I.L.R. (2014) 3 DELHI

Part-I (May, 2014)

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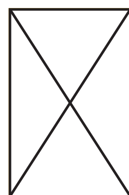

INDIAN LAW REPORTS DELHI SERIES 2014

(Containing cases determined by the High Court of Delhi)

VOLUME-3, PART-I

(CONTAINS GENERAL INDEX)

EDITOR

MS. SANGITA DHINGRA SEHGAL

REGISTRAR GENERAL

CO-EDITOR

MS. NEENA BANSAL KRISHNA

(ADDITIONAL DISTRICT & SESSIONS JUDGE)

REPORTERS

MR. CHANDER SHEKHAR

(DISTRICT & SESSIONS JUDGE)

MR. GIRISH KATHPALIA

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MR. DIG VINAY SINGH

(ADDITIONAL DISTRICT & SESSIONS JUDGES)

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MR. ASHISH MAKHIJA

(ADVOCATES)

MR. LORREN BAMNIYAL

REGISTRAR

MR. KESHAV K. BHATI

JOINT REGISTRAR

PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
BY THE CONTROLLER OF PUBLICATIONS, DELHI-110054.

P.S.D. 25.5.2014

600

Annual Subscription rate of I.L.R.(D.S.) 2013
(for 6 volumes each volume consisting of 2 Parts)

In Indian Rupees : 2500/-
Single Part : 250/-

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Controller of Publications
Department of Publication, Govt. of India,
Civil Lines, Delhi-110054.
Website: www.deptpub.nic.in
Email:acop-dep@nic.in, pub.dep@nic.in
Tel.: 23817823/9689/3761/3762/3764/3765
Fax.: 23817876

PRINTED BY : J.R. COMPUTERS, 477/7, MOONGA NAGAR,
KARAWAL NAGAR ROAD DELHI-110094.
AND PUBLISHED UNDER THE AUTHORITY OF HIGH COURT OF DELHI,
BY THE CONTROLLER OF PUBLICATIONS, DELHI-110054—2013.

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ARMS ACT, 1959—S.25 (1B)—IPC—S.307/452—Accused acquitted under IPC but convicted U/s.25 of Arms Act—in appeal arguments confined to the quantum of sentence. Held, where the complainant failed to identify the accused as assailant and accused has been acquitted of graver offences under IPC, and is not a previous convict, lenient view is taken and accused sentenced to period already undergone.

Santosh Kumar v. State of Delhi 1668

— S. 25—Appeal against conviction—Accused apprehended at a short distance from the spot and found in possession of country made pistol with live cartridges—FIR lodges promptly—No animosity between complaint and accused—Accused not even a resident of Delhi Minor contradictions and small improvement in the testimony of the witnesses do not effect the basic structure of the prosecution case—Since the accused apprehended after the incident at a short distance there was no requirement of TIP. Acquittal of co-accused—Does not necessitate acquittal of appellant where there are specific and cogent evidence of his involvement—It is always open to Court to differentiate the accused who is convicted from those who are acquitted. S. 397 IPC—Describes minimum sentence for improvement and does not prescribe fine, therefore, imposition of fine U/s. 397 IPC is not permissible.

Rizwan @ Bhura v. State of Delhi 1942

CCS (CCS) RULES, 1965—Rule 10 (1), (6) and (7) and Rule 14—Respondent in present case was placed under suspension vide orders dated 14th March, 2010 with immediate effect—Respondent's suspension was reviewed on 8th June, 2012 whereby his suspension was extended for a period of another three months—Next review in accordance with law was on 7th September, 2012—Admittedly, petitioner failed to review suspension of respondent and undertook this exercise only on 22nd November, 2012 and vide order dated 23rd November, 2012 respondent's suspension was extended for a further period of six months—Respondent challenged action of respondent in not

permitting him to join duty and prayed that period beyond 12th September, 2012 be considered as duty for all purposes—Central Administrative Tribunal allowed prayer of respondent challenging extension of period for which he was suspended when disciplinary proceedings were contemplated against him—Writ petitioner assailed order of Tribunal before High Court—Held—Review of respondent's suspension on 8th June, 2012 was within period prescribed under Rule 10 (6) of CCS (CCA) Rules, 1965 and petitioner possibly cannot make any grievance with regard to extension of suspension till 8th September, 2012—However, second review effected on 22nd November, 2012 was way beyond period prescribed under Rule 10 (6) and (7) of CCS (CCS) Rules, 1965 and therefore was illegal and not sustainable—While considering matter, Tribunal has overlooked fact that respondent's suspension was actually reviewed on 8th June, 2012 within period prescribed by law—To extent that impugned order grants relief qua suspension upto 7th September, 2012 as well, there is error in impugned order—Order of Tribunal modified and substituted—Petitioner directed to commute amounts payable to appellant in terms of present order and inform respondent about same within for weeks.

National Council of Education v. Ved Prakash 1750

CODE OF CIVIL PROCEDURE, 1908—Order 1 Rule 10—Society which was the transferor/seller filed application for impleadment—Whether seller/transferor of the property is a necessary party in a suit by transferee to enforce its rights under a transfer deed against third parties—Held—Under normal circumstance transferor/seller is not a necessary party, however present case is peculiar. The entire case of the plaintiff revolves around the various resolutions passed by the Society with regard to the acquisition of land, preparation of the layout plan. The dispute pertains to the land allotted to the society, its demarcations, the plots originally sanctioned and allotted. Dispute also pertains to location and area sold to the Plaintiffs by the Society. These questions cannot be completely and effectively adjudicated upon in the absence of the Society. The present of Society and its role at various stages would have to be examined at the time of adjudication of the various disputes that are arising in the present suit. Discretion to add a party can be exercised by a Court either suomotu or on an application of a party to the

suit or a person who is a party. Society's application for impleadment allowed.

D.V. Singh and Another v. Municipal Corporation of Delhi & Another *1601*

— Order XXXIX Rule 1 and 2, Order XXXIX Rule 4: Suit for permanent and mandatory injunction. As per the family settlement Defendant no. 1 had right to reside on the ground floor and enjoy rental income from the second floor. Plaintiff no. 2 was to be absolute and exclusive owner of ground floor. Plaintiff no. 1 was to be absolute and exclusive owner of second floor. Defendant no. 2 was to be absolute and exclusive owner of first floor. Plaintiff 1 and 2 are not residing in the suit property. Defendant no. 2 claims that drive way, roof terrace, servant quarter and any other common area or space was to be in joint ownership of residents of the property, i.e. Defendant no. 1 and 2. Plaintiffs had given power of attorney in favour of Defendant no. 2. Plaintiffs contend that the Defendant no. 2 by misusing the power of attorney, obtained sanction to build third floor and had started construction. Plaintiffs further contend that the Defendant no. 2 had no right, title or interest on the terrace, as per the family settlement. Application seeking ad interim injunction against construction—Held: For grant of interim injunction the Plaintiff has to satisfy three requirements. Prima facie case, balance of convenience and irreparable injury. The balance of convenience tilts substantially in favour of Defendant. Construction being raised is lawful construction. Defendants are raising construction after sanction of the addition/alteration plan. Plaintiffs executed a registered power of attorney giving amongst other, the power to represent the Plaintiffs and defendant no. 1 before the statutory authorities and also with the right to make additions/alterations to get the building plan sanctioned from MCD or concerned authority. Defendants have submitted that they are not claiming any amount nor would claim any amount for raising the construction from the Plaintiffs in case Plaintiffs were to succeed in their claim. Defendants are agreeable to depositing fair rental in Court. The stage of construction is such that the property cannot be left as it is. In case the Defendant is directed to remove the construction raised there would be complete wastage of the amount spent on the construction by Defendant no. 2. Balance of convenience tilts substantially in favour of the Defendants. Defendant no. 2 permitted to complete construction and occupy

the floor after construction. Defendant no. 2 shall not create any third party right. From the date of completion the Defendant no. 2 shall deposit a sum of Rs. 50, 000/- in Court. In case the Plaintiffs succeed apart from being entitled to the rental the Plaintiffs shall be entitled to payment of fair cost of construction. Defendant no. 2 shall not claim any equities. Interim order modified.

Meera Jain & Another v. Sundari Devi Garg & Ors. *1608*

— Order VIII Rule 1—Order VIII Rule 10—Appeal against order of Joint Registrar condoning delay of 129 days in filing WS despite a finding of neglect and despite the WS being defective. Held—The application seeking condonation of delay was neither signed by the Defendant No. 1 nor supported by an affidavit of the Defendant No. 1. If there were any facts or circumstances leading to the delay in filing of the Written Statement, which were within the personal knowledge of the advocate, the advocate could have filed the application with a supporting affidavit. However, in the present case, the facts pleaded for condonation of delay are attributable to the Defendant No. 1 and within the personal knowledge of the Defendant No. 1. So the application seeking condonation of delay could not have been signed alone by the advocate without signatures of the Defendant No. 1 and could not have been supported by an affidavit only of the advocate for the Defendant No. 1. This application is no application in the eyes of law and, accordingly, the same could not have been taken cognizance of by the Joint Registrar. Held Further—The Written Statement filed on behalf of the Defendant No. 1 cannot be said to be a validity signed and executed Written Statement. The Written Statement is dated 30.10.2012. It is not signed by the Defendant and does not contain any verification. It is supported by an affidavit of the Defendant No. 1 dated 30.09.2012, which was prior to the date of Written Statement. The affidavit in support of the Written Statement has to confirm the contents of the Written Statement. If the affidavit is executed and attested prior to the preparation of the Written Statement, the affidavit cannot be taken as an affidavit in support of the Written Statement. The purpose of verification is to fix responsibility on the party or person verifying and to prevent false pleadings from being recklessly filed or false allegations being recklessly made. Since the Written Statement filed on behalf

of the Defendant No. 1 is without her signatures and any verification, it is clearly defective. However, the defect of signatures and verification in pleadings is an irregularity which can be remedied. It is not fatal but is a curable defect. If defects in regard to the signature, verification or presentation of plaint are cured on a day subsequent to the date of filing the suit, the date of institution of the plaint is not changed to the subsequent date. Held—The Written Statement filed on behalf of the Defendant No. 1 is defective and the application is not application in the eyes of law. Accordingly, the chamber appeal of the Plaintiff is allowed. The order dated 06.09.2013 of the Joint Registrar is set aside and the application seeking condonation of delay being is dismissed as defective. Held—The ends of justice would be served in case an opportunity is granted to the Defendant No. 1 to cure the defects in the Written Statement and to file a proper Written Statement duly signed, verified and supported by her affidavit and further and opportunity is also granted to file a proper application seeking condonation of delay giving proper details, duly signed and supported by her affidavit.

Union of India & Ors. v. Shanti Gurung & Ors. *1621*

— Indian Easement Act, 1882—Section 52—Indian Evidence Act, 1872—Section 116—Suit for possession, damages and mense profit. Defendants claim that Plaintiff have no title to the suit property as documents produced by them are merely general power of attorney, agreement to sell etc. Further contend that property purchased benami by father of Plaintiff in name of minor children being Plaintiff and his brother. Defendants contention is that Defendants were residing with the father in joint possession of the property with the permission of the father and to the exclusion of the plaintiffs and that defendants are entitled to claim adverse possession Held—As admittedly the defendants came into possession with permission granted by the father of the plaintiffs who permitted them to enter/use the premises for a limited period, the defendants were using the premise as Licensee. As the father has died, the License has been terminated. Defendant cannot challenge the title of the licensor now at this stage after 14 years. The written statement fails to bring out any title or right in the defendants to continue to retain possession. Defendant taking frivolous and vexatious defense for the purpose of prolonging their illegal possession of the suit property. Suit decreed in favour of Plaintiff.

Laxman Singh & Ors. v. Urmila Devi & Ors. *1649*

— Order XXXIX Rules 1 and 2 CPC—Application seeking injunction to restrain the defendants etc. from manufacturing or offering for sale medicinal or pharmaceutical preparations under the trademark 'AMAFORTEN' or any other mark deceptively similar to the plaintiff's registered trademark 'ANAFORTAN'—Contention of the defendants that the trademark of the plaintiff is neither registered nor properly stamped and therefore is liable to be impounded u/s 33 of the Stamp Act and that even otherwise the relief sought is barred u/s 28(3) r/w section 30(2)(e) of the Trademark Act in as much as the defendant is the registered proprietor of the impugned mark 'AMAFORTEN' and is also protected u/s 33 and 34 of the Trademarks Act and further the defendants being situated outside New Delhi and no material brought on record to show that even the plaintiff had its office in Delhi, the Court has no territorial jurisdiction. Held: In view of the specific averments in the plaint that the plaintiff is carrying on business in New Delhi and has a sales office in Delhi, this Court had territorial jurisdiction to entertain the suit. As regards the deficient stamp fees, no cogent submissions made by the defendant and hence not possible to decide the issue at this stage. Further well settled law that sections 28(3) and 30(2) (e) do not bar a suit for injunction even where two trademarks are registered. Even otherwise an action for passing off would be maintainable. The trademark of the plaintiff registered in 1988 and it is a much prior user in point of time in the said trademark than the defendant whose trademark is registered in the year 2009 only. The trademark of the defendant is also phonetically, visually and structurally similar to that of the plaintiff and prima facie it appears that the defendant had dishonestly sought to take advantage of the name and reputation of the plaintiff's trademark and hence, the interim injunction sought for granted.

Abbott Healthcare Pvt. Ltd. v. Raj Kumar Prasad & Ors. *1734*

— Order VI Rule 17—Order XLI Rule 5—Section 11, 13, 114 and 151—Plea taken, issue of tenant being put to terms was already considered and decided by Appellate Court—Appellate Court cannot reopen issue. Whether on its own motion or on application of a party—This is in view of fact that Order XLI Rule 5 is for

purpose of protecting interest of parties, not to further interest of one party to detriment of other—Per contra plea taken, tenant who continues in property after order of eviction stays at sufferance of landlord and ought not to be allowed to enjoy premises at contractual rate of interest—Held—Principle of Res-judicata by its very nature, is intended to provide finality to judicial orders, ought to not lightly be applied to interim arrangements/ orders—That not all interlocutory orders ought to not be subject to rigours of res judicata is a principle not merely of convenience in administration of justice, but also of a long standing, well established and judicially as well as a legislatively recognised rule of law—Order of Appellate Court directing deposit of amount per mensem cannot be subject to principle of res judicata, being not final and being amenable to further modification—These orders would doubtless not be modified without sufficient cause for such modification by Court either on its own motion or upon application by party—When initial condition of deposit was to be of reasonable user charges commensurate with market rate, it cannot, by any stretch of imagination, be said that interest of landlord remains protected when quantum of deposit remains unchanged for over twenty years—Order under Order XLI Rule 5 imposing a condition of deposit/payment of reasonable user charges for continued user of premises from date of order of eviction is not final and may be altered at a later stage in proceedings—This may be done by Appellate Court on its own motion or on application of either of parties—Alteration may be either to increase or decrease amount earlier set and will depend upon facts and circumstances of case—No straitjacket formula can be laid down as to how often or to what extent quantum ought to be modified; same shall be at discretion of Appellate Court to be decided based on specific circumstances attendant to each case—However, no such application could be entertained unless party seeking modification is able to show changed circumstances as would warrant modification.

Federal Motors Pvt. Ltd. v. *Atma Ram Properties Pvt. Ltd.* *1810*

— Order XLI Rule 5—Plea taken, first order of Appellate Court imposing condition merged with order of Supreme Court, condition of deposit imposed earlier may be modified only by Supreme Court—Held—Nothing will bar either party from reapplying to Court seized of appeal seeking that grant of stay, condition to be imposed therefor, and/or quantum of deposit be reconsidered- even if same were approved, modified or set aside in appeal or revision prior to such second and/or further application—Where such new and fresh facts are indeed shown—Doubtless facts that did not exist or could not be ascertained despite exercise of due diligence at time when original order was made—Court seized of appeal would be bound to consider new facts and pass a fresh order as to either grant of stay, condition to be imposed therefor, and/or quantum of deposit, as may be prayed for.

Federal Motors Pvt. Ltd. v. *Atma Ram Properties Pvt. Ltd.* *1810*

— Order VIII Rule 5 and Order XII Rule 6—Appellant challenged judgment and order of Family Court whereby his marriage with respondent—Contracted as per Muslim Personal law was decreed to have been dissolved due to latter's subsequent apostasy—Plea taken, impugned order is invalid and contrary to express provisions of both Muslim personal law as well as Act—Act makes it amply clear that adjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslin personal law—Held—Neither could it be said that apostasy per se does not dissolve a marriage governed by Muslim personal law nor could it be said that Act makes any change to this general law—Plain meaning of Section 4 of Act would be to effect that even if prior to passing of Act apostasy would have operated to dissolve marriage *ipso facto* subsequent to coming into force of Section 4 marriage is not ipso facto dissolved—All that Section 4 had done is to introduce intervening mechanism, but to reach same conclusion, i.e. that apostasy would not be itself dissolve marriage and some further substantive act would be required to be done in this regard; substantive act being filing of a suit seeking declaration as to dissolution under Section 2(ix) of Act—A woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under Section 2(ix) seeking dissolution of marriage—Respondent was initially professing Hinduism and had embraced Islam prior to marriage, and then reconverted to Hinduism—Thus, she falls within exemption under second proviso to Section 4; in a way, she walks out of constraints of Section 4—Thus, in present matter, marriage stands dissolved from date on which respondent apostatized from Islam—Respondent made such public declaration that she had re-

embraced Hinduism and produced a certificate from organization which facilitated it—She reiterated this factum in plaint and then deposed so in affidavit in petition—No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy—First substantive defence of appellant that petition was filed contrary to terms of Section 4 of Act is unambiguous admission as to factum of reconversion—Marriage of respondent who was originally a Hindu is regulated not by rule enunciated in Section 4 of Act by rather pre-existing Muslim personal law which dissolves marriage upon apostasy ipso facto—This Court finds no merit in appeal.

Munavvar-UL-Islam v. Rishu Arora & Rukhsar *1886*

— Order VII rule 11—Appellant had filed suit seeking perpetual injunction against dispossession from suit property and declaration that restoration allotment of same by Lt. Governor was illegal—Learned Single Judge dismissed suit on ground that plaintiff (Appellant herein) had no title to suit property—Order challenged in appeal before DB—Plea taken, application u/O VII rule 11 ought to be decided based on averments in plaint alone—Learned Single Judge had incorrectly proceeded upon assumption that possession of suit premises were taken pursuant to acquisition without giving opportunity to appellant to prove his case—Per contra plea taken, it is ex facie evident from documents filed with plaint that suit property was given to Society pursuant to acquisition and under lease agreements—It is a logical sequitur therefrom that Society would be bound by terms thereof including prohibition from selling—In circumstances, no title could have flown from Society to appellant—Where plaint itself discloses no cause of action suit ought to be dismissed and there is no infirmity in action of learned Single Judge in doing so—Held—Case of appellant is that possession of suit property was never taken pursuant to agreement and Society had acquired title, possession and/or interest therein from the original owners pursuant to settlement and not acquisition—It is this that appellant seeks to set his title up—This cannot be set to be a case of clever or artful drafting to create illusory cause of action that ought to be nipped in bud under O VII rule 11—Duty of Court under O VII rule 11 is to consider whether averments in plaint taken as a whole, along with documents filed therewith, if taken to be true, would warrant a decree in favour of plaintiff—This Court is of

view that in instant case, averments and documents would so do—De hors a patent contradiction, i.e., one ascertainable ex facie from record, without involving any lengthy or complicated argument or a long drawn out process of reasoning, between averments and documents, Court considering application under O VII rule 11 ought to not lightly ignore averment in plaint—Conclusion of learned Single Judge that Society acquired title/ interest in suit property under lease agreements is unwarranted at stage of considering application under O VII rule 11—Plaint does disclose a cause of action which ought to be considered in trial—Impugned order is set aside.

Pankaj Bajaj v. Meenakshi Sharma & Ors. *1905*

— Order VII Rule 11—Court Fees Act, 1870—Section 7(x)—Specific Relief Act, 1963—Section 19 (1)(b)—Suit for specific performance of Agreement to Sell along with cancellation of five sale deeds which have been executed after the agreement to sell. Application seeking rejection of plaint on the ground that the plaintiff has not correctly valued the suit for the purposes of Court fee and jurisdiction. As per the applicant the Plaintiff had sought cancellation of sale deeds which are registered at different values and since Plaintiff is not in possession of the property., the suit should have been valued on the consideration mentioned in the respective sale deeds. Plaintiff states that Plaintiff had to value the suit for substantive relief of specific performance and the consequential reliefs of cancellation are covered in the main relief. Held—The relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of subsequent transferees is only an ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant in favour of the Plaintiff. Consequently there will be no question of payment of ad valorem Court fees in respect of said relief. The said relief claimed would be superficial and unnecessary. Application dismissed.

Jafar Imam v. Devender Chauhan & Others *1917*

— Specific Relief Act, 1963—Section 14, Indian Contract Act, 1872—Section 24, 73—Suit for declaration and damages that termination of his services is illegal, arbitrary and in violation of

the terms of employment and principles of natural justice. Plaintiff joined at the post of General Manager and continued to work till 02.01.2009. On 02.01.2009 when Plaintiff joined after a leave the was orally asked to resign without assigning any reason and was asked to leave the office abruptly/Plaintiff could not even take his original papers lying in the office containing important documents. The Plaintiff returned the laptop and the company car provided to the plaintiff was also taken away forcibly. Plaintiff contends that part of salary not paid and cash incentive not paid in full, medical bills and medical insurance not paid, statutory benefits of provident fund have also not been deducted. Defendant states that Plaintiff was not discharging his duties well and was having a highly unprofessional attitude. Oral notice of termination of three months was given to the Plaintiff. Held—No evidence on record to show that oral notice of termination was given to the plaintiff. Termination of the Plaintiff is illegal as no notice of three months was given. Salary for three months granted to Plaintiff. However, relief of reinstatement cannot be granted in view of Section 14 of the SRA as the present contract provides for a termination clause. Claim of Plaintiff for cash incentive is rejected being hit by s. 24 of the contract act. Claim of maintenance of company car, driver's salary, Petrol expenses, provident fund, medical reimbursement and medical insurance allowed. Damages of Rs. 25 lacs rejected as no cogent evidence has been places on record on the basis of which claim can be adjudicated. Compensation of any remote or any indirect loss or damage sustained by the party complaining of a breach cannot be granted. Suit decreed.

Dinesh Chadha v. Hotel Queen Road Pvt. Ltd. *1954*

CODE OF CRIMINAL PROCEDURE, 1973—Section 125—Code of Civil Procedure, 1908—Order VIII Rule 5 and Order XII Rule 6—Appellant challenged judgment and order of Family Court whereby his marriage with respondent—Contracted as per Muslim Personal law was decreed to have been dissolved due to latter's subsequent apostasy—Plea taken, impugned order is invalid and contrary to express provisions of both Muslim personal law as well as Act—Act makes it amply clear that adjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslin personal law—Held—Neither could it be said that apostasy per se does not

dissolve a marriage governed by Muslim personal law nor could it be said that Act makes any change to this general law—Plain meaning of Section 4 of Act would be to effect that even if prior to passing of Act apostasy would have operated to dissolve marriage *ipso facto* subsequent to coming into force of Section 4 marriage is not ipso facto dissolved—All that Section 4 had done is to introduce intervening mechanism, but to reach same conclusion, i.e. that apostasy would not be itself dissolve marriage and some further substantive act would be required to be done in this regard; substantive act being filing of a suit seeking declaration as to dissolution under Section 2(ix) of Act—A woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under Section 2(ix) seeking dissolution of marriage—Respondent was initially professing Hinduism and had embraced Islam prior to marriage, and then reconverted to Hinduism—Thus, she falls within exemption under second proviso to Section 4; in a way, she walks out of constraints of Section 4—Thus, in present matter, marriage stands dissolved from date on which respondent apostatized from Islam—Respondent made such public declaration that she had re-embraced Hinduism and produced a certificate from organization which facilitated it—She reiterated this factum in plaint and then deposed so in affidavit in petition—No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy—First substantive defence of appellant that petition was filed contrary to terms of Section 4 of Act is unambiguous admission as to factum of reconversion—Marriage of respondent who was originally a Hindu is regulated not by rule enunciated in Section 4 of Act by rather pre-existing Muslim personal law which dissolves marriage upon apostasy ipso facto—This Court finds no merit in appeal.

Munavvar-UL-Islam v. Rishu Arora & Rukhsar *1886*

CONSTITUTION OF INDIA, 1950—Article, 136, 141 and 227—Plea taken, application was filed to delay proceedings at a juncture when appeal was fixed for final hearing—Prior to passing impugned order, no trial was conducted, nor was any evidence permitted to be led by parties in respect of value that could have been fetched by premises—Fixation of quantum of deposit at Rs. 1,60,000/- (Rupees One lakh sixty thousand only) per mensem towards user charges for leased premises is wholly onerous—

Appellate Court has not given any reasons for fixing quantum at figure it has and has proceeded almost entirely on surmises and conjectures and impugned order ought to be set aside—Held—Order passed in exercise of a power vested in authority, directing parties to furnish documents to enable authority to appropriately exercise power can hardly be regarded as illegal or contrary to material on record—Merely because Appellate Court has proceeded to ascertain quantum based on affidavits and documents filed by parties, same cannot be considered as error so gross and patent as to warrant interference under Article 227; this Court is of view that this is not error, but appropriate course to have been followed—Where both parties have been given equal and sufficient opportunity to make their case as to quantum to be fixed, and where Court considers all material available on record and comes to a conclusion on basis thereof, same cannot be regarded as being patently illegal and warranting interference—Appellate Court has given due consideration to all material available on record and facts and attendant circumstances relevant to issue to arrive at its conclusion as found in second impugned order—Tenant is, in effect, praying that this Court reconsider material to arrive at its own conclusion; this Court sees no justification to so apply itself—This Court, in exercise of its supervisory jurisdiction, will not convert itself into a Court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

Federal Motors Pvt. Ltd. v. *Atma Ram Properties Pvt. Ltd.* *1810*

COURT FEES ACT, 1870—Section 7(x)—Specific Relief Act, 1963—Section 19 (1)(b)—Suit for specific performance of Agreement to Sell along with cancellation of five sale deeds which have been executed after the agreement to sell. Application seeking rejection of plaint on the ground that the plaintiff has not correctly valued the suit for the purposes of Court fee and jurisdiction. As per the applicant the Plaintiff had sought cancellation of sale deeds which are registered at different values and since Plaintiff is not in possession of the property., the suit should have been valued on the consideration mentioned in the respective sale deeds. Plaintiff states that Plaintiff had to value the suit for substantive relief of specific performance and the consequential reliefs of cancellation are covered in the main relief. Held—The

relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of subsequent transferees is only an ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant in favour of the Plaintiff. Consequently there will be no question of payment of ad valorem Court fees in respect of said relief. The said relief claimed would be superficial and unnecessary. Application dismissed.

Jafar Imam v. Devender Chauhan & Others 1917

DELHI RENT CONTROL ACT, 1958—Eviction Petition U/s. 14(1)(e). Once bonafide requirement of landlord is established, neither the tenant nor the Court can determine or suggest as to which accommodation would be most suitable for the landlord's need—It is landlord's exclusive prerogative to determine the suitability of property for his need.

Naveen Arora and Ors. v. Suresh Chand 1641

— Eviction Petition Under Section 14(1)(e)—Leave to defend granted by ARC—Challenged. Held, Property which is not owned by the landlord and not in possession of the landlord cannot be deemed to be alternative suitable accommodation to be taken into consideration as a defence by the tenant opposing his eviction. A landlord cannot be made to lean upon his relatives to provide accommodation. It is not for a tenant to dictate how else the landlord could adjust himself so as to obviate the need of the tenant's eviction. Revision allowed.

Kedari Lal Gupta v. CB Singh Raja 1797

— Section 6, 6A, 14(1)(b) and 38—Order of Appellate Court directing petitioner/tenant to deposit amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) per mensem towards user charges of suit property challenged before High Court—Plea taken, application by landlord is nothing short of a unilateral attempt by landlord to increase rent payable qua leased premises, exercise prohibited by law—Provisions of Act, specifically Sections and 6-A thereof specifically disentitles landlord from unilaterally increasing rent payable qua premises—Onerous condition cannot be imposed on tenant, which is exercising its statutory right of appeal—Principles laid down for increase of

rent under Section 6A have been given a complete go by in impugned order—Held—Tenancy comes to end upon order of eviction being passed and none of provisions of Delhi Rent Control Act would apply to govern relationship between parties—Provisions of Section 6 and 6A of Act would have no applicability in determination of charges to be deposited by tenant as use and occupation charges during pendency of appeal—Present contention on behalf of tenant hardly inspires any confidence in mind of Court.

Federal Motors Pvt. Ltd. v. *Atma Ram Properties Pvt. Ltd.* *1810*

DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939—Section 2(ii), 2 (viii) (a), 2 (ix) and 4—Code of Criminal Procedure, 1973—Section 125—Code of Civil Procedure, 1908—Order VIII Rule 5 and Order XII Rule 6—Appellant challenged judgment and order of Family Court whereby his marriage with respondent—Contracted as per Muslim Personal law was decreed to have been dissolved due to latter's subsequent apostasy—Plea taken, impugned order is invalid and contrary to express provisions of both Muslim personal law as well as Act—Act makes it amply clear that adjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslin personal law—Held—Neither could it be said that apostasy per se does not dissolve a marriage governed by Muslim personal law nor could it be said that Act makes any change to this general law—Plain meaning of Section 4 of Act would be to effect that even if prior to passing of Act apostasy would have operated to dissolve marriage *ipso facto* subsequent to coming into force of Section 4 marriage is not ipso facto dissolved—All that Section 4 had done is to introduce intervening mechanism, but to reach same conclusion, i.e. that apostasy would not be itself dissolve marriage and some further substantive act would be required to be done in this regard; substantive act being filing of a suit seeking declaration as to dissolution under Section 2(ix) of Act—A woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under Section 2(ix) seeking dissolution of marriage—Respondent was initially professing Hinduism and had embraced Islam prior to marriage, and then reconverted to Hinduism—Thus, she falls within exemption under second proviso to Section 4; in a way, she walks out of constraints of Section 4—Thus, in present matter, marriage stands dissolved

from date on which respondent apostatized from Islam—Respondent made such public declaration that she had re-embraced Hinduism and produced a certificate from organization which facilitated it—She reiterated this factum in plaint and then deposed so in affidavit in petition—No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy—First substantive defence of appellant that petition was filed contrary to terms of Section 4 of Act is unambiguous admission as to factum of reconversion—Marriage of respondent who was originally a Hindu is regulated not by rule enunciated in Section 4 of Act by rather pre-existing Muslim personal law which dissolves marriage upon apostasy ipso facto—This Court finds no merit in appeal.

Munavvar-UL-Islam v. Rishu Arora & Rukhsar *1886*

INDIAN CONTRACT ACT, 1872—Section 24, 73—Suit for declaration and damages that termination of his services is illegal, arbitrary and in violation of the terms of employment and principles of natural justice. Plaintiff joined at the post of General Manager and continued to work till 02.01.2009. On 02.01.2009 when Plaintiff joined after a leave the was orally asked to resign without assigning any reason and was asked to leave the office abruptly/Plaintiff could not even take his original papers lying in the office containing important documents. The Plaintiff returned the laptop and the company car provided to the plaintiff was also taken away forcibly. Plaintiff contends that part of salary not paid and cash incentive not paid in full, medical bills and medical insurance not paid, statutory benefits of provident fund have also not been deducted. Defendant states that Plaintiff was not discharging his duties well and was having a highly unprofessional attitude. Oral notice of termination of three months was given to the Plaintiff. Held—No evidence on record to show that oral notice of termination was given to the plaintiff. Termination of the Plaintiff is illegal as no notice of three months was given. Salary for three months granted to Plaintiff. However, relief of reinstatement cannot be granted in view of Section 14 of the SRA as the present contract provides for a termination clause. Claim of Plaintiff for cash incentive is rejected being hit by s. 24 of the contract act. Claim of maintenance of company car, driver's salary, Petrol expenses, provident fund, medical reimbursement and medical insurance allowed. Damages of Rs.

25 lacs rejected as no cogent evidence has been places on record on the basis of which claim can be adjudicated. Compensation of any remote or any indirect loss or damage sustained by the party complaining of a breach cannot be granted. Suit decreed.

Dinesh Chadha v. Hotel Queen Road Pvt. Ltd. *1954*

INDIAN EASEMENT ACT, 1882—Section 52—Indian Evidence Act, 1872—Section 116—Suit for possession, damages and mense profit. Defendants claim that Plaintiff have no title to the suit property as documents produced by them are merely general power of attorney, agreement to sell etc. Further contend that property purchased benami by father of Plaintiff in name of minor children being Plaintiff and his brother. Defendants contention is that Defendants were residing with the father in joint possession of the property with the permission of the father and to the exclusion of the plaintiffs and that defendants are entitled to claim adverse possession Held—As admittedly the defendants came into possession with permission granted by the father of the plaintiffs who permitted them to enter/use the premises for a limited period, the defendants were using the premise as Licensee. As the father has died, the License has been terminated. Defendant cannot challenge the title of the licensor now at this stage after 14 years. The written statement fails to bring out any title or right in the defendants to continue to retain possession. Defendant taking frivolous and vexatious defense for the purpose of prolonging their illegal possession of the suit property. Suit decreed in favour of Plaintiff.

Laxman Singh & Ors. v. Urmila Devi & Ors. *1649*

INDIAN EVIDENCE ACT, 1872—Section 116—Suit for possession, damages and mense profit. Defendants claim that Plaintiff have no title to the suit property as documents produced by them are merely general power of attorney, agreement to sell etc. Further contend that property purchased benami by father of Plaintiff in name of minor children being Plaintiff and his brother. Defendants contention is that Defendants were residing with the father in joint possession of the property with the permission of the father and to the exclusion of the plaintiffs and that defendants are entitled to claim adverse possession Held—As admittedly the defendants came into possession with

permission granted by the father of the plaintiffs who permitted them to enter/use the premises for a limited period, the defendants were using the premise as Licensee. As the father has died, the License has been terminated. Defendant cannot challenge the title of the licensor now at this stage after 14 years. The written statement fails to bring out any title or right in the defendants to continue to retain possession. Defendant taking frivolous and vexatious defense for the purpose of prolonging their illegal possession of the suit property. Suit decreed in favour of Plaintiff.

Laxman Singh & Ors. v. Urmila Devi & Ors. *1649*

— Section 108—Respondent stopped attending duties and he was issued a charge memo proposing to conduct disciplinary proceedings against him on charge of absenting himself from duty unauthorisedly—One of his relatives lodges a police complaint with regard to his being missing—Charge-sheet sent to respondent by registered post was returned undelivered with remark that "person who has to receive it remains out without intimation. No hope that he will return, hence returned"—Notice on inquiry proceedings issued by Inquiry Officer (IO) was also returned with same remark as before—Report of IO holding that charges framed against respondent were proved correct was sent to respondents permanent address and was returned undelivered with was remark as before—Disciplinary Authority (DA) accepted recommendations of IO and imposed penality of removal from service with immediate effect—Respondent was finally traced in a condition as that of a mad person in Ayodhya-Application filed by respondent before Administrative Tribunal was allowed holding that IO & DA arbitrarily concluded that applicant's absence was unauthorized—Order challenged before High Court—Held—Petitioners had before them evidence of police report as well as confirmation by police that respondent was not traceable—Tribunal had found decision of DA to initiate disciplinary action against respondent on charge of unauthorized absence from duties as arbitrary and hasty—Inquiry proceedings conducted by IO has been held to be a formality inasmuch as telegram and registered letters were being sent to a person who was missing and was admittedly not available at address to which they were sent—Nothing has been pointed out to us which would enable us to take a view which is contrary to view taken by Tribunal—Petitioners would be entitled to subject respondent to

a medical examination.

Union of India & Ors. v. Jatashankar 1770

INDIAN PENAL CODE, 1860—S.307/326—Grave and sudden provocations—Accused charged U/s.307 IPC but convicted U/s.326 IPC only—Acquittal U/s.307 IPC not challenged by prosecution—In statement accused admitted that acid was thrown by him due to grave provocation for being injured by a Lathi on his head—Burden on accused to establish beyond doubt that the injuries were inflicted whilst deprived of the power of self-control by grave and sudden provocation—He did not adduce any evidence to substantiate defence—He did not name specific individual who inflicted injuries on him—No Lathi recovered—No complaint lodged by the accused—Accused took conflicting and inconsistent pleas—Ocular testimony in consonance with the medical evidence—Appeal dismissed.

Suraj v. NCT of Delhi 1664

— Section 304 part 1 Section 34—Culpable homicide not amounting to murder—information as to a person mercilessly beaten—DD No. 23B recorded at PS Prashant Vihar—Victim removed to hospital—Spot of occurrence within the jurisdiction of PP Rohini—Intimation given to the concerned police officers—DD No.13 recorded—MLC of injured collected—Injured unfit for statement—on regaining consciousness statement of injured recorded—FIR No.516/07 u/s. 308/341/506/34 registered at PS Prashant Vihar named appellant as one of the assailants—Appellant arrested the same day—one co-accused also arrested at his instance—Baseball bat recovered from the bushes—Victim scummed to injuries—DD No.94 recorded—post mortem examination conducted—Section 302 IPC added charge-sheet filed against appellant and his associate Charge framed prosecution examined 28 witnesses—Claimed false implication in statement u/s. 313 Cr. P.C.—No witness examined in defence appellant held guilty and convicted co-accused acquitted—Appellant preferred appeal—Contended evidence not appreciated in its true and proper perspective—Informant did not support the prosecution—Dying declaration recorded by the IO highly suspect and doubtful—Victim never regained consciousness—No permission from doctor before recording dying declaration—Victim got discharged against medical advice and shifted to another hospital—Family members of victim lodged complaint

against IO for not recording the statement of victim properly—Inordinate delay in recording the statement of witnesses—Case of mistaken indentity appellant had no motive to inflict injuries to the victim—Additional PP contended judgment based on fair appraisal of evidence—IO had no ulterior motive to fabricate or manipulate—Held: MLC contains endorsement of fit for statement at 12.30 PM victim gave detailed account of the incident—Identified appellant and gave sufficient description to fix his indentity—Identity never questioned in cross examination—Plea of mistaken identity has no force—Testimony of witness as regards recording of dying declaration of victim remained unchallenged in cross examination—Genuineness and authenticity of the statement not questioned—Injuries opined to be ante mortem caused by hand blunt force impacts can be caused by baseball bat or similar type of bat—Version corroborated by in entirety by other witness no reason to infer that victim did not make that statement no material to suspect the animus of the IO—Nothing to show the statement to be a result of tutoring or prompting—Statement made without exterior influence or ulterior motive guilt of appellant established by cogent evidence—Judgment needs no interference—Appeal dismissed.

Naresh Kumar v. State 1704

— S.307/308/34—Accused acquitted U/s.307 but convicted U/s.308/34 of the IPC. TIP of one of the accused not conducted despite the occurrence taking place at night and despite the accused not acquainted with victim prior to the occurrence—Identification of said accused for the first time in the Court not enough to prove his involvement specially when no crime weapon was recovered and other recoveries were disbelieved by trial court. In the initial information, victim did not give exact number of assailants—Names of assailants not disclosed to the police and to the doctors initially despite acquainted with three accused prior to the incident-Inordinate delay in recording statement of witness which remained unexplained—Apparently the prosecution witnesses presented untrue facts and improved their versions from time to time—All accused acquitted.

Shivender Pandey @ Pandit & Ors. v. State 1763

— S.308/326/324/34—Prompt lodging of FIR—Since of FIR was lodges without any delay, there was least possibility of the complainant to fabricate or concoct a false story in such a short

interval. Contradictions in evidence—Held, such minor contradictions are bound where a group of persons had attacked three persons. In such a situation, it would not be reasonable to expect that every witness should describe with mathematical accuracy about each and every injury sustained by all the injured persons giving minor details. The totality of the evidence of a witness has to be taken into consideration for fixing the probative value. The totality of the evidence of a witness has to be taken into consideration for fixing the probative value. Plea of alibi—Held, when a plea of alibi is raised by an accused, it is for him to establish the said plea by positive evidence. The burden is on the accused to show that he was somewhere else other than the place of occurrence at the time of incident. The burden on the accused is undoubtedly heavy. This flows from Section 103 of Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. Plea of 'alibi' must be proved with absolute certainty so as to completely exclude the possibility of accused's presence at the time and place where the incident took place.

Kanchan Singh v. State *1970*

— Injured witness—Held, testimony of injured witness is accorded a special status in law. Injury to a witness is an inbuilt guarantee of his presence at the scene of crime. Injured witness will not want to let the actual assailant go unpunished merely to falsely involve a third party.

Plea of alibi—Plea of alibi must be proved by an accused by cogent and satisfactory evidence completely excluding the possibility of accused persons at the scene of occurrence at the relevant time, where presence of accused at the scene of occurrence has been established satisfactorily by the prosecution.

Necessary ingredients of S. 308 IPC—No injuries inflicted on vital organs of the victim—Fractures on right femur, right Tibia and metacarpal bones—Though injuries were 'grievous' in nature, they were not sufficient in ordinary course of nature to cause death—Prosecution could not establish any evidence to infer that the injuries were caused with the object and knowledge to cause victim's death—Incident took place suddenly without pre-plan—Accused not armed with any weapon—No past history of animosity—From these circumstances, it cannot be inferred

that accused had intention or knowledge attracting S. 308 IPC—Conviction U/s.325/34 affirmed.

Prabhu Dayal Sharma v. The State of NCT of Delhi *1979*

— Arms Act, 1959—S. 25—Appeal against conviction—Accused apprehended at a short distance from the spot and found in possession of country made pistol with live cartridges—FIR lodges promptly—No animosity between complaint and accused—Accused not even a resident of Delhi Minor contradictions and small improvement in the testimony of the witnesses do not effect the basic structure of the prosecution case—Since the accused apprehended after the incident at a short distance there was no requirement of TIP. Acquittal of co-accused—Does not necessitate acquittal of appellant where there are specific and cogent evidence of his involvement—It is always open to Court to differentiate the accused who is convicted from those who are acquitted. S. 397 IPC—Describes minimum sentence for improvement and does not prescribe fine, therefore, imposition of fine U/s. 397 IPC is not permissible.

Rizwan @ Bhura v. State of Delhi *1944*

— S.302/34—Related witnesses—Held, relationship itself is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal culprit and make allegations against an innocent person. Evidence of related witnesses can be relied upon if it has a ring of truth to it and is cogent, credible and trustworthy. Such evidence however needs to be carefully scrutinised and appreciated before any conclusion is made to rest upon it. Evidence cannot be disbelieved merely on the ground that the witnesses are related. Once it is established that their depositions are cogent, inspires confidence, do not suffer from any material contradictions, the Court would be justified in relying upon such valuable piece of evidence.

Ravi Kumar & Ors. v. *State* *1990*

INDUSTRIAL DISPUTES ACT, 1947—Section 25F—Petitioner challenged before High Court award Passed by Labour Court holding that respondents no. 1 and 2 have been in continuous service for 5 and 4 years respectively and their services were terminated without complying with mandatory conditions specified in Section 25F of Act—Plea taken, finding recorded by Labour

Court that Petitioner is industry is erroneous—Onus to Prove that workman had worked for 240 days is on respondent workman—All India Institute of Medical Sciences is industry—Held—A Division Bench of this Court has already held that petitioner is industry within meaning of Industrial Disputes Act, 1947—There is no reason to take a different view here—Reply filed by petitioner to statement of claim is utterly vague and bereft of details—A specific averment is made by workmen about date of their employment, date of their termination and that they have worked for 240 days in each completed year of service—Written statement of Petitioner simply accepts that they were employed in AIIMS but failed to give period of employment—Labour Court cannot be faulted in making adverse inference against petitioner—There is also no merit in contention of learned counsel for petitioner that respondents failed to discharge onus on them to prove that they have worked for 240 days is on respondents—In view of pleadings and evidence placed on record by respondents workmen, there is no merit in submission of petitioner.

A.I.I.M.S. New Delhi v. Uddal & Ors. *1714*

— Section 33(2)(b)—Order passed by Industrial Tribunal dismissing Petition of petitioner seeking approval of its directions for removal of respondent from service, challenged before High Court—Plea taken, evidence of a ticketless passenger is not necessary for petitioner to prove type of charges that were leveled against respondent—per contra plea taken, in present case there was evidence on record before Enquiry Officer to show that one of two passengers on basis of whose statement Checking Team had made a report, had sent a written communication pointing out that Conductor was not at fault and passenger had asked him for a ticket which was given to him by Conductor—This fact clearly falsifies statement of Checking Team and there is no basis to disregard findings recorded by impugned order—Held—Considering two conflicting statements, impugned order records a finding disbelieving version of petitioner and hence holds that petitioner has not been able to establish charges against respondent—There is no perversity in said conclusion drawn by impugned order—Appreciation of evidence is within domain of Tribunal—Findings of fact recorded by fact finding authority duly constituted for said purpose cannot be disturbed for reason of having been based on materials

or evidence not said to be sufficient by Writ Court as long as findings are based on some materials on record which are relevant for said purpose—Merely because another view was possible would not be a ground to set aside said findings—petitioner failed to show as to why finding recorded by Tribunal is liable to be set aside—it is true that in this case there is evidence of inspecting staff which carried out checking to show that two of passengers had been given tickets of less denomination—Yet in present case one of passengers has written a communication to petitioner clearly pointing out that he had been issued a ticked which he had requested for and conductor did nothing wrong—This evidence of passenger has gone un-rebutted—There is nothing on record to show that statement of passenger was obtained under any influence—In light of this evidence, statement of Inspecting staff cannot be unequivocally accepted—Petition is without merit and is dismissed—Order of Tribunal is upheld—However, in case petition implements order of Tribunal dated 18.03.2002 within three months from today, namely, that he will be satisfied in case 50% of back wages plus relief of re-instatement is given to him.

D.T.C. v. Amarjeet Singh & Anr. *1724*

LAND ACQUISITION ACT, 1894—Section 4, 6, 9 & 10—Code of Civil Procedure, 1908—O VII rule 11—Appellant had filed suit seeking perpetual injunction against dispossession from suit property and declaration that restoration allotment of same by Lt. Governor was illegal—Learned Single Judge dismissed suit on ground that plaintiff (Appellant herein) had no title to suit property—Order challenged in appeal before DB—Plea taken, application u/O VII rule 11 ought to be decided based on averments in plaint alone—Learned Single Judge had incorrectly proceeded upon assumption that possession of suit premises were taken pursuant to acquisition without giving opportunity to appellant to prove his case—Per contra plea taken, it is ex facie evident from documents filed with plaint that suit property was given to Society pursuant to acquisition and under lease agreements—It is a logical sequitur therefrom that Society would be bound by terms thereof including prohibition from selling—In circumstances, no title could have flown from Society to appellant—Where plaint itself discloses no cause of action suit ought to be dismissed and there is no infirmity in action of learned Single Judge in doing so—Held—Case of appellant is that

possession of suit property was never taken pursuant to agreement and Society had acquired title, possession and/or interest therein from the original owners pursuant to settlement and not acquisition—It is this that appellant seeks to set his title up—This cannot be set to be a case of clever or artful drafting to create illusory cause of action that ought to be nipped in bud under O VII rule 11—Duty of Court under O VII rule 11 is to consider whether averments in plaint taken as a whole, along with documents filed therewith, if taken to be true, would warrant a decree in favour of plaintiff—This Court is of view that in instant case, averments and documents would so do—De hors a patent contradiction, i.e., one ascertainable ex facie from record, without involving any lengthy or complicated argument or a long drawn out process of reasoning, between averments and documents, Court considering application under O VII rule 11 ought to not lightly ignore averment in plaint—Conclusion of learned Single Judge that Society acquired title/interest in suit property under lease agreements is unwarranted at stage of considering application under O VII rule 11—Plaint does disclose a cause of action which ought to be considered in trial—Impugned order is set aside.

Pankaj Bajaj v. Meenakshi Sharma & Ors.............. 1905

LIMITATION ACT, 1963—Section 18—Preliminary issue of limitation—Whether the fresh period of limitation would commence from the date of execution of the document acknowledging the debt or from the expiry of the period stipulated in the acknowledgment for payment. Held—IF a person had promised to do a particular act within a stipulated period, then the cause of action to sue for breach of the promise would accrue either on the specific refusal of the promisor to perform the said promise or on the expiry of the period stipulated for the performance. The cause of action to sue for recovery accrues to a party only on the failure of the other party to pay within stipulated period for payment. In the facts of the present case, the cause of action to sue on written acknowledgment of 14.04.2006 would accrue to the plaintiff only on the failure of the defendant to pay on the expiry of six months of 14.04.2006. i.e., on 13.10.2006. Thus, the acknowledg-ment dated 10.06.2009 is a written acknowledgment in terms of Section 18

of the Act and executed within the period of limitation of the acknowledgment dated 14.04.2006 as it was coupled with a payment of Rs. 30,000/- and an undertaking to pay the balance amount within six months. The suit of the Plaintiff is prima facie held to be within time.

Manoj Kumar Goyal v. Jagdish Kumar Modi 1595

MOTOR VEHICLES ACT, 1988—Challenge to award of compensation on the ground that Tribunal wrongly calculated income of deceased as GPF, Gratuity and other benefits which the deceased was getting not added and loss of consortium and love and affection not included. Held—Settled law that while calculating the income of the deceased for the purpose of calculation of loss of dependency, the income includes all the perks and benefits which were beneficial to the family of the deceased. Tribunal erred in not adding this amount while calculating income. Held—From the principles laid down by the Hon'ble Supreme Court in Rajesh and others v. Rajbir Singh & Ors. Appellants and wife and minor children of the deceased are entitled to Rs. 1,00,000/- towards loss of consortium and Rs. 1,00,000/- towards loss of love and affection. Compensation re-assessed from the date of filing of petition.

Neena Devi & Ors. v. Ashok Yadav & Ors. 1802

— Compensation In the proceedings under Motor Vehicles Act, learned Motor Accident Claims Tribunal awarded compensation but at the same time, reached the conclusion that there was a breach in terms of the insurance policy since the driver of the offending vehicle was not holding a valid driving licence, as such the Tribunal granted recovery to the insurance company—Appellant challenged the order of the Tribunal arguing only to the effect that the liability to pay the claimant ought to have been fixed directly on the driver and owner of the offending vehicle instead of the appellant being directed to first pay the claimant and then recover the same from the owner and driver of the offending vehicle—Held, in view of settled legal position that the liabilty to pay compensation under Motor Vehicles Act is joint and several, coupled with the legal position that liability to pay the third person under the policy is that of the insurance company, the insurance company can only be given a right to recover the awarded compensation from violators of terms and conditions of the insurance policy, so order of the learned Tribunal did not

suffer any infirmity.

New India Assurance Company Ltd. v. Ashwani Kumar & Ors. *1863*

— Challenged to award of the Tribunal on the ground that income calculated in the absence of documentary evidence as the documents on record were manipulated and fabricated. Held—After going through he evidence produced before the Tribunal it is apparent that the Appellant's stand has no merit and income correctly calculated. Contention of the Appellant that because the signature of the deceased differs on each and every voucher, the vouchers are not genuine has no force. The insurance company had the opportunity for getting the disputed signatures of deceased on vouchers examined by the handwriting expert. The Court at this stage cannot presume that the vouchers do not bear the signatures of the deceased. Appeal dismissed.

National Insurance Co. Ltd. v. Sukriti Devi & Ors. *1849*

— Sections 2 (44), 2 (21), 166 & 140—Award passed by Motor Accident Claims Tribunal on petition filed by respondents fixing liability on insurance company to pay compensation and rejected its claim for recovery rights—Aggrieved insurance company preferred appeal claiming there was violation of insurance policy as driver was not holding valid and effective driving licence to drive tractor—He was holding driving licence valid for motorcycle and LMV (Non-Transport). Held: Tractor is motor vehicle coming within the definition of section 2 (44) of Motor Vehicle Act and is also a light motor vehicle within the meaning of section 2 (21) of motor Vehicle Act. The tractor not being used for any commercial purpose and is also not a non-transport vehicle.

New India Assurance Co. Ltd. v. Sanjay Singh & Ors. *1857*

— Appeal for enhancement of compensation by LR's of deceased properly. The deceased was a contractor and income ought to have been Rs. 30,000/- to 40,000/-. Denial of future prospects is against the principles laid down in Sarla Verma's case. Held—Appellant had failed to prove that the deceased was a marble contractor. His income has been assessed on the basis of minimum wage. He thus is taken as a salaried person instead of

a self employed person. Held—From the directions in Sarla Verma's case it is apparent that only two categories of persons are not entitled to future prospects, one, where the deceased was self employed and secondly where the deceased was working on a fixed salary (without prospect of annual increment). The government revises the minimum wages twice annually. The deceased who has been assessed as daily wager does not fall into the exempted category in Sarla Verma's case. Since age of the deceased is below 40, he was entitled to 50% of his salary towards future prospect. Appeal disposed of.

Rajender Sah & Ors. v. Santosh Kumar & Ors. *1875*

— Appellant met with an accieent and thereby suffered Permanent disablement of 80% in respect of lower limbs—The Tribunal assessed the whole body disability at 40% and calculated loss of future earning after taking into account his age as well as three income tax returns—Challenged—Petitioner argued before the High Court that the Tribunal ought not to have taken into consideration the income shown in the assessment year 2009-2010 since during financial year 2008-2009 the petitioner remained indisposed due to his injuries and was not in service, which is the reason for reduction in the earnings of that year otherwise the income tax returns showed that there was yearwise increase in his income—Held, as reflected from record that due to the accident on 21.9.2009, appellant was not able to perform duties with his employer for 5-6 months and therefore, his earnings for the assessment year 2009-2010 are less than the earnings of the previous years, so the Tribunal ought not to have taken into consideration the same—Also held that towards future prospects, keeping in mind age of the appellant as 26 years, the Tribunal ought to have applied 50% of his salary towards future prospects and the Tribunal wrongly applied 30% towards future prospects—Accordingly, the High Court recomputed the compensation payable to the appellant.

Raj Kumar v. Jeet Singh & Ors. *1868*

— Section 166 & 140—Award passed by Motor Accident Claims Tribunal challenged by insurance company on ground of incorrect multiplier as per age of deceased applied to calculate compensation in death case of a bachelor aged 21 years. Held:-

Multiplier has to be taken as per the age of bachelor deceased or the survivor, whichever is higher.

Royal Sundram Alliance Insurance Co. Ltd. v. Vimla Devi & Ors. *1946*

— Section 166 & 140—Award passed by Motor Accident Claims Tribunal challenged by insurance company on ground that legal heirs of deceased not entitled to future prospects. Held:- Only two categories i.e. where the deceased was self employed or where he was working on a fixed salary with no provision of annual increment etc. are excluded while calculating the future prospects.

Royal Sundram Alliance Insurance Co. Ltd. v. Vimla Devi & Ors. *1946*

NDPS ACT, 1985—Section 21 (b)—Appeal against conviction. Held, delay in sending of the sample in FSL, without any evidence of tampering with the samples, is of no adverse consequence to the prosecution. Also, Held, merely because prosecution witnesses are police officials, they do not cease to be competent witnesses and their testimony cannot be doubted merely because they were police officials. Non-joining of public persons especially when the reason has been explained, is not fatal to the prosecution's case and conviction can be based on the testimony of police officials which is corroborated by ocular as well as documentary evidence. Also, held, minor omissions in the testimonies of police officials not fatal especially when the police officials witness many such criminal cases in discharge of their official duties.

Ashif Khan @ Kallu v. State *1754*

PREVENTION OF CORRUPTION ACT, 1988—S. 7, 13 (1)(d) r/w S. 13(2)—Conviction—Challenged—Accused caught with treated government currency notes in left pocket of his shirt—Hands as well as pocket of the shirt turned pink on handwash—Accused admitted his presence at the spot but claimed that his shirt was lying on the bench nearby which was found to be having currency notes when he was apprehended by the raid officer—Explanation appears to be afterthought and weak defence—Evidence was unimpeachable—Conviction upheld—Appeal dismissed.

— S. 7, 13(1)(d) r/w S. 13(2)—Conviction—Appeal against—

Complainant PW3 in his examination in chief confirmed the demand made by accused and acceptance of the bribe and the fact that after accepting the bribe amount accused had kept it in the right side pocket of his pant—However in his cross-examination, after one month, PW3 resiled and claimed that he had purchased a scooter from accused and owed Rs. 5000/- as balance consideration to the accused—PW3 admitted in his chief that a trap was laid and that accused was arrested after his right hand and right side pocket of pant turned pink on wash—Accused also claimed that he took money as balance consideration of sale of scooter from PW3, which explanation was not offered soon after his apprehension—Accused did not deny that his hand and pant turned pink on wash—Defence of accused is an afterthought—Shadow witness and recovery witness supported prosecution—Relying on the case of *Khujji v. State of M.P.:* AIR 1991 SC 1953 contrary statement of PW3 in cross-examination discarded—Appeal dismissed.

Dinesh v. State *1777*

—S. 7, 13(1)(d) r/w S. 13(2)—Conviction—Appeal against—Complainant PW3 in his examination in chief confirmed the demand made by accused and acceptance of the bribe and the fact that after accepting the bribe amount accused had kept it in the right side pocket of his pant—However in his cross-examination, after one month, PW3 resiled and claimed that he had purchased a scooter from accused and owed Rs. 5000/- as balance consideration to the accused—PW3 admitted in his chief that a trap was laid and that accused was arrested after his right hand and right side pocket of pant turned pink on wash—Accused also claimed that he took money as balance consideration of sale of scooter from PW3, which explanation was not offered soon after his apprehension—Accused did not deny that his hand and pant turned pink on wash—Defence of accused is an afterthought—Shadow witness and recovery witness supported prosecution—Relying on the case of *Khujji v. State of M.P.:* AIR 1991 SC 1953 contrary statement of PW3 in cross-examination discarded—Appeal dismissed.

Babu Ram v. *Central Bureau of Investigation* *1783*

PROMOTION—Non-Grant of actual benefits—Brief Facts—Shri Mahesh Kumar was working as a lecturer in Mathematics in the Lucknow University, which job he gave up to join the UP

Provincial Forest Service in the year 1952 as a direct recuit as an Assistant Conservator of Forests—In the year 1960, he was duly promoted to the post of Deputy conservator of Forests—He was promoted to the post of Deputy Conservator of Forest and when the All India Forest Services (IFS) was constituted—Shri Mahesh Kumar being the senior most Deputy Conservator of Forests, Grade-II with effect from 11th May, 1978—He was granted the selection grade with effect from 12th July, 1977 but for some reasons, the benefit thereof was not extended to him—Unfortunately with effect from 10th May, 1978, one day prior to his formal promotion to the post of Conservators of Forests, he was compulsorily retired—Shri Mahesh Kumar challenged his compulsory retirement in the Delhi High Court by way of a writ petition which came to be dismissed—The decision of the learned Single Judge was reversed by the Division Bench in LPA No. 71/1978. By its order dated 22nd May, 1979 the order of compulsory retirement dated 10th May, 1978 was also set aside—Petitioners challenged the judgment of the Division Bench by way of Civil Appeal No. 2759-6/1979 before the Supreme Court of India—This appeal was dismissed by the Supreme Court by an order dated 6th August, 1986—Shri Mahesh Kumar was still not granted any relief by the present petitioners and he was compelled to seek relief by way of W.P. Nos. 997/1999 and 998/2006 which were transferred to the Central Administrative Tribunal—Tribunal has set aside and quashed the DPC minutes dated 1st November, 1995 and allotted the T.A. No.3/2007 directing the respondents to extend the benefit of the selection grade and promotions within the period of five months from the date of receipt of the order—Hence, the present petition. Held: Tribunal had noted that it was not the case of the respondents that the merit of Shri Mahesh Kumar suddenly and drastically deteriorated after 12th July, 1977 so as to deprive him of the promotion in question—Tribunal has also noted the letter dated 17th November, 1992 written by the Conservator of Forests to the Principal Chief Conservator of Forests, Lucknow, U.P. on the above lines and stating that the order of the Court would be complied with and the matter would be solved—Approval of this action was sought—Tribunal had considered the manner in which the present petitioners were proceeding and also that they had wrongly done the fixation and that their actions were erroneous and contrary to the prior orders of the tribunal dated 8th November, 2008 and 31st January, 2012 and that of the High

Court dated 7th September, 2010—After seeking justice for a period of 26 years from 1978, Shri Mahesh Kumar expired in the year 2004—Thereafter, his legal heirs have been pursuing the litigation—Despite passage of almost 36 years from the date when cause of action arose in favour of late Shri Mahesh Kumar, justice still eludes the present respondents who are the legal heirs of the deceased—In view of the above discussion, this writ petition and application are dismissed being devoid of merits.

State of U.P. v. Shri Mahesh Kumar & Anr. 1632

RAILWAY SERVANTS (DISCIPLINARY & APPEAL) RULES, 1968—Rule 18 and 25—Indian Evidence Act, 1872—Section 108—Respondent stopped attending duties and he was issued a charge memo proposing to conduct disciplinary proceedings against him on charge of absenting himself from duty unauthorisedly—One of his relatives lodges a police complaint with regard to his being missing—Charge-sheet sent to respondent by registered post was returned undelivered with remark that "person who has to receive it remains out without intimation. No hope that he will return, hence returned"—Notice on inquiry proceedings issued by Inquiry Officer (IO) was also returned with same remark as before—Report of IO holding that charges framed against respondent were proved correct was sent to respondents permanent address and was returned undelivered with was remark as before—Disciplinary Authority (DA) accepted recommendations of IO and imposed penality of removal from service with immediate effect—Respondent was finally traced in a condition as that of a mad person in Ayodhya-Application filed by respondent before Administrative Tribunal was allowed holding that IO & DA arbitrarily concluded that applicant's absence was unauthorized—Order challenged before High Court—Held—Petitioners had before them evidence of police report as well as confirmation by police that respondent was not traceable—Tribunal had found decision of DA to initiate disciplinary action against respondent on charge of unauthorized absence from duties as arbitrary and hasty—Inquiry proceedings conducted by IO has been held to be a formality inasmuch as telegram and registered letters were being sent to a person who was missing and was admittedly not available at address to which they were sent—Nothing has been pointed out to us which would enable us to take a view which is contrary to view taken by Tribunal—Petitioners would be entitled to subject respondent to

a medical examination.

Union of India & Ors. v. Jatashankar 1770

SERVICE LAW—Respondents notified vacancies of 14 posts of Instructor/Mathematics in the Department of respondent No.1, out of which 12 posts were in the category of unreserved and 2 were in the category of schedule caste Petitioner submitted an application as scheduled caste candidate and successfully cleared the written examination and was provisionally selected as one of the two scheduled caste candidates for the post—Respondent No.2 forwarded dosier of the petitioner alongwith the other selected candidates to respondent for issuing after of appointment after due verification—Respondents found on verification that the letter of experience submitted by the petitioner was not genuine, so his candidature was rejected—Tribunal also held that the experience certificate submitted by petitioner was not genuine, so respondents rightly denied appointment to the petitioner—Challenged in writ petition—Held, the confusion occurred since the company issuing the experience certificate had been using spelling of its name as Tondon Diesels and had also been spelling its name as Tondon Diesel as well as Tandon Diesel—Held, the doubt as regards genuineness of the experience certificate was without any basis, so order of Tribunal set aside and directions issued to the respondents to proceed in the matter of appointment of petitioner.

Khem Chand v. Govt of NCT of Delhi & Anr. 1931

SPECIFIC RELIEF ACT, 1963—Section 19 (1)(b)—Suit for specific performance of Agreement to Sell along with cancellation of five sale deeds which have been executed after the agreement to sell. Application seeking rejection of plaint on the ground that the plaintiff has not correctly valued the suit for the purposes of Court fee and jurisdiction. As per the applicant the Plaintiff had sought cancellation of sale deeds which are registered at different values and since Plaintiff is not in possession of the property., the suit should have been valued on the consideration mentioned in the respective sale deeds. Plaintiff states that Plaintiff had to value the suit for substantive relief of specific performance and the consequential reliefs of cancellation are covered in the main relief. Held—The relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of subsequent transferees is only an

ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant in favour of the Plaintiff. Consequently there will be no question of payment of ad valorem Court fees in respect of said relief. The said relief claimed would be superficial and unnecessary. Application dismissed.

Jafar Imam v. Devender Chauhan & Others 1917

— Section 14, Indian Contract Act, 1872—Section 24, 73—Suit for declaration and damages that termination of his services is illegal, arbitrary and in violation of the terms of employment and principles of natural justice. Plaintiff joined at the post of General Manager and continued to work till 02.01.2009. On 02.01.2009 when Plaintiff joined after a leave the was orally asked to resign without assigning any reason and was asked to leave the office abruptly/Plaintiff could not even take his original papers lying in the office containing important documents. The Plaintiff returned the laptop and the company car provided to the plaintiff was also taken away forcibly. Plaintiff contends that part of salary not paid and cash incentive not paid in full, medical bills and medical insurance not paid, statutory benefits of provident fund have also not been deducted. Defendant states that Plaintiff was not discharging his duties well and was having a highly unprofessional attitude. Oral notice of termination of three months was given to the Plaintiff. Held—No evidence on record to show that oral notice of termination was given to the plaintiff. Termination of the Plaintiff is illegal as no notice of three months was given. Salary for three months granted to Plaintiff. However, relief of reinstatement cannot be granted in view of Section 14 of the SRA as the present contract provides for a termination clause. Claim of Plaintiff for cash incentive is rejected being hit by s. 24 of the contract act. Claim of maintenance of company car, driver's salary, Petrol expenses, provident fund, medical reimbursement and medical insurance allowed. Damages of Rs. 25 lacs rejected as no cogent evidence has been places on record on the basis of which claim can be adjudicated. Compensation of any remote or any indirect loss or damage sustained by the party complaining of a breach cannot be granted. Suit decreed.

Dinesh Chadha v. Hotel Queen
Road Pvt. Ltd. 1954

SUIT FOR SPECIFIC PERFORMANCE, DECLARATION AND PERMANENT INJUNCTION: BRIEF FACTS—Appellant and Respondent No. 1 entered into an agreement to sell on 9.2.2005 for land owned by the appellant company for a total consideration of 7,35,00,000/- Respondent No. 1 Paid an advance of 1,10,000,00/- and the balance 6,25,000,00/- was payable at the time of completion of the sale formalities by April 30, 2005—Appellant was to Provide the No Objection Certificate/Permission from the competent authority (NOC) for transfer of the suit property—Company applied for NOC on March 24, 2005 Respondent No. 1 was surprised to receive a letter dated April 30, 2005 on May 05, 2005 by which the appellant company sought to cancel the agreement on the pretext that its Board did not approve the Agreement—A draft of 1,10,000,00/- was also sent with the said communication—Respondent No. 1 did not accept the cancellation of the agreement by the appellant company and vide his letter dated May 19, 2005 reiterated the some to the appellant stressing also that respondent No. 1 was not accepting the said bank draft for 1,10,00,000/- Appellant had received the NOC on May 02, 2005—In the second week of June 2005, Attorney holder of the appellant informed respondent No. 1 that the Board of Directors of the appellant had approved the Agreement to Sell dated February 09, 2005 and the General Body of the shareholders of the appellant company had also accorded its approval on June 08, 2005—Appellant is also stated to have applied for a fresh NOC on June 13,2005 as the earlier NOC had expired on June 01, 2005—On July 08, 2005 a communication was received from the appellant stating that sale formalities would be completed within 15 days of receipt of NOC—In the meantime, it is stated that a circular was issued on June 01, 2005 by the Government of NCT of Delhi that NOCs would not be issued in respect of Agricultural lands less than 8 acres—Delhi High Court on December 20, 2005 allowed the writ petition inasmuch as Government of NCT Delhi agreed to issue the NOC.—Thereafter, there was no information from the appellant and they kept evading the respondents—Hence, the respondent No. 1 filed the present Suit seeking the relief of specific performance, declaration and permanent injunction on February 14, 2006 -Judgment and decree dated 21.12.2012 Passed whereby the suit of the respondents seeking specific performance of the Agreement to Sell dated February 09,2005 was decreed in favour of the respondents with a direction to the

respondent to pay to the appellant the balance sale consideration of 6.25 crores (Rupees six crore and twenty five lacs only) with interest @ 6% Per annum from the date of filing of the suit till date of payment—Hence, the Present Appeal—Cross objections filed by the respondents challenging the direction in the impugned order directing the respondents to pay interest @ 6% Per annum on the balance sale consideration. Held: There are no reasons to differ with the view taken in the impugned order on the said issues—Though no serious arguments were raised as to whether time was the essence of the Agreement to Sell, impugned order has rightly held relying on Section 55 of The Contract Act that there are no facts on record to show that it was the intention of the parties that time should be the essence of the Contract—Original contract dated February 09, 2005 Provided that the sale formalities would be completed by April 30. 2005—Appellant received that the NOC on May 02, 2005 but did not take steps to communicate the same to respondent No. 1 or have the transaction completed—Accordingly, the said NOC lapsed—in the meantime, respondent No. 1 purported to cancel the agreement on April 30, 2005 (Ex. P-12) claiming that the shareholders of the company did not approve the Agreement to Sell—Thereafter on June 08, 2005 it claimed that the shareholders of respondent No. 1 company approved the sale transaction and accordingly a fresh application for NOC was made and a supplementary agreement was entered into on July 08, 2005 (Ex. P-13)—it was the supplementary agreement which provided that balance payment would be made within 15 days of receipt of the NOC from the competent authority- A finding has already been recorded that NOC was received on December 23, 2005, but a copy was never provided to respondent No. 1—No copy of the fresh Power of Attorney was supplied to respondent No. 1 nor was respondent No. 1 intimated about the same. In the light of the above facts and the conduct of the appellant it is not possible to conclude that time was the essence of the contract—Appellant could not cancel the Contract in the manner sought to be done.

R.K.B. Fiscal Services Pvt. v. Ishwar Dayal Kansal and Anr. *1671*

ILR (2014) III DELHI 1595
CS (OS)

MANOJ KUMAR GOYAL ....PLAINTIFF

VERSUS

JAGDISH PRASHAD MODI ....DEFENDANTS

(SANJEEV SACHDEVA, J.)

CS(OS) NO. : 2321/2011 DATE OF DECISION: 13.02.2014

Limitation Act, 1963—Section 18—Preliminary issue of limitation—Whether the fresh period of limitation would commence from the date of execution of the document acknowledging the debt or from the expiry of the period stipulated in the acknowledgment for payment. Held—IF a person had promised to do a particular act within a stipulated period, then the cause of action to sue for breach of the promise would accrue either on the specific refusal of the promisor to perform the said promise or on the expiry of the period stipulated for the performance. The cause of action to sue for recovery accrues to a party only on the failure of the other party to pay within stipulated period for payment. In the facts of the present case, the cause of action to sue on written acknowledgment of 14.04.2006 would accrue to the plaintiff only on the failure of the defendant to pay on the expiry of six months of 14.04.2006. i.e., on 13.10.2006. Thus, the acknowledgment dated 10.06.2009 is a written acknowledgment in terms of Section 18 of the Act and executed within the period of limitation of the acknowledgment dated 14.04.2006 as it was coupled with a payment of Rs. 30,000/- and an undertaking to pay the balance amount within six months. The suit of the Plaintiff is prima facie held to be within time.

In terms of Section 18 of the Act, if before the expiry of the prescribed period for filing a suit an acknowledgement of liability is made in writing by the party against whom such claim is made a fresh period of limitation shall be computed from the time when the acknowledgement was so signed. If a person availing a loan before the expiry of the period of limitation for filing the suit acknowledges his liability in writing, then the lender gets a fresh period of limitation for filing the suit. **(Para 9)**

If a person has promised to do a particular act within a stipulated period, then the cause of action to sue for breach of the promise would accrue either on the specific refusal of the promisor to perform the said promise or on the expiry of the period stipulated for the performance. **(Para 14)**

The cause of action to sue for recovery accrues to a party only on the failure of the other party to pay within stipulated period for payment. In the facts of the present case the cause of action to sue on the said written acknowledgement of 14.04.2006 would accrue to the plaintiff only on the failure of the defendant to pay on the expiry of six months of 14.04.2006, i.e., on 13.10.2006. Thus the acknowledgement dated 10.06.2009 is a written acknowledgement in terms of Section 18 of the Act and executed within the period of limitation of the acknowledgement dated 14.04.2006 as it was coupled with a payment of Rs.30,000/- and an undertaking to pay the balance amount within six months. The suit of the Plaintiff is prima facie held to be within time. **(Para 15)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Madan Mohan, Advocate

FOR THE DEFENDANTS : Ms. Rashmi B. Singh, Advocate

RESULT: Preliminary issue decided in favour of the Plaintiff.

SANJEEV SACHDEVA, J.

1. Vide order dated 30.7.2012, the issues were framed in the suit and the issue "whether the suit is barred by limitation?" was treated as preliminary issue.

2. The plaintiff has filed the present suit seeking recovery of a sum of Rs.35,14,100/-. The case of the plaintiff is that the defendant had obtained a loan of Rs.10,37,000/- from the plaintiff on interest payable at market rate, i.e., 2% per month on 1.5.2001 and executed a receipt for the same. As per the plaintiff, the defendant had undertaken to discharge the liability within two years with interest.

3. The defendant is stated to have paid a sum of Rs.20,000/- on 16.04.2003 and executed a document for the same undertaking to pay the balance amount within six months. The defendant once again is claimed to have paid a sum of Rs. 30,000/- on 14.04.2006 and agreed to pay the balance amount with interest within six months and executed a written acknowledgement for the same. As per the plaintiff, once again on 10.06.2009, the defendant paid another sum of Rs.25,000/- and agreed to pay the balance amount within six months along with interest. The acknowledgment dated 10.06.2009 is stated to have been executed within a period of three years from the expiry of the six months stipulated vide acknowledgment dated 14.04.2006.

4. As per the plaintiff, since the defendant failed to pay the amount within the period stipulated, the present suit was filed on 04.08,2011.

5. The defendant has disputed the taking of loan and has submitted that the documents are forged and fabricated.

6. The defendant has raised a plea that the suit is barred by limitation as the loan was allegedly granted on 01.05.2001 and the suit has been filed on 04.08.2011. Learned counsel for the defendant submits that even if the three writing, i.e. writing dated 16.4.2003, 12.4.2006 and 10.6.2009 were taken into account, the suit would be still barred by limitation as in terms of Section 18 of the Limitation Act, 1963 (hereinafter referred as the Act) for the limitation to be extended, the acknowledgement has to be executed within a period of three years from the date the cause of action arises. For the period of limitation to be extended, the document has to be executed within the existing period of limitation. Learned counsel

further contends that if any document is executed after the expiry of period of limitation, the same will not extend limitation.

7. Learned counsel for the defendant submits that the third alleged acknowledgement, i.e., document dated 10.06.2009 has been executed admittedly beyond a period of three years from the last alleged acknowledgement of 14.04.2006 and as such, the suit even on the showing of the plaintiff is barred by limitation. 8. Section 18 of the Act, lays down as under:

> "**18. Effect of acknowledgment in writing. -** (1) Where, before the expiration of the prescribed period for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.
>
> (2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.
>
> Explanation.- For the purposes of this section,-
>
> (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right,
>
> (b) the word" signed" means signed either personally or by an agent duly authorised in this behalf, and
>
> (c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right."

9. In terms of Section 18 of the Act, if before the expiry of the

prescribed period for filing a suit an acknowledgement of liability is made in writing by the party against whom such claim is made a fresh period of limitation shall be computed from the time when the acknowledgement was so signed. If a person availing a loan before the expiry of the period of limitation for filing the suit acknowledges his liability in writing, then the lender gets a fresh period of limitation for filing the suit.

10. The question that arises for consideration is whether the fresh period of limitation would commence from the date of execution of the document acknowledging the debt or from the expiry of the period stipulated in the acknowledgment for payment if any such period is stipulated.

11. The debt was allegedly given on 01.05.2001 and a receipt executed for the same. It was further acknowledged and undertaken to be re-paid within six months by a document executed on 16.04.2003 and the said acknowledgment was accompanied with a payment of Rs.20,000/-. This acknowledgement dated 16.04.2003 was within a period of three years from the alleged creation of the debt. Similarly the acknowledgement dated 14.04.2006 was within three years of 16.04.2003 and the acknowledgment of 14.04.2006 was accompanied by a payment of Rs.30,000/- and an undertaking to pay the balance amount with interest within six months. Further there is reliance on the acknowledgement dated 10.06.2009 which was also coupled with a payment of Rs.25,000/- and an undertaking to pay the balance amount within six months. The acknowledgement of 10.06.2009 is not within three years of the acknowledgment dated 14.04.2006 but is within three years of the six months period stipulated for payment in the acknowledgment dated 14.04.2006.

12. The question then is whether the limitation to file the suit would commence from the date of the acknowledgment or from the expiry of the period stipulated in the acknowledgment for payment. This question would not arise in a case where the acknowledgement does not stipulate any period for payment, in which case the limitation would commence from the date of the acknowledgment.

13. The acknowledgement dated 14.04.2006 stipulated a six months period for payment. The defendant could have paid the said amount anytime within the stipulated period of six months. The plaintiff had to

wait for the expiry of the period of six months before filing a suit. In case a suit were to be filed before the expiry of the period stipulated for payment, the suit would be premature.

14. If a person has promised to do a particular act within a stipulated period, then the cause of action to sue for breach of the promise would accrue either on the specific refusal of the promisor to perform the said promise or on the expiry of the period stipulated for the performance.

15. The cause of action to sue for recovery accrues to a party only on the failure of the other party to pay within stipulated period for payment. In the facts of the present case the cause of action to sue on the said written acknowledgement of 14.04.2006 would accrue to the plaintiff only on the failure of the defendant to pay on the expiry of six months of 14.04.2006, i.e., on 13.10.2006. Thus the acknowledgement dated 10.06.2009 is a written acknowledgement in terms of Section 18 of the Act and executed within the period of limitation of the acknowledgement dated 14.04.2006 as it was coupled with a payment of Rs.30,000/- and an undertaking to pay the balance amount within six months. The suit of the Plaintiff is prima facie held to be within time.

16. The question whether the documents are forged or fabricated is a disputed question of fact which would be decided after the trial of the suit. If after the trial the court comes to a conclusion that any of the acknowledgments are forged and fabricated then the suit would be liable to dismissed as being barred by limitation.

17. Nothing stated herein would amount to an expression on the merits of the case of either party.

ILR (2014) III DELHI 1601
CS (OS)

D.V. SINGH AND ANOTHER ....PLAINTIFFS

VERSUS

MUNICIPAL CORPORATION OF DELHI & ANOTHER ....DEFENDANTS

(SANJEEV SACHDEVA, J.)

I.A. NO. : 12765/2013 IN CS(OS) NO. : 2984/2011 DATE OF DECISION: 13.02.2014

Code of Civil Procedure, 1908—Order 1 Rule 10—Society which was the transferor/seller filed application for impleadment—Whether seller/transferor of the property is a necessary party in a suit by transferee to enforce its rights under a transfer deed against third parties—Held—Under normal circumstance transferor/seller is not a necessary party, however present case is peculiar. The entire case of the plaintiff revolves around the various resolutions passed by the Society with regard to the acquisition of land, preparation of the layout plan. The dispute pertains to the land allotted to the society, its demarcations, the plots originally sanctioned and allotted. Dispute also pertains to location and area sold to the Plaintiffs by the Society. These questions cannot be completely and effectively adjudicated upon in the absence of the Society. The present of Society and its role at various stages would have to be examined at the time of adjudication of the various disputes that are arising in the present suit. Discretion to add a party can be exercised by a Court either suomotu or on an application of a party to the suit or a person who is a party. Society's application for impleadment allowed.

The entire case of the plaintiff revolves round the various resolutions passed by the society with regard to the acquisition of land, preparation of the layout plan. The disputes pertain to the land allotted to the society, its demarcations, the plots originally sanctioned and allotted. The dispute also pertains to location of the area sold to the Plaintiffs by the society. The plaintiff has relied on various letters and resolutions of the society. The controversy also revolves around the fact whether the area that is allegedly sold and handed over to the Plaintiffs by the society was sanctioned or not and whether the allotment to the mother of the plaintiffs by the society was conditional or not and whether the said allotment lapsed on account of subsequent events. In my view these questions cannot be completely and effectively adjudicated upon in the absence of the society. The presence of the society and its role at various stages would have to be examined at the time of the adjudication of the various disputes that are arising in the present suit. **(Para 20)**

The discretion to add a party can be exercised by a court either suo motu or on an application of a party to the suit or a person who is not a party. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. [**MUMBAI INTERNATIONAL AIRPORT PVT LTD. VS REGENCY CONVENTION CENTRE AND HOTELS PRIVATE LIMITED** 2010 (7) SCC 417]. **(Para 22)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFFS	:	Mr. Anand Yadav, Advocate.
FOR THE DEFENDANTS	:	Ms. Shyel Tehan and Ms. Manzira Dasgupta, Advocates for D-1/MCD Mr. A.P. Aggarwal, Adv for D-2. Mr. Ravi Kant Chadha, Sr. Advocate with Mr. R.K. Gautam, Adv for defendant/applicant.

RESULT: Impeadment application allowed.

SANJEEV SACHDEVA, J.

IA No.12765/2013 (under Order 1 rule 10)

1. This is an application on behalf of M/s Swatantra Coop House Building Society for being impleaded as defendant in the present suit.

2. Order 1 rule 10 of the Code of Civil Procedure lays down as under:

> **10. Suit in name of wrong plaintiff. -** (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.
>
> (2) Court may strike out or add parties. - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.
>
> (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.
>
> (4) Where defendant added, plaint to be amended. - Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

> (5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

3. Under Order 1 rule 10(2) any person whose presence is necessary for the purposes of enabling the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit can be added as a defendant. The power to add a party can be exercised at any stage of the proceedings.

4. The plaintiffs have filed the present suit for declaration and permanent injunction primarily against defendant No.1, i.e., MCD. The plaintiffs and defendant No.2 claim to be owners of free hold plot No.25 (New) Category II, Group B measuring 399.93 Sq.Yards, Kalindi Colony in Revenue Estate of Village Kilokri, Delhi.

5. Case of the plaintiff it that the said plot was allotted and sold to the mother of the plaintiff and defendant No. 2 by Swatantra Coop House Building Society (applicant herein) vide sale deed dated 07.10.1965. The society had purchased an area of 2046 acres of land in the year 1955-57. The land purchased was not in any geometrical dimensions and zigzag shape. A layout plan was prepared by the society and the same was passed by the defendant MCD vide resolution dated 01.10.1958 and as per the said resolution, 108 residential plots were approved. Since the land was irregular, the society had been representing to the MCD and other concerned authorities for adjustment of pocket and boundaries belonging to CRRI, Ministry of Transport and to exchange land belonging to the society with the land belonging to CRRI and others.

6. The society sought for permission from the MCD, which permission was granted vide resolution dated 08.05.1964, to make boundary wall of the colony regular. Society was granted permission to construct on the plots in the colony except plots No. 1, 2, 10 – 15 in Block B and Plots No. 18 – 25 in Block 'E' for want of approach road. As per plaintiff, the society once again approached the corporation for allowing building activities on the plots and vide resolution No.588 dated 25.08.1965, the Municipal Corporation of Delhi permitted the society to carry on building activities subject to certain conditions.

7. The plaintiff has relied on various resolutions of the society. As

per the plaintiff, an additional area of 0.88 acres became available to the society for planning i.e. area of 0.46 acres which was left out from planning earlier in the original plan and 0.42 acres which was specifically acquired.

8. The plaintiff further contends that after adjustment of area with CRRI. As some area was exchanged with CRRI, certain plots that were shown in the area handed over to CRRI ceased to exist and in their place some additional land became available. As per the original layout plan there were no plots on the additional land. The original plot E – 25 being on the area handed over to CRRI no longer existed and in its place plot E – 25 (new) was shown in the area received from CRRI in the revised layout plan in the society.

9. As per the plaintiff, on 07.10.1965, the mother and the predecessor of the plaintiffs and defendant No.2 were sold plot No. E – 25 (New), and she was put in possession on execution and registration of the sale deed. She continues to remain in possession of the same without any interruption or disturbance.

10. Plaintiff have referred to various letters and resolutions passed by the society seeking revision of the layout plan.

11. It is the case of the plaintiff that the society had allotted and sold the said plot E – 25(new) to the mother of the plaintiffs and accordingly, the plaintiffs are the owner and in possession of the said plot.

12. The plaintiffs in the plaint have referred to certain proceedings that took place with regard to the sanction of the building plan for construction on the plot sold and for possession of the plot purchased. The plaintiff has placed reliance on various orders passed in the said proceedings relating to sanction of the building plan which culminated in an order being passed by the Supreme Court in the said proceedings.

13. The plaintiff contends that some officers of the defendant MCD had come to the site and had tried to take forcible possession of the said plot and dispossess the plaintiffs in April and May, 2011. It is in these circumstances that the plaintiff has filed the present suit seeking a declaration that the plaintiffs and defendant No.2 be declared as owners and in possession of the said plot having purchased the same by virtue of sale deed executed by the Society.

14. The defendant MCD has filed the written statement to the suit and has submitted that in the process of straightening out boundaries, Plot No. E – 25 went to the share of CRRI and thus ceased to exist. The defendant MCD has referred to the various revised layout plans submitted by the society and has contended that there was no plot E – 25 (new) that was carved out by the society. It is further the case of the defendant MCD that plot No. E – 25 was mentioned in the resolution No.158 by mistake.

15. As per the stand of the defendant MCD, the society had made the mother of the plaintiff aware through a circular that there was an exchange contemplated between the society and CRRI on account of which the sanction and allotment would only be conditional on the sanction of layout plan being received from the defendant MCD. The circular issued by the society also made it clear that in case the MCD rejected the revised layout plan or passed it with modifications, the allottees would not be allotted new plots but would get a refund of deposits after deduction of expenses. It would be only to those person who accepted the conditions that the allotment would be made. As per the defendants, the mother of the plaintiff accepted these conditions and gave an undertaking to the said effect and, accordingly, the conditional allotment of a plot was made in her favour.

16. As per the written statement of MCD, the society had claimed that plots bearing No. C – 35 and C – 36 were substituted for plots No. E – 25 and C – 23 which ceased to exist on account of straightening of the boundaries. The defendant MCD has further referred to the proceedings qua the sanction of the building plan to contend that no plot bearing No. E – 25 (new) was ever sanctioned or authorised to the society and as such, the sale of the same by the society to the plaintiff could not take place and being a conditional sale, the plaintiff was not entitled to the said plot.

17. The society was not impleaded as a defendant in the suit. The present application has been moved by the society for impleadment. The applicant has contended that the entire controversy with regard to the said plot stands finally concluded by the judgment of the Supreme Court in Civil Appeal No. 4246/2000. The applicant/society has contended that the applicant ought to have been impleaded as a party to the suit and the presence of the applicant is necessary in order to enable the court to

effectively and completely adjudicate upon several questions involved in the suit.

18. Learned counsel for the plaintiff opposes the application on the ground that the applicant is neither a necessary nor a proper party as once the society has sold the plot and executed a sale deed in favour of the plaintiffs, the role of the society is over. Learned counsel further contends that the person who has signed and filed the present application is not authorised by virtue of a resolution of the society authorising him to file the said application.

19. No doubt under normal circumstances a transferor/seller is not a necessary party in a suit by the transferee to enforce its rights under a transfer deed against third parties but the facts in the present case are peculiar.

20. The entire case of the plaintiff revolves round the various resolutions passed by the society with regard to the acquisition of land, preparation of the layout plan. The disputes pertain to the land allotted to the society, its demarcations, the plots originally sanctioned and allotted. The dispute also pertains to location of the area sold to the Plaintiffs by the society. The plaintiff has relied on various letters and resolutions of the society. The controversy also revolves around the fact whether the area that is allegedly sold and handed over to the Plaintiffs by the society was sanctioned or not and whether the allotment to the mother of the plaintiffs by the society was conditional or not and whether the said allotment lapsed on account of subsequent events. In my view these questions cannot be completely and effectively adjudicated upon in the absence of the society. The presence of the society and its role at various stages would have to be examined at the time of the adjudication of the various disputes that are arising in the present suit.

21. As the presence of the society is necessary to effectively and completely adjudicate upon the various questions that arise for consideration in the present suit, the application is allowed, The applicant society M/s Swatantra Coop House Building Society is impleaded as Defendant No. 3 to the suit.

22. The discretion to add a party can be exercised by a court either suo motu or on an application of a party to the suit or a person who is not a party. The court can add anyone as a plaintiff or as a defendant

if it finds that he is a necessary party or proper party. [**MUMBAI INTERNATIONAL AIRPORT PVT LTD. VS REGENCY CONVENTION CENTRE AND HOTELS PRIVATE LIMITED** 2010 (7) SCC 417].

23. In view of the finding above that the applicant society is a necessary party, the argument of the plaintiff that there is no resolution authorising the filing of the present application is not being dealt with and is left open. 24. Nothing stated herein shall amount to an expression of opinion on merits of the dispute between the parties. 25. No costs.

ILR (2014) III DELHI 1608
CS (OS)

MEERA JAIN & ANOTHER ....PLAINTIFFS

VERSUS

SUNDARI DEVI GARG & OTHERS ....DEFENDANTS

(SANJEEV SACHDEVA, J.)

I.A. NOS. : 16249 & 19009 OF 2013 IN CS(OS) NO. : 1953/2013 **DATE OF DECISION: 20.02.2014**

Code of Civil Procedure, 1973—Order XXXIX Rule 1 and 2, Order XXXIX Rule 4: Suit for permanent and mandatory injunction. As per the family settlement Defendant no. 1 had right to reside on the ground floor and enjoy rental income from the second floor. Plaintiff no. 2 was to be absolute and exclusive owner of ground floor. Plaintiff no. 1 was to be absolute and exclusive owner of second floor. Defendant no. 2 was to be absolute and exclusive owner of first floor. Plaintiff 1 and 2 are not residing in the suit property. Defendant no. 2 claims that drive way, roof terrace,

servant quarter and any other common area or space was to be in joint ownership of residents of the property, i.e. Defendant no. 1 and 2. Plaintiffs had given power of attorney in favour of Defendant no. 2. Plaintiffs contend that the Defendant no. 2 by misusing the power of attorney, obtained sanction to build third floor and had started construction. Plaintiffs further contend that the Defendant no. 2 had no right, title or interest on the terrace, as per the family settlement. Application seeking ad interim injunction against construction—Held: For grant of interim injunction the Plaintiff has to satisfy three requirements. Prima facie case, balance of convenience and irreparable injury. The balance of convenience tilts substantially in favour of Defendant. Construction being raised is lawful construction. Defendants are raising construction after sanction of the addition/alteration plan. Plaintiffs executed a registered power of attorney giving amongst other, the power to represent the Plaintiffs and defendant no. 1 before the statutory authorities and also with the right to make additions/alterations to get the building plan sanctioned from MCD or concerned authority. Defendants have submitted that they are not claiming any amount nor would claim any amount for raising the construction from the Plaintiffs in case Plaintiffs were to succeed in their claim. Defendants are agreeable to depositing fair rental in Court. The stage of construction is such that the property cannot be left as it is. In case the Defendant is directed to remove the construction raised there would be complete wastage of the amount spent on the construction by Defendant no. 2. Balance of convenience tilts substantially in favour of the Defendants. Defendant no. 2 permitted to complete construction and occupy the floor after construction. Defendant no. 2 shall not create any third party right. From the date of completion the Defendant no. 2 shall deposit a sum of Rs. 50, 000/- in Court. In case the

Plaintiffs succeed apart from being entitled to the rental the Plaintiffs shall be entitled to payment of fair cost of construction. Defendant no. 2 shall not claim any equities. Interim order modified.

For grant of ad-interim injunction the plaintiff has to satisfy three requirements. Plaintiff has to show a strong prima-facie case, the balance of convenience has to tilt in favour of the plaintiff and in favour of grant of ad-interim injunction and the plaintiff has to show that in case the ad-interim injunction is not granted the plaintiff shall suffer an irreparable loss and injury. Unless all the three requirements are satisfied the plaintiff is not entitled to the relief of injunction.

(Para 19)

In my opinion at least two out of the three requirements are not satisfied by the plaintiffs. The balance of convenience tilts substantially in favour of the Defendants. **(Para 20)**

The construction that is being raised by the Defendant is lawful construction. The Defendants are raising construction after sanction of the additional/alteration plan from the Defendant No. 3. Admittedly the Plaintiffs had executed a registered general power of attorney dated 13.03.2008 giving amongst other the power to represent the Plaintiffs and Defendant No. 1 before the statutory authorities and also with the right to make additions/alterations, to get the building plan sanctioned from MCD or concerned authority. The Defendant No. 2 at her own cost and expense has commenced construction/additions/alteration in the entire suit property after obtaining the requisite permission from Defendant No. 3. The permissions were obtained on behalf of the Plaintiffs as well as Defendant No. 1 on the basis of the registered general power of attorney dated 13.03.2008. Construction based on the sanctioned plan has also been made in the floors falling to the share of the plaintiffs. When the plan was got sanctioned and the construction commenced there was admittedly a registered power of attorney in favour of the Defendant No. 2 authorising her to apply for

and get a plan sanctioned and raise construction. The plea of the Plaintiffs that the power of attorney has subsequently been revoked would not invalidate an action taken on the basis of the power of attorney at a time when it was admittedly in force. **(Para 21)**

The stage of construction is such that the property cannot be left as it is. In case the property is left in the incomplete state, the entire property would deteriorate. There would be water seepage and the existing structure be damaged. In case the defendant is directed to remove the construction raised there would be complete wastage of the amount spent on the construction by the Defendant No. 2. This would not be a desirable consequence in view of the fact that the amount has been spent on the construction after sanction of the plan on the basis of the power of attorney of the Plaintiffs and also the fact that the amount has been spent on making additions/alterations to the floors admittedly falling to the share of the Plaintiffs. Further the Plaintiffs have not objected to the raising of the construction but only to it creating equities in favour of the Defendants.

(Para 26)

[An Ba]

APPEARANCES:

FOR THE PLAINTIFFS : Mr. Anil K. Kher, Senior Advocate with Mr. Siddhartha Jain, Advocate.

FOR THE DEFENDANTS : Mr. Varun Nischal, Advocate for D – 1. Mr. Harish Malhotra, Senior Advocate with Mr.Vikas Arora and Mr. Dheeraj Manchanda, Advocates for D – 2. Mr. Mukesh Gupta, Advocate, Standing counsel for D–3 /SDMC Ms. Purnima Maheshwari, Adv for D-4.

RESULT: Interim Order Modified.

SANJEEV SACHDEVA, J.

IA No. 16249/2013 (under Order 39 Rule 1 & 2 CPC) and IA 19009/2013 (under Order 39 Rule 4 CPC)

1. The Plaintiffs have filed the present suit for permanent and mandatory injunction. The property in dispute is property No. A – 1/66, Safdarjung Enclave, New Delhi. The said property was owned by Late Mr. Banwari Lal Garg. After the death of Mr. Banwari Lal Garg, the property devolved upon the legal heirs, i.e., the parties to the suit. The Defendant No. 1 is the wife of Late Mr. Banwari Lal Garg and the Plaintiffs and Defendant No. 2 are real sisters and the daughters of Defendant No. 1 and Late Mr. Banwari Lal Garg. Mr. Banwari Lal Garg expired on 19th February, 2008.

2. As per the Plaintiff, after the death of Late Mr. Banwari Lal Garg with a view to arrive at an amicable settlement, the parties to the suit entered into a family settlement which was recorded in memorandum of family settlement deed dated 12th March, 2008. In terms of memorandum of family settlement, Defendant No. 1 (the mother) had the right to reside on the ground floor of the suit property and enjoy the rental income from the second floor portion during her lifetime. Plaintiff No. 2 was to be the absolute and exclusive owner of Ground floor portion of the suit property and Plaintiff No. 1 was to be the absolute and exclusive owner of the second floor of the suit property and the Defendant No. 2 was to be the absolute owner of the first floor. The drive way, roof/terrace, servant quarter and any other common area/space is under the joint ownership of all the original heirs of late Mr. Banwari Lal Garg. As per the Plaintiffs, the memorandum of family settlement has been accepted and acted upon by the parties.

3. Plaintiff No. 2 is stated to be residing in United States of America and Plaintiff No. 1 is residing in another property in New Delhi. As per the Plaintiffs, the Plaintiffs had given a General Power of Attorney in favour of Defendant No. 2 to carry out various act and deeds as detailed in the said power of attorney. The Defendant No. 2 by misusing the power of attorney started raising construction over the second floor by constructing an entirely new third floor. As per the Plaintiffs, Defendant No. 2 has got the building plan sanctioned from Defendant No. 3, i.e., South Delhi Municipal Corporation of Delhi for construction of third

floor over the terrace of the second floor and was proposing to sell and/or transfer the third floor portion to be constructed by Defendant No. 2 to third parties.

4. The Plaintiffs issued a legal notice dated 22.07.2013 informing Defendant No. 2 about the revocation of the power of attorney and to cease and desist from raising any unauthorised construction on the terrace of the second floor. As per the Plaintiffs the said terrace of the second floor on which the construction was being raised is a joint property and the Defendants could not have raised construction over the same without obtaining 'No objection' from the Plaintiffs. In these circumstances, the Plaintiffs have filed the present suit seeking permanent injunction against the Defendant from dealing with the property in a manner violating the provisions of memorandum of family settlement and for a mandatory injunction for demolition of the construct raised and for the cancellation of the sanction and approval by Defendant No. 3 for construction of the third floor portion.

5. Though the Defendants have filed separate Written Statements but the stand of both the Defendants No 1 and 2 is identical.

6. As per the Defendants No. 1 and 2, the First Floor in terms of the Family Settlement belongs exclusively to the Defendant No. 2 and the drive way, roof/terrace, servant quarters and other common areas/spaces of the suit property was under the joint ownership of only Defendant No. 1 and 2 to the exclusion of the Plaintiffs.

7. The said Defendants place reliance on the term of the family settlement deed that records that the said portion shall be under the joint ownership of all the original heirs of Late Mr. Banwari Lal Garg, who are residing in the said property. As per the Defendants, since on the date of the family settlement only Defendant Nos. 1 and 2 were residing in the suit property, the said portions including drive way, roof/terrace came to the share of Defendants only. The said Defendants claim that Plaintiffs have no right in any manner upon the drive way, roof/terrace since they were not residing in the suit property at the time of the family settlement.

8. The Defendant No. 1 is stated to have relinquished her entire share in the suit property with regard to the drive way on the ground floor, roof/terrace above the second floor, servant quarters and other

common areas/space by a registered relinquishment deed dated 12.01.2012 in favour of Defendant No. 2.

9. As per the Defendants, the Plaintiffs had executed an irrevocable registered general power of attorney dated 13.03.2008 giving absolute power to Defendant No. 2 to manage and control the entire property including the right to sell the said property and to represent the Plaintiffs and Defendant No. 1 before the statutory authorities and also with the right to make additions/alterations, to get the building plan sanctioned from MCD or concerned authority.

10. The Defendant No. 2 is stated to have been managing the affairs of the property and letting out the same, recovering rent and giving the said rent to Defendant No. 1. The Defendant No. 2 is the absolute owner of the first floor of the suit property and the aforementioned portions including roof/terrace above the second floor. As per the said Defendants, the Defendant No. 2 at her own cost and expense has commenced construction/additions/alteration in the entire suit property after obtaining the requisite permission from Defendant No. 3. After the requisite plan for the same was duly sanctioned/approved, the construction was commenced in April, 2013. The permissions were obtained on behalf of the Plaintiffs as well as Defendant No. 1 on the basis of the registered general power of attorney dated 13.03.2008 which is claimed to be irrevocable.

11. As per the said Defendants, the Plaintiffs were aware about the permission received from MCD and commencement of construction work from the very beginning and the Plaintiffs have waited for the Defendant No. 2 to complete the entire building structure by investing huge amount of money before approaching this court.

12. It is claimed by the Defendant No. 2 that since the sanction of the building plan was applied for in the joint names of the co-owners on the basis of the power of attorney, admittedly, executed by the Plaintiffs, there was no requirement for obtaining 'No Objection Certificate'. The Defendant No. 2 claims to have invested over Rs. 50 lacs in the construction of not only the third floor but also extension/alterations in the ground floor, first floor and second floor portions. As per the Defendants, the Plaintiffs did not raise any objection when Defendant No. 2 was making addition/alteration by spending her own money in the

portions of the Plaintiffs on the ground floor and the second floor. It is only when the entire structure of the third floor is completed with the complete roof being laid and the walls having been plastered that the Plaintiffs have filed the present suit to harass the Defendants.

13. Learned senior counsel for the Plaintiffs has submitted that the Defendants have no right to raise any construction over the roof of the second floor portion as the terrace floor was common area to all and in case the Defendants were permitted to complete the construction, equities would be created in favour of the Defendants and there would be ouster of the rights of the Plaintiffs from the said portion.

14. Learned senior counsel further contended that to avoid any equities being created, the Plaintiffs were agreeable to the completion of the construction subject to the fact that the property was rented out to a third party and 2/3rd of the rent were to be deposited in Court. As per the learned senior counsel for the Plaintiff the fair rental would be approximately Rs.1,00,000/- per month. He further contended that the Plaintiffs were agreeable to sharing the cost of the construction provided the Defendants gave a cap on the cost of construction.

15. Learned senior counsel for the Defendants, on the contra, submitted that the Plaintiffs had no right title or interest on the terrace of the third floor by virtue of the memorandum of family settlement executed by the parties. He further contended that Defendant No. 2 was raising lawful construction in accordance with the sanctioned/approved additions/alterations plan. He further contended that when the plan was sanctioned, admittedly, there was a power of attorney executed by the Plaintiffs authorising Defendant No. 2 to obtain necessary sanctions and raise construction. Learned senior counsel further submitted that the fact that the Plaintiffs kept quiet when the construction was being raised and additions/alteration were being made in their portions establishes the fact that the Plaintiffs were very much aware of the sanction of the third floor and the construction being raised thereon. Learned senior counsel further contends that the Plaintiffs cannot revoke an irrevocable power of attorney.

16. Learned senior counsel further contends that in view of the fact that Plaintiffs are not residing in the suit property and the Defendant No. 2 on account of the needs of her growing family was facing space crunch and as such had constructed the said terrace floor. Learned

senior counsel further contented that no equities were being claimed by the Defendants by raising the said construction. He further submits that Defendant No. 2 is not claiming any amount nor would claim any amount for raising the said construction from the Plaintiff in case the Plaintiffs were to succeed in the suit and in case, the Plaintiffs were to succeed in their claim, the Defendant No. 2 would hand over the peaceful vacant possession of the share of the Plaintiff without claiming any money for the construction raised.

17. Learned senior counsel contended that in case, the super structure that had been raised on the third floor was not permitted to be completed, great loss and damage would be caused to the entire property inasmuch as there would be water seepage and damage to the property. He further submitted that the Defendant No. 2 would be ready to deposit proportionate the fair rental of the second floor in Court with prejudice to the rights and contentions of the Defendants. As per him the fair rental would be about Rs. 50,000/- per month for the entire floor.

18. The Defendant No. 3 MCD has filed the status report that the building plan for additions/alteration was sanctioned under the simplified procedure on an application made by Defendant No. 2 accompanied with the power of attorney of Plaintiffs and Defendant No. 1. As per the status report, the application was submitted on 01.04.2013. However on the complaint of the Plaintiff a show cause notice has been issued in the name of all the applicants and the matter is under consideration.

19. For grant of ad-interim injunction the plaintiff has to satisfy three requirements. Plaintiff has to show a strong prima-facie case, the balance of convenience has to tilt in favour of the plaintiff and in favour of grant of ad-interim injunction and the plaintiff has to show that in case the ad-interim injunction is not granted the plaintiff shall suffer an irreparable loss and injury. Unless all the three requirements are satisfied the plaintiff is not entitled to the relief of injunction.

20. In my opinion at least two out of the three requirements are not satisfied by the plaintiffs. The balance of convenience tilts substantially in favour of the Defendants.

21. The construction that is being raised by the Defendant is lawful construction. The Defendants are raising construction after sanction of the additional/alteration plan from the Defendant No. 3. Admittedly the

Plaintiffs had executed a registered general power of attorney dated 13.03.2008 giving amongst other the power to represent the Plaintiffs and Defendant No. 1 before the statutory authorities and also with the right to make additions/alterations, to get the building plan sanctioned from MCD or concerned authority. The Defendant No. 2 at her own cost and expense has commenced construction/additions/alteration in the entire suit property after obtaining the requisite permission from Defendant No. 3. The permissions were obtained on behalf of the Plaintiffs as well as Defendant No. 1 on the basis of the registered general power of attorney dated 13.03.2008. Construction based on the sanctioned plan has also been made in the floors falling to the share of the plaintiffs. When the plan was got sanctioned and the construction commenced there was admittedly a registered power of attorney in favour of the Defendant No. 2 authorising her to apply for and get a plan sanctioned and raise construction. The plea of the Plaintiffs that the power of attorney has subsequently been revoked would not invalidate an action taken on the basis of the power of attorney at a time when it was admittedly in force.

22. The plaintiffs have not raised any real objection to the raising of the construction except that the same would create equities in favour of the defendants and there would be ouster of the rights of the plaintiffs. The Plaintiffs have themselves submitted that they were agreeable to the completion of the construction subject to the renting out of the property to a third party and 2/3rd of the rent being deposited in Court. The plaintiffs are agreeable to sharing the cost of the construction provided the Defendants gave a cap on the cost of construction.

23. On the other hand the defendants have contended that the plaintiffs are not residing in the property in suit and the defendant No. 2 is raising construction on account of the needs of her growing family and she was facing space crunch. The Defendants are not claiming any equities by raising the said construction. The Defendants have submitted that they are not claiming any amount nor would claim any amount for raising the said construction from the Plaintiffs in case the Plaintiffs were to succeed in the suit and in case, the Plaintiffs were to succeed in their claim, the Defendant No. 2 would hand over the peaceful vacant possession of the share of the Plaintiff without claiming any money for the construction raised. The Defendants are agreeable to deposit of a fair rental in court.

24. By order dated 06.11.2013 A local commissioner was appointed to inspect the suit property to find out the status of the construction of the said third floor portion. The local commissioner has submitted a report dated 27.11.2013 and has annexed the photographs of the construction raised. The local Commissioner vide his report in respect of the status of the property has reported as under:

a. *That while entering I noticed that the cement packets were lying at the ground floor near entry gate and construction/amendment was there on the ground floor just adjacent to starting of stairs for lift provision.*

b. *That the top of the second floor is totally covered with lenter/concrete plastered ceiling.*

c. *That the construction materials like phatte, balli, chhali, water pipe, window and Bucket etc. was there on the said floor.*

d. *That the bundle of electricity pipes was lying in front portion.*

e. *That the bricks of the wall of right side covered front portion had been cut for affixing the electricity pipes.*

f. *That there is an old structure/old toilet-washroom near the entry gate on top of the second floor.*

g. *That new bricks had been filled in old wall in grill portion facing stairs near old structure.*

h. *That the wall has been cut for the purpose of affixing the door facing stairs and some new bricks had been affixed.*

i. *That walls in various portion of the top of the second floor had been cut out for the purpose of affixing electricity or water pipes etc. out of which in some areas electricity pipes had been affixed while others remaining un-affixed.*

j. *That the daily used household goods belong to labours was also lying on the said floor and there was sign of preparing foods seems to be prepared by the labours.*

k. *That there were plasters in patches in different portions of said floor on different walls out of which some were looking new as the same were wet when touched by hand.*

l. *That the portion of the last room wall of left side portion of the property was looking fresh as when I touched the same by hand then the pieces of plaster fell down.*

m. *That only the front portion i.e. front open area/looking front drawing room is partly whitewashed except old structure.*

n. *That the railing portion/backward portion was also plastered and the same was also looking wet.*

o. *That there was no wet mixture of building material available at the spot at the time of inspection and no labour persons was present on the top of the second floor.*

p. *That there is no affixation of doors in any room except an old door at the entry gate of top of the second floor as well as on old structure.*

q. *That there was temporary electricity connection on the said floor.*

25. The report of the Commissioner and the photographs filed by the commissioner suggests that substantial structural civil work has been carried out. The complete roof slab has being laid and the ceiling and walls have been plastered. Even electrical conduit pipes were being laid.

26. The stage of construction is such that the property cannot be left as it is. In case the property is left in the incomplete state, the entire property would deteriorate. There would be water seepage and the existing structure be damaged. In case the defendant is directed to remove the construction raised there would be complete wastage of the amount spent on the construction by the Defendant No. 2. This would not be a desirable consequence in view of the fact that the amount has been spent on the construction after sanction of the plan on the basis of the power of attorney of the Plaintiffs and also the fact that the amount has been spent on making additions/alterations to the floors admittedly falling to the share of the Plaintiffs. Further the Plaintiffs have not objected to the raising of the construction but only to it creating equities in favour of the Defendants.

27. In view of the above, I am of the opinion that the balance of convenience tilts substantially in favour of the Defendants. In case the construction is now directed to be removed, it would cause substantial

damage and loss to the property. I am of the view that the solution to the problem can be achieved by permitting the Defendant No. 2 to complete the construction and occupy the third floor without any rights or equities being claimed and subject to terms.

28. In view of the above, it is ordered as under:

(i) the Defendant No. 2 is permitted to complete the construction of the third floor in accordance with the approved plan; and

(ii) the Defendant No. 2 is permitted to occupy the said floor after completion of construction;

(iii) the Defendant No. 2 shall not create any third party right in respect of the said third floor, he shall not sell, mortgage, rent out, part with the possession of the whole or any part of the third floor; and

(iv) from the date of completion of construction the Defendant No. 2 shall deposit a sum of Rs. 50,000/- per month with this court. The deposit shall be made every quarter in the name of the Registrar General. The amount deposited shall be kept in an interest bearing fixed deposit. The amount deposited shall be subject to the final outcome of the suit.

(v) In case the plaintiffs succeed in the suit, apart from being entitled to the rental, the plaintiffs shall be entitled to the proportionate share in the said third floor subject to payment of fair cost of construction.

(vi) The Defendant No. 2 shall not claim any rights or equities on the basis of the above directions and the possession of the Defendant No. 2 shall be akin to that of a court receiver.

29. The interim order dated 08.10.2013 is modified in the above terms. Nothing stated herein shall amount an expression of opinion on the merits of either party.

30. With the above directions, the applications are disposed off. No costs.

ILR (2014) III DELHI 1621
CS (OS)

UNION OF INDIA & ORS. ....PLAINTIFFS

VERSUS

SHANTI GURUNG & ORS. ....DEFENDANTS

(SANJEEV SACHDEVA, J.)

OA NO. : 146/2013 IN CS(OS) NO. : 610/2012 DATE OF DECISION: 05.03.2014

Code of Civil Procedure, 1908—Order VIII Rule 1—Order VIII Rule 10—Appeal against order of Joint Registrar condoning delay of 129 days in filing WS despite a finding of neglect and despite the WS being defective. Held—The application seeking condonation of delay was neither signed by the Defendant No. 1 nor supported by an affidavit of the Defendant No. 1. If there were any facts or circumstances leading to the delay in filing of the Written Statement, which were within the personal knowledge of the advocate, the advocate could have filed the application with a supporting affidavit. However, in the present case, the facts pleaded for condonation of delay are attributable to the Defendant No. 1 and within the personal knowledge of the Defendant No. 1. So the application seeking condonation of delay could not have been signed alone by the advocate without signatures of the Defendant No. 1 and could not have been supported by an affidavit only of the advocate for the Defendant No. 1. This application is no application in the eyes of law and, accordingly, the same could not have been taken cognizance of by the Joint Registrar. Held Further—The Written Statement filed on behalf of the Defendant No. 1 cannot be said

to be a validity signed and executed Written Statement. The Written Statement is dated 30.10.2012. It is not signed by the Defendant and does not contain any verification. It is supported by an affidavit of the Defendant No. 1 dated 30.09.2012, which was prior to the date of Written Statement. The affidavit in support of the Written Statement has to confirm the contents of the Written Statement. If the affidavit is executed and attested prior to the preparation of the Written Statement, the affidavit cannot be taken as an affidavit in support of the Written Statement. The purpose of verification is to fix responsibility on the party or person verifying and to prevent false pleadings from being recklessly filed or false allegations being recklessly made. Since the Written Statement filed on behalf of the Defendant No. 1 is without her signatures and any verification, it is clearly defective. However, the defect of signatures and verification in pleadings is an irregularity which can be remedied. It is not fatal but is a curable defect. If defects in regard to the signature, verification or presentation of plaint are cured on a day subsequent to the date of filing the suit, the date of institution of the plaint is not changed to the subsequent date. Held—The Written Statement filed on behalf of the Defendant No. 1 is defective and the application is not application in the eyes of law. Accordingly, the chamber appeal of the Plaintiff is allowed. The order dated 06.09.2013 of the Joint Registrar is set aside and the application seeking condonation of delay being is dismissed as defective. Held—The ends of justice would be served in case an opportunity is granted to the Defendant No. 1 to cure the defects in the Written Statement and to file a proper Written Statement duly signed, verified and supported by her affidavit and further and opportunity is also granted to file a proper application seeking condonation of delay giving proper details, duly signed and supported by her affidavit.

A person can file an affidavit deposing to the facts which are in the personal knowledge of the deponent (SEE **BHUPINDER SINGH VERSUS STATE OF HARYANA:** AIR 1968 P & H 406). Normally, it is not proper for an advocate to file an affidavit on behalf of a party. However, an advocate can certainly file an affidavit in a proceeding in respect of facts which are within the personal knowledge of the advocate. Application containing facts within the personal knowledge of the parties, should be signed and supported by the affidavits of the parties. The application seeking condonation of delay was neither signed by the Defendant No. 1 nor supported by an affidavit of the Defendant No. 1. If there were any facts or circumstances leading to the delay in filing of the Written Statement, which were within the personal knowledge of the advocate, the advocate could have filed the application with a supporting affidavit. However, in the present case, the facts pleaded for condonation of delay are attributable to the Defendant No. 1 and within the personal knowledge of the Defendant No. 1. So the application seeking condonation of delay could not have been signed alone by the advocate without signatures of the Defendant No. 1 and could not have been supported by an affidavit only of the advocate for the Defendant No. 1. This application is no application in the eyes of law and, accordingly, the same could not have been taken cognizance of by the Joint Registrar. **(Para 17)**

The purpose of verification is to fix responsibility on the party or person verifying and to prevent false pleadings from being recklessly filed or false allegations being recklessly made (**STATE OF PUNJAB VERSUS I.M. LALL:** ILR 1975 DELHI 332; **SAPNA SINGH PATHANIA VERSUS JAGDISH CHANDER MEHTA** (1998) 75 DLT 725). **(Para 19)**

Since the Written Statement filed on behalf of the Defendant No. 1 is without her signatures and any verification, it is clearly defective. However the defect of signatures and verification in pleadings is an irregularity which can be remedied. It is not fatal but is a cureable defect. Non

compliance of any procedural requirement relating to a pleading should not entail automatic dismissal or rejection unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. (**MUKHTIAR KAUR VERSUS GHULAB KAUR** AIR 1977 P & H 257; **UDAY SHANKAR TRIYAR VERSUS RAM KALEWAR PRASAD SINGH** 2006 (1) SCC 75). Further the Division Bench of Bombay High Court in the case of **ALL INDIA REPORTER LTD, BOMBAY VERSUS RAMCHANDRA DHONDO DATAR** AIR 1961 BOM 292 has laid down that if defects in regard to the signature, verification or presentation of plaint are cured on a day subsequent to the date of filing the suit, the date of institution of the plaint is not changed to the subsequent date. **(Para 20)**

The ends of justice would be served in case an opportunity is granted to the Defendant No. 1 to cure the defects in the Written Statement and to file a proper Written Statement duly signed, verified and supported by her affidavit and further an opportunity is also granted to file a proper application seeking condonation of delay giving proper details, duly signed and supported by her affidavit. **(Para 22)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFFS : Mr. A. S. Chandioke, Senior Advocate with Ms. Yamini Khurana, Advocate.

FOR THE DEFENDANTS : Mr. Mohit Choudhary with Ms. Jayshree Satpute, Ms. Damini Chawla and Ms. Pragya Singh, Advocates for Defendant No. 1.

CASES REFERRED TO:

1. *UDAY SHANKAR TRIYAR* vs. *RAM KALEWAR PRASAD SINGH* 2006 (1) SCC 75).
2. *SAPNA SINGH PATHANIA* vs. *JAGDISH CHANDER MEHTA* (1998) 75 DLT 725).
3. *MUKHTIAR KAUR* vs. *GHULAB KAUR* AIR 1977 P & H 257.
4. *STATE OF PUNJAB* vs. *I.M. LALL:* ILR 1975 DELHI 332.
5. *BHUPINDER SINGH* vs. *STATE OF HARYANA:* AIR 1968 P & H 406).
6. *ALL INDIA REPORTER LTD, BOMBAY* vs. *RAMCHANDRA DHONDO DATAR* AIR 1961 BOM 292

RESULT: Application dismissed.

SANJEEV SACHDEVA, J.

OA No.146/2013

1. The Plaintiffs have filed the Chamber Appeal impugning the order dated 06.09.2013 of the Joint Registrar. The Joint Registrar by the order of 06.09.2013 allowed the application of the Defendant No. 1 for condonation of delay of 129 days in filing the Written Statement. The Joint Registrar by the impugned order has held that though the Defendant could have filed the Written Statement within reasonable time after service but consumption of some time in communication overseas cannot be ruled out. He has further held that the Defendant No. 1 cannot claim that the entire delay has been occasioned on account of loss in transaction or for want of instructions/details and as such, some amount of neglect is attributable to the Defendant. He has, however, held that in the larger interest, considering the nature of lis, the stakes involved and the stage of proceedings, the prejudice caused to the Plaintiff could be compensated in terms of the costs. The delay has accordingly been condoned and the Written Statement has been directed to be taken on record. The Plaintiffs have impugned the condonation of delay and taking on record of the Written Statement.

2. The contention of the Plaintiff is that the facts of the present

case are so glaring that even if the provisions of Order 8 rule 1 of the Code of Civil Procedure were to be liberally construed, the Defendant No. 1 is not entitled to condonation of delay in filing the Written Statement and for exercise of discretion in her favour. As per the Plaintiffs the Written Statement filed is defective and is no Written Statement in the eyes of law and the application seeking condonation of delay cannot be construed as an application filed by or on behalf of the said Defendant.

3. The Plaintiff filed the present suit for declaration and injunction against three Defendants. For the purposes of condonation of delay, the merits of the case of the Plaintiffs is not germane, what is relevant is the service of the summons and the filing of the Written Statement and the purported application seeking condonation of delay by the Defendant No. 1.

4. Summons in the suit were directed to be issued on 14.03.2012. On 03.05.2012, an advocate entered appearance on behalf of the Defendant No. 1 and sought time to file the Written Statement. The Court permitted the Written Statement to be filed within six weeks. The matter thereafter was listed on 22.05.2012, 18.07.2012, 30.07.2012, 07.08.2012 and 27.08.2012, when the advocate for the Defendant No. 1 appeared. However, no Written Statement was filed. On failure of the Defendant No. 1 to file the Written Statement, the Plaintiffs on 08.08.2012, filed IA No.15833/2012 (under Order VIII Rule 10 CPC). As the advocate for the Plaintiffs could not trace out the said application, a fresh application being IA 16905/2012 (under Order VIII Rule 10 CPC) was filed on 05.09.2012.

5. Consequent to the filing of the application under Order VIII Rule 10 by the Plaintiffs, an application being IA 20039/2012 (under Order VII Rules 10 & 11) was filed on behalf of the Defendant No. 1. An application being IA 20042/2012 (under Order XXXIX Rule 4) dated 30.10.2012 on behalf of the Defendant No. 1 was also filed on 31.10.2012. The Written Statement dated 30.10.2012 was filed on 31.10.2012. Since the Written Statement was beyond time, an application being IA 8937/2013 dated 11.04.2013 was filed on behalf of the Defendant No. 1 seeking condonation of delay of 129 days in filing the Written Statement. The Plaintiffs objected to the condonation of delay.

6. The Joint Registrar by the impugned order noticed that the Defendant No. 1 had sought condonation of delay in filing the Written

Statement on the ground that the Defendant No. 1 was currently residing in New York and it required substantive time for getting details/instructions and, in view of the fact that the Written Statement and affidavit sent to her advocate from USA were lost in transaction. She had to get another affidavit signed and attested for filing the Written Statement.

7. Counsel for the Plaintiffs contended before the Joint Registrar that the application seeking condonation of delay was filed after 300 days. As per the plaintiffs the date on which the application seeking condonation of delay was filed would be the date on which the Written Statement would be deemed to be filed and thus the delay would not be 129 days but around 300 days. It was further contended that no document had been filed to substantiate that the Written Statement was ever sought to be filed earlier and was lost in post. The Joint Registrar, as noticed above, though attributing some neglect to the Defendant No. 1, has condoned the delay.

8. Learned senior Counsel for the Plaintiff has, in addition to the above facts, submitted that the Written Statement filed by the Defendant No. 1 is defective and is not a Written Statement in the eyes of law. He has further contended that even the application seeking condonation of delay cannot be treated as an application filed either by or on behalf of the Defendant No. 1 as the same is neither signed by the Defendant No. 1 nor supported by an affidavit of the Defendant No. 1. He has further contended that the reasons for the delay pleaded on behalf of the Defendant No. 1 in the said application by the executant of the application are hearsay and cannot be taken as grounds sufficient for condoning the delay.

9. The Written Statement was neither filed within the stipulated period nor within the time permitted by the Court vide order dated 03.05.2012 i.e. within six weeks.

10. Perusal of the Written Statement filed on behalf of the Defendant No. 1 shows that the Written Statement is neither signed by the Defendant No. 1 nor on behalf of the Defendant No. 1 by any authorised person. The said place for signature of the Defendant is blank. The Written Statement is signed only by the advocate for the Defendant No. 1 and by hand it mentions the place and the date as "New Delhi dated 30.10.2012". Admittedly, the Defendant No. 1 was not in New Delhi on 30.10.2012. The Written Statement also does not contain any verification.

11. The affidavit in support of the Written Statement is dated 30.09.2013 (i.e. one month before the date of the signing of the Written Statement). The affidavit states that the present Written Statement has been drafted by the advocate of the Defendant No. 1 under her instructions and the contents of the same are true and correct to the "best of her knowledge and belief". Paragraphs D & E of the affidavit refer to "present application". The affidavit does not mention which part of the Written Statement is true to the knowledge of the deponent and which part of the Written Statement is based on information received and believed to be correct. The date mentioned on the Written Statement by hand is 30.10.2012 at New Delhi and the affidavit is verified at Woodside, New York on 30.09.2012. This shows that the affidavit was executed prior to the Written Statement. The Written Statement dated 30.10.2012 was filed in the Registry on 31.10.2012. Copy of the Written Statement was delivered to the Plaintiffs on 30.10.2012. So, it is apparent that the Written Statement which is dated 30.10.2012 and is signed only by the advocate at New Delhi was not sent to the Defendant No. 1 for signatures or verification. The affidavit which bears the stamp of a notary public does not bear any endorsement that any oath is administered to the deponent and any affirmation is made by the Deponent. The affidavit also does not bear any date when the notary public had signed it, though, it may be presumed that the date which is written on the affidavit i.e. 30.09.2012 is the date on which the affidavit is signed by the deponent and attested by the notary public.

12. Now coming to the application seeking condonation of delay. i.e. I.A. 8937/2013 and I.A. 20039/2012 (under Order VII Rules 10 & 11 CPC) and I.A. 20042/2012 (under Order XXXIX Rule 4 CPC). The three applications are dated 30.10.2012 and the affidavits are dated 30.09.2012.

13. The application i.e. IA 8937/2013 (application seeking condonation of delay) has neither been signed by the Defendant No. 1 nor supported by an affidavit of the Defendant No. 1. The application is signed only by the advocate for the Defendant No. 1 and the place for signatures of the Defendant No. 1 is blank. Personal affidavit of the advocate for the Defendant No. 1 has been filed in support of the application. In the verification of the affidavit, it is mentioned that the application is verified at Woodsland, New York, even though the address

of the deponent i.e. advocate for the Defendant No. 1 is shown as that of Delhi and the affidavit is attested by an Oath Commissioner at Delhi. The reasons for delay are stated as under:-

> "3. The Defendant No. 1 was granted 6 weeks time to file W.S. on 3.5.2012. The Defendant No. 1 is currently residing in New York. Looking at several issued involved in the present suit, it took substantial time to get detailed instructions from the Defendant No. 1. for the W.S.
>
> 4. Also, the Defendant No. 1 has posted the duly signed and attested affidavit for W.S. to her counsel from U.S. which got lost in the post. She had to get another affidavit signed and attest for filing the present W.S."

14. The reason seeking condonation of delay stated in the application is that it took substantial time to get detailed instructions from the Defendant No. 1 for the Written Statement and that the Defendant No. 1 had posted the duly, signed and attested affidavit for Written Statement to her counsel from US which got lost in the post and, accordingly, she got another affidavit signed and attested for filing the Written Statement.

15. The facts stated in the paragraphs 3 & 4 that the Defendant No. 1 is presently residing in the U.S. and that the affidavit was attested and posted from the U.S. by the Defendant No. 1 and that it got lost in the transit are the facts that can only be in the personal knowledge of the Defendant No. 1. The person who has signed the application and affirmed the affidavit in support of the application would not have personal knowledge of these facts.

16. Furthermore, the affidavit does not indicate that the Written Statement which is filed in this Court was ever seen and signed by the Defendant No. 1. As per the application it is only the affidavit that is signed and sent from U.S. so admittedly no Written Statement has been signed and sent by the Defendant No. 1 from the U.S. along with the affidavit. The date and manner of posting of the affidavit, when it was lost and when the Defendant No. 1 came to know that it had been lost in post, is not mentioned. These facts cannot be in the personal knowledge of the advocate for the Defendant No. 1, who has signed the application in Delhi and affirmed her personal affidavit.

17. A person can file an affidavit deposing to the facts which are in the personal knowledge of the deponent (SEE **BHUPINDER SINGH VERSUS STATE OF HARYANA:** AIR 1968 P & H 406). Normally, it is not proper for an advocate to file an affidavit on behalf of a party. However, an advocate can certainly file an affidavit in a proceeding in respect of facts which are within the personal knowledge of the advocate. Application containing facts within the personal knowledge of the parties, should be signed and supported by the affidavits of the parties. The application seeking condonation of delay was neither signed by the Defendant No. 1 nor supported by an affidavit of the Defendant No. 1. If there were any facts or circumstances leading to the delay in filing of the Written Statement, which were within the personal knowledge of the advocate, the advocate could have filed the application with a supporting affidavit. However, in the present case, the facts pleaded for condonation of delay are attributable to the Defendant No. 1 and within the personal knowledge of the Defendant No. 1. So the application seeking condonation of delay could not have been signed alone by the advocate without signatures of the Defendant No. 1 and could not have been supported by an affidavit only of the advocate for the Defendant No. 1. This application is no application in the eyes of law and, accordingly, the same could not have been taken cognizance of by the Joint Registrar.

18. The Written Statement filed on behalf of the Defendant No. 1 cannot be said to be a validly signed and executed Written Statement. The Written Statement is dated 30.10.2012. It is not signed by the Defendant and does not contain any verification. It is supported by an affidavit of the Defendant No. 1 dated 30.09.2012, which was prior to the date of Written Statement. The affidavit in support of the Written Statement has to confirm the contents of the Written Statement. If the affidavit is executed and attested prior to the preparation of the Written Statement, the affidavit cannot be taken as an affidavit in support of the Written Statement.

19. The purpose of verification is to fix responsibility on the party or person verifying and to prevent false pleadings from being recklessly filed or false allegations being recklessly made (**STATE OF PUNJAB VERSUS I.M. LALL:** ILR 1975 DELHI 332; **SAPNA SINGH PATHANIA VERSUS JAGDISH CHANDER MEHTA** (1998) 75 DLT 725).

20. Since the Written Statement filed on behalf of the Defendant No. 1 is without her signatures and any verification, it is clearly defective. However the defect of signatures and verification in pleadings is an irregularity which can be remedied. It is not fatal but is a cureable defect. Non compliance of any procedural requirement relating to a pleading should not entail automatic dismissal or rejection unless the relevant statute or rule so mandates. Procedural defects and irregularities which are curable should not be allowed to defeat substantive rights or to cause injustice. Procedure, a handmaiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. (**MUKHTIAR KAUR VERSUS GHULAB KAUR** AIR 1977 P & H 257; **UDAY SHANKAR TRIYAR VERSUS RAM KALEWAR PRASAD SINGH** 2006 (1) SCC 75). Further the Division Bench of Bombay High Court in the case of **ALL INDIA REPORTER LTD, BOMBAY VERSUS RAMCHANDRA DHONDO DATAR** AIR 1961 BOM 292 has laid down that if defects in regard to the signature, verification or presentation of plaint are cured on a day subsequent to the date of filing the suit, the date of institution of the plaint is not changed to the subsequent date.

21. The Written Statement filed on behalf of the Defendant No. 1 is defective and the application is no application in the eyes of law. Accordingly, the chamber appeal of the Plaintiff is allowed. The order dated 06.09.2013 of the Joint Registrar is set aside and the application seeking condonation of delay being IA 8937/2013 is dismissed as defective.

22. The ends of justice would be served in case an opportunity is granted to the Defendant No. 1 to cure the defects in the Written Statement and to file a proper Written Statement duly signed, verified and supported by her affidavit and further an opportunity is also granted to file a proper application seeking condonation of delay giving proper details, duly signed and supported by her affidavit.

23. The Defendant No. 1 is accordingly permitted to cure the defect in the Written Statement and to file a proper application seeking condonation of delay within a period of 8 weeks. In case an application seeking condonation of delay is filed the same shall be considered in accordance with law.

No Costs.

ILR (2014) III DELHI 1632
W.P. (C)

STATE OF U.P. ....PETITIONER

VERSUS

MAHESH KUMAR & ANR. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 1460/2014 DATE OF DECISION: 05.03.2014
& CM NO. : 3039/2014

Service Law—Promotion—Non-Grant of actual benefits—Brief Facts—Shri Mahesh Kumar was working as a lecturer in Mathematics in the Lucknow University, which job he gave up to join the UP Provincial Forest Service in the year 1952 as a direct recuit as an Assistant Conservator of Forests—In the year 1960, he was duly promoted to the post of Deputy conservator of Forests—He was promoted to the post of Deputy Conservator of Forest and when the All India Forest Services (IFS) was constituted—Shri Mahesh Kumar being the senior most Deputy Conservator of Forests, Grade-II with effect from 11th May, 1978—He was granted the selection grade with effect from 12th July, 1977 but for some reasons, the benefit thereof was not extended to him—Unfortunately with effect from 10th May, 1978, one day prior to his formal promotion to the post of Conservators of Forests, he was compulsorily retired—Shri Mahesh Kumar challenged his compulsory retirement in the Delhi High Court by way of a writ petition which came to be dismissed—The decision of the learned Single Judge was reversed by the Division Bench in LPA No. 71/1978. By its order dated 22nd May, 1979 the order of compulsory retirement dated 10th May, 1978 was

also set aside—Petitioners challenged the judgment of the Division Bench by way of Civil Appeal No. 2759-6/1979 before the Supreme Court of India—This appeal was dismissed by the Supreme Court by an order dated 6th August, 1986—Shri Mahesh Kumar was still not granted any relief by the present petitioners and he was compelled to seek relief by way of W.P. Nos. 997/1999 and 998/2006 which were transferred to the Central Administrative Tribunal—Tribunal has set aside and quashed the DPC minutes dated 1st November, 1995 and allotted the T.A. No.3/2007 directing the respondents to extend the benefit of the selection grade and promotions within the period of five months from the date of receipt of the order—Hence, the present petition. Held: Tribunal had noted that it was not the case of the respondents that the merit of Shri Mahesh Kumar suddenly and drastically deteriorated after 12th July, 1977 so as to deprive him of the promotion in question—Tribunal has also noted the letter dated 17th November, 1992 written by the Conservator of Forests to the Principal Chief Conservator of Forests, Lucknow, U.P. on the above lines and stating that the order of the Court would be complied with and the matter would be solved—Approval of this action was sought—Tribunal had considered the manner in which the present petitioners were proceeding and also that they had wrongly done the fixation and that their actions were erroneous and contrary to the prior orders of the tribunal dated 8th November, 2008 and 31st January, 2012 and that of the High Court dated 7th September, 2010—After seeking justice for a period of 26 years from 1978, Shri Mahesh Kumar expired in the year 2004—Thereafter, his legal heirs have been pursuing the litigation—Despite passage of almost 36 years from the date when cause of action arose in favour of late Shri Mahesh Kumar, justice still eludes the present respondents who are the legal heirs of the deceased—

In view of the above discussion, this writ petition and application are dismissed being devoid of merits.

The Tribunal has considered the manner in which the present petitioners were proceeding and also that they had wrongly done the fixation and that their actions were erroneous and contrary to the prior orders of the tribunal dated 8th November, 2008 and 31st January, 2012 and that of the High Court dated 7th September, 2010. In this background, the Tribunal issued the following directions:-

> "17. In this view of the matter, we have no hesitation in holding that the prayer of the applicant that he be granted pension, pay and arrears etc. after applying correct equivalence of pay in the pay scale of Rs.3700-5000 w.e.f. 10.01.1986 as per notification dated 13.3.1987; and further refix it as per notification dated 17.10.1997 read with Govt. of India's order dated 17.12.1998 w.e.f. 01.10.1996. It is needless to say that this aspect has become final and the respondents are invariably required to recalculate the pay, pension family pension and arrears etc. of the applicant from the respective dates as mentioned just above and also take it to its logical end by giving corresponding pay revision, as per the recommendations of the 6th Central Pay Commission w.e.f. 01.10.2006. it is clarified that the said arrears of pay, pension and family pension should be re-worked by the respondents, strictly in terms of the prayer made by the applicants in TA No.02/2007 and also the directions given herein above with 10% interest on the pay, pension, family pension and arrears, within a period of five months from today, as per directions already given in TA No.03/2007. In fact, the learned counsel for applicant has insisted to grant 18% interest but keeping in view the totality of facts and circumstances of the case and the fair approach of Shri Anil Mittal, learned counsel for the respondents, in the whole matter, we grant 10% interest to the applicant from

the respective dates as mentioned above, till the actual payment is made." **(Para 21)**

It is noteworthy that after seeking justice for a period of 26 years from 1978, Shri Mahesh Kumar expired in the year 2004. Thereafter his legal heirs have been pursuing the litigation. Despite passage of almost 36 years from the date when cause of action arose in favour of late Shri Mahesh Kumar, justice still eludes the present respondents who are the legal heirs of the deceased. **(Para 22)**

Important Issue Involved: After seeking justice for a period of 26 years from 1978, Respondent expired in the year 2004—Thereafter his legal heirs have been pursuing the litigation—Despite passage of almost 36 years from the date when cause of action arose in favour of late Respondent, justice still eludes the present respondents who are the legal heirs of the deceased.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Anil Mittal, Adv.

FOR THE RESPONDENTS : None.

RESULT: Writ petition dismissed.

GITA MITTAL, J. (Oral)

1. By a separate order we have dismissed the writ petition. We now pen down our reasons for doing so.

2. Before us the petitioners have assailed the order dated 1st of February 2013 passed by the Central Administrative Tribunal in T.A.No.3/2007 with T.A.No.2/2007 after the same were remanded to it.

3. Shri Mahesh Kumar was working as a lecturer in Mathematics in the Lucknow University which job he gave up to join the UP Provincial Forest Service in the year 1952 as a direct recuit as an Assistant Conservator of Forests. In the year 1960, he was duly promoted to the post of Deputy Conservator of Forest. He was promoted to the post of

Deputy conservator of Forest and when the All India Forest Services (IFS) was constituted, he was one of its first recruit in the U.P. Cadre. Shri Mahesh Kumar being the senior most Deputy Conservator of Forest was legitimately aspiring to be promoted to the post of Conservator of Forests, Grade-II with effect from 11th May, 1978. He was granted the selection grade with effect from 12th July, 1977 but for some reasons, the benefit thereof was not extended to him. Unfortunately with effect from 10th May, 1978, one day prior to his formal promotion to the post of Conservators of Forests he was compulsorily retired.

4. The Central Administrative Tribunal has noted that one Shri M.P. Tripathi, the then Conservators of Forests at the relevant time not only did not grant the actual benefit of selection grade to Shri Mahesh Kumar with effect from 12th July, 1977 but was responsible for his compulsory retirement. At the same time, his established junior Shri K.B. Srivastava was promoted to the said post on the very next date with effect from 11th May, 1978. The Tribunal has held that these actions on the part of Shri M.P. Tripathi established the element of malice on his part; speak volumes about the illegalities and the biased manner in which officials of the forest department of the U.P. Government had been working in the matter.

5. Shri Mahesh Kumar challenged his compulsory retirement in the Delhi High Court by way of a writ petition which came to be dismissed. The decision of the learned Single Judge was reversed by the Division Bench in LPA No.71/1978. By its order dated 22nd May, 1979 the order of compulsory retirement dated 10th May, 1978 was also set aside.

6. The present petitioners still did not grant Shri Mahesh Kumar his legitimate benefits and instead challenged the judgment of the Division Bench by way of Civil Appeal No.2759-6/1979 before the Supreme Court of India. This appeal was dismissed by the Supreme Court by an order dated 6th August, 1986 directing as follows:-

> "These appeals by Union of India and State of U.P. are dismissed. The Respondent will be entitled to all allowances and other benefits which he was entitled while in Service upto 31st July 1984, i.e, the date of superannuation, as if he was on duty. The money if any already paid will be adjusted. All interim orders stand vacated.
>
> Pay, pensions and Gratuity and other benefits be paid to the

respondent.

There will be no order as to costs."

7. The Tribunal has noticed that upon a conjoint reading of the order of the Supreme Court and that of this court, Shri Mahesh Kumar became entitled to various benefits from the date when his established junior Shri K.B. Srivastava was granted the same which would include the following:-

(i) Selection Grade with effect from 12th July, 1977 (for the post of Deputy Conservator of Forests)

(ii) Conservator of Forests Grade-II with effect from 11th May, 1978 and

(iii) Conservator of Forests Grade – I with effect from 9th of June, 1983.

8. Shri Mahesh Kumar was still not granted any relief by the present petitioners and he went on making representations which were of no avail. Finally, Shri Mahesh Kumar was compelled to seek relief by way of W.P.Nos.997/1999 and 998/2006. By an order dated 7th February, 2006, these writ petitions were transferred to the Central Administrative Tribunal whereupon they were renumbered as T.A.No.03/2007 (WP No.997/1999) and T.A.No.02/2007 (WP No.998/2006). The applicant claimed retrospective promotions and selection grade, etc. in T.A.No.03/ 2007.

9. It appears that by an order dated 8th November, 2008, the Central Administrative Tribunal disposed of the T.A.Nos.3/2007 and 02/ 2007 and by an order dated 7th September, 2010 were remanded to the tribunal.

10. The Tribunal has noted that while the writ petitions were pending before this court, the order dated 9th January, 2001 had been passed summoning the original records pertaining to Shri Mahesh Kumar. The impugned order records that these documents and records could not be produced by the respondents before it as well as some of them were ostensibly destroyed specially that pertaining to the DPC held in 1977 when Shri Mahesh Kumar was considered and granted the selection grade on his own merit by a duly constituted DPC in accordance with the rules.

11. The material facts which have been considered by the Central Administrative Tribunal are the fact that Shri Mahesh Kumar was favourably considered by DPC in accordance with grant of selection grade and he was found fit with effect from 12th July, 1977. Shri Mahesh Kumar was deprived of the benefits and thereafter he was compulsorily retired within a year or so. As such, after 10th May, 1978, he was not in service till he attained the age of superannuation on 31st July, 1984.

12. The respondents claim to have conducted some kind of review DPC on 1st of November 1995 as in para 6 of the impugned judgment, the Tribunal has noted that this DPC was based only on a piece of typed paper giving relevant entries in the so called character rolls of Shri Mahesh Kumar at one page beginning from 1966-67 till 1976-77.

13. Shri Mahesh Kumar had filed an affidavit dated 9th December, 2010, which was not rebutted by the present petitioners, stating that some of the entries reflected even on that piece of paper had already been expunged by judicial orders and the same were taken into consideration by the review DPC held on 1st of November 1995.

14. The Tribunal perused the minutes of the meeting held on 1st of November, 1995. Given the fact that on the same date confidential report and the service record of the deceased applicant, he was considered and found fit for selection grade for the post of Deputy Conservator of Forests as on 12th July, 1977; the fact that selection grade is granted to an officer, only on the basis of merit and as per rules; that within the span of 10 months or so, Shri Mahesh Kumar was compulsorily retired from service and therefore, there was no question of writing any ACRs till the date of his superannuation in the year 1984. It was highly contradictory on the part of the respondents not to grant the benefit of promotions and selection grade etc. from the date his established junior Shri K.B. Srivastava was granted the same.

15. We find that the tribunal has noted that it was not the case of the respondents that the merit of Shri Mahesh Kumar suddenly and drastically deteriorated after 12th July, 1977 so as to deprive him of the promotion in question. The Tribunal has also noted the letter dated 17th November, 1992 written by the Conservator of Forests to the Principal Chief Conservator of Forests, Lukhnow, U.P. on the above lines and stating that the order of the court would be complied with and the matter would be solved. Approval of this action was sought.

16. In this background, by the impugned order, the Tribunal has set aside and quashed the DPC minutes dated 1st November, 1995 and allotted the T.A.No.3/2007 directing the respondents to extend the benefit of the selection grade and promotions within the period of five months from the date of receipt of the order. The Tribunal has directed the respondents to recalculate the pay, pensionary benefits, family pension based on the pay scale of the promoted posts with interests @ 10% per annum to be paid to the applicant from the dates claimed in the prayer that is from the dates when the immediate junior to shri Mahesh Kumar was granted the same within a period of five months.

17. The Tribunal has noted in the impugned order that in the preamble as well as the prayers in the writ petition reveal that the State of U.P. was challenging the order of the tribunal in question that is order dated 8th November, 2008 only to the extent that the report of the selection committee was sought to be set aside holding that Shri Mahesh Kumar was entitled to the aforenoticed promotions on the stated dates.

18. However, the prayer of the applicant regarding grant of pay scale of Rs.3700-5000 with effect from 1st November, 1986 and further upgradations, as per the successive Central Pay Commissions' recommendations with effect from 1st January, 1996 and 1st January, 2006 remain challenged.

19. In this background by the order dated 8th November, 2008, the High Court directed the Central Administrative Tribunal to re-hear the matter mainly on the prayers made by the applicant in T.A.No.03/2007.

20. The tribunal has noted the order dated 31st December, 2012 passed in T.A.No.02/2007 whereby, after analyzing various details and reproducing the prayer at the instance of the present petitioners, the Tribunal held that respondents would make the final calculations of the amounts payable in terms of the relief prayed for and granted in T.A.No.02/2007 and file an affidavit in this regard.

21. The Tribunal has considered the manner in which the present petitioners were proceeding and also that they had wrongly done the fixation and that their actions were erroneous and contrary to the prior orders of the tribunal dated 8th November, 2008 and 31st January, 2012 and that of the High Court dated 7th September, 2010. In this background, the Tribunal issued the following directions:-

> "17. In this view of the matter, we have no hesitation in holding that the prayer of the applicant that he be granted pension, pay and arrears etc. after applying correct equivalence of pay in the pay scale of Rs.3700-5000 w.e.f. 10.01.1986 as per notification dated 13.3.1987; and further refix it as per notification dated 17.10.1997 read with Govt. of India's order dated 17.12.1998 w.e.f. 01.10.1996. It is needless to say that this aspect has become final and the respondents are invariably required to recalculate the pay, pension family pension and arrears etc. of the applicant from the respective dates as mentioned just above and also take it to its logical end by giving corresponding pay revision, as per the recommendations of the 6th Central Pay Commission w.e.f. 01.10.2006. it is clarified that the said arrears of pay, pension and family pension should be re-worked by the respondents, strictly in terms of the prayer made by the applicants in TA No.02/2007 and also the directions given herein above with 10% interest on the pay, pension, family pension and arrears, within a period of five months from today, as per directions already given in TA No.03/2007. In fact, the learned counsel for applicant has insisted to grant 18% interest but keeping in view the totality of facts and circumstances of the case and the fair approach of Shri Anil Mittal, learned counsel for the respondents, in the whole matter, we grant 10% interest to the applicant from the respective dates as mentioned above, till the actual payment is made."

22. It is noteworthy that after seeking justice for a period of 26 years from 1978, Shri Mahesh Kumar expired in the year 2004. Thereafter his legal heirs have been pursuing the litigation. Despite passage of almost 36 years from the date when cause of action arose in favour of late Shri Mahesh Kumar, justice still eludes the present respondents who are the legal heirs of the deceased.

In view of the above discussion, this writ petition and application are dismissed being devoid of merits.

ILR (2014) III DELHI 1641
RC. REV.

NAVEEN ARORA AND ORS. ....PETITIONERS

VERSUS

SURESH CHAND ....RESPONDENT

(NAJMI WAZIRI, J.)

RC.REV. NO. : 441/2013 DATE OF DECISION: 25.03.2014

Delhi Rent Control Act, 1958—Eviction Petition U/s. 14(1)(e). Once bonafide requirement of landlord is established, neither the tenant nor the Court can determine or suggest as to which accommodation would be most suitable for the landlord's need—It is landlord's exclusive prerogative to determine the suitability of property for his need.

[Di Vi]

APPEARANCES:

FOR THE PETITIONERS : Mr. P.S. Bindra, Adv.

FOR THE RESPONDENT : Mr. R.S. Sahni, Adv.

CASES REFERRED TO:

1. *Kishan Lal* vs. *R.N. Bakshi* 169 (2010) DLT.
2. *Prativa Devi* vs. *T.V. Krishnan* AIR 1987 SC 2060.
3. *Vinod Kumar Arora* vs. *Smt. Surjit Kaur,* AIR 1987 SC 2179.
4. *Saghir Ahmad & Ors.* vs. *Mohd. Irfan,* RCR No. 200/1269.

RESULT: Petition dismissed.

NAJMI WAZIRI, J. (Open Court)

1. This petition impugns an order of 30th July, 2013 which allowed

the respondent'/landlord's eviction petition under Section 14(1)(e) of the Delhi Rent Control Act, 1958 (the 'Act'). The petitioners/tenants have been directed to be evicted from the suit premises i.e. Shop No.683/2, Katra Neel, Chandni Chowk, Delhi. The order has been assailed on the following grounds:-

i) that there was no bonafide need;

ii) that the landlord had sufficient alternate commercial space available to him hence there was no requirement for the tenanted shop and

iii) that the landlord failed to establish that he was engaged in the business of cloth trade in the Chandni Chowk area.

2. The leave to defend was allowed and the eviction order was passed after complete trial. The learned counsel for the petitioners submits that the Trial Court fell into error in returning a finding which is not supported by evidence. He submits that the record would clearly establish that the landlord was not engaged in the business of cloth trade. Therefore, he submits that the impugned order be set aside. It was the petitioners'/tenants' case that the landlord owned four DDA flats in Dilshad Garden area bearing Nos. A-391, L-21-A, H-85-A and R-29-A. He argued that while the landlord resided at A-391 which comprised of three bedrooms, a drawing-cum-dining room; the petitioner had constructed numerous shops on the remaining ground floor flats. He further contended that the shops were misuser of the residential premises. Furthermore, he alleged that the landlord did not disclose the nature of business which was sought to be run from the tenanted premises in case it was vacated. In reply thereto, the landlord asserted that all the DDA flats were residential properties which could not be used for commercial purposes. He denied the existence or construction of any shop in any of his flats and considered the tenanted premises as the most suitable for his bonafide need for running a cloth trade. The landlord further contended that the said accommodation could not be considered as a commercial accommodation till the requisite sanction from the DDA is obtained. Further for the sake of arguments he contended that even if it could be used for commercial purposes he did not consider them suitable for his need. According to the landlord, the most suitable place/accommodation for carrying out a business of cloth trade was at Chandni Chowk which is a well known market for the said trade. He reiterated that he has no alternate accommodation for

carrying out the said business.

3. Mr. R.S. Sahni, learned counsel for the respondent-landlord submits that the findings of the Trial Court were based upon the evidence recorded and the eviction order was rightly passed. The Trial Court returned the finding that the tenant in his cross-examination had admitted that the petitioner-tenant is running his business from the premises since the last forty years. The Court observed:

"RW-1 Naveen Arora in his cross examination has admitted that the petitioner is running his business from his residence since last 40 years. He has also admitted in his cross examination that the petitioner has no commercial premises in Chandni Chowk except the tenanted shop. RW-2 Sunil Arora has also admitted in his cross examination that the petitioner is doing his cloth business in Chandni Chowk. The petitioner has also produced the account opening forms Ex.PW2/1 and passbook Ex.PW2/6 of his saving account no.8138 along with the account opening form Ex.PW2/2 of his current account no. S-235. Both these accounts are operated from OBC, Chandni Chowk, Delhi. The aforesaid testimonies of the RW's and the bank documents of the petitioner proves that the petitioner is doing his cloth business in Chandni Chowk. Had the petitioner not been doinig business in Chandni Chowk, he would not have opened two bank accounts at OBC, Chandni Chowk, Delhi, particularly, when his residence is admittedly situated at a distinct place at Dilshad Garden. The aforesaid testimonies of RW's also proves that he has been running his business from his residence since last 40 years and that the petitioner has no commercial accommodation of his own in Chandni Chowk except for the tenanted shop."

The Court went out to conclude as under:

"The aforesaid discussion clearly proves on record that the petitioner is a wholesale cloth merchant since last 40 years; that he conducts his business activities in Chandni Chowk; that he has no commercial accommodation in Chandni Chowk except the tenanted shop and that he is running his business from his residence since last 40 years. It is understandable in the given situation that the petitioner is running his business activities from his residence because of the lack of commercial accommodation in Chandni Chowk where his cloth business is predominantly situated."

4. The Trial Court also considered that of the six residential flats admittedly owned by the landlord, three were situated on the ground floor which were being used for commercial activities by his tenants. Flat No.R-29-A was vacated about two years ago and the remaining two flats were occupied by other tenants. However, the landlord denied the suggestion that he was in possession of the two or three commercial shops at the time of filing the petition. The tenant had contended that though the flats owned by the petitioner and his wife were residential in nature, they were put to commercial activities by their tenants. He relies upon photographs to emphasize his point. The Trial Court was of the view that question of conversion of these three flats into shops and the running of the commercial activities therefrom by the tenants would be of no significance since the landlord had let them out as residential accommodation and change of user or irregular user by the tenant cannot be said to have changed the intrinsic character of the property: i.e. from residential to commercial from there loses its significance. This Court is of the view that the property could not be legitimately considered a commercial accommodation without prior sanction of the authority concerned.

5. The Trial Court was of the view that Flat No.839 being used by the petitioner for his residence could not be considered as an alternate accommodation apropos his business needs. Since the other properties were in occupation of other tenants, the Trial Court concluded that the landlord had no alternate accommodation. The Court then deliberated upon the flat No.R-29/A which was vacated by the earlier tenant, Mr. Mukesh Kumar and concluded that on the comparative analysis the said residential flat could not be compared with the commercial accommodation located in the Chandni Chowk. It deduced that *"the tenanted shop is a better and suitable alternative for answering the business needs of the petitioner. Chandni Chowk is known as the centralized hub of wholesale cloth business in Delhi and adjoining areas. It is also one of the oldest and biggest centralized market place for the wholesale cloth business whereby it is a comparatively better business place for carrying on the kind of business being run by the petitioner. The petitioner has been running his wholesale cloth business from this area since long whereby he must have developed business relations and good will in this area.*

Thus it would be totally unreasonable to ask the petitioner to shift his business now to flat no.R-29/A in Dilshad Garden leaving behind all his business relations, goodwill and the opportunities he has created for himself in Chandni Chowk over the span of time. Moreover the Dilshad Garden where the flat no. R-29/A is situated is not a renowned business area for cloth business. It is a lesser known market as compared to Chandni Chowk. Furthermore it is situated far from Chandni Chowk where the petitioner has already established his business in the last 35 years. The petitioner otherwise being the landlord is always at liberty to choose amongst his properties as to from which he wants to carry his business. The respondents being the tenants cannot dictate terms to the petitioner as to how and in what manner, he should run his business or to prescribe a business standard for him. The petitioner being the landlord is the best judge of his requirements and he has complete liberty to choose from his available accommodations as to which of them is more suitable qua his needs. Thus the flat no. R-29/A cannot be considered as a suitable and reasonable alternative to the tenanted shop.

Thus the contention of the respondents that the petitioner's need is in the nature of additional accommodation fails."

6. The learned counsel for the respondent submits that some years ago an agreement had been arrived at between the parties, whereby the tenant had agreed to provide a three feet area for staircase to be constructed to access the terrace of the tenanted premises. Upon such access being provided additional commercial space was contemplated to be constructed on the terrace which could have satisfied the abiding need of the landlord for commercial space in Chandni Chowk. However, the tenant resiled from the said agreement, therefore the contemplated additional space could never be constructed. Also, with the passage of time the municipal authorities stopped permitting the construction of another shop on the terrace of the existing shops, thereby foreclosing all likelihood of any such serendipitous fruition. The learned counsel relies upon the evidence of the tenant where he admits that such an agreement is existed and his (tenant's) father did not give the three feet access. This Court notices that the tenant's evidence (PW-1/5) where he deposed that *"my father complied with the terms and conditions of Ex.PW-1/5. However, it is correct that my father did not give the three feet access."*

7. Mr. P.S. Bindra, the learned counsel for the petitioners/tenants

states that the landlord had failed to establish that he was engaged in the business of cloth trade in the year 1993 in Chandni Chowk area and that the landlord had not filed any documents whatsoever in support of his said claim. He refers to his two bank accounts having been opened in the Oriental Bank of Commerce in the years 1983 and 1987 and contended that mere opening of account is not sufficient to establish that the business of cloth trade was carried out. He submits that the turnover of the cloth trade has to be established.

8. In rebuttal thereto Mr. R.S. Sahni, the learned counsel for the respondent submits that the landlord was indeed carrying out the business and has so stated in his affidavit in evidence which was not challenged by the tenant in his cross-examination (at Page 86). He refers to the deposition of the landlord to the effect that *"the suit shops are bonafidely required by the deponent for cloth business."*

And further in the cross-examination, the landlord has reiterated that:-

> *"......it is correct that I have filed a civil case against respondent for providing the three feet passage from within the shop for going to the roof and for the recovery of rent as per agreement dated 17.3.1993 which is Ex. PW-1/5. The said suit has been partly decreed and partly dismissed. The court has not granted the three feet passage to me as claimed by me with regard to the suit property.*
>
> *If the respondents surrender the said three feet area to enable you to construct the first floor at their costs upon suit property for your business, are you willing for the same ?*
>
> *Ans: No, I require suit premises which is situated on the ground floor as the cloth business can flourish from the ground floor as now days cloth is being sold after showing the same.*
>
> *I am into the whole sale business of cloth selling and not in retail as on date. I had instructed my counsel at the time of drafting of the eviction petition all the averments mentioned in my affidavit. It is incorrect to suggest that I do not require the premises in question bonafidely. It is incorrect to suggest that I have filed the present petition to put undue pressure upon the respondent to vacate the suit property. It is incorrect to suggest*

that I have been asking the respondent to pay me substantial amount in case they want to continue in the premises. It is wrong to suggest that the statement of the fact made by me in my affidavit are incorrect and false to my knowledge. It is wrong to suggest that I am deposing falsely and do not require the suit premises. It is wrong to suggest that I have filed false petition."

9. Mr. Sahni submits that the findings of the impugned order is based upon these submissions of the landlord which were unrebutted by the tenant in the cross-examination. Therefore, the unquestioned evidence was duly accepted and there is no fault with the order impugned.

10. The Trial Court considered the ratio of **Vinod Kumar Arora vs. Smt. Surjit Kaur,** AIR 1987 SC 2179 relied upon by the tenant in support of the contention that the pleadings of the parties are the foundation of their case and it is not open for them to set up a new and different case in their evidence which is at variance with their pleadings. However, it rejected the tenant's arguments that the testimony of the petitioner was beyond the pleadings, therefore it could not be taken into consideration.

11. Insofar as the Trial Court found that the landlord had established that he was engaged in the business of cloth trade and that he required the tenanted shop for his wholesale cloth business as stated in his replication, the aforesaid precedent relied upon by the tenant was rightly distinguished. It is settled law that the permission from competent authority under Section 19 of the Slum Act is not required in the case of bonafide requirement of the landlord (**Saghir Ahmad & Ors. vs. Mohd. Irfan,** RCR No. 200/12 decided by the Delhi High Court on 10.10.2012).

12. In view of the tenant's admission that the landlord was engaged in business for the last 40 years (albeit from his residence); the factum of the landlord having opened two bank accounts in 1983 and 1987 with the Oriental Bank of Commerce, Chandni Chowk and the unrebutted deposition of the landlord that he was carrying on his cloth business at 642, Gali Ghanteshwar, Katra Neel, Chandni Chowk, Delhi, which was tenanted premises. The petitioner was carrying his cloth business in partnership with his brother and the said partnership has been now dissolved and the deponent is without any place of work. The deponent is in cloth business for the last 35 years. Surely it cannot be anyone's case that although the landlord did not engage in any such business but

had then opened the said two bank accounts in Chandni Chowk only to use them as a prop for evidence at an opportune time decades later. The Trial Court rightly concluded that it would be highly impractical and unlikely for the landlord to run his business from his residence in Dilshad Garden but to have his bank account miles away in Chandni Chowk. A business person would always prefer for convenience's sake to have his bank operations in the vicinity of his principal place of business. Besides, three decades ago the nature of banking services required more personal interaction and between the bank officials and the account holder. It is only in the past few years that internet banking options have obviated the necessity for such personal interaction or for being near a bank. Therefore, it would be a rational deduction based upon the evidence that the landlord carried on his business from Chandni Chowk.

13. In view of the aforesaid discussion, this Court is of the view that the Trial Court had considered every argument and with good reasons rejected the tenant's contention. The reasons for and the conclusion arrived at cannot be faulted. This Court has considered the evidence as discussed hereinabove and finds that there is clear admission on behalf of the tenant that the landlord did not have any other suitable accommodation. Once it is established that there is a bonafide requirement of the tenanted premises neither the tenant nor the Court can determine or suggest as to which accommodation would be most suitable for the landlord's need. It is the landlord's exclusive prerogative to determine the suitability of the property for his need. In **Prativa Devi v. T.V. Krishnan** AIR 1987 SC 2060, the Supreme Court held: *"the landlord is the best judge of his requirement."* This Court in **Kishan Lal v. R.N. Bakshi** 169 (2010) DLT 769 has held that *"it is settled position of law that the landlords is the best judge of residential or business purpose."* This Court is unpursuaded by arguments of learned counsel for the petitioner and finds no reason to interfere with the impugned order. The petition is without merit and is dismissed accordingly.

ILR (2014) III DELHI 1649
CS(OS)

LAXMAN SINGH & ORS. ....PLAINTIFF

VERSUS

URMILA DEVI & ORS. ....DEFENDANTS

(JAYANT NATH, J.)

CS(OS) NO. : 3275/2012 DATE OF DECISION: 28.03.2014

Code of Civil Procedure, 1908—Indian Easement Act, 1882—Section 52—Indian Evidence Act, 1872—Section 116—Suit for possession, damages and mense profit. Defendants claim that Plaintiff have no title to the suit property as documents produced by them are merely general power of attorney, agreement to sell etc. Further contend that property purchased benami by father of Plaintiff in name of minor children being Plaintiff and his brother. Defendants contention is that Defendants were residing with the father in joint possession of the property with the permission of the father and to the exclusion of the plaintiffs and that defendants are entitled to claim adverse possession Held—As admittedly the defendants came into possession with permission granted by the father of the plaintiffs who permitted them to enter/use the premises for a limited period, the defendants were using the premise as Licensee. As the father has died, the License has been terminated. Defendant cannot challenge the title of the licensor now at this stage after 14 years. The written statement fails to bring out any title or right in the defendants to continue to retain possession. Defendant taking frivolous and vexatious defense for the purpose of prolonging their illegal possession of the suit property. Suit decreed in favour of Plaintiff.

The first aspect is the status of the defendants vis-a-vis the suit property. It is admitted by the defendants in the written statement that they were in occupation with the permission of Ganpat Ram. Relevant portion of the written statement reads as follows:-

> "3. ... As aforesaid, the defendants were in exclusive possession of the entire suit property though in occupation with the permission of the said Ganpat Ram. It was the said late Shri Ganpat Ram who had permitted or inducted the defendants to reside with him in the suit property. The defendants were also taking care of not only the day to day needs of the said late Ganpat Ram but also looking after him in all other aspects of life. ..." **(Para 10)**

As far as the rights of the plaintiff to the suit property are concerned, the defendants along with their written statement themselves have filed photocopy of documents being General Power of Attorney executed by Sohan Dutt Gupta in favour of Bhagat Ram and Laxman Singh (plaintiff No.1) (Ex.D-1), Agreement dated 12.04.1985 between Sohan Dutt Gupta and the said Bhagat Ram and Laxman Singh (Ex.D-2), cash received for a sum of Rs.40,000/- executed by Sohan Dutt Gupta in favour of Bhagat Ram and Laxman Singh (Ex.D-3) and affidavit of Sohan Dutt Gupta dated 12.04.1985 stating that possession of the suit property has been handed over to the said Shri Bhagat Ram and Shri Ganpat Ram (Ex.D-4). In the course of admission/denial the plaintiffs have admitted the said documents which were hence marked accordingly. **(Para 11)**

It would follow that as per documents executed in favour of the plaintiff filed by the defendant himself, which have been admitted by the plaintiff, plaintiffs, namely, Laxman Singh and Late Bhagat Ram (LR being plaintiff No.2) have legally, after passing due consideration to the original owner entered into possession of the suit property way back in 1985. Their father Shri Ganpat Ram had thereafter been residing in the

suit property with the consent and permission of his sons Laxman Singh and Bhagat Ram. As per the written statement, the said Ganpat Ram, the father permitted the defendants to reside in the suit property. Based on these admitted facts, it unequivocally follows that the possession of the defendants was permissive possession without any payment. The defendants were hence licencee. They have permissive possession of the suit property which was permitted by late Shri Ganpat Ram. **(Para 12)**

Section 52 of the Indian Easement Act reads as follows:-

> **"52. "Licence" defined.-**Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

(Para 13)

As admittedly, the defendants came into possession on permission granted by the father of the plaintiffs who permitted them to enter/use the premises for a limited period, the defendants were using the premises as Licensee as elaborated above. **(Para 15)**

In view of the above legal position, it would follow that the defendant admittedly as per the written statement was inducted in the suit property as a licencee. Shri Ganpat Ram has now died on 20.08.2010. Their license has been terminated. He cannot challenge the title of the licensor now at this stage after 14 years. The reliance of the defendant on the judgment of **Suraj Lamps** (supra) is clearly misplaced. Even otherwise, the judgment of the Hon'ble Supreme Court in Suraj Lamps (supra) has prospective effect and would not affect the transactions that have already been effected. **(Para 17)**

Reference may also be had to the judgment in the case of

Sant Lal Jain vs. Avtar Singh (1985) 2 SCC 332 where the Hon'ble Supreme held as follows:

> "6. ..... In **Milkha Singh v. Diana,** it has been observed that the principle once a licensee always a licensee would apply to all kinds of licences and that it cannot be said that the moment the licence it terminated, the licensee's possession becomes that of a trespasser. In that case, one of us (Murtaza Fazal Ali, J. as he then was) speaking for the Division Bench has observed:
>
> After the termination of licence, the licensee is under a clear obligation to surrender his possession to the owner and if he fails to do so, we do not see any reason why the licensee cannot be compelled to discharge this obligation by way of a mandatory injunction under s. 55 of the Specific Relief Act. We might further mention that even under English law a suit for injunction to evict a licensee has always been held to be maintainable."

In view of the above, it is clear that the defendants are licensees. The license has been terminated. The written statement fails to bring out any title or right in the defendants to continue to retain possession. **(Para 21)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Saurabh Tiwari, Advocate.

FOR THE DEFENDANTS : Mr. Raman Gandhi, Advocate.

CASES REFERRED TO:

1. *Suraj Lamp and Industries Pvt.Ltd.* vs. *State of Haryana and Anr.,* (2012)1 SCC 656.
2. *Prabhudas Damodar Kotecha and Anr* vs. *Smt. Manharbala Jeram Damodar and Ors.* MANU/MH/0692/2007.

3. *Vishal Builders Pvt. Ltd.* vs. *Delhi Development Authority & Ors.,* 2006(130) DLT 667.
4. *Desh Raj Singh* vs. *Triveni Engineering & Industries Ltd & Anr.,* 2006 (130) DLT 120
5. *Bansraj Laltaprasad Mishra* vs. *Stanley Parker Jones* AIR 2006 SC 3569.
6. *Sri S.K. Sarma* vs. *Mahesh Kumar Verma* AIR 2002 SC 3294.
7. *Sant Lal Jain* vs. *Avtar Singh* (1985) 2 SCC 332.
8. *Chandu al* vs. *Municipal Corporation of Delhi* AIR 1978 Del 174.
9. *Brahma Nand Puri* vs. *Neki Puri,* AIR 1965 SC 1506.

RESULT: Suit decreed.

JAYANT NATH, J.

1. The plaintiffs have filed the present suit for possession, damages and mesne profits. Plaintiff No.2 is the mother and plaintiff No.1 is her son. They claim to be the absolute owners of property being plot No.323/1-A, Block-D (Old No. 229/1-A), Sangam Vihar, New Delhi-110062 measuring 200 sq.yards. The said suit property was purchased by plaintiff No.1 along with his late brother Bhagat Ram whereby each was owner of 100 square yards respectively. It is stated that the seller executed a general power of attorney dated 12.04.1985, an agreement to sell dated 12.04.1985 and a receipt for consideration of '40,000/-. The property is said to be built up having eight rooms, a store room and two wash rooms.

2. The brother of plaintiff No.1 late Bhagat Ram is said to have died a bachelor and issueless about 20 years ago. Hence, it is submitted that his mother, plaintiff No.2 inherited his share to the said property and accordingly, the plaintiffs are the absolute owners.

3. It is stated that about 14 years ago defendants approached the father of plaintiff No.1 late Sh.Ganpat Ram and sought permission to take shelter in the suit property for a few months. Late Sh.Ganpat Ram is stated to have given the said approval inasmuch as he permitted the defendants to reside in one of the rooms in the suit property for some

time. On the request of the defendants the duration of stay kept extending. In July 2010 the plaintiffs along with the other family members asked the defendants to vacate the only room in the possession of the defendants as the plaintiffs required the suit property for the purpose of wedding in the family. Sh.Ganpat Ram, the father of plaintiff No.1 died on 20.08.2010. It is further stated that instead of vacating the suit property as requested by the plaintiffs, the defendants sometime after February 2011 filed a suit in the District Court for permanent injunction. The Civil Judge vide order dated 31.05.2012 dismissed the suit. On 18.10.2012 the appeal along with application under Section 5 of the Limitation Act was dismissed by the Additional District Judge. It is urged that the defendants are licencees and cannot continue to retain possession. Hence, the present suit has been filed.

4. The defendants in their written statement have stated that the plaintiffs have no title in the suit property inasmuch as the documents produced by the plaintiffs are merely a general power of attorney, agreement to sell, etc. and in accordance with the judgment of the Supreme Court in the case of **Suraj Lamp and Industries Pvt.Ltd. vs. State of Haryana and Anr.,** (2012)1 SCC 656 the plaintiffs cannot claim to be the owners of the suit property. It is further stated that the property was purchased benami by late Sh.Ganpat Ram in the name of his two minor sons inasmuch as the said brothers were minors when the property was bought. It is next stated that Sh.Ganpat Ram was also a trespasser on the property inasmuch as the property is located in an unauthorised colony and the ownership of the property vests with the Government. It is further stated that the defendants were residing with Sh.Ganpat Ram in joint possession of the property with the permission of Sh.Ganpat Ram to the exclusion of the plaintiffs. The plaintiffs were never in possession of the property for the last 18 years. It is admitted that Ganpat Ram permitted/inducted the defendants to reside in the suit property. The defendants also claim that they were taking care of the day to day needs of Late Sh.Ganpat Ram and looking after all aspects of his life.

5. On 25.04.2013 the present suit came up for framing of issues. The court on the said date passed the following order.

> "1. The suit is ripe for framing of issues.
>
> 2. The counsel for the defendants has handed over proposed

issues which are taken on record.

3. The counsel for the plaintiffs states that no issue arises since there are no material pleas in the written statement and the suit insofar as for the relief of possession is liable to be decreed forthwith. It is argued that some of the pleas in the written statement in this suit are contrary to the pleadings by the defendant no.2 who is the wife of the defendant no.1 in the earlier suit and the orders and the proceedings therein.

4. The counsels have been heard for some time.

5. It is deemed expedient to record the statement of both the defendants under Order 10 read with Section 165 of the Evidence Act.

6. On enquiry, it is informed that neither of the defendants are present in the Court today.

7. Both the defendants are directed to personally appear before this Court on 24th May, 2013."

6. Thereafter on 28.05.2013 and 13.08.2013 the defendants did not appear in person. They appeared on 05.09.2013 but sought an adjournment as their counsel was not available. The matter was adjourned to 09.10.2013.

On that date counsel for the defendants stated that defendant No.2 is hospitalized and defendant No.1 is with him. Another opportunity was given to the defendants to appear in court to record their statements under Order 10 CPC and the matter was renotified for 08.11.2013. On 08.11.2013 again the defendants did not appear in person. Arguments were heard on the contention of the learned counsel for the plaintiffs that no issue arises as there are no material pleas in the written statement and the suit as far as the relief of possession is concerned is liable to be decreed. Judgment was reserved.

7. Learned counsel appearing for the plaintiffs submits that the defendants, on a plain reading of the pleadings are licencees. They were inducted for temporary purposes with the permission of the father of plaintiff No.1 and were paying no consideration. The license having been terminated, the defendants have no locus standi to continue to remain in possession.

8. Learned counsel relies upon judgments of this Court in the case of **Vishal Builders Pvt. Ltd. vs. Delhi Development Authority & Ors.,** 2006(130) DLT 667 and **Desh Raj Singh vs. Triveni Engineering & Industries Ltd & Anr.,** 2006 (130) DLT 120 which hold that no person who comes into possession of an immovable property on the basis of license or permission of the person in possession can be permitted to deny that such a person had a title to the suit property when the license was given.

9. Learned counsel for the defendants submitted that the suit of the plaintiffs has to succeed on the strength of its own title and possession. Hence, the claim of the plaintiffs based on unregistered documents cannot succeed. It is further submitted that between two individuals both of whom do not have title, the person in possession would be entitled to retain possession. Reliance for this proposition is made on the judgment of the Supreme Court in the case of **Brahma Nand Puri vs Neki Puri,** AIR 1965 SC 1506. It is further submitted that the plaintiffs have to also prove that they were in possession for a period of 12 years prior to filing of the suit. It is further stated that the defendants had exclusive possession of the property with their father and they are also entitled to claim adverse possession. They have also relied upon a Will of Late Sh.Ganpat Ram, according to which they claim that the property has been bequeathed to defendant No.2. The last submission that is made is that the suit land is a Government land and the plaintiffs and Late Ganpat Ram had no title to the same.

10. The first aspect is the status of the defendants vis-a-vis the suit property. It is admitted by the defendants in the written statement that they were in occupation with the permission of Ganpat Ram. Relevant portion of the written statement reads as follows:-

> "3. ... As aforesaid, the defendants were in exclusive possession of the entire suit property though in occupation with the permission of the said Ganpat Ram. It was the said late Shri Ganpat Ram who had permitted or inducted the defendants to reside with him in the suit property. The defendants were also taking care of not only the day to day needs of the said late Ganpat Ram but also looking after him in all other aspects of life. ..."

11. As far as the rights of the plaintiff to the suit property are concerned, the defendants along with their written statement themselves

have filed photocopy of documents being General Power of Attorney executed by Sohan Dutt Gupta in favour of Bhagat Ram and Laxman Singh (plaintiff No.1) (Ex.D-1), Agreement dated 12.04.1985 between Sohan Dutt Gupta and the said Bhagat Ram and Laxman Singh (Ex.D-2), cash received for a sum of Rs.40,000/- executed by Sohan Dutt Gupta in favour of Bhagat Ram and Laxman Singh (Ex.D-3) and affidavit of Sohan Dutt Gupta dated 12.04.1985 stating that possession of the suit property has been handed over to the said Shri Bhagat Ram and Shri Ganpat Ram (Ex.D-4). In the course of admission/denial the plaintiffs have admitted the said documents which were hence marked accordingly.

12. It would follow that as per documents executed in favour of the plaintiff filed by the defendant himself, which have been admitted by the plaintiff, plaintiffs, namely, Laxman Singh and Late Bhagat Ram (LR being plaintiff No.2) have legally, after passing due consideration to the original owner entered into possession of the suit property way back in 1985. Their father Shri Ganpat Ram had thereafter been residing in the suit property with the consent and permission of his sons Laxman Singh and Bhagat Ram. As per the written statement, the said Ganpat Ram, the father permitted the defendants to reside in the suit property. Based on these admitted facts, it unequivocally follows that the possession of the defendants was permissive possession without any payment. The defendants were hence licencee. They have permissive possession of the suit property which was permitted by late Shri Ganpat Ram.

13. Section 52 of the Indian Easement Act reads as follows:-

> **"52. "Licence" defined.-**Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence."

14. To elaborate the requirements of the above Statutory provision, reference may be had to the Full Bench judgment of the Bombay High Court in the case of **Prabhudas Damodar Kotecha and Anr v. Smt. Manharbala Jeram Damodar and Ors.** MANU/MH/0692/2007 where the Court elaborated on the expression 'Licensee' as follows:-

> "43. As opposed to this, the expression "license", as defined

> under Section 52 of the Indian Easement Act, provides that where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to easement or an interest in the property, the right is called a license. Section 52 does not require any consideration, material or non-material, to be an element of the definition of license, nor does it require that the right under the license must arise by way of contract or as a result of a mutual promise. Thus, license as defined in Section 52 of the Indian Easement Act can be a unilateral grant and unsupported by any consideration. The Supreme Court in State of Punjab v. Brig. Sukhjit Singh MANU/SC/0540/1993: [1993]3SCR944 has observed that, "payment of license fee is not an essential attribute for subsistence of license".
>
> 44. Let us see as to how the expressions "license" and "licensee" are understood, used and spoken in common parlance. It is often said that a word, apart from having the meaning as defined under different statutes, has ordinary or popular meaning and that a word of everyday usage it must be construed in its popular sense, meaning that sense which people conversant with the subject matter with which the statute is dealing would attribute to it. A "license" is a power or authority to do some act, which, without such authority, could not lawfully be done. In the context of an immovable property a "license" is an authority to do an act which would otherwise be a trespass. It passes no interest, and does not amount to a demise, nor does it give the licensee an exclusive right to use the property. [See Puran Singh Sahani v.Sundari Bhagwandas Kriplani MANU/SC/0541/1991: [1991] 1 SCR 592]. Barron's Law Dictionary has given the meaning of word "licensee" to mean "the one to whom a license has been granted; in property, one whose presence on the premises is not invited but tolerated. Thus, a licensee is a person who is neither a customer, nor a servant, nor a trespasser, and does not stand in any contractual relation with the owner of the premises, and who is permitted expressly or impliedly to go thereon usually for his own interest, convenience, or gratification". Stroud's Judicial

Dictionary of Words and Phrases, Sixth Edition, Vol.2, provides the meaning of word "licensee" to mean "a licensee is a person who has permission to do an act which without such permission would be unlawful. [See Vaughan C.J., in **Thomas v. Sewell** Vaugh at page 330 at page 351, quoted by Romour, J, in Frank Warr and Co. v. London County Council (1940) 1 K.B. 713." In Black's Law Dictionary, Seventh Edition, the word "license" means "a revocable permission to commit some act that would otherwise be unlawful" and the word "licensee" means "one to whom a license is granted or one who has permission to enter or use another's premises, but only for one's own purposes and not for the occupier's benefit." Thus, it is seen that even in popular sense the word "license" is not understood to mean it should be on payment of license fee for subsistence of license. It also covers a "gratuitous licensee", that is, a person who is permitted, although not invited, to enter another's property and who provides no consideration in exchange for such permission."

15. As admittedly, the defendants came into possession on permission granted by the father of the plaintiffs who permitted them to enter/use the premises for a limited period, the defendants were using the premises as Licensee as elaborated above.

16. I now deal with the argument about title of the plaintiff to the suit property. Section 116 of the Evidence Act reads as follows:-

"116. Estoppel of tenant; and of license of person in possession

No tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when license was given.

17. In **Bansraj Laltaprasad Mishra v. Stanley Parker Jones** AIR 2006 SC 3569, the Hon'ble Supreme Court in paragraphs 14 and 15 held as under:

"14. The "possession" in the instant case relates to second limb of the Section. It is couched in negative terms and mandates that a person who comes upon any immoveable property by the license of the person in possession thereof, shall not be permitted to deny that such person had title to such possession at the time when such license was given.

15. The underlying policy of Section 116 is that where a person has been brought into possession as a tenant by the landlord and if that tenant is permitted to question the title of the landlord at the time of the settlement then that will give rise to extreme confusion in the matter of relationship of the landlord and tenant and so the equitable principle of estoppels has been incorporated by the legislature in the said section."

15. Similar is the view taken by the Hon'ble Supreme Court in the case of **Sri S.K. Sarma vs. Mahesh Kumar Verma** AIR 2002 SC 3294.

16. In **Vishal Builders Pvt. Ltd. vs. Delhi Development Authority** (supra), this court held that no person who comes into possession of an immovable property on the basis of license or permission of the person in possession thereof can be permitted to deny that such person had a title to such property when such license was given. Similar is the view of the judgment of this Court in the case of **Desh Raj Singh vs. Triveni Engineering & Industries Ltd.**(supra).

17. In view of the above legal position, it would follow that the defendant admittedly as per the written statement was inducted in the suit property as a licencee. Shri Ganpat Ram has now died on 20.08.2010. Their license has been terminated. He cannot challenge the title of the licensor now at this stage after 14 years. The reliance of the defendant on the judgment of **Suraj Lamps** (supra) is clearly misplaced. Even otherwise, the judgment of the Hon'ble Supreme Court in Suraj Lamps (supra) has prospective effect and would not affect the transactions that have already been effected.

18. There is another defence now raised in the written statement by the defendant, namely, an alleged Will dated 4.1.2010 allegedly issued by Shri Ganpat Ram in favour of defendant No.2. As per the said Will, the said Shri Ganpat Ram is stated to be the owner in possession of the

property in question measuring 100 sq.yds. out of 200 sq.yds. The will states that the property was purchased in the name of the two sons, namely, Shri Laxman and Shri Bhagat. The will further states that Shri Bhagat died without any surviving legal heir and hence the testator, namely, Ganpat Ram became the absolute owner of the said portion of the suit property measuring 100 sq.yds and that the testator has now become the absolute owner of the said 100 sq.yds of the suit property. The said will allegedly bequeaths the half share of the suit property to defendant No.2.

19. Even if for the sake of arguments it is presumed that the will was genuinely executed by the testator late Shri Ganpat Ram who excluded his natural heirs from the will, on the face of it no title flows to defendant No.2. The will itself accepts that the property was originally owned by the said late son of Shri Ganpat Ram, namely, Mr.Bhagat who died. Admittedly, the mother of Mr.Bhagat, namely, plaintiff No.2 is alive. Under Section 8 of the Hindu Succession Act, 1956 the mother is a Class-I heir. Being the only surviving Class-I heir she would succeed to the properties left behind by Mr.Bhagat on his death. Father is not a Class-I heir. It is obvious that the propounders of the Will forgot the provisions of the Hindu Succession Act. Hence no title, as claimed, can pass to defendant No.2.

20. The rights of a licencee to stay in possession of the property have been dealt by the Division Bench of this High Court in the case of **Chandu al vs. Municipal Corporation of Delhi** AIR 1978 Del 174. Relevant portion of paragraph 26 of which is reproduced as under:

> "26....... A mere licensee has only a right to use the property. Such a right does not amount to an easement or an interest in the property but is only a personal privilege to the licensee. After the termination of the license, the licensor is entitled to deal with the property as he likes. This right he gets as an owner in possession of his property. He need not secure a decree of the Court to obtain the right. He is entitled to resist in defence of his property the attempts of a trespasser to come upon his property by exerting the necessary and reasonable force to expel a trespasser............."

21. Reference may also be had to the judgment in the case of **Sant**

Lal Jain vs. Avtar Singh (1985) 2 SCC 332 where the Hon'ble Supreme held as follows:

> "6. ..... In **Milkha Singh v. Diana,** it has been observed that the principle once a licensee always a licensee would apply to all kinds of licences and that it cannot be said that the moment the licence it terminated, the licensee's possession becomes that of a trespasser. In that case, one of us (Murtaza Fazal Ali, J. as he then was) speaking for the Division Bench has observed:
>
> > After the termination of licence, the licensee is under a clear obligation to surrender his possession to the owner and if he fails to do so, we do not see any reason why the licensee cannot be compelled to discharge this obligation by way of a mandatory injunction under s. 55 of the Specific Relief Act. We might further mention that even under English law a suit for injunction to evict a licensee has always been held to be maintainable."

In view of the above, it is clear that the defendants are licensees. The license has been terminated. The written statement fails to bring out any title or right in the defendants to continue to retain possession.

22. It is also noteworthy that in 2010 the defendants had filed a suit in the Court of Senior Civil Judge, Saket for permanent injunction to restrain the legal heirs of Shri Ganpat Ram including the plaintiffs from selling or transferring part of the suit property measuring 100 sq.yds. The said suit was dismissed by the trial court on 31.05.2012 holding that the defendants herein have admitted the possession as a licensee and the threats of the plaintiffs herein is a deemed revocation of the license and hence the defendants herein cannot seek protection of their possession by permanent injunction. The suit was dismissed under Order VII Rule 11 CPC. Against the said order the defendant had filed an appeal in the Court of ADJ, Saket, alongwith an application under Section 5 of the Limitation Act. On 18.10.2012 the application under Section 5 of the Limitation Act was dismissed alongwith the appeal.

23. A perusal of the plaint filed in the Saket Court would show that in the said plaint there is no averment made regarding execution of any will by late Mr.Ganpat Ram in favour of defendant No.2. The plaint there stated that late Ganpat Ram donated mutually, expressly and openly and

in the knowledge of his family members half share in the said property in favour of the defendants.

24. It is but obvious that the defendants are taking up frivolous and vexatious defence for the purpose of prolonging their illegal possession of the suit property. They cannot be permitted to misuse the process of law in this manner.

25. It may also be noted that on 25.4.2013 the defendants were directed to personally appear before the Court on 24.5.2013 for the purpose of recording of their statement under Order X CPC read with Section 165 of the Indian Evidence Act. The defendants appeared on 24.5.2013 but as the Court did not assemble the matter was adjourned to 28.5.2013. On 28.5.2013 the defendants did not appear in person. The matter was deferred to 13.8.2013. On 13.8.2013 again the defendants were not present and the matter was adjourned to 5.9.2013. On 5.9.2013 though defendants No.1 and 2 were present in person they requested for an adjournment as their counsel was in difficulty and unable to appear. On their request and subject to their appearance in person on the next date the case was adjourned to 9.10.2013. Again, they were not present in person on 9.10.2013 and another opportunity was given and the case was adjourned to 8.11.2013. On 8.11.2013 again the defendants did not appear. In the interest of justice, arguments were heard and order was reserved.

26. In terms of Order X Rule 4(2) of CPC, if a party fails to appear in person the Court may pronounce judgment against such party or make such order in relation to the suit as it thinks fit. Normally the present suit was liable to be decreed against the defendants on the issue of possession under the said provision.

27. I have in any case considered the submissions of the defendants on merits. I find that there is no merit in the contentions of the defendant. Accordingly, no material issues arise in the case. The present suit is decreed in terms of prayer (a) of the plaint.

28. The issue of mesne profit and damages would survive. The matter may be listed before the Joint Registrar on 28.5.2014 for further proceedings in this regard.

ILR (2014) III DELHI 1664
CRL. A.

SURAJ ....APPELLANT

VERSUS

NCT OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 1357/2011 DATE OF DECISION: 01.04.2014

Indian Penal Code, 1860—S.307/326—Grave and sudden provocations—Accused charged U/s.307 IPC but convicted U/s.326 IPC only—Acquittal U/s.307 IPC not challenged by prosecution—In statement accused admitted that acid was thrown by him due to grave provocation for being injured by a Lathi on his head—Burden on accused to establish beyond doubt that the injuries were inflicted whilst deprived of the power of self-control by grave and sudden provocation—He did not adduce any evidence to substantiate defence—He did not name specific individual who inflicted injuries on him—No Lathi recovered—No complaint lodged by the accused—Accused took conflicting and inconsistent pleas—Ocular testimony in consonance with the medical evidence—Appeal dismissed.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Shekh Israr Ahmad, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Suraj (the appellant) impugns a judgment dated 17.02.2011 of

learned Additional Sessions Judge in case FIR No.277/09 registered at Police Station H.N.Din by which he was convicted under Section 326 IPC. By an order on sentence dated 19.02.2011, he was awarded RI for five years with fine Rs. 10,000/-.

2. Prosecution case, as revealed in the charge-sheet, was that on 04.07.2009 at about 06.30 p.m. in front of House No.210, Near Qureshi Masjid, Basti Hazrat Nizamuddin, the appellant-Suraj voluntarily caused dangerous injuries to Sobha Rani, Prem Wati, Ritu and Thakur Singh by throwing acid on them with an intention to commit murder. The victims were medically examined. The Investigating Officer lodged First Information Report after recording complainant-Ritu's statement (Ex.PW1/A). Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed under Section 307 IPC against the accused; he was duly charged; and brought to trial. The prosecution examined ten witnesses to establish appellant's involvement in the crime. In 313 statement, the appellant pleaded false implication and came up with the plea that acid was thrown by him after he was inflicted injuries on head by a lathi by his sister-in-law-Sobha Rani. He did not examine any defence witness. The trial resulted in his conviction under Section 326 IPC. It is significant to note that the State did not challenge his acquittal under Section 307 IPC.

3. I have heard the learned counsel for the parties and examined the file. Appellant's counsel urged that the injuries inflicted to the victims were the result of grave provocation when Suraj was hit/inflicted injuries by a lathi on his head. No cross-case was registered against the assailants. The victims are his close relations and intended to grab his property. They have succeeded in grabbing one jhuggi after his detention in jail. Prayer was made to modify the sentence order as the appellant was not involved in any criminal case and has suffered custody for about more than a year. He is unmarried and none else is there to look after his property/jhuggi. Learned Additional Public Prosecutor urged that the prosecution witnesses have categorically deposed that acid was thrown at them intentionally and voluntarily by the appellant without any provocation.

4. The occurrence took place at around 06.30 p.m. The victims Sobha Rani, Prem Wati, Ritu and Thakur Singh had sustained burn injuries due to throwing of acid and were medically examined vide MLC's

(Ex.PW-8/A, Ex.PW-8/B, Ex.PW-8/C and Ex.PW-8/D respectively) at Safdarjung hospital. The MLCs record their arrival time at 09.30 p.m. PW-8 (Dr.Monisha) medically examined the victims and opined the nature of injuries sustained by them as 'dangerous caused by acid'. Daily Dairy (DD) No.56B about the occurrence was recorded at 06.48 p.m. The investigation was marked to ASI Narender who with HC B.D.Niwas went to the spot. Rukka (Ex.PW-10/A) was sent for registering the FIR at 11.30 p.m. after recording statement (Ex.PW-1/A). Apparently, there was no inordinate delay in lodging the FIR. In the complaint, Ritu (PW-1) described the incident in detail and disclosed as to how and under what circumstances Suraj threw acid on her and her mother-Sobha Rani. When her aunt Prem Wati and brother Thakur intervened, Suraj also threw acid on them. While appearing as PW-1, Ritu proved the version given to the police without major variations. She deposed that on 04.07.2009 at about 06.30 p.m. when she and her mother were present in the house, the accused-Suraj came and started abusing them. When her mother objected to that, the accused threatened to deface her. Thereafter, accused-Suraj went inside his house, brought a bottle filled with acid and threw it on her mother's breast. He also threw acid on her which caused burn injuries on her right side face, both the shoulders and also the front upper portion of chest. When Prem Wati and Thakur arrived on hearing the noise, the accused threw acid on them also. They were taken to Safdarjung hospital by her father who was informed on telephone. The police arrived at the hospital and recorded her statement (Ex.PW-1/A). In the cross-examination, she admitted that Suraj was her paternal uncle (chacha) and they all lived in the houses in the same compound. She was taken to Safdarjung hospital by her cousin in his lap as she had become unconscious. She denied the suggestion that her mother and brothers in a quarrel with the accused caused injuries to him on his head by a lathi and when the accused threatened to inform the police, someone from the family picked-up the acid bottle and threw towards him which hit on the wall and the acid splashed on the victims. PW-3 (Rohit) also implicated Suraj for throwing acid on all of them. Similar is the testimony of PW-4 (Sobha Rani) and PW-5 (Prem Wati). Injuries sustained by the victims due to acid are not under challenge. In 313 statement, the appellant admitted that acid was thrown by him due to grave provocation for causing injuries by a lathi on his head. It was imperative for the appellant to establish beyond doubt that the injuries were inflicted whilst deprived of the power of self-control by grave and

sudden provocation. He, however, did not adduce any evidence to substantiate his defence. He did not implicate any specific individual who had inflicted injuries to him on his head by a lathi. No such crime weapon was recovered. The appellant did not lodge complaint with the police for causing injuries to him. MLC on record reveals that he was taken to Jai Prakash Narayan Apex Trauma Centre, AIIMS at 08.15 p.m. and was medically examined. In the alleged history mentioned therein, it is recorded that he was given beatings at around 06.00 p.m. in an assault by people. Suraj did not give any explanation as to what had prompted any individual/ victim to inflict injuries by a lathi on his head. He took conflicting and inconsistent pleas during trial. In cross-examination of PWs, he put suggestions that someone from the family had thrown acid on him, which hit the wall and its splashes caused injuries to the victims. No such suggestion was put to PW-8 (Dr.Monisha) to ascertain this possibility. The statements of victims, except PW-2 (Thakur Singh), are consistent. Despite cross-examination, no material discrepancies emerged in their statements to disbelieve them. PW-2 (Thakur Singh), however, did not support the prosecution on all material facts and stated that injuries were not caused to his mother and sister in his presence and he sustained burn injuries due to acid when his sister Ritu @ Reshma grappled with him. Exclusion of his statement would not dilute the cogent and reliable version given by the other victims. Court observations were recorded when the victim-PW-1 (Ritu), a young girl of 23 years, showed burn marks still visible on her face and right shoulder. She even attempted to show other burn marks on shoulder and upper chest. However, considering the modesty of a woman, she was not allowed to do so. PW-4 (Sobha Rani) also showed her both hands which still had a scar of burn injuries during recording of her statement in the court. The photographs on record demonstrate the gravity of the injuries sustained by the victims particularly by Ritu and Sobha Rani. The ocular testimony is in consonance with the medical evidence. The judgment is based upon fair appraisal of the evidence and findings on conviction need no interference.

5. The appellant was awarded RI for five years with fine Rs.10,000/ -. Nominal roll dated 08.11.11 reveals that the appellant had suffered incarceration for one year and ten days besides remission for two months and five days. He had no history of criminal case and was the first

offender. His overall jail conduct was satisfactory. The dispute had occurred suddenly among the family members. Substantive sentence was suspended vide order dated 14.11.2011 and the appellant was enlarged on bail. Nothing has come on record if he misused the liberty or indulged in any such activity after his release. The victims had sustained burn injuries to the extent Sobha Rani (15%), Ritu (10%), Thakur Singh (1%) and Prem Wati (1%). Considering all these circumstances and the fact that the appellant also sustained injuries on his body, sentence order is modified and the substantive sentence awarded by the trial court is reduced to RI for three years with fine Rs.1,000/- and failing to pay the fine to further undergo SI for fifteen days under Section 326 IPC.

6. The appeal stands disposed of in the above terms. The appellant is directed to surrender before the Trial Court on 16.04.2014 to serve the remaining period of sentence. The Registry shall transmit the Trial Court records forthwith along with the copy of this judgment.

ILR (2014) III DELHI 1668
CRL. A.

SANTOSH KUMAR ....APPELLANT

VERSUS

STATE OF DELHI ....RESPONDENT

(DEEPA SHARMA, J.)

CRL.A. NO. : 480/2003 DATE OF DECISION: 01.04.2014

Arms Act, 1959—S.25 (1B)—IPC—S.307/452—Accused acquitted under IPC but convicted U/s.25 of Arms Act—in appeal arguments confined to the quantum of sentence. Held, where the complainant failed to identify the accused as assailant and accused has been acquitted of graver offences under IPC, and is

not a previous convict, lenient view is taken and accused sentenced to period already undergone.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Gupta, Adv. with Appellant in person.

FOR THE RESPONDENT : Mr. O.P. Saxena, APP for the State.

RESULT: Appeal disposed of.

DEEPA SHARMA, J.

1. The present appeal has been filed against the order of conviction under Section 25 (1B) of Arms Act in Sessions Case no.68/2002 arising out of FIR no.369/2001, Police Station Sultanpuri.

2. In the abovesaid FIR a challan had been filed against the appellant-accused for the offence under Section 307/452 IPC and Section 25/27/54/59 of the Arms Act. Vide order dated 27.05.2003 while the appellant-accused was acquitted for the offence under Section 307/452 IPC, his conviction was upheld for the offence under Section 25 of the Arms Act. Vide order dated 28.05.2003 the appellant-accused was sentenced to rigorous imprisonment for one year and to pay fine of Rs.1000/-, in default of payment of fine to undergo simple imprisonment for one month. The appellant-accused was released on bail vide order of this court dated 23.07.2003. As per record, he had already deposited the fine.

3. Although the order of conviction under Section 25 (1B) has been challenged by the appellant on various grounds, during the course of arguments he has voluntarily stated through his counsel that he did not wish to challenge his conviction under Section 25 (1B) Arms Act but confine his arguments on the point of sentence. It is submitted that he is not a previous convict and he is not involved in any other crime at any point of time except the present case and he was a young boy at the time of his conviction in the year 2003 and within this 11 years he is not involved in any way with the world of crime and, therefore, a lenient view be taken and a he be released on probation.

4. Learned APP for the State has conceded that there is no other case pending against the appellant and that it was the only case in which

he has been convicted. It is, however, submitted that the sentence awarded was proper and justified.

5. I have given due consideration to the rival contentions of the parties and have gone through the record.

6. From the perusal of the record it is apparent that the appellant-accused was apprehended at the spot by the public on 4.4.2001 at about 2.30 p.m. for stabbing Smt.Sunita in her abdomen. She was removed to the hospital. The appellant-accused was in custody of the public when the Investigating Officer reached at the spot. He took the personal search of the appellant-accused and recovered a Button actuated knife from his possession. Smt.Sunita, in her deposition, before the court failed to identify the appellant-accused as her assailant and finding no other evidence against the appellant-accused to connect him with the commission of crime under Section 307/452 IPC, he was acquitted by the trial court of the charges but since the police officials including the investigating officer had corroborated each other regarding the recovery of knife from the possession of the appellant-accused, he was convicted for keeping button actuated knife but since the prosecution failed to prove that the knife was used for commission of offence, he was convicted for the offence under Section 25 (1B) of the Arms Act.

7. In the background of this case where the complainant has failed to identify the appellant-accused as her assailant and where the appellant-accused has been acquitted of the graver charges of the offence under Section 307/452 IPC and Section 25/27 of the Arms Act but convicted for a lesser charge of keeping the button actuated knife in his possession and because he was not found involved into any other case even at that time in the year 2003 and during this period of 11 years which has elapsed since he was first arrested in this FIR no.369/2001, I take a lenient view and while upholding the conviction under Section 25 of the Arms Act sentence the appellant-accused for the period already undergone by him.

8. With modification in order of sentence the appeal is disposed of.

9. The Registry is directed to send a copy of the order to the Jail Superintendent, Central Jail, Tihar.

10. Copy of this order be sent to the trial court.

ILR (2014) III DELHI 1671
RFA (OS)

R.K.B.K. FISCAL SERVICES PVT. LTD. ....APPELLANT

VERSUS

ISHWAR DAYAL KANSAL AND ANR. ....RESPONDENTS

(PRADEEP NANDRAJOG & JAYANT NATH, JJ.)

RFA (OS) NO. : 15/2013 DATE OF DECISION: 15.04.2014

Specific Performance—Suit for specific performance, declaration and permanent injunction: Brief Facts—Appellant and Respondent No. 1 entered into an agreement to sell on 9.2.2005 for land owned by the appellant company for a total consideration of 7,35,00,000/- Respondent No. 1 Paid an advance of 1,10,000,00/- and the balance 6,25,000,00/- was payable at the time of completion of the sale formalities by April 30, 2005—Appellant was to Provide the No Objection Certificate/Permission from the competent authority (NOC) for transfer of the suit property—Company applied for NOC on March 24, 2005 Respondent No. 1 was surprised to receive a letter dated April 30, 2005 on May 05, 2005 by which the appellant company sought to cancel the agreement on the pretext that its Board did not approve the Agreement—A draft of 1,10,000,00/- was also sent with the said communication—Respondent No. 1 did not accept the cancellation of the agreement by the appellant company and vide his letter dated May 19, 2005 reiterated the some to the appellant stressing also that respondent No. 1 was not accepting the said bank draft for 1,10,00,000/- Appellant had received the NOC on May 02, 2005—In the second week of June 2005, Attorney holder of the appellant informed

respondent No. 1 that the Board of Directors of the appellant had approved the Agreement to Sell dated February 09, 2005 and the General Body of the shareholders of the appellant company had also accorded its approval on June 08, 2005—Appellant is also stated to have applied for a fresh NOC on June 13,2005 as the earlier NOC had expired on June 01, 2005—On July 08, 2005 a communication was received from the appellant stating that sale formalities would be completed within 15 days of receipt of NOC—In the meantime, it is stated that a circular was issued on June 01, 2005 by the Government of NCT of Delhi that NOCs would not be issued in respect of Agricultural lands less than 8 acres—Delhi High Court on December 20, 2005 allowed the writ petition inasmuch as Government of NCT Delhi agreed to issue the NOC.—Thereafter, there was no information from the appellant and they kept evading the respondents—Hence, the respondent No. 1 filed the present Suit seeking the relief of specific performance, declaration and permanent injunction on February 14, 2006 -Judgment and decree dated 21.12.2012 Passed whereby the suit of the respondents seeking specific performance of the Agreement to Sell dated February 09,2005 was decreed in favour of the respondents with a direction to the respondent to pay to the appellant the balance sale consideration of 6.25 crores (Rupees six crore and twenty five lacs only) with interest @ 6% Per annum from the date of filing of the suit till date of payment—Hence, the Present Appeal—Cross objections filed by the respondents challenging the direction in the impugned order directing the respondents to pay interest @ 6% Per annum on the balance sale consideration. Held: There are no reasons to differ with the view taken in the impugned order on the said issues—Though no serious arguments were raised as to whether time was the essence of the Agreement to Sell, impugned order has rightly held

relying on Section 55 of The Contract Act that there are no facts on record to show that it was the intention of the parties that time should be the essence of the Contract—Original contract dated February 09, 2005 Provided that the sale formalities would be completed by April 30. 2005—Appellant received that the NOC on May 02, 2005 but did not take steps to communicate the same to respondent No. 1 or have the transaction completed—Accordingly, the said NOC lapsed—in the meantime, respondent No. 1 purported to cancel the agreement on April 30, 2005 (Ex. P-12) claiming that the shareholders of the company did not approve the Agreement to Sell—Thereafter on June 08, 2005 it claimed that the shareholders of respondent No. 1 company approved the sale transaction and accordingly a fresh application for NOC was made and a supplementary agreement was entered into on July 08, 2005 (Ex. P-13)—it was the supplementary agreement which provided that balance payment would be made within 15 days of receipt of the NOC from the competent authority- A finding has already been recorded that NOC was received on December 23, 2005, but a copy was never provided to respondent No. 1—No copy of the fresh Power of Attorney was supplied to respondent No. 1 nor was respondent No. 1 intimated about the same. In the light of the above facts and the conduct of the appellant it is not possible to conclude that time was the essence of the contract—Appellant could not cancel the Contract in the manner sought to be done.

Though no serious arguments were raised on this aspect, but it would be necessary to deal with issue No.10 i.e. as to whether time was the essence of the Agreement to Sell. In our view the impugned order has rightly held relying on Section 55 of The Contract Act that there are no facts on record to show that it was the intention of the parties that time should be the essence of the Contract. The original contract dated February 09, 2005 provided that the sale

formalities would be completed by April 30, 2005. The appellant received the NOC on May 02, 2005 but did not take steps to communicate the same to respondent No.1 or have the transaction completed. Accordingly, the said NOC lapsed. In the meantime, respondent No.1 purported to cancel the agreement on April 30, 2005 (Ex.P-12) claiming that the shareholders of the company did not approve the Agreement to Sell. Thereafter on June 08, 2005 it claimed that the shareholders of respondent No.1 company approved the sale transaction and accordingly a fresh application for NOC was made and a supplementary agreement was entered into on July 08, 2005 (Ex.P-13). It was the supplementary agreement which provided that balance payment would be made within 15 days of receipt of the NOC from the competent authority. **(Para 31)**

The whole emphasis of the appellant centers around Clause 1 of the Supplementary Agreement dated July 08, 2005 (Ex.P-13) relevant portion of which reads as follows:-

> *"1. That the Board of Directors of the Seller company M/s.Khas Joyrampur Colliery Company Pvt.Ltd. (KJCL) has reconsidered the Agreement to Sell dated 09.02.2005 to sell "Surabhi Farmhouse" situated at Vill.Bijwasan, New Delhi to you and was placed before the General Meeting of the Share Holders for according their approval for sale in terms of the said Agreement to Sell dated 09.02.2005. The General Meeting of Share Holders was held on 08.06.2005 and accorded its approval to the Agreement to Sell dated 09.02.2005 to sell "Surabhi Farmhouse", New Delhi to you with a modification to allow you maximum 15 days time from the date of receiving the fresh NOC (since the earlier NOC obtained 1stfor the purpose got expired on June 2005) from the competent authority to complete the sale formalities say getting stamping of the documents from the officer of Collector of Stamps and making payment of balance amount of Rs.6,25,00,000.00 (Rupees six crores twenty five lacs*

only) at the time of registration of the Sale Deed with the Office of the Sub-Registrar).” **(Para 32)**

On the basis of this, it has been urged by the appellant that respondent No.1 had to tender the balance sale consideration within 15 days of receipt of the NOC failing which the agreement to sell would automatically stand cancelled. **(Para 33)**

Appropos whether the plaintiffs (respondents) are entitled to decree of specific performance—impugned order concludes that the conduct of the appellant is not worthy of claiming any special equities while the conduct of respondents has been commensurate with accepted standard demanded by equity—Further, respondents filed the present suit and pursued their remedy at the earliest point of time and the suit was instituted within one month of the appellant resiling from the agreement—Further, the impugned order holds that respondents have diligently pursued the suit and hence it is difficult to hold that they acted in a malafide manner and are disentitled to grant relief for specific performance—On the other hand, the conduct of the appellant is to be noticed—Agreement to Sell was executed on February 09, 2005—Sale formalities were to be completed by April 30, 2005—Appellants applied for NOC on March 24, 2005 and the NOC was received on May 2, 2005—Suddenly, on the date of completion of transaction being April 30, 2005 as fixed by the Agreement, the appellant cancelled the Agreement to Sell claiming that the agreement had not been approved by the Board and shareholders of the appellant company—Payment received from respondent No. 1 of 1, 10,00,000/- was returned by way of a demand draft—in addition, a caveat was also filed in the Delhi High Court—This unilateral action of the appellant was not accepted by respondent No. 1 who protested on May 19, 2005—Thereafter the appellant

informed respondent No. 1 that the Agreement to Sell had been approved by the shareholders on June 08, 2005—Appellant applied for a fresh NOC on June 13, 2005 as the first NOC expired on June 01, 2005—A supplementary agreement was also executed on July 08, 2005—The matter did not make any progress as the NOC was not received—Finally, in December 2005, the appellant filed a joint Writ Petition alongwith respondent No. 1 against the Government of NCT of Delhi—The said Writ Petition was allowed on December 20, 2005 with directions for issue of the NOC—The NOC was received on December 23, 2005—Thereafter the appellant dilly dallied on completion of the sale transaction and on January 09, 2006 sent a communication dated January 07, 2006 asking 09, 2006 sent a compete the sale transaction and Pay the balance amount on January 09, 2006 failing which the Agreement to Sell would stand automatically January 13, 2006—it was also the contention of the appellant that in terms of the Agreement to Sell it was entitled 50% of the advance received, namely, the sum of 55 lacs. The facts, taken as a whole, would clearly show that appellant has been dilly dallying and trying to side step the agreement on one pretext or the other. Hence, there is no equity in favour of the appellant—in view of the above, the findings of the impugned order reaffirmed—Impugned judgment upheld and appeal dismissed—Directions in the impugned order to respondents to pay interest @ 6% Per annum on the balance unpaid sale consideration from date of filing of the suit till payment are justified—Cross-objections dismissed. No order as to costs.

The last issues are issues No.13 and 14, namely, as to whether the plaintiffs (respondents) are entitled to decree of specific performance. The impugned order concludes that the conduct of the appellant is not worthy of claiming any special equities while the conduct of respondents has been

commensurate with accepted standard demanded by equity. Further, respondents filed the present suit and pursued their remedy at the earliest point of time and the suit was instituted within one month of the appellant resiling from the agreement. Further, the impugned order holds that respondents have diligently pursued the suit and hence it is difficult to hold that they acted in a malafide manner and are disentitled to grant relief for specific performance.

(Para 50)

[Sa Gh]

Important Issue Involved: The legal position in the case of sale of immovable property is that there is no presumption of time being the essence of the contract even if the parties have expressly provided that time is the essence of the contract.

APPEARANCES:

FOR THE PETITIONER : Mr. Parag P. Tripathi, Senior Advocate, instructed by Ms. Pratibha Sinha, Mr. Kunal Bahl and Mr. Dhawal Mehrotra, Advocates.

FOR THE RESPONDENT : Respondent No.1 in person.

CASES REFERRED TO:

1. *Saradamani Kandappan* vs. *S.Rajalakshmi & Ors.* (2011)12 SCC 18.
2. *Chand Rani (Smt.) (dead) by LRs.* vs. *Kamal Rani (Smt.) (dead) by LRs,* (1993) 1 SCC 519.
3. *Indira Kaur (Smt)* vs. *Sheo Lal Kapoor* (1988) 2 SCC 488.
4. *Gomathinayagam Pillai & Ors.* vs. *Pallaniswami Nadar* AIR 1967 SC 868.

RESULT: Appeal dismissed.

JAYANT NATH, J.

1. The present appeal is filed challenging the judgment and decree dated 21.12.2012 whereby the suit of the respondents seeking specific performance of the Agreement to Sell dated February 09, 2005 was decreed in favour of the respondents with a direction to the respondent to pay to the appellant the balance sale consideration of Rs.6.25 crores (Rupees six crore and twenty five lacs only) with interest @ 6% per annum from the date of filing of the suit till date of payment. Cross objections being CM No.4402/2013 is filed by the respondents challenging the direction in the impugned order directing the respondents to pay interest @ 6% per annum on the balance sale consideration.

2. Respondents filed the present suit stating in the Plaint that the appellant and respondent No.1 entered into an agreement to sell on 9.2.2005 for land owned by the appellant company measuring 1.8252 hectares (18252.50 Sq.Mtrs.) bearing Khasra Nos.85/4/3 Min., 7 East, 7 West, 7,8,13,14 West, 17 Min. and 85/18, Min.situated at Village Bijwasan, New Delhi for a total consideration of Rs.7,35,00,000/- (Rupees seven crore and thirty five lakh only). Respondent No.1 paid an advance of Rs.1,10,000,00/- Rupees one crore and ten lacs only) and the balance Rs.6,25,000,00/- (Rupees six crore and twenty five lacs only) was payable at the time of completion of the sale formalities by April 30, 2005. The appellant was to provide the No Objection Certificate/permission from the competent authority (NOC) for transfer of the suit property. In case there was any problem in obtaining the NOC before April 30, 2005 the parties were to find a mutually acceptable way to complete the transaction. The appellant/defendant company applied for NOC on March 24, 2005. It is urged that despite several reminders, the appellant did not find any acceptable way to transfer the suit property despite the stipulated date April 30, 2005 approaching. Thereafter, respondent No.1 was surprised to receive a letter dated April 30, 2005 on May 05, 2005 by which the appellant company sought to cancel the agreement on the pretext that its Board did not approve the Agreement. A draft of '1,10,000,00/- (Rupees one crore and ten lacs only) was also sent with the said communication. A copy of a Caveat petition was also received by respondent No.1 dated May 03, 2005 filed in the Delhi High Court by the appellant. Respondent No.1 did not accept the cancellation of the agreement by the appellant company and vide his letter dated May 19, 2005 reiterated the same to

the appellant. It was also stressed in the said communication that respondent No.1 was not accepting the said bank draft for Rs. 1,10,00,000/- (Rupees one crore and ten lacs only). It was also pointed out that the appellant had received the NOC issued by the Tehsildar and a copy of the same be provided. The appellant had received the NOC on May 02, 2005.

3. It is further stated that in the second week of June 2005 Mr.Ramjee Dwivedee Attorney holder of the appellant informed respondent No.1 that the Board of Directors of the appellant had approved the Agreement to Sell dated February 09, 2005 and the General Body of the shareholders of the appellant company had also accorded its approval on June 08, 2005. The appellant is also stated to have applied for a fresh NOC on June 13, 2005 as the earlier NOC had expired on June 01, 2005. On July 08, 2005 a communication was received from the appellant stating that sale formalities would be completed within 15 days of receipt of NOC. It is further urged that on July 09, 2005 respondent No.1 returned the bank draft of '1.1 crore to the appellant and also delivered to the appellant company the proposed sale-deed duly initialed by respondent No.1. In the meantime it is stated that a circular was issued on June 01, 2005 by the Government of NCT of Delhi that NOCs would not be issued in respect of Agricultural lands less than 8 acres. It is further stated that in last week of November 2005 as the appellant was not getting the NOC, Mr.Dwivedee of the appellant company informed respondent No.1 that the appellant company was planning to file a Writ Petition in the Delhi High Court and that respondent No.1 would have to be a co-petitioner. Respondent No.1 agreed to the same and signed the Writ Petition on December 02, 2005. The Delhi High Court on December 20, 2005 allowed the writ petition inasmuch as Government of NCT Delhi agreed to issue the NOC. It is further stated that on December 23, 2005 Mr.Dwivedee again met respondent No.1 and informed him about the order of Delhi High Court and asked him to sign a fresh application for grant of NOC, which was duly signed by respondent No.1. It is further stated that thereafter there was no information from the appellant and they kept evading the respondents. On December 25, 2005 respondent No.1 tried to contact Mr.Dwivedee but learnt that he was hospitalized and was admitted in ICU at Apollo Hospital due to a serious illness. On January 02, 2006 respondent No.1 met Mr.Barun Kumar Sinha, Advocate of the appellant company and came to know that the appellant company was

sending another power of attorney to execute the sale-deed in place of Mr.Dwivedee who was seriously ill. No other information is stated to have been given to him by Mr.B.K.Sinha, Advocate. Respondent No.1 further stated that the appellant company has no office in Delhi and that Mr.Dwivedee was the only representative in Delhi. Respondent No.1 claims to have written a letter on January 3, 2006 to the Kolkata Office of the appellant pointing out that respondent No.2 has been incorporated and that in terms of the Agreement to Sell dated February 9, 2005 would be the nominee in favour of whom the sale-deed would have to be registered by the appellant. Various other details were requested from the appellant including original NOC, copy of the Delhi High Court Order, a fresh power of attorney and Board resolution, copy of Memorandum and Articles of the Appellant, proof of payment of house tax, electricity bills, original latest Khasra and Khatoni, etc. The letter is stated to have been sent by Registered A.D. to the appellant company. As there was no response, it was stated that respondent No.1 sent another letter on January 7, 2006 to the appellant company at the Kolkata office with a copy to Mr.Dwivedee. On January 12, 2006 respondent No.1 again claims to have sent a third letter to the appellant company. On January 13, 2006 respondent No.1 claims to have been shocked to receive a photocopy of a notice of cancellation sent by the appellant dated January 7, 2006 couriered on January 9, 2006 which was signed by one Mr.Puneet Saran claiming himself to be the Attorney of the company. It is stated that no copy of the Power of Attorney or authority of Mr.Puneet Saran was enclosed with the said letter. The said communication threatened that in case respondent No.1 did not furnish the bank draft for the balance sum of '6,25,00,000/- (Rupees six crore and twenty five lacs only) by January 9, 2006 the Agreement dated February 9, 2005 shall be treated as cancelled and null and void.

4. The stand of the appellant as stated in the letter dated January 07, 2006 received by the appellant on January 13, 2006 is strongly refuted. It is urged that the action of the appellant was mala fide and fraudulent. Respondent No.1 had no knowledge about appointment of Mr.Puneet Saran as an Attorney in place of Mr.Dwivedee. The appellant company did not inform respondent No.1 about appointment of any other attorney in place of Mr.Dwivedee, the earlier authorized attorney. The appellant company is also stated to have never informed respondent No.1 about issue of NOC dated December 23, 2005 nor contacted respondent

No.1 for completing the sale formalities. Despite letter dated January 03, 2006 sent by respondent No.1 the appellant company did not supply necessary information or documents required to finalize the proposed sale-deed and to send the said proposed sale deed for stamping for purpose of payment of stamp duty. The only action taken by the appellant was on January 9, 2006 when a photocopy of the communication dated January 07, 2006 was purportedly sent by Mr.Puneet Saran claiming himself to be the attorney of the appellant with a request to respondent No.1 to get the sale-deed stamped and to pay vide bank draft Rs.6,25,00,000/- (Rupees six crore and twenty five lacs only) by January 9, 2006 itself. Further on January 14, 2006 respondent No.1 of 34 received photocopy of a letter dated January 12, 2006 signed by the said Mr.Puneet Saran in reply to the letter dated January 07, 2006 sent by respondent No.1, stating that the Agreement to Sell already stands cancelled and that a bank draft of Rs.55,00,000/- (Rupees fifty five lacs only) dated January 12, 2006 was being sent alongwith the said letter whereas in fact no such draft was sent.

5. Hence, the respondent No.1 filed the present Suit seeking the relief of specific performance, declaration and permanent injunction on February 14, 2006.

6. The appellant filed the written statement. It is urged in the written statement that the Agreement to Sell was originally cancelled as the shareholders of the appellant company did not accept the same. However, after reconsideration and acceptance of the same by the shareholders a fresh application for NOC was made by the appellant on June 13, 2005. It is further stated that a supplementary agreement was signed on July 8, 2005 and the parties had specifically agreed to complete the sale formalities within 15 days' time from receiving the fresh NOC and that in case of non compliance of the said provision it was to entail cancellation of the said contract.

7. On July 9, 2005 respondent No.1 handed over the bank draft of Rs.1,10,00,000/- (Rupees one crore and ten lacs only). It is urged that after the order of the Delhi High Court on December 20, 2005 directing Government of NCT Delhi to grant necessary NOC, respondent No.1 was informed by Shri Ramjee Dwivedee when he came to sign the application form on December 23, 2005 that the NOC would be made available on the same date and that respondent No.1 must complete the

sale formalities within 15 days. It is further stated that on December 24, 2005 the appellant company sent the NOC alongwith a letter dated December 23, 2005 requiring respondent No.1 to complete the sale formalities within a period of 15 days from the date of issuance of NOC failing which the Agreement to Sell would stand terminated and 50% of the advance money would stand forfeited. The said communication/NOC was sent through messenger at the residence of respondent No.1 where his wife refused to accept it on telephonic instructions. The same thing happened in the office of respondent No.1 at Ansari Road, Daryaganj, Delhi where the office staff refused to accept the letter. The appellant then claims that on December 26, 2005, the NOC and letter was sent by first flight courier and speed post to respondent No.1. It is further stated that as Shri Ramjee Dwivedee was retiring the appellant company appointed Mr.Puneet Saran as Power of Attorney holder to execute the sale-deed in respect of the suit property and power of attorney was executed on December 26, 2005 and an intimation of the same was sent to respondent No.1 through counsel Mr.B.K.Sinha on December 26, 2005. Further, on January 2, 2006 when respondent No.1 met Mr.B.K.Sinha, Advocate, he spoke to Mr.Puneet Saran the new power of attorney holder on telephone. It was offered to him to inspect the power of attorney the next day. Regarding letter dated January 3, 2006 sent by respondent No.1, it is urged that the same was received by fax on January 7, 2006 by the appellant and it was only an excuse to delay the matter inasmuch as copy of most of the documents demanded by respondent No.1 were already available with respondent No.1 at the time of entering into the agreement to sell and the supplementary agreement. The letter dated January 7, 2006 said to have been sent by respondent No.1 was also received by the appellant company on January 9, 2006. Reply was sent on January 12, 2006 by the appellant that as respondent No.1 had failed to execute the sale-deed within 15 days of issuance of NOC, the appellant company had forfeited 50% of the advance amount of Rs.1,10,00,000/- (Rupees one crore ten lacs only) as per clause 10 of the Agreement to Sell and the balance amount was being returned. Hence, it is urged that the present suit was liable to be dismissed. It is urged that respondent No.1 failed in performing his part of the obligation inasmuch as he did not come forward and get the sale deed executed on or before January 9, 2006 as per the Agreement nor did he make the necessary payment compelling the appellant to cancel the Agreement to Sell w.e.f. January 10, 2006. It is further urged that respondent No.1 was under a legal

obligation to show his readiness and willingness to perform his part of the obligation under the Agreement to Sell and that respondent No.1 has not discharged its obligation under the Agreement.

8. Issues were framed on January 30, 2007 which read as follows:-

"1. Whether any cause of action arises in favour of the plaintiff to file the present suit for specific performance?

2. Whether there is any termination of the agreement to sell by the alleged Notice of Cancellation dated 7.1.2006?

3. Whether cancellation of agreement dated 9.2.2005 by the defendant for violation of the terms of the contract is valid?

4. Whether cancellation of power of attorney dated 17.6.2005 of Mr.Ramajee Dwivedi was communicated to the plaintiff? If not, its effect?

5. Whether particulars of new power of attorney dated 26.12.2005 along with a copy of new power of attorney was delivered/sent to the plaintiff?

6. Whether the defendant has delivered the No Objection Certificate to the plaintiff on 24.12.2005?

7. Whether the Board of the Defendant Company approved the draft of sale deed submitted by the plaintiff on 9.7.2005 and communicated the same to the plaintiff? If so, its effect?

8. Whether the defendant has performed its reciprocal obligation under the agreement to sell dated 9.2.2005?

9. Whether the plaintiff was always ready and willing to perform his part of the obligation under the agreement to sale dated 9.2.2005?

10. Whether time was the essence of the agreement to sell?

11. Whether in the absence of registration of the agreement to sell the same is hit by Sections 53(a) and 54 of the Transfer of Property Act read with Section 17 of the Registration Act and the suit is liable to be dismissed as not maintainable?

12. Whether the suit is properly valued?

13. Whether the plaintiff is entitled to decree of specific performance?

14. Relief."

9. The appellant has examined Sh.Puneet Saran as DW-1, Sh. S.M. Barmecha as DW-2, both representatives of the appellant company, DW-3 is Mr.Naveen Chaturvedi and DW-5, Mr.Sushil Kumar who are both employees of the appellant company. Mr. Barun Kumar Sinha, Advocate has given his evidence as DW-4. The appellant has proved documents which are marked as Ex.D-1 to D-15.

10. The respondents has examined himself i.e. Respondent No.1 as PW-1, Sh.Uday Singh from Karol Bagh Post Office as PW-2, Sh.Madan Mohan Singh, Joint Managing Director, Consortium Securities Pvt. Ltd. as PW-3, Accountant of M/s.Multi Media & Entertainment Ltd. Sh.Rajiv Maheshwari as PW-4 and Sh.B.L.Agarwal, Chartered Accountant as PW-5. The respondent No.1 has proved on record documents which are marked as Ex.P-1 to P-18 and Ex.PW-1/1 to PW-1/21.

11. Parties have clubbed issue Nos. 2 to 6 and 8 to 10 to make their submissions. Separate submissions have been made on the financial capacity of respondent No.1. Both sides have also filed written submissions.

12. Learned senior counsel for the appellant has submitted extensively on events that took place between December 23, 2005 i.e. date of receipt of NOC till cancellation of the Agreement to Sell by the appellant vide notice dated January 07, 2006 to submit that respondent No.1 was not possessed of sufficient means and was only delaying matters. Learned senior counsel has further submitted that the plaintiff/respondent was neither ready nor willing to perform his part of the contract. It is urged that as per the terms of the Supplementary Agreement dated July 08, 2005 (Ex.P-13), respondent No.1 was obliged to make payment of the balance amount of Rs.6,25,00,000/(Rupees six crores twenty five lacs only) within 15 days from the date of receipt of the fresh NOC from the competent authority and to complete all formalities for registration of the sale-deed. It is submitted that the said Supplementary Agreement clearly stipulated that in case respondent No.1 failed to do the needful within the stipulated time, the Agreement to Sell dated February 09, 2005 shall stand automatically cancelled and the appellant will be entitled to forfeit 50% of the advance amount already paid by respondent No.1. It is urged that

despite full knowledge that the NOC has been granted to the appellant on December 23, 2005, respondent No.1 took no steps. It is submitted that admittedly respondent No.1 met Mr.Ramjee Dwivedee on December 23, 2005 to sign the duplicate application for grant of NOC. Obviously, respondent No.1 was informed by the said Mr.Ramjee Dwivedee that the writ petition filed by the appellant and the respondent No.1 jointly before the Delhi High Court had been disposed of on December 20, 2005 and Government of NCT of Delhi had agreed to issue the NOC. It is urged that it is highly improbable that the respondent No.1 would not have sought a copy of the order of the High Court or that the contents of the order were not shared with him. It is further urged that the respondent No.1 thereafter admittedly met the counsel who had filed the writ petition in the Delhi High Court, namely, Sh.B.K.Sinha on January 02, 2006. It is urged that it is inconceivable that the said Mr.B.K.Sinha would not have informed respondent No.1 about the fact that the appellant Company has received the NOC and that in place of Mr.Ramjee Dwivedee who was hospitalized, Mr.Puneet Saran has been appointed as a power of attorney of the appellant Company. In fact, it is urged that the appellant Company had on December 26, 2005 got executed a fresh power of attorney in favour of Mr.Puneet Saran and got it registered in Kolkata on December 29, 2005. These steps were taken to ensure smooth completion of the transaction. It is inconceivable that having taken all these steps, they would not have informed respondent No. 1 about the appointment of the new attorney holder. It is further stated that Mr.B.K.Sinha, Advocate in his meeting with respondent No.1, on January 02, 2006 had made respondent No.1 speak to Mr.Puneet Saran on telephone and he had fixed a meeting at Mr.Saran's office at Okhla, New Delhi to inspect the new power of attorney. It is urged that despite all these developments, on January 03, 2006 respondent No.1 claims to have written a communication seeking details of the new power of attorney and also seeking certain other documents including khasra and khatoni for the suit property, etc. It is urged that this was only an attempt to evade the issue, namely, the fact that the respondent No.1 had to perform his part of the contract within 15 days of the receipt of the NOC. It is further urged that on January 07, 2006 the appellant sent a notice of cancellation whereby it was made clear to respondent No.1 that if the necessary balance payment was not made on or before January 09, 2006, the Agreement to Sell shall stand cancelled. This was reiterated by the appellant on January 12, 2006 where a reference was made to the notice dated

January 07, 2006 and to the effect that the appellant have forfeited 50% of the advance amount i.e. Rs.55,00,000/-(Rupees fifty five lacs only) and was returning balance amount of Rs.55,00,000/-(Rupees fifty five lacs only).

13. On the basis of these facts it is urged that respondent No.1 was only evading and trying to back track from completing his part of the transaction knowing fully well that the appellant had received the NOC on December 23, 2005 and that a power of attorney has been executed and got registered in favour of a new attorney Mr.Puneet Saran and that the appellant Company was ready and willing to perform its part of the contract. It is urged that the appellant Company had taken the effort of filing the writ petition, engaging a lawyer, appointing a new attorney, getting the attorney registered and thereafter following up and getting the NOC from the concerned department. It is urged that all these steps were done by the appellant is a clear pointer to the intention of the appellant Company to get the transaction completed. In contrast it is urged that respondent No.1 was dilly dallying and side stepping the root issue and was delaying the matter needlessly. Hence, it is argued that time being the essence of the Contract, the appellant was entitled to cancel the Agreement to Sell. Reliance is also placed upon judgment of the Hon'ble Supreme Court in the case of (2011)12 SCC 18 **Saradamani Kandappan vs. S.Rajalakshmi & Ors.** where the Court held that there is an urgent need to revisit the principle that time is not the essence in contract relating to immovable properties in view of the changed circumstances arising from inflation and steep increase in prices.

14. Learned senior counsel has further urged that respondent No.1 has not been able to show availability of funds to make good the balance transaction. It is urged that respondent No.1 has given a false and distorted picture of his assets and advances and his shareholdings. It is urged that the Valuation Certificate dated February 16, 2006 (Ex.PW-1/20) and Demat Account Statement (Ex.PW-3/2) are not credible evidence. It is urged that the Valuation Certificate which shows the valuation of the shares to be over Rs.9,00,00,000/- (Rupees nine crores only) as on February 16, 2006 is a manipulated document. The further evidence of the respondent No.1 of having owned 1,00,21,500 equity shares of Rs.10 each in Multimedia Entertainment Ltd. worth above Rs.10,00,00,000/- (Rupees ten crores only) (Ex.PW-1/21) is also said to be a false statement. Thus as per respondent's evidence, the value of all the listed shares

(Andhra Cements Limited, Duncan Industries Limited, Snowcem Limited and Multimedia & Entertainment Limited) taken together should have been Rs.19,83,02,500/(Rs. 9,80,87,500/- + Rs.10,02,15,000/-) as on 31.03.2006. Yet his audited balance sheet as on 31.03.2006 (Ex.PW-1/18) shows total investment in quoted/listed shares as Rs.7,25,28,207.73/- only. Hence, it is urged that the valuation of assets by respondent No.1 is manipulated. It is further urged that in fact the value of shares of Andhara Cements limited, Duncan Industries Limited and Snowcem Limited which are the basis of the Certificate PW-1/20 should be negative as they are sick companies under The Sick Industrial Companies (Special Provision)Act, 1985 and proceedings are pending before BIFR. These shares would also have no ready market. Further, the shares of Multimedia & Entertainment Limited were held by respondent No.1 in physical form and were listed at Guwahati, Delhi and Jaipur stock exchange where there has been no trading of shares for the last 5-6 years. In view thereof, it is submitted that the shares of Multimedia could not have been sold at all by the plaintiff and certainly not within 15 days from the receipt of NOC for payment of balance sale consideration.

15. As regards the loans and advances, it is urged that there is clear window dressing done by respondent No.1 to show a picture of large assets in the form of loan portfolios. This loan portfolio pertains to defunct companies which are all sister or associate concerns owned by respondent No.1 and his family members. It is urged that the transactions are circuitous and fictitious and no reliance can be placed on the same.

16. Hence, it is urged that issue Nos. 2 to 6, 8 to 10, 13 and 14 have been wrongly decided by the impugned order.

17. Respondent No.1 appearing in person has on the other hand submitted that the contentions of the appellant are entirely false on the events that unfolded after December 23, 2005. He submitted that at no stage did the appellant forward to him the NOC received from the concerned department or a copy of the power of attorney of the new Attorney holder Mr.Puneet Saran. Regarding notice of cancellation dated January 07, 2006, sent by the appellant it is urged that as per the appellant company this was sent by registered post, courier and by hand on January 07, 2006. However, despite an application filed by respondent No.1 under Order XI Rules 12 & 14 CPC for discovery of receipt of registered post, speed post for the said communication and despite order

of the court dated November 02, 2006, to discover the document on oath, no such receipt has been filed. The court on February 18, 2008 passed an order that it shall be deemed that no such receipt exists. In fact, it is urged that DW-1 in his cross-examination on February 02, 2011 DW-1 admitted that the said letter was sent by the appellant company by courier on January 09, 2006 only. Hence, this communication of January 07, 2006 was admittedly received by respondent No.1 on January 13, 2006 after the date mentioned as the last date of payment, namely, 09.01.2006 in the said notice. Hence, it is urged that the alleged cancellation dated January 07, 2006 is no cancellation in the eyes of law.

18. On the issue of availability of funds with respondent No.1, to complete the sale transaction reliance is placed on para 46 to 51 of the affidavit of evidence of PW-1 where he has stated about his assets. He has filed his audited balance sheet as on 31-03-2006 (Ex.PW1/18), copy of his Income tax return for the said year (Ex. PW1/19) a valuation of the holding of shares in D'mat form (Ex.PW3/2) and the market price of the said shares in the stock exchanges as on 16-02-2006 (Ex.PW1/20) and a certificate of holding of 10021500 shares of Rs.10/- each by respondent no.1 in Multimedia and Entertainment Limited book value of each share as per the balance sheet of the said Company as on 31st March 2006 (Ex.PW1/21). These documents have been stated to have been proved by the respective witnesses that is the auditor of balance sheet of respondent no.1 (PW-5), Joint Managing Director of Consortium Securities P. Limited (PW-3) and accountant of Multimedia & Entertainment Limited (PW4). Respondent No.1 has stated that he could sell the listed shares held by him in D'mat form and would have got the payment on the 3rd working day. The market price of the said shares as on February 16, 2006 is more than Rs.9,80,00,000/- whereas he had to pay only Rs.6.25 crores. He has also stated that he could raise the funds based on his shares of Multimedia and Entertainment Ltd. Being a promoter of Multimedia and Entertainment Ltd., funds could be arranged by pledging the shares in physical form to a NBFC or a private financier.

19. On the loans advanced by him, respondent No.1 has submitted that it is not his case that he was to raise funds from recovery of loans advanced by him. Hence, on the basis of this it is urged that the respondent No.1 was ready and willing to perform his part of the contract. He had the necessary funds but it was the appellant who acted in an arbitrary and grossly illegal fashion and without any rhyme or reason cancelled the

Agreement to Sell on a back date. Hence, he urges that the present appeal is liable to be dismissed and the cross-objections filed be allowed inasmuch as on account of the conduct of the appellant, they would not be entitled to any interest on the balance sale consideration.

20. In our view there are no reasons to differ with the view taken in the impugned order on the said issues. The first basic controversy pertains to the three documents i.e. NOC (Ex.D-5), the new Power of Attorney issued in favour of Mr.Puneet Saran (Ex. D/A) and the notice dated January 07, 2006 sent by the appellant.

21. We will first deal with the controversy of receipt of NOC by respondent No.1 i.e. issue No.6. The impugned order holds that NOC was not received by respondent No.1.

22. It has been strongly urged by the appellant that respondent No.1 had come to the office of the appellant on December 23, 2005 after the order of the Delhi High Court directing issue of the NOC and signed the application for grant of NOC. He was informed by Mr.Ramjee Dwivedee attorney of the appellant that the NOC would be issued by the evening. It is then urged that on December 24, 2005 a letter dated December 23, 2005 along with the NOC was sent to respondent No.1 requesting him to complete sale formalities within 15 days. (Initially the letter was said to be dated December 24, 2005 but later the date was changed via an amendment to December 23, 2005). The said NOC was allegedly sent by hand through a messenger Mr.Sushil Kumar at the residence of respondent No.1 but respondent No.1's wife refused to accept the said communication after receiving instructions from respondent No.1 on telephone. The same was stated to be the fate when Mr.Sushil Kumar visited the office of respondent No.1. Hence it is claimed that on December 26, 2005 the letter along with the NOC was sent by courier and the receipt has been filed as Ex.D-6. Respondent No.1 denied his signatures on the said receipt.

23. The impugned order records a finding that a bare glance at the receipt Ex.D-6 shows that the sender's name is not that of the appellant and further that the address of the respondent No.1 is not there on the courier receipt. Further, the alleged signatures of respondent No.1 on the said receipt do not tally with any signatures of respondent No.1 on any documents on record. The impugned order further holds that in the light

of the denial of signatures, no witness from the courier company was examined by the appellant nor any handwriting expert summoned. Further the appellant has failed to produce on record copy of the letter dated December 23, 2005 despite an order for production of the same passed in IA No.10248/2006 on November 02, 2006. Further, on February 18, 2008 the Court passed an order staying that it shall be presumed that the documents not produced pursuant to order dated November 02, 2006 do not exist. It is also noteworthy that respondent No.1 in his communication dated January 03, 2006 to the appellant had asked for a copy of the NOC. In its reply dated January 07, 2006 the appellant took the stand that the original documents are ready and would be given to respondent No. 1 at the time of execution of sale deed provided respondentNo.1 furnishes bank draft of Rs.6,25,00,000/-(Rupees six crores twenty five lacs only) by January 09, 2006.

24. In the light of the evidence led by the appellant, there is nothing on record to prove the receipt of the NOC by respondent No.1. We agree with the said finding recorded in the impugned order.

25. We now come to the controversy of the fresh power of attorney executed in favour of Mr.Puneet Saran on December 26, 2005 which got registered on December 29, 2005 and as to whether respondent No.1 was informed about the same. This aspect is covered by issues No.4 and 5. The impugned order recorded a finding that the appellant neither informed respondent No.1 about the cancellation of the power of attorney in favour of Mr.Ramjee Dwivedee nor sent/delivered to him the new power of attorney in favour of Mr.Puneet Saran. It is the contention of the appellant that respondent No.1 was duly informed of the fresh power of attorney executed in favour of Mr.Puneet Saran by Mr.B.K.Sinha, Advocate on January 02, 2006 when respondent No.1 admittedly met Mr.Sinha. Apart from this averment there is nothing on record to show that a copy of the new power of attorney was sent to respondent No.1. The evidence of DW-4 Sh.Barun Kumar Sinha is also completely silent on this aspect of giving a copy of the Power of Attorney in favour of Mr.Puneet Saran. In fact DW-1 Mr.Puneet Saran in his cross-examination has said that he has not met respondent No.1 between the date when the power of attorney executed i.e. December 26, 2005 till February 14, 2006, the date of filing of the suit.

26. It is also further noteworthy that respondent No.1 in his letter

dated January 03, 2006 clearly stated that he learnt from Mr.B.K. Sinha, Advocate about the appellant sending some fresh power of attorney. He requested for the original power of attorney which should be duly registered with other details. In its reply dated January 07, 2006, the appellant simply brushed aside the demand for the original Attorney including the other documents saying that the documents are irrelevant and unnecessary for execution of the sale deed. It was however said that the appellant would produce the said documents at the time of execution of the sale-deed provided the sale-deed gets done on or before January 09, 2006. It is clear that there is nothing on record to show that respondent No.1 received a copy of the new power of attorney. We see no reason to differ from the said finding recorded in the impugned order.

27. The next argument addressed by learned senior counsel for the appellant pertains to service of notice dated January 07, 2006 of termination of Agreement to Sell by the appellant on respondent No.1. This aspect is covered by issues No.2 and 3. On these issues the impugned order holds that the said notice of cancellation was sent by the appellant only on January 09, 2006 and was received by respondent No.1 on January 13, 2006 i.e. after the time limit specified in the notice for the execution of the sale-deed expired. Even otherwise it was held that the power of attorney of Mr.Puneet Saran dated December 26, 2005 gives him no power to cancel the agreement. The impugned order points out at lot of controversies regarding the date when the said communication dated January 07, 2006 was dispatched by the appellant and was received by respondent No.1. The impugned order concludes after going in detail into the evidence that the said letter was sent by courier only on January 09, 2006 and was received by respondent No.1 on January 13, 2006. The impugned order relies on the cross-examination of DW-1 on February 02, 2011 where the date of dispatch is admitted. For date of proof of delivery reliance is placed on Ex.D-8. This position as accepted in the impugned order has not been seriously contested before us.

28. The said communication dated January 07, 2006 was in response to a communication dated January 03, 2006 sent by respondent No.1. The said communication stated that the demand of respondent No.1 for original documents is misplaced inasmuch as these ten documents sought by respondent No.1 are irrelevant and unnecessary for execution of the sale-deed and that the same would be produced whenever the sale-deed is executed and registered. The letter further states that the respondent

No.1 must make balance payment of Rs.6,25,00,000/-(Rupees six crore twenty five lacs only) and get the sale-deed executed on or before January 09, 2006 failing which the Agreement to Sell dated February 09, 2005 shall be treated as cancelled and null and void automatically without any further notice and 50% of the advance money paid shall be forfeited as per Clause 10 of the Agreement to Sell dated February 09, 2005. Hence, the notice/communication which gives an opportunity to respondent No.1 to complete the transaction by January 09, 2006 is posted on the said date itself and is received by the respondent No.1 on January 13, 2006 after expiry of the notice period. Clearly, the notice dated January 07, 2006 is mischievous and cannot be treated as of any effect whatsoever.

29. In view of above finding the effect is that no notice of cancellation of the agreement was served on respondent No.1 by the appellant. What would be the effect of the same? In this context reference may be had to the judgment of the Supreme Court in the case of AIR 1967 SC 868 **Gomathinayagam Pillai & Ors. vs. Pallaniswami Nadar** relevant portion of which reads as follows:-

> *"8. ... In the present case there is no express stipulation, and the circumstances are not such as to indicate that it was the intention of the parties that time was intended to be of the essence of the contract. It is true that even if time was not originally of the essence, the appellants could by notice served upon the respondent call upon him to take the conveyance within the time fixed and intimate that in default of compliance with the requisition the contract will be treated as cancelled. As observed in* ***Stickney vs Keeble I.L.R.*** *[1915] A.C. 386 where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end. In the present case appellants 1 & 2 have served no such notice; by their letter dated July 30, 1959 they treated the contract as at an end. If the respondent was otherwise qualified to obtain a decree for specific performance, his right could not be determined by the letter of appellants 1 & 2."*

Accordingly the so called notice dated January 07, 2006 does not affect the rights of respondent No.1 flowing from the Agreement to Sell

dated February 09, 2005.

30. We see no reason to differ with the findings in the impugned order on issues No.2 and 3 i.e. whether there is termination of Agreement to Sell vide notice dated January 07, 2006 and whether cancellation of the Agreement to Sell by the Appellant is valid.

31. Though no serious arguments were raised on this aspect, but it would be necessary to deal with issue No.10 i.e. as to whether time was the essence of the Agreement to Sell. In our view the impugned order has rightly held relying on Section 55 of The Contract Act that there are no facts on record to show that it was the intention of the parties that time should be the essence of the Contract. The original contract dated February 09, 2005 provided that the sale formalities would be completed by April 30, 2005. The appellant received the NOC on May 02, 2005 but did not take steps to communicate the same to respondent No.1 or have the transaction completed. Accordingly, the said NOC lapsed. In the meantime, respondent No.1 purported to cancel the agreement on April 30, 2005 (Ex.P-12) claiming that the shareholders of the company did not approve the Agreement to Sell. Thereafter on June 08, 2005 it claimed that the shareholders of respondent No.1 company approved the sale transaction and accordingly a fresh application for NOC was made and a supplementary agreement was entered into on July 08, 2005 (Ex.P-13). It was the supplementary agreement which provided that balance payment would be made within 15 days of receipt of the NOC from the competent authority.

32. The whole emphasis of the appellant centers around Clause 1 of the Supplementary Agreement dated July 08, 2005 (Ex.P-13) relevant portion of which reads as follows:-

> *"1. That the Board of Directors of the Seller company M/s.Khas Joyrampur Colliery Company Pvt.Ltd. (KJCL) has reconsidered the Agreement to Sell dated 09.02.2005 to sell "Surabhi Farmhouse" situated at Vill.Bijwasan, New Delhi to you and was placed before the General Meeting of the Share Holders for according their approval for sale in terms of the said Agreement to Sell dated 09.02.2005. The General Meeting of Share Holders was held on 08.06.2005 and accorded its approval to the Agreement to Sell dated 09.02.2005 to sell "Surabhi Farmhouse", New Delhi to you with a modification to allow you maximum 15 days time from the date of receiving the fresh NOC (since the earlier NOC obtained 1stfor the purpose got expired on June 2005) from the competent authority to complete the sale formalities say getting stamping of the documents from the officer of Collector of Stamps and making payment of balance amount of Rs.6,25,00,000.00 (Rupees six crores twenty five lacs only) at the time of registration of the Sale Deed with the Office of the Sub-Registrar)."*

33. On the basis of this, it has been urged by the appellant that respondent No.1 had to tender the balance sale consideration within 15 days of receipt of the NOC failing which the agreement to sell would automatically stand cancelled.

34. A finding has already been recorded that NOC was received on December 23, 2005, but a copy was never provided to respondent No.1. The original attorney holder of the appellant Shri Ramjee Dwivedee was seriously unwell and hospitalized on December 25, 2005. He could not recover from his illness. A fresh attorney was executed in favour of Mr.Puneet Saran on December 26, 2005 and was registered on December 29, 2005. No copy of the Power of Attorney was supplied to respondent No.1 nor was respondent No.1 intimated about the same. In the light of the above facts and the conduct of the appellant it is not possible to conclude that time was the essence of the contract. The appellant could not cancel the Contract in the manner sought to be done.

35. The legal position in the case of sale of immovable property is that there is no presumption of time being the essence of the contract even if the parties have expressly provided that time is the essence of the contract. In AIR 2008 SC 1205, **Balasaheb Dayandeo Naik (Dead) Through LRs. & Ors. vs.Appasaheb Dattatraya Pawar** in paragraph 9 the Hon'ble Supreme Court held as under:-

> "9. In **Chand Rani (Smt.) (dead) by LRs. Vs. Kamal Rani (Smt.) (dead) by LRs,** (1993) 1 SCC 519, a Constitution Bench of this Court has held that in the sale of immoveable property, time is not the essence of the contract. It is worthwhile to refer the following conclusion:-
>
> "19. It is a well-accepted principle that in the case of sale

of immovable property, time is never regarded as the essence of the contract. In fact, there is a presumption against time being the essence of the contract. This principle is not in any way different from that obtainable in England. Under the law of equity which governs the rights of the parties in the case of specific performance of contract to sell real estate, law looks not at the letter but at the substance of the agreement. It has to be ascertained whether under the terms of the contract the parties named a specific time within which completion was to take place, really and in substance it was intended that it should be completed within a reasonable time. An intention to make time the essence of the contract must be expressed in unequivocal language."

"21. In Govind Prasad Chaturvedi v. Hari Dutt Shastri (1977) 2 SCC 539 following the above ruling it was held at pages 543-544: (SCC para 5)

"... It is settled law that the fixation of the period within which the contract has to be performed does not make the stipulation as to time the essence of the contract. When a contract relates to sale of immovable property it will normally be presumed that the time is not the essence of the contract. [Vide Gomathinayagam Pillai v. Pallaniswami Nadar 1 (at p. 233).] It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract."

"23. In **Indira Kaur (Smt) v. Sheo Lal Kapoor** (1988) 2 SCC 488 in paragraph 6 it was held as under:

"... The law is well-settled that in transactions of sale of immovable properties, time is not the essence of the contract."

36. Similarly the Hon'ble Supreme Court in **Gomathinayagam Pillai's** case (supra) in para 6 held as follows:

"6. It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable: it may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence....."

In the facts and circumstances of this case, it is obvious that in the original Agreement to Sell dated February 09, 2005 the date of completion of the transaction was April 30, 2005. The appellant themselves resiled on April 30,2005 claiming that the Board and the General Body of shareholders had not approved the Agreement to Sell. The Supplementary Agreement was later executed on July 08, 2005 which provided that the balance payment would be made within 15 days of receipt of NOC. The NOC took almost more than five months. The conduct of the parties especially of the appellant does not in any way show that the parties treated the time as the essence of the contract. We see no reason to differ with the view taken in the impugned order.

37. We will now deal with the second aspect argued by the parties i.e. the ability of respondent No.1 to make payment of the balance amount of sale consideration. This is covered by Issue No.9 i.e. whether respondent No.1 was ready and willing to perform his part of the Agreement to Sell. On this issue the impugned order holds that the respondent No.1 was possessed of the capacity to arrange the funds for payment of sale consideration at all points of time. It held that the

availability of funds in hand or in the bank accounts was not a sine qua non but the respondent No.1 led sufficient evidence to show that it was capable of paying the sale consideration at the time of the execution of the sale deed.

38. Respondent No.1 namely DW1 in his evidence by way of affidavit, has stated that as per his Balance Sheet as on March 31, 2006, his net worth is Rs.27.3 Crores and that the current valuation of assets is Rs. 40 crores and there is no liability of any institution or bank. It has further been stated that he has substantial investments in shares of listed companies which payment is realizable within three working days from the Stock Exchange. The valuation certificate issued by the depository participants has been placed on record valuing the stock holding of listed shares of respondent No.1 as on February 16, 2006 at Rs.9,80,87,500/- based on the closing price of the Scrip. The shares pertain to companies Andhra Cement Ltd., Dunken Industries Ltd. and Snowcem India Ltd. It is further stated in the affidavit that respondent No.1 owns fully paid up equity shares of Rs.10/- face value each in physical form in Multi Media Entertainment Ltd, a company listed in Delhi, Guwahati and Jaipur Stock Exchanges and the book value of shares is more that Rs. 10 Crores as per the company's balance sheet on March 31, 2006. He has also pleaded that he has investments in unlisted companies of more than Rs.10 Crores. PW3 Mr. Madan Mohan Singh, Joint Managing Director, Consortium Securities Pvt Ltd., has proved certificate issued by them, namely, which gives total valuation of the share holding in the three listed companies of respondent No.1 and also confirms issue of the valuation as on 16.02.2006 (Ex.PW1/20). PW4 Mr. Rajiv Maheshwari, Accountant of M/s. Multi Media & Entertainment Ltd has pointed out that the said Multi Media Entertainment Ltd. has a paid up capital of Rs.20 Crore. He has confirmed certificate dated August 20, 2007 stating the share holding of respondent No.1 in Multi Media Entertainment Ltd (Ex.PW1/21).

39. Learned senior counsel appearing for the appellant has strongly urged that the valuations put forth are imaginary figures and that respondent No.1 does not have the financial capacity to pay the balance sale consideration and was hence needlessly prolonging the matter. He urges that shares which are owned by respondent No.1 and are said to be listed on the Stock Exchange and which are the subject matter of certificate of valuation (Ex. PW-1/20) are sick companies under The Sick Industrial Companies (Special Provisions) Act, 1985. It is urged that Andhra Cements,

Dunken Industries and Snowcem India are, as on 2006, sick companies and subject matter of proceedings before the BIFR and could not command any worthwhile price and were incapable of being sold in the manner as projected by respondent No.1. It has further been argued that cross examination of PW4 would show that the company Multi Media Entertainment Ltd has a paid up capital of Rs.20 Crores of which 10 Crores worth share are owned by respondent No.1 implying that the said company is a family company and the attempt to value share above Rs.10 Crores is a manipulated valuation. He has also urged that Ex. PW1/20 shows the valuation of Scrip, at Rs. 9.8 Crores. Ex.PW1/21 shows the valuation of shares in Multi Media Entertainment Limited above Rs.10 Crores whereas as per the balance sheet of respondent No.1 as on March 31, 2006, the total investments in quoted/listed shares is only Rs.7,25,28,207/-as is apparent from a perusal of PW1/18. Hence it is urged that there is a huge variation in the valuation as projected by different documents which clearly shows that the same are manipulated. It is also urged that reliance on loans receivable from other parties by respondent No.1 is misplaced as these are sham transactions which are circuitous loans within the family and cannot be said to be available to respondent No.1 for the purpose of payment of balance sale consideration.

40. Respondent No.1, in his written submissions, has explained that the balance sheet always shows the cost price at the time of purchase and not the market price prevalent on the particular date. Hence it is pleaded that there is variation in the valuation certificate dated February 16, 2006 (PW-1/20) and the balance sheet (PW-1/18). He has further stated that respondent No.1 could have raised an amount of Rs.9.8 crores by sale of shares which are listed on the Stock Exchange and the money would be made available to him within three working days. He could not sell the shares in Multi Media Entertainment Ltd to arrange funds on a short notice but these shares could have been pledged for raising funds. Regarding the loans made by respondent No.1 to other unlisted companies and associates, it is submitted that it is not the case of respondent that he would raise funds by recovery of such loans and hence, the contention of learned senior counsel of appellant on this aspect is misplaced. He submits that he had other sufficient assets to raise the necessary funds and reference to these loans to associates and family members was only for the purpose of completing the full picture.

41. In our view, the contentions of the appellant are misplaced.

They have not been able to shake the evidence placed on record by respondent No.1 regarding his net worth and assets available in hand.

42. On the valuation of listed shares on the basis of which the document Ex.PW-1/20 has been prepared, PW-1 in his cross-examination on this aspect on September 24, 2008 stated as follows:-

> *Ques. I put it to you that the companies namely Dunken industries, Andhra Cement and Snoweem India, have already referred to BIFR as sick industrial company and delisted on all the stock exchanges.*
>
> *Ans. It is incorrect that these companies were delisted on stock exchanges. But I am not aware if the reference of these companies was pending with BIFR and reference to BIFR does not affect the listing of shares with stock exchanges for trading. It is incorrect to suggest that there were not buyers for shares of these companies as they were already referred to BIFR as sick industries as their share price were zero.*
>
> *I was holding about one lac shares in Electrolux India Ltd. they went in demat form. It is correct that I have not filed any record of these Demat sales of M/s.Electrolux Kalvinators. Volunteered: but I can file it. This Demat account was in respect of Electroloux Calvinator Shares was with Stock Holding Corporation of India. It is incorrect to suggest that multimedia Entertainment shares are not listed with any stock exchanges. It is listed with Delhi, Jaipur and Guwahati Stock Exchanges. The Kalvinator shares were purchased by me long back. The amount utilized for purchase of Kalvinator shares is reflected in the bank account when shares were purchased through stock exchange."*

43. There is no question posed to him about difference in the listed shares as stated in Ex.PW-1/20 issued by Consortium Securities Private Limited and the balance sheets of the respondent No.1 as on March 31, 2006 (Ex.PW-1/18).

44. Similarly, PW-3 Shri Madan Mohan Singh, Joint Managing Director, Consortium Securities Pvt. Limited confirmed the certificate Ex.PW-1/20 and in his cross-examination stated as follows:-

> *"It is correct that I have no legal status with NSDL but my company has that status as it has been granted a certificate of registration as participant by Securities & Exchange board of India (SEBI). I have not brought the certificate issued by SEBI but I can produce the same. We have kept in deposit any of the shares of Mr.Kansal in physical form. (Vol.) these shares are not tradable in physical form.*
>
> *I do not know whether reference of Andhra Cement Co. is pending in the board of industrial and Financial Reconstruction (BIFR) but its shares are being traded in the stock exchange. Same is my answer to M/s.Duncan Industries. I have no idea of present price of shares of these 3 companies as on today."*

45. On this document PW-1/20 no other worthwhile evidence has been placed on record by the appellant.

46. Shri Rajiv Maheshwari, Accountant of M/s.Multimedia & Entertainment Ltd. had deposed regarding the shareholding of respondent No.1 in the said company Multimedia and Entertainment Limited. In his cross-examination on August 27, 2008 he said as follows:-

> *"Multi Media and Entertainment Ltd. was incorporated on 01.11.1994. The paid up capital of my company is '20 crores. I have brought the copy of balance sheet and annual return with ROC receipts of my company for the year 2007 but it is only a photocopy. I can bring its original. The copy of balance sheet and annual return and ROC receipt are collectively put as Ex.PW4/1 (Coll.). As the Delhi Stock Exchange is not working now a days. To my knowledge, DSE is not doing the trading of shares for the last 5-6 years. Besides DSE, the Multimedia Entertainment company's share were listed at Gohati and Jaipur Stock Exchanges. The position of Gohati and Jaipur stock exchanges are also the same about their non trading of shares."*

47. Hence, the evidence placed on record by respondent No.1 has not been shaken. There is nothing to disbelieve the contention of respondent No.1 that he held shares is three companies, namely, Dunken Industries Ltd., Andhra Cement Ltd. and Snowcem India Ltd. which as on February 16, 2006 were valued at Rs.9.8 crores and could have been liquidated within three days. The submission of the appellant that these companies

were BIFR companies may be true but it is obvious that the shares were being traded on the stock market.

48. Similarly, there is nothing to show that the shareholding of respondent No.1 in Multimedia Entertainment Limited could not have realized assets as stated by respondent No.1 in his evidence. In fact in paragraph 51 of his evidence PW-1 i.e. respondent No.1 said as follows:-

> *"51. I say I can also raise the loan within a short span of five days by pledging the shares and immovable property held by me. I also have personal friends and associates who are financially sound and can provide me the funds if required."*

49. Respondent No.1 has not been cross-examined on this aspect. Hence, there is merit in the submission of respondent No.1 that though the shares in Multimedia and Entertainment Limited were not in D'mat form and that the stock exchange in Delhi, Guwahati and Jaipur had shut down, yet he could have raised funds by pledge of these shares within a short period and could have easily paid the dues payable to the appellant in terms of the Agreement to Sell. In view of the above, we affirm the findings of the learned Single Judge regarding issue No.9.

50. The last issues are issues No.13 and 14, namely, as to whether the plaintiffs (respondents) are entitled to decree of specific performance. The impugned order concludes that the conduct of the appellant is not worthy of claiming any special equities while the conduct of respondents has been commensurate with accepted standard demanded by equity. Further, respondents filed the present suit and pursued their remedy at the earliest point of time and the suit was instituted within one month of the appellant resiling from the agreement. Further, the impugned order holds that respondents have diligently pursued the suit and hence it is difficult to hold that they acted in a malafide manner and are disentitled to grant relief for specific performance.

51. We cannot help noticing the conduct of the appellant. The Agreement to Sell was executed on February 09, 2005. The sale formalities were to be completed by April 30, 2005. The appellants applied for NOC on March 24, 2005 and the NOC was received on May 2, 2005. Suddenly, on the date of completion of transaction being April 30, 2005 as fixed by the Agreement, the appellant cancelled the Agreement to Sell claiming that the agreement had not been approved by the Board and shareholders

of the appellant company (Ex.P-12). The payment received from respondent No.1 of Rs.1,10,00,000/- (Rupees one crore ten lac only) was returned by way of a demand draft. In addition, a caveat was also filed in the Delhi High Court. This unilateral action of the appellant was not accepted by respondent No.1 who protested on May 19, 2005 (Ex.PW-1/3). Thereafter the appellant informed respondent No.1 that the Agreement to Sell had been approved by the shareholders on June 08, 2005. The appellant applied for a fresh NOC on June 13, 2005 as the first NOC expired on June 01, 2005. A supplementary agreement was also executed on July 08, 2005 (Ex.P-13). The matter did not make any progress as the NOC was not received. Finally, in December 2005, the appellant filed a joint Writ Petition alongwith respondent No.1 against the Government of NCT of Delhi. The said Writ Petition was allowed on December 20, 2005 with directions for issue of the NOC. The NOC was received on December 23, 2005. Thereafter the appellant dilly dallied on completion of the sale transaction and on January 09, 2006 sent a communication dated January 07, 2006 asking respondent No.1 to complete the sale transaction and pay the balance amount on January 09, 2006 failing which the Agreement to Sell would stand automatically cancelled. This communication was received by the respondent No.1 on January 13, 2006. It was also the contention of the appellant that in terms of the Agreement to Sell it was entitled to forfeit 50% of the advance received, namely, the sum of Rs.55 lacs. The facts taken as a whole would clearly show that appellant has been dilly dallying and trying to side step the agreement on one pretext or the other. Hence, there is no equity in favour of the appellant.

52. In view of the above facts, the submission of learned senior counsel for the appellant that in the meantime during pendency of present proceedings the prices have risen astronomically cannot be accepted given the conduct of the appellant. The appellants are to be blamed for the present situation.

53. We also cannot help noticing another aspect which was also noted in the impugned order regarding the conduct of the appellant. On February 17, 2006 an ex parte injunction was passed directing the appellant to maintain status quo with regard to title. Despite the said proceedings the appellant intentionally withheld the information about its amalgamation with R.K.B.K.Fiscal Services Pvt.Ltd. which took place vide order of the

Calcutta High Court on June 05, 2006. The said R.K.B.K.Fiscal Services Pvt.Ltd. was designated as a transferee company in the amalgamation scheme. Hence, this Court on August 04, 2010 in IA No. 5963/2009 held R.K.B.K.Fiscal Services Pvt.Ltd. bound by the interim status quo order vis-a-vis the suit property till final disposal and a direction was passed that the cause title be amended to substitute the transferee company in the array of defendants. A cost quantified at Rs.50,000/-(Rupees fifty thousand only) was imposed on the said R.K.B.K.Fiscal Services Pvt.Ltd. which is now appellant before us for failing to place on record these facts despite interim order dated February 17, 2006. This conduct of the appellant is being noted to reiterate that there can be no equity in favour of the appellant.

54. In view of the above, we affirm the findings of the impugned order. The impugned judgment is upheld and the present appeal is dismissed.

55. There are no serious submissions made by respondent No.1 appearing in person in the cross-objections. In our view the directions in the impugned order to respondents to pay interest @ 6% per annum on the balance unpaid sale consideration from date of filing of the suit till payment are justified. The cross-objections are also accordingly dismissed.

56. No order as to costs.

ILR (2014) III DELHI 1704
CRL. A.

NARESH KUMAR ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 1047/2012 DATE OF DECISION: 16.04.2014

Indian Penal Code, 1860—Section 304 part 1 Section 34—Culpable homicide not amounting to murder—information as to a person mercilessly beaten—DD No. 23B recorded at PS Prashant Vihar—Victim removed to hospital—Spot of occurrence within the jurisdiction of PP Rohini—Intimation given to the concerned police officers—DD No.13 recorded—MLC of injured collected—Injured unfit for statement—on regaining consciousness statement of injured recorded—FIR No.516/07 u/s. 308/341/506/34 registered at PS Prashant Vihar named appellant as one of the assailants—Appellant arrested the same day—one co-accused also arrested at his instance—Baseball bat recovered from the bushes—Victim scummed to injuries—DD No.94 recorded—post mortem examination conducted—Section 302 IPC added charge-sheet filed against appellant and his associate Charge framed prosecution examined 28 witnesses—Claimed false implication in statement u/s. 313 Cr. P.C.—No witness examined in defence appellant held guilty and convicted co-accused acquitted—Appellant preferred appeal—Contended evidence not appreciated in its true and proper perspective—Informant did not support the prosecution—Dying declaration recorded by the IO highly suspect and doubtful—Victim never regained consciousness—No permission from doctor before

recording dying declaration—Victim got discharged against medical advice and shifted to another hospital—Family members of victim lodged complaint against IO for not recording the statement of victim properly—Inordinate delay in recording the statement of witnesses—Case of mistaken indentity appellant had no motive to inflict injuries to the victim—Additional PP contended judgment based on fair appraisal of evidence—IO had no ulterior motive to fabricate or manipulate—Held: MLC contains endorsement of fit for statement at 12.30 PM victim gave detailed account of the incident—Identified appellant and gave sufficient description to fix his indentity—Identity never questioned in cross examination—Plea of mistaken identity has no force—Testimony of witness as regards recording of dying declaration of victim remained unchallenged in cross examination—Genuineness and authenticity of the statement not questioned—Injuries opined to be ante mortem caused by hand blunt force impacts can be caused by baseball bat or similar type of bat—Version corroborated by in entirety by other witness no reason to infer that victim did not make that statement no material to suspect the animus of the IO—Nothing to show the statement to be a result of tutoring or prompting—Statement made without exterior influence or ulterior motive guilt of appellant established by cogent evidence—Judgment needs no interference—Appeal dismissed.

Important Issue Involved: Dying declaration can be made a basis of conviction.

For basing the conviction on the dying declaration it must pass all the tests of voluntariness, the fit condition of mind of the maker of the dying declaration and not being influenced by any other factors and truthfulness of the declaration.

[Vi Ku]

APPEARANCES:

FOR THE APPELLANT : Mr. Harish Khanna, Advocate.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

CASE REFERRED TO:

1. *Laxman* vs. *State of Maharashtra* 2002 (6) SCC 710.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Challenge in this appeal is to a judgment dated 18.08.12 in Sessions Case No.159/11 arising out of FIR No.516/07 registered at Police Station Prashant Vihar by which the appellant-Naresh Kumar was held guilty under Section 304(1)/34 IPC. By an order dated 30.08.2012, he was sentenced to undergo RI for ten years with fine Rs. 5,000/-.

2. The prosecution case, as projected in the charge-sheet, was that on 24.07.2007, Daily Diary (DD) No.23B (Ex.PW-14/A) was recorded at 9.37 a.m. at police station, Prashant Vihar on getting information from mobile number 9958386072 about an individual being mercilessly beaten near Metro Station, Sector-9, Rohini. The investigation was assigned to HC Bharat Lal who with Ct.Mahabir Singh went to the spot. They came to know that the victim had already been taken to BSA hospital. Since the spot of occurrence was within the jurisdiction of Police Post, Rohini, necessary intimation was given to the concerned police officers there. ASI Prem Singh, on receipt of call vide DD No.13 at 11.45 a.m. went to the spot along with Ct.Virender from that police post. After reaching at BSA hospital, he collected the MLC of injured Nand Lal Thakur and met HC Bharat Lal and Ct.Mahabir Singh. The injured was 'unfit' to make statement. At 12.30 p.m. when Nand Lal Thakur regained consciousness, ASI Prem Singh recorded his statement (Ex.PW-22/A) and lodged First Information Report by making endorsement over it under Sections 308/341/506/34 IPC. In the statement, Nand Lal Thakur disclosed that at about 9.25 a.m. when he was going to Rohini courts on foot after getting down from a bus and reached in District Park, Sector 14, Rohini, he was stopped by four/five individuals; two of them were armed with baseball bat and wooden danda; and they inflicted injuries to him. They asked him to withdraw the case filed against them or else they would kill him. He identified Naresh Kumar r/o Budh Vihar,

as one of the assailants and claimed to identify the others also. Further investigation was taken over by SI K.P.Tomar. On the basis of secret information, Naresh was apprehended near gate No.2, Japanese Park, Rohini in the evening same day and at his instance Parveen his associate in the crime, was arrested who recovered a baseball bat from the bushes. On the night intervening 28/29.07.07, Nand Lal Thakur succumbed to the injuries in the hospital and DD No.9A (Ex.PW-28/B) was recorded. Post-mortem examination on the body was conducted and Section 302 IPC was added. During investigation, statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted against Naresh and Praveen. Ram Niwas and Rakesh were kept in column No.2 in the charge-sheet. Without taking cognizance against Ram Niwas and Rakesh, the learned Metropolitan Magistrate committed the case to the Court of Sessions. Naresh Kumar and Praveen were duly charged and brought to trial. The prosecution examined 28 witnesses to establish their guilt. In 313 statements, they denied their complicity in the crime and claimed false implication. They did not examine any witness in defence. On appreciation of the evidence and after considering the rival contentions of the parties, the trial court by the impugned judgment held the appellant-Naresh Kumar guilty for committing the offence mentioned previously. It is pertinent to note that the Praveen was acquitted of the charges. The State did not prefer any appeal to challenge his acquittal and conviction of the appellant-Naresh Kumar under Section 304 (1)/34 IPC instead of 302 IPC.

3. I have heard the learned counsel for the parties and have examined the record. Appellant's counsel urged that the trial court did not appreciate the evidence in its true and proper perspective. PW-1 (Sunil Kumar), the informant, did not support the prosecution regarding identity of the appellant and was not declared 'hostile' by the prosecution. Dying declaration recorded by the Investigating Officer is highly suspect and doubtful. The victim was 'unfit' to make statement as he never regained consciousness after the occurrence. No permission from the concerned doctor before recording the dying declaration was obtained and it is mystery who had declared the victim 'fit for statement' at 12.30 p.m. that day in the absence of any certificate/endorsement of the examining doctor. Since the condition of the patient was critical, his family members got him discharged against medical advice and shifted him to Jaipur Golden hospital. The family members of the victim accused the Investigating Officer for

not recording his statement correctly and lodged a complaint in that regard. Inordinate delay in recording PW-8 (Durga Devi)'s statement under Section 161 Cr.P.C. remained unexplained. The appellant, who is a resident of Rithala Village never resided or carried out any business at Budh Vihar and it was a case of mistaken identity. Co-accused (Praveen) was acquitted on the same set of evidence though crime weapon was alleged to have been recovered at his instance. The appellant had no motive to inflict injuries to the victim. Learned Additional Public urged that the judgment is based upon fair appraisal of the evidence. The Investigating Officer had no ulterior motive to fabricate or manipulate the statement (Ex.PW-22/A) of the deceased-Nand Lal Thakur.

4. Undisputedly, victim-Nand Lal Thakur suffered a homicidal death. Medical evidence is clear on this point. PW-3 (Dr.Bhawna Jain) medically examined the patient on 24.07.2007 by MLC (Ex.PW-3/A). Various injuries on different body parts of the patient were described therein. PW-4 (Dr.K.Goel) conducted post-mortem examination on 29.07.2007. Following external injuries were found on the body:-

(i) Diffuse coalesced bruises all over right arm, right elbow and upper two third of right forearm with ill define rail-road patterns over outer aspect of arm and at places over forearm, blueish-greenish in colour.

(ii) Diffuse bruises all over medial aspect of left arm in area 8' X 3' inches.

(iii) Diffuse coalesced rail-road patterns bruises in area 20 X 14 cm over right side back of chest.

(iv) Diffuse bruises with rail road patterns 10 X 8 cm area over right side chest between right nipple and axilla.

(v) Coalesced rail-road patterns bruises 12 X 7 cm area over right knee placed antero-lateral aspect.

(vi) Surgical stitch wound 11 cm long over back of right forearm. On exploration there was fracture of right ulna bone which was fixed with nails and plate.

(vii) Partly stitched laceration 5 cm long with diffuse bruising in area 15 X 12 cm around with ill defined rail-road patterns over

upper middle front of right leg.

(viii) Coalesced rail-road patterns bruises in area of 14 X 9 cm over front and lateral aspects left knee.

(ix) Coalesced bruises with rail-road patterns scattered all over back of left thigh, left knee and left leg.

(x) Surgical stitched wound about 13 cm long over middle front of left leg and 8 cm long over upper front of left leg. On exploration fracture of left tibia was found fixed with nails and plate.

In his opinion, all the injuries were ante-mortem in nature caused by hard blunt forced impacts. Cause of death was asphyxia (ARDS) as a result of net sequele of long bone fractures. Time of death was ascertained as 08.10 p.m. on 28.07.07. On 27.09.07, he examined the crime weapon i.e. baseball bat and was of the opinion that the injuries with rail–road patterns mentioned in the post-mortem report were possible with the said baseball bat or similar type of such bat. The victim was hale and hearty before the incident. Various injuries of different dimension inflicted to him on his body proved fatal and he expired after five days. Apparently, it was a case of culpable homicide.

5. Crucial testimony is that of PW-22 (Prem Singh, the then ASI) who recorded the dying declaration of the deceased on 24.07.2007 at BSA hospital. He deposed that on 24.07.2007, on receipt of Daily Dairy 13 (Ex.PW-21/A) at around 11.45 a.m. he and Ct. Virender went to BSA hospital and obtained the MLC of injured Nand Lal Thakur who was unfit to make statement. He (SI Prem Singh) waited in the hospital and at about 12.30 p.m. when the victim was declared 'fit for statement' by the doctor, he recorded his statement (Ex.PW-22/A). He lodged First Information Report by making endorsement from point 'C' to 'C' on Ex.PW-22/A. A broken danda (Ex.P-1) handed over to him in the hospital was seized vide seizure memo (Ex.PW-12/A). In the cross-examination, he disclosed that he reached the hospital at about 12/12.15 p.m. and did not meet any family member of the injured there at that time. Apparently, the testimony of the witness regarding recording of the dying declaration of the victim remained unchallenged in the cross-examination. Nothing was suggested if the victim was not in a fit state of mind to make statement. Genuineness and authenticity of the statement (Ex.PW-22/A)

recorded by him was not questioned in the cross-examination. No ulterior motive was assigned to him to fabricate or manufacture a false declaration. The statement (Ex.PW22/A) was taken for the purpose of registering the case in a routine manner. After death, the same was treated as dying declaration. PW-17 (Ct.Virender Singh), who accompanied him to the hospital, also corroborated his version in its entirety. He also deposed that at about 12.30 or 12.40 p.m., the victim was declared 'fit for statement' by the doctor and the Investigating Officer recorded his statement. Rukka was handed over to him and he lodged First Information Report with the Duty Officer. In the cross-examination, the statement made by the victim as recorded by the Investigating Officer was not challenged. PW-15 (Ct.Charan Singh), Computer Operator, at PS Prashant Vihar, at about 2.05 p.m. recorded FIR (Ex.PW-15/A) after getting rukka. He was not cross-examined. From the statements of these witnesses, no sound reasons exist to infer that the victim did not make statement (Ex.PW22/ A) to the Investigating Officer Prem Singh (PW-22). Initially, the FIR lodged on the day of incident itself was for the commission of offence under Section 308/341/506/34 IPC. When the victim succumbed to the injuries on 29.07.2007, Section 302 IPC was added. The name of the appellant emerged in the statement (Ex.PW-22/A) on 24.07.2007 itself and he was arrested that day at around 08.30 p.m. At no stage the appellant suspected the authenticity of the statement (Ex.PW-22/A) recorded by the Investigating Officer. MLC (Ex.PW-3/A) records the arrival time of the patient at BSA hospital as 10.30 a.m. At 10.40 a.m., the victim was 'unfit for statement'. The MLC contains another endorsement 'fit for statement' at 12.30 p.m.. Dr.Bhawna Jain (PW-3) who medically examined the victim with the alleged history of assault by 'some people' proved MLC (Ex.PW-3/A). In the cross-examination, she revealed that the patient was under proper treatment in the hospital and left against medical advice. She was not questioned as to when the victim came to senses and how and in what manner endorsement 'fit for statement' appeared on MLC (Ex.PW-3/A) at 12.30 p.m. Nothing was suggested to her if the patient remained unconscious or was unfit to make statement till his discharge from the hospital by relatives, PW-3 (Dr.Bhawna Jain) had no motive/reason to furnish a false certificate. PW-2 (Madhu Thakur), victim's daughter, and PW-8 (Durga Devi), deceased's wife, have also deposed that the Investigating Officer recorded the statement of victim in the hospital. Their grievance was that it was not recorded correctly and the Investigating Officer left

the name of some of the assailants. Statement (Ex.PW-22/A) contains signature of the victim. The appellant did not challenge that it were not victim's signature.

6. On scanning the statement (Ex.PW-22/A), it reveals that Nand Lal Thakur gave detailed account of the incident and stated that on 24.07.2007 at around 09.25 a.m. when he was going on foot to Rohini Court (where he was a Reader in the court of Sh.Vijay Shankar, MM) after alighting from the bus through District Park, Sector 14, he was surrounded and obstructed by four/five boys. Two of them caught hold of him and the other two who were armed with baseball and wooden danda gave beatings to him. They threatened him to kill in case he did not withdraw the case. He identified Naresh r/o Budh Vihar doing cable business/job as one of the assailants with whom he was acquainted prior to the occurrence. He claimed to identify his associates. Obviously, Naresh r/o Budh Vihar, was named as one of the assailants who inflicted injuries to the victim. The victim gave sufficient description to fix Naresh's identity and informed that he was involved in the cable business. His identity was never questioned or challenged during trial in the cross-examination of the Investigating Officer or family members of the victim. It has come on record that Ram Niwas who was one of the suspects, shown in column No.2, was facing trial in a rape case. The appellant Naresh is his nephew and was associated with him in his cable business. PW-2 (Madhu Thakur), victim's daughter, admitted that Naresh used to reside at village Rithala. Specific suggestion was put to her that Naresh was falsely implicated because she had personal enmity with Ram Niwas with whom Naresh was working. PW-8 (Durga Devi), deceased's wife, disclosed that Ram Niwas cable operator in the locality where she was residing, was known to her and he was an accused in a rape case in which her daughter was a prosecutrix. She admitted that Naresh was Ram Niwas's nephew. She disclosed that she knew Naresh as he was also working with Ram Niwas in operating cable network. It is relevant to note that Budh Vihar and Rithala are located nearby. The appellant's plea that it was a case of mistaken identity has no force at all and deserves outright rejection.

7. In the dying declaration, the victim disclosed that the crime weapon was a baseball bat. This finds corroboration in the testimonies of informant PW-1 (Sunil Kumar) and PW-11 (Virender Singh Mann). On 24.07.2007, PW-1 (Sunil Kumar) present at the District Park noticed

that two or three persons were giving beatings to an individual with a baseball bat. He made call at 100 from his mobile No.9958386072. He deposed that after some time, PCR van came and he pointed out the place where the victim was given beatings. He also showed them the broken danda of the base ball. In the cross-examination, he informed that the PCR van came to the spot within 10/15 minutes. PCR official summoned the ambulance. The victim was unable to speak at that time. The two pieces of base ball bat were taken by PCR officials.

PW-11 (Virender Singh Mann) posted at CATS Ambulance station, Mangol Puri deposed that at about 09.50 a.m., on receipt of PCR call, he along with Ajay Kumar Sharma went to the spot. The victim was in a delirious condition; was not in a position to disclose anything and had injuries on his hands, legs. He was admitted vide MLC No.3832 CR No.61504 in BSA hospital. His personal belongings were handed over to the duty constable. Form (Ex.PW-11/A) was filled. Local police met him in the hospital and he pointed out the place where the injured was found lying. In the cross-examination, he disclosed that he had handed over the base ball bat to the duty constable. PW-12 (ASI Vijay Kumar) duty constable in BSA hospital, also corroborated his version and stated that Incharge of CATS Ambulance, Mr.V.K.Maan had admitted Nand Lal Thakur in the hospital. Base ball/danda on which a label of RBK (Dhoni) smash was affixed, was produced by him stating that it was found lying near the injured at the spot. This bat (Ex.P-1) was handed over subsequently to ASI Prem Singh.

8. Appellant's conviction is primarily based upon the dying declaration recorded by the Investigating Officer. It is a settled proposition of law that dying declaration can be made a basis of conviction. There can be no dispute that for basing the conviction on the dying declaration, it must pass all the tests of voluntariness, the fit condition of mind of the maker of the dying declaration and the witness not being influenced by any other factors and truthfulness of the declaration (**Laxman vs.State of Maharashtra** 2002 (6) SCC 710). In the instant case, there is nothing on record to show that the statement (Ex.PW22/ A) was the result of any tutoring or prompting or a product of imagination. There was no material on record to suspect that the Investigating Officer had any animus against the appellant or was in any way interested in fabricating the dying declaration. The deceased fully possessed the power to understand the implication of his statement and the same was made

without any exterior influence or ulterior motive. The victim was fair enough not to name the other assailants though he had specific grudge against Ram Niwas and the trial court despite his name shown in column No.2 in the charge-sheet, did not initiate any proceedings against him. Even Praveen who faced trial with the appellant, was not named by the victim and was acquitted of the charge. The deceased was hale and hearty prior to the incident and was on his way to attend his duty. He had direct confrontation with the assailants during day time for sufficient duration and had reasonable and clear opportunity to observe and identify them. Since the appellant was acquainted with him prior to the incident, the victim was able to name him in his dying declaration. The other assailants who were not known to him and perhaps were hired goons could not be identified and named by him in his statement.

9. The prosecution has adduced evidence that Ram Niwas, appellant's uncle, was facing criminal proceedings in a rape case where deceased's daughter, was a prosecutrix. PW-24 (ASI Sajjan Singh) disclosed that case vide FIR No.895/2005 under Sections 365/376/506/34 IPC registered at Police Station Sultan Puri was pending before the court where the next date of hearing was 21.09.2011. PW-8 (Smt.Durga Devi) clearly deposed that her husband was murdered because of the enmity due to rape case of her daughter in which Ram Niwas etc. were the accused. She and her husband were also implicated in case FIR No.502/2006 (Ex.PW-9/A) registered at PS Rohini lodged by Rekha (Krishan Pal @ Babloo's wife) against them. The appellant being Ram Niwas's close relative had motive to inflict injuries and criminally intimidate the victim to withdraw the said criminal case lodged against his uncle.

10. PW-1 (Sunil Kumar) was the informant to the police. In his statement under Section 161 Cr.P.C., he did not claim to recognize the assailants. He did not give broad features/description of the assailants while making call from his mobile at 100. DD No.23B recorded on the basis of information conveyed by him even does not record the number of assailants. When PW-11 (Virender Singh Maan) went to the spot, he did not find him there. Only PCR officials were found at the spot. PW-1 claimed that he left the spot between 09.30-9.45 a.m. He did not stay to record his statement and to inform the police about the number of assailants and their broad features. Only in the cross-examination, he disclosed that he could identify the assailants and the accused facing trial before the court were not the assailants. Since this witness was not relied

on as an eye-witness, his statement in the cross-examination that the accused persons were not the assailants has little value. Acquittal of coaccused Praveen is inconsequential. Praveen was acquitted for lack of evidence and his name did not find mention in the dying declaration. The prosecution was able to establish appellant's guilt by leading cogent and clinching evidence. The impugned judgment is based upon fair appreciation of the evidence and needs no interference. Since an old man was mercilessly beaten and multiple injuries were inflicted on his body without any fault of his, the sentence awarded to the appellant cannot be termed unreasonable or excessive.

11. In the light of the above discussion, the appeal is dismissed as unmerited. The conviction and sentence awarded by the trial court are sustained. Trial court record be sent back forthwith along with the copy of this order.

ILR (2014) III DELHI 1714
W.P. (C)

A.I.I.M.S. NEW DELHI ....PETITIONER

VERSUS

UDDAL & ORS. ....RESPONDENT

(JAYANT NATH, J.)

W.P. (C) NO. : 870/200 3 DATE OF DECISION: 21.04.2014

Industrial Disputes Act, 1947—Section 25F—Petitioner challenged before High Court award Passed by Labour Court holding that respondents no. 1 and 2 have been in continuous service for 5 and 4 years respectively and their services were terminated without complying with mandatory conditions specified in Section 25F of Act—Plea taken, finding recorded by Labour Court

that Petitioner is industry is erroneous—Onus to Prove that workman had worked for 240 days is on respondent workman—All India Institute of Medical Sciences is industry—Held—A Division Bench of this Court has already held that petitioner is industry within meaning of Industrial Disputes Act, 1947—There is no reason to take a different view here—Reply filed by petitioner to statement of claim is utterly vague and bereft of details—A specific averment is made by workmen about date of their employment, date of their termination and that they have worked for 240 days in each completed year of service—Written statement of Petitioner simply accepts that they were employed in AIIMS but failed to give period of employment—Labour Court cannot be faulted in making adverse inference against petitioner—There is also no merit in contention of learned counsel for petitioner that respondents failed to discharge onus on them to prove that they have worked for 240 days is on respondents—In view of pleadings and evidence placed on record by respondents workmen, there is no merit in submission of petitioner.

Important Issue Involved: When reply filed by Management to statement of claim of workman is utterly vague and bereft of details, the Labour Court cannot be faulted in making adverse inference against the Management.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Razat Katyal and Mr. Rishab Kaushik, Advocates.

FOR THE RESPONDENT : Mr. Ashok Gurnani, Advocate.

CASES REFERRED TO:

1. *Grand Vasant Residents Welfare Association* vs. *DDA & Ors.* in LPA no. 775/2003 decided on 05.03.2014.

2. *A. Shanmugam* vs. *Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam* 2012 (6) SCC 430.
3. *Rameshwari Devi* vs. *Nirmala Devi* 2011 (6) SCALE 677.
4. *P.K. Gupta* vs. *Ess Aar Universal (P) Ltd.* RFA (OS) 78/ 2011.
5. *Director, Fisheries Terminal Division* vs. *Bhikubhai Meghajibhai Chavda,* (2010) 1 SCC 47.
6. *M/s. Sriram Industrial Enterprises Ltd.* vs. *Mahak Singh & Ors.,* AIR 2007 SC 1370.
7. *Surendranagar District Panchayat and Anr.* vs. *Jethabhai Pitamberbhai, JT* 2005 (9) SC 163.
8. *Range Forest Officer* vs. *S.T.Hadimani,* (2002) 3 SCC 25.
9. *Bangalore Water Supply & Sewerage Board* vs. *A. Rajappa & Ors.,* (1978) 2 SCC 213.

RESULT: Dismissed

JAYANT NATH, J. (Oral)

1. The present writ petition is filed challenging the Award dated 30.03.2002 passed by the Labour Court holding that the workmen in question Shri Uddal Singh and Sh. Desh Pal have put in more than five years and four years of continuous service respectively under the Management when their services were terminated and that they are entitled to protection under Section 25 F of the Industrial Disputes Act, 1947.

2. The workman Uddal Singh (respondent No.1) states that he joined employment of the petitioner on 21.01.1987 as daily wager 'Beldar' in the Engineering Services Department where he is stated to have worked up to 21.02.1992 continuously without any break. He states that he has put in more than 240 days of actual work in each completed year of service. His services were terminated vide oral order.

3. The other workman Desh Pal (respondent No.2) claims to have joined the petitioner on 21.03.1988 and makes the same submission of having put in more than 240 days of service in each year. He also served upto 21.2.1992.

4. Respondents No.1 and 2 raised an industrial dispute which was referred for adjudication to the Labour Court. The references were disposed of by a common judgment inasmuch as common question of facts and law were involved.

5. The reference by the Government of NCT of Delhi regarding the case of Uddal Singh reads as follows:-

> *"Whether the services of Sh.Uddal Singh have been terminated illegally and/or unjustifiably by the management, and if so, to what relief is he entitled and what directions are necessary in this regard."*

6. Reference for Sh. Desh Pal is also the same.

7. On 06.01.1995 the Labour Court framed common issues which reads as follows:-

> *"1. Whether the petitioner is a workman and the management is an industry as defined under the I.D. Act?*
>
> *2. As in terms of reference."*

8. In Uddal Singh's case (respondent No.1) the workman filed his own evidence i.e. being Ex. WW-1. The petitioners filed evidence of Mr.R.K.Gangal as Ex. MW-1. In the case of Sh. Desh Pal (respondent No.2), the said respondent also filed his own evidence and Sh. R.K. Gangal was examined as MW-1. Later on the petitioner also filed the evidence of Mr.Suresh Bhaskar as MW-2 in both the cases.

9. As far as issue No.1 is concerned, namely, as to whether the respondents are workmen, the Labour Court held respondents No.1 and 2 to be workmen. It also held the petitioner to be an industry as defined within the meaning of Industrial Disputes Act.

10. On the main merits of the case, the impugned Award holds that respondents No. 1 and 2 have been in continuous service for 5 and 4 years respectively and on 21.02.1992 their services were terminated. It was further held that each workman has put in more than 240 days of actual work and is entitled to protection under Section 25 F of the Industrial Disputes Act. It was also held that it is not the case of the petitioners that at the time of termination of services of the workmen, any of the mandatory conditions specified in Section 25 F of the Act

have been complied with. In view of the said findings, the impugned Award holds that the workmen are entitled to reinstatement with full back wages and continuity of service. The Award holds that there are specific assertions of facts made by the respondents workmen regarding their period of employment which the Management have simply denied without specifying the exact date of engagement and exact date of termination and hence, the denial is utterly vague and no denial in the eyes of law.

11. Learned counsel for the petitioner has raised two submissions. He firstly submits that the finding recorded by the Labour Court that the petitioner is an industry is erroneous. He submits that the definition of industry as propounded by the Supreme Court in the case of **Bangalore Water Supply & Sewerage Board vs. A. Rajappa & Ors.,** (1978) 2 SCC 213 was referred to a Larger Bench and this Court should wait for the decision of the Larger Bench of the Hon'ble Supreme Court.

12. He secondly submits that the onus to prove that the workman had worked for 240 days is on the respondent workmen. He relies upon the judgments of **Range Forest Officer vs. S.T.Hadimani,** (2002) 3 SCC 25 and **Surendranagar District Panchayat and Anr. vs. Jethabhai Pitamberbhai,** JT 2005 (9) SC 163 to contend that it is for the workman to prove that he has worked for 240 days in a year preceding his termination by appropriate proof of salary and wages or record of appointment or engagement, etc. and that mere averment on oath would not be sufficient.

13. Learned counsel appearing for the respondents has refuted the contention of the petitioner. He submits that as far as the issue of industry is concerned, this High Court has already held that the petitioner i.e. All India Institute of Medical Sciences is an industry and there is no stay order against the said judgment or of the matter or any interim orders to the contrary.

14. On the issue of onus, he relies upon the judgments of the Supreme Court in the case of **Director, Fisheries Terminal Division vs. Bhikubhai Meghajibhai Chavda,** (2010) 1 SCC 47 and **M/s. Sriram Industrial Enterprises Ltd. v. Mahak Singh & Ors.,** AIR 2007 SC 1370 to contend that the subsequent judgments of the Hon'ble Supreme Court have held that the burden of proving that the workman has worked for 240 days in a year is discharged upon the workman adducing cogent

evidence. The Court also noticed that in most cases workmen can only call upon the employer to produce the muster roll for the period in question, letter of appointment, proof of payment of wages, etc. as no letters of appointment are issued, wages would be paid in cash and hence the workman would have no such record in his possession. It is stated that in the case of **Director, Fisheries Terminal Division vs. Bhikubhai Meghajibhai Chavda** (supra) the court accepted the statement of workman that he worked for 240 days prior to the date of termination as sufficient proof. Hence, he submits that there are no grounds to interfere with the Award passed by the Labour Court.

15. It may be noted that the matter was referred to Lok Adalat where Mr.Attar Singh, Chief Administrative Officer of the petitioner had pointed out that Mr.Uddal Singh, respondent No. 1 has already been given the status of temporary employee and that he will be considered for regularization as per the policy of AIIMS in due course. The second respondent, Desh Pal expired on 11.12.2004. The legal heirs of the said deceased respondent No. 2 were permitted to be brought on record vide order dated 25.08.2006.

16. Regarding the first contention of the learned counsel for the petitioner, a Division Bench of this Court in the case of **A.I.I.M.S. vs. Raj Singh,** 2009 (1) LLJ 499 has already held that the petitioner is an industry within the meaning of Industrial Disputes Act. Further, in that case the Court did not accept the submission that it should await the judgment of the larger Bench. There is no reason to take a different view here.

17. Coming to the second contention, it would be necessary to first look at the pleadings of the parties as made before the Labour Court.

18. For the present purpose we look at the statement of claim filed by Mr. Uddal Singh, respondent No.1. Paras 1 and 2 of the said Statement of Claims reads as follows:-

> "1. That the petitioner joined the A.I.I.M.S. on 21.01.1987 as a daily wager and worked in the Engineering Service Department of the Institute as a Beldar under the Supervision of Shri Suresh Bhaskar (J.E.) and Shri Chander Mani (A.E.) I worked upto 21.2.1992 when my services were terminated by the verbal order of the J.E. A demand notice has been duly served on the management on 4.3.1992.
>
> 2. That the petitioner worked the above said work in the institute without any break in service and put in more than 240 days of actual work in each completed year of his service. The services of the petitioner have been illegally, arbitrarily and without assigning any reason terminated by the officials of the management on the 21st day of February, 1992. No notice or pay in lieu of notice as stipulated under the provisions of the I.D. Act 1947 was given to the petitioner."

19. The written statement to the above Statement of Claim by the petitioner reads as follows:

> "1. Para 1 of the statement of claims is wrong and denied. It is denied that the workman had joined the services at AIIMS on 21.07.1987 as a daily wager and worked in the Engineering Service Department of the AIIMS as a Carpenter under the supervision of Shri Suresh Bhaskar J.E. and Shri Chander Mani, A.E. It is also denied that the workman worked upto 21.02.1992.
>
> 2. Para 2 of the statement of claims is wrong and denied. It is denied that the workman worked in AIIMS without any break in service and it is also denied that the workman has put in 240 days of actual work in each completed year of his service. It is also denied that the services of the workman illegally, arbitrarily and without assigning any reasons were terminated by the officials of the Management on 21-2-92. It is submitted that all the allegations levelled against the Management are weird, was vague and baseless. It has been submitted by the workman that his service was terminated by the officials he has not specified the number of officials as well as their names. Such kind of a frivolous pleas are not tonable in law. It is also submitted that no notice is required to be given to the workman who is a daily wager and working against a non regular post. It has already been submitted by the management that the petitioner is not a workman under the I.D.Act and the Management/AIIMS is not an industry defined under the I.D.Act."

20. On the issue of pleadings a Division Bench of this Court in the case of **Grand Vasant Residents Welfare Association vs. DDA &**

<u>Ors.</u> in LPA no. 775/2003 decided on 05.03.2014 in paras 30 and 32 held as follows:

> "31. On November 21, 2011 this Court while deciding RFA (OS) 78/2011 **<u>P.K. Gupta vs Ess Aar Universal (P) Ltd.</u>** held as under:
>
> 11. We need to highlight that the fundamental principles, essential to the purpose of a pleading is to place before a Court the case of a party with a warranty of truth to bind the party and inform the other party of the case it has to meet. It means that the necessary facts to support a particular cause of action or a defence should be clearly delineated with a clear articulation of the relief sought. It is the duty of a party presenting a pleading to place all material facts and make reference to the material documents, relevant for purposes of fair adjudication, to enable the Court to conveniently adjudicate the matter. The duty of candour approximates uberrima fides when a pleading, duly verified, is presented to a Court. In this context it may be highlighted that deception may arise equally from silence as to a material fact, akin to a direct lies. Placing all relevant facts in a civil litigation cannot be reduced to a game of hide and seek. In the decision reported as 2011 (6) SCALE 677 **<u>Rameshwari Devi vs. Nirmala Devi</u>** the Supreme Court highlighted that pleadings are the foundation of a claim of the parties and where the civil litigation is largely based on documents, it is the bounden duty and obligation of the Trial Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties.
>
> xxx
>
> 32. In the decision reported as 2012 (6) SCC 430 **<u>A. Shanmugam vs Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam</u>** it was held as under:"
>
> 27. The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands."

21. Clearly the reply filed by the petitioner is utterly vague and bereft of details. A specific averment is made by the workmen about the date of their employment, date of their termination and that they have worked for 240 days in each completed year of service. The written statement of the petitioner simply accepts that they were employed in AIIMS but failed to give the period of employment. In view of the legal position as stated above, the Labour Court cannot be faulted in making adverse inference against the petitioner.

22. There is also no merit in the contention of the learned counsel for the petitioner that the respondents failed to discharge the onus on them to prove that they have worked for 240 days is on the respondents.

23. A reference may be had to the evidence led by the workmen. For the said purpose I will refer to the evidence by way of affidavit by Mr. Uddal Singh. In his evidence he states as follows:-

> "2. That I joined the A.I.I.M.S. as a Beldar on 21.1.1987 on daily wages basis and worked in the Engineering Service Department as a Beldar under the Supervision of Sh. Suresh Bhaskar, as J.E. and Shri Hiroo Chander Mani A.E. I performed my duties in the teaching and P.C. Block under the supervision of the above said officials. I worked with the above said management upto 21.2.1992 on which date my services have been terminated by a verbal order of the above said J.E.
>
> 3. That I have worked with the above said institute without any break in service and I have worked for more than 240 days in each completed year of service. My services have been terminated illegally and arbitrarily without assigning me any reason for the same. No notice or pay in lieu of notice as stipulated under the provisions of the I.D. Act was given to me."

24. The respondents have rightly placed reliance on the judgment of the Supreme Court in the case of **Director, Fisheries Terminal Division vs. Bhikubhai Meghajibhai Chavda** (supra.) The Supreme Court in the said judgment in paras 16 and 17 while quoting an earlier judgment held as follows:-

"16. This court in the case of **R.M. Yellatti vs. Asstt. Executive Engineer** has observed: (SCC p.116, para 17)

"17. ... However, applying general principles and on reading the [aforesaid] judgments, we find that this Court, has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping up in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment of termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case"

17. Applying the principles laid down in the above case by this Court, the evidence produced by the appellants has not been consistent. The appellant claims that the respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this court pointed out in the above case that he would have difficulty in having access to all the official documents, muster rolls etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the appellant employer to prove that he did not complete 240 days of service in the requisite period to constitute continuous service."

25. In the facts of that case the court kept into account the fact that a daily wage earner would not have a letter of appointment and would have no receipt or proof of payment of wages, accepted the deposition of the workman who clearly stated that he had worked for more than 240 days continuously.

26. In view of the pleadings and the evidence placed on record by the respondents workmen, I see no merit in the submission of the petitioner. There are no reasons to interfere in the findings of fact recorded

by the Labour Court. The present writ petition is accordingly dismissed. No orders as to costs.

ILR (2014) III DELHI 1724
W.P. (C)

D.T.C. ....PETITIONER

VERSUS

AMARJEET SINGH & ANR. ....RESPONDENTS

(JAYANT NATH, J.)

W.P. (C) NO. : 400/2003 DATE OF DECISION: 22.04.2014

Industrial Disputes Act, 1947—Section 33(2)(b)—Order passed by Industrial Tribunal dismissing Petition of petitioner seeking approval of its directions for removal of respondent from service, challenged before High Court—Plea taken, evidence of a ticketless passenger is not necessary for petitioner to prove type of charges that were leveled against respondent—per contra plea taken, in present case there was evidence on record before Enquiry Officer to show that one of two passengers on basis of whose statement Checking Team had made a report, had sent a written communication pointing out that Conductor was not at fault and passenger had asked him for a ticket which was given to him by Conductor—This fact clearly falsifies statement of Checking Team and there is no basis to disregard findings recorded by impugned order—Held—Considering two conflicting statements, impugned order records a finding disbelieving version of petitioner and hence holds that petitioner has not been able to establish charges against respondent—There is no perversity in said conclusion drawn by

impugned order—Appreciation of evidence is within domain of Tribunal—Findings of fact recorded by fact finding authority duly constituted for said purpose cannot be disturbed for reason of having been based on materials or evidence not said to be sufficient by Writ Court as long as findings are based on some materials on record which are relevant for said purpose—Merely because another view was possible would not be a ground to set aside said findings—petitioner failed to show as to why finding recorded by Tribunal is liable to be set aside—it is true that in this case there is evidence of inspecting staff which carried out checking to show that two of passengers had been given tickets of less denomination—Yet in present case one of passengers has written a communication to petitioner clearly pointing out that he had been issued a ticked which he had requested for and conductor did nothing wrong—This evidence of passenger has gone un-rebutted—There is nothing on record to show that statement of passenger was obtained under any influence—In light of this evidence, statement of Inspecting staff cannot be unequivocally accepted—Petition is without merit and is dismissed—Order of Tribunal is upheld—However, in case petition implements order of Tribunal dated 18.03.2002 within three months from today, namely, that he will be satisfied in case 50% of back wages plus relief of re-instatement is given to him.

Important Issue Involved: The findings of fact recorded by a fact-finding authority duly constituted for the said purpose cannot be disturbed for the reason of having been based on materials or evidence not said to be sufficient by the Writ Court as long as the findings are based on some materials on record which are relevant for the said purpose. Merely because another view was possible would not be a ground to set aside the said findings.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Adesh Kumar Gill, Advocate.

FOR THE RESPONDENTS : Mr. Atul T.N. Advocate.

CASES REFERRED TO:

1. *DTC* vs. *Anup Singh,* 2006 (133) DLT 148 (DB).

2. *Divisional Controller, KSRTC (NWKRTC)* vs. *A.T.Mane,* (2005) 3 SCC 254.

3. *Jaipur Zila Sahakari Bhoomi Vikas Bank Limited* vs. *Ram Gopal Sharma & Ors.,* AIR 2002 SC 643.

4. *State of Haryana & Anr.* vs. *Rattan Singh,* (1977) 2 SCC 491.

RESULT: Dismissed.

JAYANT NATH, J. (Oral)

1. The present writ petition is filed seeking to quash the impugned order dated 18.03.2002 passed by the Industrial Tribunal dismissing the petition of the petitioner under Section 33(2)(b) of the Industrial Disputes Act, 1947 by which petition the petitioner sought approval for its directions for removal of the respondent from service.

2. The basic facts which lead to filing of the present petition are that the respondent was employed as a Conductor by the petitioner. On 04.05.1989 the respondent was performing his duty as a Conductor on the route of New Delhi-Bulandshahr. Members of the Ticket Checking Staff of the petitioner inspected the Bus. It was found that two passengers were travelling in the Bus on the tickets of less denomination of Rs.2.50/- each valid from Sikandrabad to Dadri. These two passengers had boarded the Bus at Sikandrabad for going to Ghaziabad. The two passengers told the Checking Staff that they had paid fare charges of Rs.5.00/-per ticket to the Conductor whereas they were issued tickets only of the denomination of Rs.2.50. On the basis of the report of the Checking Staff, the Manager of the concerned Depot i.e. BBM Depot, issued charge-sheet dated 15.05.1989 to the respondent for causing financial losses to the employer and for committing irregularity and misconduct within the meaning of Executive Instructions regarding the

duties of a Conductor and the Standing Orders governing the conduct of DTC employees. An enquiry was conducted into the charges. The Enquiry Officer found the charges proved. The Manager, BBM Depot acted as the Disciplinary Authority and issued a show cause notice on 25.07.1989 to the respondent with proposed punishment of removal from service. The Disciplinary Authority passed the order to confirm punishment of removal from service of the respondent on 29.05.1990 and on the same day remitted one month's salary by way of Money Order and an appropriate petition under Section 33(2)(b) of the Industrial Disputes Act was also filed before the Industrial Tribunal.

3. The Industrial Tribunal framed a preliminary issue on 06.03.1991 which reads as under:-

> "Whether the applicant held a legal and valid enquiry against the respondent according to principles of natural justice?"

4. Vide order dated 29.03.2001 the issue was decided against the petitioner as the Report of the Enquiry Officer was found perverse inasmuch as the Enquiry Officer admitted that letter Ex.RW-1/2 was received from one of the defaulting passengers before he submitted his findings. This letter was written in response to summons issued to the said passengers by the Enquiry Officer. While finalising his report the Enquiry Officer did not take into consideration the communication received from the said passenger. The said communication states that the said passenger had asked the Conductor to issue him a ticket only till Dadri. He states that he had informed the Checking Team that he had slept and hence could not get off at his destination point. He has said that the Checking Officer insisted upon him to disclose his address and he had complied with his request. He got down from the Bus at Ghaziabad and the Conductor was not at fault. As the said document was not dealt with at all by the Enquiry Officer despite receipt of the same, the report was held to be perverse.

5. On 29.03.2011 the following additional issues were framed by the Industrial Tribunal

> "1) Whether the respondent committed the misconduct as mentioned in the petition and alleged in the charge sheet, issued by the petitioner?
>
> 2) Whether the petitioner remitted one month's wage to the respondent at the time of his removal from service?
>
> 3) Relief."

6. The parties led their evidence. The petitioner filed evidence of Mr.Sanjay Saxena, Depot Manager Shahdara-I, Delhi, the Enquiry Officer AW-1, Mr.Inder Pal Singh, AW-2 and Mr.Kanhaiya Lal, AW-3. Respondent filed his own evidence being RW-1.

7. The Tribunal held issue No.1 against the petitioner. The impugned order relies upon communication dated 19.06.1989 being RW-1/2 which was received from passenger Ranvir Singh. In the said letter the said passenger has stated that he had asked the Conductor to give a ticket only till Dadri. He had gone to sleep and hence could not get off at the right stand and realised this when Checking Officer entered the Bus. These facts as contained in the said letter were at variance with the statement recorded on the back of the challan of the said two passengers by the Inspecting Team. The impugned order further holds that the petitioner had the residential address of the two passengers in their possession. The passengers could have been summoned to make their statement before the Tribunal and to clarify the correct position. Needful was not done and no request was made to summon the said passengers. Therefore, the facts as presented by the petitioner were held to be completely at variance with the un-rebutted statement of the passenger as contained in letter dated RW-1/2. As it was for the petitioner to establish the facts, the impugned order concludes that the petitioner had failed to do the needful. Based on these facts, the Tribunal concluded that the petitioner has not been able to establish the charges that the respondent/ Conductor collected fare charges of Rs.5.00/-from two passengers for their journey from Sikandrabad to Ghaziabad and then issued them a ticket of Rs.2.50/-each for their journey from Sikandrabad to Dadri.

8. On Issue No. 2, the impugned order had held in favour of the petitioner.

9. In view of the finding on issue No.1, the necessary approval as sought by the petitioner was not given for its action of removal of respondent from service under Section 33(2)(b) of the Industrial Disputes Act and the petition of the petitioner was rejected.

10. Learned counsel appearing for the petitioner has strenuously

urged that the finding in the impugned order is entirely misconceived. He relies upon the judgment of the Supreme Court in the case of **State of Haryana & Anr. vs. Rattan Singh,** (1977) 2 SCC 491 and **Divisional Controller, KSRTC (NWKRTC) vs. A.T.Mane,** (2005) 3 SCC 254 to state that in similar facts the Supreme Court has taken the view that the evidence of a ticketless passenger is not necessary for the petitioner to prove the type of charges that were levelled against the respondent.

11. On the other hand, learned counsel appearing for the respondent submits that firstly there is no challenge in the present writ petition by the petitioner to the order dated 29.03.2001 where the preliminary issue was decided against the petitioner and the report of the Enquiry Officer was held to be perverse. Hence, it is submitted that the said order has attained finality.

12. Regarding the impugned order he submits that the judgments cited by the learned counsel for the petitioner can easily be distinguished on the facts of the present case inasmuch as in the present case there was evidence on record before the Enquiry Officer to show that one of the two passengers on the basis of whose statement Checking Team had made a report, had sent a written communication pointing out that the Conductor was not at fault and that the passenger had asked him for a ticket which was given to him by the Conductor. This fact clearly falsifies the statement of the Checking Team and there is no basis to disregard the findings recorded by the impugned order. He also relies upon the judgment of the Division Bench of this High Court in the case of **DTC vs. Anup Singh,** 2006 (133) DLT 148 (DB) where this Court had in somewhat similar facts pointed out that though it may not be possible in every case for the passenger to be examined as witnesses, especially keeping in view the judgment of the Supreme Court in the case of **State of Haryana & Anr. vs. Rattan Singh** (supra) but other forms of evidence can certainly be placed on record to prove that the fare charges were collected without tickets being issued. For instance it should have been possible for the Checking Staff to tally the cash in the Conductor's hand with the tickets issued etc. He also relies upon the judgment of Constitution Bench in the case of **Jaipur Zila Sahakari Bhoomi Vikas Bank Limited vs. Ram Gopal Sharma & Ors.,** AIR 2002 SC 643 to submit that when a permission under Section 33(2)(b) of the Industrial Disputes Act is declined, a necessary consequence

would be that the employee continues to be in service as if order of discharge or dismissal has never been passed and the employee would be deemed to have continued in service and entitled to all consequential benefits. However, he submits that his client has spent a lot of time in litigation and that he has instructions from the respondent who is present in court, to submit that his client would be willing to accept 50% of back wages as a gesture to try and sort out the matter, apart from reinstatement.

13. The only ground on the basis of which the impugned order has been challenged by the petitioner is that the version as given by the Checking Staff has been disbelieved by the impugned order on the basis of the fact that evidence of the two passengers was not led. The Checking Staff has on the challan, which is a small piece of paper, recorded statements of the two passengers claiming that they had paid a sum of Rs.5.00/- but they had been issued a ticket for Rs. 2.50/-(Ex.AW-3/3).

The evidence that has been led by the petitioner is of Mr.Sanjay Saxena, AW-1, the Depot Manager of Shahadara Depot who conducted the enquiry and has proved the enquiry proceedings. AW-2 Mr. Inder Pal Singh has proved the dispatch of one month's salary to the respondent by means of Money Order. The third witness is AW-3 Kanhiya Lal.

14. AW-3 is the relevant witness regarding the issue urged by the petitioner. AW-3 Kanhiya Lal was a member of the Vigilance Squad which checked the Bus along with another traffic inspector on 04.05.1989. The said witness has proved the challan which was issued to the respondent as AW-3/1, the statement of passengers which is AW-3/2, tickets AW-3/3 (colly.) and the report that was prepared pursuant to the checking is exhibited as AW-3/4. Ex.AW-3/2 i.e. the statements of the passengers noted on the reverse of AW-3/1 reads as follows:-

"(Translated)

I boarded the bus from Sikandrabad for Ghaziabad and gave Rs.5 to the conductor. The ticket given to me had ticket no. 69134.

Anil Kumar s/o
Shri Ram Kumar c/o
House No. 232,
Mauhalla Sabji Vada,

Sikandrabad
Bulandshahr

I boarded the bus from Sikandrabad for Ghaziabad. I gave Rs. 5 to the conductor and he gave me ticket bearing number 69132.

Ranvir Singh c/o
Village & PO Bilas Pur
Dist. Bulandshahr"

15. In contrast to the above evidence, the communication that was received from the passenger, Ranvir Singh which is RW-1/2 reads as follows:-

"(Translated)

To,
Delhi Transport Department
Indraprastha Depot

Date: 19.06.89 Sir, I am writing in response of your letter no. E.O (I-A)..... dated 12.06.89. As enquired by you in your letter stated above, it is true that I travelled in your bus on 4.05.89. I asked the conductor to give me a ticket for Dadri and took back the rest of the money. A little ahead of Dadri the Checking Team came and asked me for my ticket. I showed them my ticket to which they asked as to why I have travelled beyond Dadri. I told them that I suddenly fell asleep and the conductor at that time was doing some work and was sitting in the front seat of the bus. I asked them to issue me a ticket till Ghaziabad, but they did not do so. The Checking Team started enquiring and I had to give my address to them. The bus dropped me off at Ghaziabad.

The conductor is at no fault here and I request you to not take any action against him.

Thanking You,
Yours Faithfully,
Ranvir Singh
Village Bilaspur
District Bulandshahr
Uttar Pradesh."

The respondent RW-1 who tendered the said letter RW-1/2 has not been cross-examined on the same by the petitioner.

16. Considering the two conflicting statements, the impugned order records a finding disbelieving the version of the petitioner and hence holds that the petitioner has not been able to establish the charges against the respondent.

17. In my view there is no perversity in the said conclusion drawn by the impugned order. The appreciation of evidence is within the domain of Tribunal. The findings of fact recorded by a fact-finding authority duly constituted for the said purpose cannot be disturbed for the reason of having been based on materials or evidence not said to be sufficient by the Writ Court as long as the findings are based on some materials on record which are relevant for the said purpose. Merely because another view was possible would not be a ground to set aside the said findings. The petitioner failed to show as to why the finding recorded by the Tribunal is liable to be set aside.

18. The judgments relied upon by the learned counsel for the petitioner pertaining to the case of **State of Haryana & Anr. vs. Rattan Singh** (supra) and **Divisional Controller, KSRTC vs. A.T.Mane** (supra), would not apply to the facts of the present case. It is true that in this case also there is evidence of the inspecting staff which carried out the checking to show that two of the passengers had been given tickets of less denomination. Yet in the present case one of the passengers has written a communication to the petitioner clearly pointing out that he had been issued a ticket which he had requested for and the conductor did nothing wrong. This evidence of the passenger has gone un-rebutted. There is nothing on record to show that the statement of the passenger was obtained under any influence. In the light of this evidence, the statement of the Inspecting staff cannot be unequivocally accepted.

19. The judgment of the Division Bench of this High Court on the facts of this case would be applicable to the present case, i.e., the judgment in the case of **DTC vs. Anup Singh** (supra). That case also pertains to an employee of the petitioner who was working as a Conductor. Four persons were found to be travelling in the Bus without tickets. In those facts this court in para 16 held as follows:-

"16. We may add here that we may not be understood as holding

that in every such case the passengers will have to be examined as witnesses. We are aware that it may not always be possible to examine the passengers themselves. We are also conscious of the decision of the Hon'ble Supreme Court in this regard in **State of Haryana v. Rattan Singh** (1977) 2 SCC 491. But, surely, there are other forms of evidence which can go to prove that fare charges were collected without tickets being issued. For instance, it should have been possible for the checking staff to tally the cash in the conductor's hand with the tickets issued and record this contemporaneously in writing in any known and acceptable form which can be proved in the enquiry by the author of the document. This is only one possible method, there might be others too. We are, in the facts of this case, unable to accept the plea of the learned Counsel for the appellant that there is enough evidence on record to prove the guilt of respondent. Accordingly, we see no reason to interfere with the award of the Tribunal or the impugned order of the learned Single Judge."

20. The present petition is without merit and is dismissed. The order of the Tribunal dated 18.03.2002 is upheld. However, in case the petitioner implements the order of the Tribunal dated 18.03.2002 within three months from today, the respondent shall remain bound by the statement made by the learned counsel, namely, that he will be satisfied in case 50% of back wages plus relief of re-instatement is given to him.

21. All interim orders stand vacated. Any money deposited in the Court by the petitioner pursuant to any interim orders shall be released to the respondent.

ILR (2014) III DELHI 1734
I.A.

ABBOTT HEALTHCARE PVT. LTD. ....PLAINTIFF

VERSUS

RAJ KUMAR PRASAD & ORS. ....DEFENDANTS

(JAYANTH NATH, J.)

I.A. NO. : 23086/2012 IN CS(OS) NO. : 3534/2012 DATE OF DECISION: 25.04.2014

Code of Civil Procedure, 1908—Order XXXIX Rules 1 and 2 CPC—Application seeking injunction to restrain the defendants etc. from manufacturing or offering for sale medicinal or pharmaceutical preparations under the trademark 'AMAFORTEN' or any other mark deceptively similar to the plaintiff's registered trademark 'ANAFORTAN'—Contention of the defendants that the trademark of the plaintiff is neither registered nor properly stamped and therefore is liable to be impounded u/s 33 of the Stamp Act and that even otherwise the relief sought is barred u/s 28(3) r/w section 30(2)(e) of the Trademark Act in as much as the defendant is the registered proprietor of the impugned mark 'AMAFORTEN' and is also protected u/s 33 and 34 of the Trademarks Act and further the defendants being situated outside New Delhi and no material brought on record to show that even the plaintiff had its office in Delhi, the Court has no territorial jurisdiction. Held: In view of the specific averments in the plaint that the plaintiff is carrying on business in New Delhi and has a sales office in Delhi, this Court had territorial jurisdiction to entertain the suit. As regards the deficient stamp fees, no cogent submissions made by the defendant and hence not

possible to decide the issue at this stage. Further well settled law that sections 28(3) and 30(2) (e) do not bar a suit for injunction even where two trademarks are registered. Even otherwise an action for passing off would be maintainable. The trademark of the plaintiff registered in 1988 and it is a much prior user in point of time in the said trademark than the defendant whose trademark is registered in the year 2009 only. The trademark of the defendant is also phonetically, visually and structurally similar to that of the plaintiff and prima facie it appears that the defendant had dishonestly sought to take advantage of the name and reputation of the plaintiff's trademark and hence, the interim injunction sought for granted.

In paragraph 27 of the plaint, the plaintiff has pointed out that it is carrying on business and voluntarily working for gain within the jurisdiction of this Court. It has further been averred that the products of the defendant with the impugned trademark and packaging are being sold and marketed within the jurisdiction of this Court. In para 4 of the replication the address of the branch office and sales office in Delhi has been given, namely, the Branch Office being in Jasola Business District, New Delhi and Sales Office at Okhla Industrial Estate, Phase-III, New Delhi. Reference may also be had to the judgement of this Court in the case of **Ford Motor Company and Anr. vs. C.R. Borman and Anr.**(supra) where in para 18 it was held as follows:-

> "18. Since the learned Single Judge has returned the Plaint for filing it before a court of appropriate jurisdiction, even though this was not the prayer of the Defendants, we think it expedient to consider the question of whether the Delhi High Court possesses territorial jurisdiction over the dispute. It has been noted that the pleadings necessary to maintain an action under Section 29 are contained in the Plaint. The action, therefore, is one of infringement of trademark, thereby attracting Section 134 of the Act.

> It has been asseverated in the Plaint that the plaintiffs carry on business in commercial quantities and have authorised agents in Delhi. The plaintiffs may eventually fail to prove and establish these assertions and it is at that juncture that the Plaint may have to be returned to it. At this stage, it is trite, that the pleadings have to be taken to be a correct narration of facts. We have already stated that we are unable to accept the argument of Mr. Banerjee that Dhodha House is an authority supporting a decision directing the dismissal of the Suit. This is for the reason that the Plaint does not rely solely on sales having been effected in New Delhi. Prima facie, therefore, the Delhi High Court possesses territorial jurisdiction to entertain the Suit. Whilst a Preliminary Issue may be struck in this regard, it would require evidence of the parties for it to be conclusively substantiated. In this analysis, the Plaint is also not liable to be returned."
>
> **(Para 17)**

In **Clinique Laboratories LLC and Anr. vs. Gufic Limited and Anr.**, (supra) this Court further held as follows:-

> "12. I also find merit in the contention of the senior counsel for the plaintiff with reference to Section 31(2) of the Act. Section 31(2) suggests that the court notwithstanding registration being prima-facie evidence of validity as provided in Section 31(1) can hold the registered trademark to be invalid. The court can hold the registration to be invalid, on any ground or for non compliance of any of the conditions for registration provided under the Act. It further provides that if the invalidity of registration is averred for the reason of non compliance of Section 9(1), i.e. of evidence of distinctiveness having not been submitted before the Registrar, then the party pleading validity of registration shall be entitled to give evidence in legal proceedings where validity is challenged, of the mark having acquired distinctiveness on date of registration. Section

32 permits evidence of acquisition of distinctive character within the meaning of Section 9(1) post registration, also being led in such proceedings. It follows that where validity of registration is challenged on grounds other than provided in Section 9(1) of the Act, the test is whether the criteria laid down in such other provisions of the Act, for registration has been satisfied or not. Since, Section 124 otherwise provides for stay of proceedings in such suit and only permits passing an interlocutory order, such finding of invalidity naturally has to be on the touchstone of principles for interlocutory order only and not as at the time of final decision of the suit, in as much as the finding in the rectification proceedings has been otherwise made binding in the suit and on all aspects of validity i.e. under Section 9 as well as under Section 11."

On the facts of that case this Court came to the conclusion that prima facie it appears that the registration of the mark of the defendant suffers from non-compliance of requirement of Section 11(1) and (2). The Court further concluded that once having reached the aforesaid conclusion there can be no doubt that if the mark of the defendant were to be held to be invalidly registered a case of infringement under Section 29 is made out. **(Para 24)**

Important Issue Involved: A suit for infringement of a registered trademark is maintainable against another registered proprietor of identical or similar trademark and the provisions of section 28 (3) and section 30 (2) (e) of the Trade Marks Act do not bar such a suit or prohibit an action for passing off.

[An Gr]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Manav Kumar, Advocate.

FOR THE DEFENDANTS : Mr. Mohan Vidhani, Mr. Rahul Vidhani and Mr. Arun K. Jain, Advocates.

CASES REFERRED TO:

1. *Rajnish Aggarwal & Ors.* vs. *M/s.Anantam,* 2010(43) PTC 442(Del).
2. *Ford Motor Company and Anr.* vs. *C.R.Borman and Anr.,* 2009(39) PTC 76(Del).
3. *Clinique Laboratories LLC and Anr.* vs. *Gufic Limited and Anr.,* 2009(41) PTC 41(Del).
4. *Micolube India Ltd.* vs. *Maggon Auto Centre & Another,* 2008 (36) PTC 231 (Del).
5. *M/s.Kisan Industries* vs. *M/s. Punjab Food Corporation and Another,* AIR 1983 Del 387.

RESULT: Interim Injunction granted.

JAYANT NATH, J.

I.A. No.23086/2012

1. The present application is filed under Order 39 Rules 1 and 2 CPC seeking injunction to restrain the defendants etc. from manufacturing or offering for sale medicinal or pharmaceutical preparations under the trademark 'AMAFORTEN' or any other mark deceptively similar to the plaintiff's registered trademark 'ANAFORTAN'. Other connected reliefs are also sought for. The accompanying plaint is filed by the plaintiff stating that it is a wholly owned subsidiary of Abbott Laboratories, Chicago, USA which was founded in the year 1888. The trademark 'ANAFORTAN' is stated to be an invented mark having no dictionary meaning. It is also not derived from any principal ingredient/formulation of the drug. The said mark has the active ingredient of 'Camylofin Dihydrochloride with Paracetamol'. The said mark was originally stated to be owned by Khandelwal Laboratories Pvt.Ltd. (KLPL) who was stated to be registered proprietor of the said mark in respect of medicinal and pharmaceutical veterinary preparations since 1.12.1998. On 15.4.2008 the said Khandelwal Laboratories Private Limited entered into an agreement of 'Brand Transfer and Knowhow License Agreement' with Nicholas

Piramal India Ltd. (NPIL) whose name was later on changed to Piramal Healthcare Limited. The said Piramal Healthcare Limited assigned the trademark to the plaintiff vide Agreement dated 8.9.2010. The plaintiff vide application dated 21.2.2011 had sought to bring on record the change of proprietor of the trademark registered with the Trade Marks Registry.

2. It is stated that the plaintiff's medicinal preparations with the mark 'ANAFORTAN' are extremely popular and widely distributed all over India. It is stated that the said mark was used by the plaintiff's predecessor for decades and now the plaintiff by way of extensive use has acquired a considerable reputation as a quality pharmaceutical product. It is stated that the sales figures from September 2010 to December 2010 was Rs. 7.840 crores and from January to December 2011 the sales figures are said to be Rs.23.047 crores. Hence, on the basis of the above facts it is stated that the superior quality of the products sold and marketed by the plaintiff under the said trademark 'ANAFORTAN' has acquired valuable goodwill and reputation which extends throughout India. The plaintiff's trademark is said to be recognised and associated extensively with the plaintiff.

3. Regarding the defendants it is stated that defendant No.1 is the sole proprietorship concern of Birani Pharmaceuticals and is said to be carrying on business from Patna, Bihar and is a marketer of pharmaceutical and medicinal preparations. The said defendant No.1 is stated to be marketing the drug containing 'Camylofin Dihydrochloride with Paracetamol' in the form of Tablets under the brand name 'AMAFORTEN' which is similar to the plaintiff's product 'ANAFORTAN'. Defendant No.2 is stated to be a private limited company which is stated to be engaged in manufacturing of the drug for defendant No.1. Plaintiff states that in July 2012 through market enquiries it came to know about the unauthorised use of the 'AMAFORTEN' mark by the defendants. It also came to know that defendant No.1 has surreptitiously registered the similar mark 'AMAFORTEN' in Class 5. It is stated that the plaintiff intends to file rectification proceedings against the aforesaid registration of defendant No.1 as the said mark is said to have been registered in bad faith and the mark has invalidly remained on the Register. It is stated that a lot of efforts were made by the plaintiff to locate the identity of the person manufacturing and selling the drug with the impugned trademark as the product that was being sold was on a very small scale and was not in an organised manner.

4. The trademark of the defendant 'AMAFORTEN' is stated to be deceptively similar to the plaintiff's registered trademark. The mark is phonetically, visually and structurally similar to the plaintiff's registered trademark. The defendant has also copied the colour of the strip and packaging of the plaintiff's product. The same golden colour has been adopted by the defendant for selling his medicines. Even the outer packaging is stated to be a substantial reproduction of the plaintiff's packaging thereby amounting to infringement of plaintiff's copyright in the distinctive colour of the strip of the packaging. The adoption of identical colour on the strips by the defendant is stated to be a deliberate attempt to cash the goodwill and reputation of the plaintiff.

5. It is further urged that the two medicines in question have the same formula and same compound and have the same therapeutic use i.e. for relief in abdominal pain and intestinal colic. Hence confusion and/or deception are bound to arise.

6. It is urged that by virtue of prior adoption, prior use, prior registration and extensive publicity and promotion, the trademark 'ANAFORTAN' of the plaintiff has earned substantial goodwill and reputation. It is further submitted that the defendants by using a virtually identical mark and blister packaging in relation to identical goods is making a deliberate attempt to pass off its goods as those of the plaintiff.

7. Hence, the present Suit has been filed seeking a decree of permanent injunction and appropriate order for delivery of goods.

8. The defendant has filed the written statement. It is urged in the written statement that the Suit is an abuse of the process of law and is barred under Section 28(3) read with section 30(2) (e) of the Trade Marks Act, 1999 and is liable to be dismissed inasmuch as defendant No.1 is the registered proprietor of the impugned mark 'AMAFORTEN' in class 5 against which the present Suit has been filed. It is further urged that the defendants are also protected under sections 33 and 34 of the Trade Marks Act.

9. It is next submitted that this Court lacks territorial jurisdiction to try and entertain the Suit inasmuch as it is urged that the plaintiff cannot invoke jurisdiction as per provisions of Section 134 of the Trade Marks Act. It is further stated that the plaintiff has made a concocted statement in paragraph 27 of the plaint that the products of the defendants under

the impugned mark and packaging are being sold and marketed within the jurisdiction of this Court. It is urged that no evidence to this effect has been placed on record. It is urged that the defendants are situated outside the territorial jurisdiction of this Court. It has also been stated that there is no evidence that the plaintiff has its office in Delhi. Hence the plaint is liable to be returned.

10. It is next urged that this Court does not have the pecuniary jurisdiction to try the Suit as relief has been prayed for damages for Rs.20,00,100/-but the plaintiff has not claimed any relief for damages.

11. It is next alleged that the trademark of the plaintiff is neither registered nor properly stamped and is therefore liable to be impounded under Section 33 of the Stamp Act. It is claimed that the stamp duty on the Agreement dated 15.4.2008 comes approximately to Rs.3,41,93,334/-and the stamp duty for deed of intellectual property assignment dated 8.9.2010 is chargeable with approximately Rs.2,48,79,96,294/-and hence the said instrument is suffering from disability and cannot be admitted in evidence.

12. Apart from the above submissions the written statement simply denies all the averments and submissions made in the plaint.

13. Learned counsel appearing for the plaintiff have strenuously urged that Section 28(3) readwith Section 30(2)(e) of the Trademark Act does not bar the plaintiff from filing the present Suit. Reliance is placed on judgments of this Court in the case of **Clinique Laboratories LLC and Anr. vs. Gufic Limited and Anr.,** 2009(41) PTC 41(Del) and **Rajnish Aggarwal & Ors. vs. M/s.Anantam,** 2010(43) PTC 442(Del) to contend that even where the trademarks of the plaintiff and defendant are registered a suit for injunction by the plaintiff can be filed and cannot be said to be barred. On the issue of territorial jurisdiction reliance is placed on Section 134(2) to contend that this Court would have the territorial jurisdiction. Reliance is placed on paragraph 27 of the plaint where it is stated that the plaintiff is carrying on business and voluntarily working within the territorial jurisdiction of this Court. Reliance is also placed on the judgement of this Court in the case of **Ford Motor Company and Anr. vs. C.R.Borman and Anr.,** 2009(39) PTC 76(Del) to contend that once an averment is made in the plaint, the plaint cannot be thrown out without evidence on as to whether this Court would have territorial jurisdiction. On the issue of pecuniary jurisdiction it is stated that the

appropriate Court Fee has been paid and the valuation of the plaint is above Rs.20 lacs. Hence, this Court has pecuniary jurisdiction to try the present Suit. On the Assignment Deed it is urged that the said deed has been appropriately stamped and the submissions of the defendant are vague. Reliance is placed on **M/s.Kisan Industries vs. M/s.Punjab Food Corporation and Another,** AIR 1983 Del 387 to contend that the present stage where the issue of interim injunction is being looked into is not the appropriate stage to go into this aspect of Stamp Duty.

14. Learned counsel for the plaintiff has also relied upon a compilation of judgments to contend that in pharmaceutical preparations, strict measures to prevent confusion should be taken.

15. Learned counsel appearing for the defendant has reiterated the submissions in the written statement. He relies upon judgment of this Court in the case of **Micolube India Ltd. vs. Maggon Auto Centre & Another,** 2008 (36) PTC 231 (Del) to contend that in view of the Trade Marks Act the present Suit cannot be filed for infringement of trademark. He has also filed a compilation of judgments to support his contention about lack of territorial jurisdiction, lack of pecuniary jurisdiction and to contend that documents of the plaintiff are liable to be impounded for shortfall of Court Fees and to support his contention that the trademarks are not similar.

16. I will first deal with the submissions of the defendant pertaining to territorial jurisdiction of this Court. Section 134(2) of the Trade Marks Act provides that the District Court having jurisdiction includes a District Court within the local limits, of which the person instituting the suit actually or voluntarily resides or carries on business or personally works for gain.

17. In paragraph 27 of the plaint, the plaintiff has pointed out that it is carrying on business and voluntarily working for gain within the jurisdiction of this Court. It has further been averred that the products of the defendant with the impugned trademark and packaging are being sold and marketed within the jurisdiction of this Court. In para 4 of the replication the address of the branch office and sales office in Delhi has been given, namely, the Branch Office being in Jasola Business District, New Delhi and Sales Office at Okhla Industrial Estate, Phase-III, New Delhi. Reference may also be had to the judgement of this Court in the case of **Ford Motor Company and Anr. vs. C.R.Borman and**

Anr.(supra) where in para 18 it was held as follows:-

> "18. Since the learned Single Judge has returned the Plaint for filing it before a court of appropriate jurisdiction, even though this was not the prayer of the Defendants, we think it expedient to consider the question of whether the Delhi High Court possesses territorial jurisdiction over the dispute. It has been noted that the pleadings necessary to maintain an action under Section 29 are contained in the Plaint. The action, therefore, is one of infringement of trademark, thereby attracting Section 134 of the Act. It has been asseverated in the Plaint that the plaintiffs carry on business in commercial quantities and have authorised agents in Delhi. The plaintiffs may eventually fail to prove and establish these assertions and it is at that juncture that the Plaint may have to be returned to it. At this stage, it is trite, that the pleadings have to be taken to be a correct narration of facts. We have already stated that we are unable to accept the argument of Mr. Banerjee that Dhodha House is an authority supporting a decision directing the dismissal of the Suit. This is for the reason that the Plaint does not rely solely on sales having been effected in New Delhi. Prima facie, therefore, the Delhi High Court possesses territorial jurisdiction to entertain the Suit. Whilst a Preliminary Issue may be struck in this regard, it would require evidence of the parties for it to be conclusively substantiated. In this analysis, the Plaint is also not liable to be returned."

18. In view of the above legal position and the averments in the plaint as discussed above, at this juncture it is not possible to accept the contention of the defendant in this regard. Prima facie this Court has territorial jurisdiction to entertain the suit. This is clear from para 27 of the plaint; which contention has to be accepted at this stage. It would be open for the defendant to press this relief at the time of framing of issues and disposal of the suit.

19. As far as the pecuniary jurisdiction is concerned para 28 of the plaint fixes the relief for damages @ Rs.20,00,100/- and affixes the Court Fee of Rs.80,004/-. For permanent injunction the value of the relief has not been stated but Court Fee of Rs.5,000/- has been paid. Under Delhi High Court Act, 1966 this Court has the pecuniary jurisdiction to try all matters which are valued above Rs.20 lacs. In view of the above, this Court would have the pecuniary jurisdiction to try the suit.

20. The next issue pertains to whether the Brand Transfer Agreement dated 21.05.2010 and Deed of Agreement dated 08.09.2010 executed in favour of the plaintiff is liable to be impounded for deficient Stamp Fees. Neither of the parties has made any cogent submissions in this regard. The written statement merely states that as per the defendant the stamp duty is Rs.3,41,93,334/- and Rs.2,48,79,96,294/- respectively. However, as to how the defendant has arrived at this figure has not been elaborated or argued. Similarly, the plaintiff has also not sought to elaborate the calculation of the Stamp Fees paid. The only averment made in the replication is that the plaintiff acquired the trade mark 'ANAFORTAN' through a slump sale transaction between Piramal Health Care Limited and the plaintiff under a Business Transfer Agreement on which the full and sufficient stamp duty has been paid and that the consideration for transfer of the trade mark specified under the Deed of Assignment dated 08.09.2010 is a part of the total sale consideration for the slump sale made vide Transfer Agreement dated 21.05.2010. Hence, it is not possible to decide the issue at this stage. It is also not necessary to go into the same for the purpose of the present interim application. It is for the defendant to press this issue at the appropriate stage.

21. I will now come to the last contention of the defendant, namely, as to whether this Court can entertain the present suit in view of Section 28(3) read with Section 30(2) (e) of the Trade Marks Act. This Court has already held that a suit for such an injunction would lie where the two trade marks are registered and Sections 28(3) and 30(2) (e) do not bar filing of a suit. Reference may be had to the judgement of **Clinique Laboratories LLC and Anr. vs. Gufic Limited and Anr.** (supra) where in para 14 this Court concluded as follows:-

> "14. I thus conclude that a suit for infringement of registered trademark is maintainable against another registered proprietor of identical or similar trademark and in such suit, while staying the further proceedings pending decision of the registrar on rectification, an interim order including of injunction restraining the use of the registered trademark by the defendant can be made by the court, if the court is prima facie convinced of invalidity of registration of the defendant's mark."

22. Relying on the above judgment similar view was reiterated in

Rajnish Aggarwal & Ors. vs. M/s Anantam, (supra) where this Court in paragraphs 21 to 22 held as follows:" 21. Following the above-quoted observation, the learned single judge, as far as this issue was concerned, held as under:-

> "14. I thus conclude that a suit for infringement of registered trademark is maintainable against another registered proprietor of identical or similar trademark and in such suit, while staying the further proceedings pending decision of the registrar on rectification, an interim order including of injunction restraining the use of the registered trademark by the defendant can be made by the court, if the court is prima facie convinced of invalidity of registration of the defendant's mark."

22. In view of the finding given in the earlier paras above and the case law referred, I hereby hold that a suit for infringement is maintainable in the present case and that this court has got jurisdiction as per the averment made in the plaint." 23. In view of the above legal position what would follow is that a suit for infringement of a registered trademark is maintainable against another registered proprietor of identical or similar trademark.

24. In **Clinique Laboratories LLC and Anr. vs. Gufic Limited and Anr.**, (supra) this Court further held as follows:-

> "12. I also find merit in the contention of the senior counsel for the plaintiff with reference to Section 31(2) of the Act. Section 31(2) suggests that the court notwithstanding registration being prima-facie evidence of validity as provided in Section 31(1) can hold the registered trademark to be invalid. The court can hold the registration to be invalid, on any ground or for non compliance of any of the conditions for registration provided under the Act. It further provides that if the invalidity of registration is averred for the reason of non compliance of Section 9(1), i.e. of evidence of distinctiveness having not been submitted before the Registrar, then the party pleading validity of registration shall be entitled to give evidence in legal proceedings where validity is challenged, of the mark having acquired distinctiveness on date of registration. Section 32 permits evidence of acquisition of distinctive character within the meaning of Section 9(1) post registration, also being led in such proceedings. It follows that where validity of registration is challenged on grounds other than provided in Section 9(1) of the Act, the test is whether the criteria laid down in such other provisions of the Act, for registration has been satisfied or not. Since, Section 124 otherwise provides for stay of proceedings in such suit and only permits passing an interlocutory order, such finding of invalidity naturally has to be on the touchstone of principles for interlocutory order only and not as at the time of final decision of the suit, in as much as the finding in the rectification proceedings has been otherwise made binding in the suit and on all aspects of validity i.e. under Section 9 as well as under Section 11."

On the facts of that case this Court came to the conclusion that prima facie it appears that the registration of the mark of the defendant suffers from non-compliance of requirement of Section 11(1) and (2). The Court further concluded that once having reached the aforesaid conclusion there can be no doubt that if the mark of the defendant were to be held to be invalidly registered a case of infringement under Section 29 is made out.

25. Similarly, in **Rajnish Aggarwal vs. Anantam,** (supra) this Court in para 23 further held as follows:-

> "23. Coming to the arguments on merit, the plaintiffs have a bona fide registered trade mark for their products. The contention of the defendant that it is also a bona fide registered trade mark holder is without any substance as the said trade mark has been registered under the wrong class in Schedule IV. I am of the considered view that even otherwise, in an action of passing off, the well settled law in **Century Traders v. Roshan Lal Duggar Co.** AIR 1978 (Del) 250 will be applicable. In this case it was held that for the purpose of claiming proprietorship of a mark, it is not necessary that the mark should have been used for considerable length of time. A single actual use with intent to continue such use co instanti confers a right to such mark as a trade mark. Further, in order to succeed in an application for temporary injunction the applicant has to establish user of the aforesaid mark prior in point of time than the impugned user by the non-applicant. Further still, actual damage or fraud is

unnecessary in a passing off action whether the relief asked for is injunction alone or injunction, accounts and damages. If there is a likelihood of the offending trade mark invading the proprietary right, a case for injunction is made out.

26. Similar view was expressed by this High Court in the case of **Micolube India Ltd. vs. Maggon Auto Centre & Another** (supra) cited by the learned counsel for the defendant. Relevant portion of the said judgment reads as follows:-

> 5. ....A reading of Section 28(3) with Section 30(1)(d) shows that the proprietor of a registered trade mark cannot file an infringement action against a proprietor of an identical or a similar trade mark. While Sections 28(3) and 30(1)(d) on the one hand deal with the rights of registered proprietors of identical trade marks and bar action of infringement against each other, Section 27(2) on the other hand deals with the passing off action. The rights of action under Section 27(2) are not affected by Section 28(3) and Section 30(1)(d). Therefore, registration of a trade mark under the Act would be irrelevant in an action for passing off. Registration of a trade mark in fact does not confer any new right on the proprietor thereof than what already existed at common law without registration of the mark. The right of goodwill and reputation in a trade mark was recognised at common law even before it was subject of statutory law. Prior to codification of trade mark law there was no provision in India for registration of a trade mark. The right in a trade mark was acquired only by use thereof. This right has not been affected by the Act and is preserved and recognised by Sections 27(2) and 33.
>
> (30) The law of 'passing off' as it has developed, permits an action against a registered proprietor of a trade mark for its mendacious use for inducing and misleading the consumers into thinking that his goods are the goods of or are connected with the goods of a prior user of the trade mark. It seems to us that in so far as this Court is concerned, this position cannot be disputed in view of the judgment of the Division Bench in Century Traders v. Roshan Lal Duggar and Co. 1978, Delhi 250 where, while construing Sections27(2) and 106 of the Act, it was held as follows: From a reading of the above sections it is clear that registration of mark in the trade mark registry would be irrelevant in an action for passing off.
>
> Thus, the law is pretty well settled that in order to succeed at this stage the appellant had to establish user of the aforesaid mark prior in point of time than the impugned user by the respondents. The registration of the said mark or similar mark prior in point of time to user by the appellant is irrelevant in an action for passing off and the mere presence of the mark in the register maintained by the trade mark registry did not prove its user by the persons in whose names the mark was registered and was irrelevant for the purposes of deciding the application for interim injunction unless evidence had been led or was available of user of the registered trade marks. In our opinion, these clear rules of law were not kept in view by the learned single Judge and led him to, commit an error.
>
> 6. Considering the submissions made by the parties up to this point and the observations of the Supreme Court in the case of **Whirlpool** (supra), it is apparent that the injunction order passed on 09.10.2007 cannot stand against the defendant merely on the basis of an infringement action. But if the plaintiff is able to establish his case under the common law right of passing off then an injunction can be granted in favor of the plaintiff."

24. The legal position that would follow is that even if for arguments sake it is held that a proprietor of a trademark cannot claim infringement of his trademark in view of section 28(3) and read with section 30(2)(e) of the Trade Marks Act an action for passing off would be maintainable. In the present case, the plaintiff has sought to press the contention of passing off stating that the defendant is guilty of passing off.

25. We may now have a look at the facts of the case. The trademark of the plaintiff is ANAFORTAN. The trademark of the defendant is AMAFORTEN. The wrappers of the two drugs have been placed on record and are depicted as follows:-

Plaintiff's Product	**Defendant's Product**

26. The trademark of the plaintiff is registered on 1.12.1988. As per the pleadings of the plaintiff, the predecessors of the plaintiff have used the said trademark for decades. The sales figures of the said product using the said trademark subsequent to the Assignment Agreement of 8.9.2010 are placed on record. From September to December 2010 sales of Rs.7.8 crores was achieved and in the calendar year 2011, a sale of Rs.23.047 crores was achieved. It has further been established that the drug sold by the plaintiff and the defendant have the same ingredients and have the same therapeutic use. The said drugs are used for relief in abdominal pain and intestinal colic. The active ingredient of both the drugs is 'Camylofin Dihydrochloride with Paracetamol'.

27. A perusal of the written statement would show that defendant has simply denied the above averments of the plaintiff. The trademark of the defendant is registered with effect from 17.6.2009. There is no averment or document placed on record to show the turnover of the defendants. In fact in the course of argument a question was posed to the learned counsel for the defendant about the turnover of the drugs. There was no answer to the said question.

28. In view of the above facts it is clear that the plaintiff is a much prior user in point of time in the said trademark. The user of the plaintiff is extensive and wide. The defendant is a much later entrant in the field.

29. The trademark of the defendant is also phonetically, visually and structurally similar to that of the plaintiff. It appears to be a case

where defendant has dishonestly sought to take advantage of the name and reputation of the plaintiff's trademark and has slavishly copied the mark and design of the product of the plaintiff for a drug which has the same therapeutic use.

30. Clearly, the plaintiff has established a prima facie case. Balance of convenience is in their favour as they are prior users of the said mark. Irreparable injury would be caused to the plaintiff if the defendant is allowed to carry on its infringing activity. Accordingly, the defendant is restrained by an interim injunction from using the impugned trademark AMAFORTEN or any other trademark deceptively similar to the trademark of the plaintiff ANAFORTAN, till pendency of the accompanying suit.

CS(OS) No.3534/2012

List on 9th July 2014 before Joint Registrar.

ILR (2014) III DELHI 1750
W.P. (C)

NATIONAL COUNCIL OF EDUCATION RESEARCH AND TRAINING ....PETITIONER

VERSUS

VED PRAKASH ....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 527/2014 DATE OF DECISION: 25.04.2014

CCS (CCS) Rules, 1965—Rule 10 (1), (6) and (7) and Rule 14—Respondent in present case was placed under suspension vide orders dated 14th March, 2010 with immediate effect—Respondent's suspension was reviewed on 8th June, 2012 whereby his suspension was extended for a period of another three months—Next review in accordance with law was on 7th

September, 2012—Admittedly, petitioner failed to review suspension of respondent and undertook this exercise only on 22nd November, 2012 and vide order dated 23rd November, 2012 respondent's suspension was extended for a further period of six months—Respondent challenged action of respondent in not permitting him to join duty and prayed that period beyond 12th September, 2012 be considered as duty for all purposes—Central Administrative Tribunal allowed prayer of respondent challenging extension of period for which he was suspended when disciplinary proceedings were contemplated against him—Writ petitioner assailed order of Tribunal before High Court—Held—Review of respondent's suspension on 8th June, 2012 was within period prescribed under Rule 10 (6) of CCS (CCA) Rules, 1965 and petitioner possibly cannot make any grievance with regard to extension of suspension till 8th September, 2012—However, second review effected on 22nd November, 2012 was way beyond period prescribed under Rule 10 (6) and (7) of CCS (CCS) Rules, 1965 and therefore was illegal and not sustainable—While considering matter, Tribunal has overlooked fact that respondent's suspension was actually reviewed on 8th June, 2012 within period prescribed by law—To extent that impugned order grants relief qua suspension upto 7th September, 2012 as well, there is error in impugned order—Order of Tribunal modified and substituted—Petitioner directed to commute amounts payable to appellant in terms of present order and inform respondent about same within for weeks.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Anand Nandan, Adv.

FOR THE RESPONDENT : Mr. Shanker Raju and Mr. Nilansh Gaur, advts.

RESULT: Disposed of.

GITA MITTAL, J. (Oral)

Caveat No.79/2014

Caveator has been represented. Caveat is therefore discharged.

C.M.No.1063/2014 (for exemption)

Exemption is allowed subject to exceptions. Application is disposed of.

W.P.(C) 527/2014

1. The writ petitioner assails the order dated 6th November, 2013 passed in O.A.No.1006/2013 by the Central Administrative Tribunal allowing the prayer of the respondent herein challenging the extension of period for which he was suspended when disciplinary proceedings were contemplated against him. The respondent in the present case was placed under suspension in terms of Rule 10 (1) of the CCS (CCA) Rules, 1965 vide order dated 14th March, 2012 with immediate effect. The respondent's suspension was reviewed on 8th June, 2012 whereby his suspension was extended for a period of another three months. Therefore the next review in accordance with law was due on 7th September, 2012. It is an admitted position that the petitioner failed to review the suspension of the respondent and undertook this exercise only on 22nd November, 2012. As a result, vide the order dated 23rd November, 2012 the respondent's suspension was extended for a further period of six months.

2. The respondent's representation dated 22nd November, 2012 complaining of breach of rule 10 (6) and (7) of CCS (CCA) Rules, 1965 contending that continued suspension beyond 90 days after issuance of the order dated 14th March, 2012 was not legal, was not favourably considered. The respondent consequently filed O.A.No.1006/2013 challenging the action of the respondent in not permitting him to join duty and prayed that the period beyond 12th September, 2012 be considered as duty for all purposes.

3. It is not disputed that the petitioner was subjected to disciplinary proceedings. However, it is not necessary to examine these proceedings in the present case.

4. One important fact which intervened requires to be noted. It appears that a second charge sheet under Rule 14 of CCS (CCA) Rules, 1965 dated 30th July, 2012 was issued to the respondent. Pursuant to an order dated 1st August, 2013, the petitioner was suspended for a second time. This suspension and the disciplinary proceedings are subject matter of a separate challenge by way of O.A.No.2741/2013 on behalf of the respondent which is stated to be pending. The present consideration and order is without prejudice to the rights and contentions of the parties in the second application filed by the respondent which is pending before the Tribunal.

5. The review of the respondent's suspension on 8th June, 2012 was within the period prescribed under Rule 10 (6) of CCS (CCA) Rules, 1965 and the petitioner possibly cannot make any grievance with regard to the extension of suspension till the 8th of September, 2012. However, the second review effected on 22nd November, 2012 was way beyond the period prescribed under Rule 10 (6) and (7) of the CCS (CCA) Rules, 1965 and therefore was illegal and not sustainable. While considering the matter, the Tribunal has overlooked the fact that the respondent's suspension was actually reviewed on 8th June, 2012 within the period prescribed by law. To the extent that the impugned order grants relief qua the suspension upto 7th of September, 2012 as well, there is an error in the impugned order dated 6th November, 2013.

6. In view the above, we hold and direct as follows:-

(i) It is held that respondent's suspension from the 14th March, 2012 to 14th September, 2012 was in terms of the CCS (CCA) Rules, 1965 and legal.

(ii) The extension of respondent's suspension by the order dated 23rd November, 2012 was in violation of Rule 10 (6) of CCS (CCA) Rules, 1965 and therefore is unsustainable and is hereby quashed.

(iii) The order of the Tribunal dated 6th November, 2013 in O.A. No.1006/2013 shall stand modified and substituted by the above directions.

(iv) The petitioner shall compute the amounts payable to the appellant in terms of the present order and inform the respondent about the same within four weeks from today. The payment of

dues to the respondent, if any, if not already done, shall be effected within a period of eight weeks from today.

7. This petition is disposed of in the above terms.

C.M.No.1062/2014 (for stay)

8. In view of the order passed in the writ petition, this application does not survive for consideration and is therefore dismissed.

ILR (2014) III DELHI 1754
CRL. A.

ASHIF KHAN @ KALLU ....APPELLANT

VERSUS

STATE ....RESPONDENT

(DEEPA SHARMA, J.)

CRL.A. NO. : 1122/2012 DATE OF DECISION: 29.04.2014

NDPS Act, 1985—Section 21 (b)—Appeal against conviction. Held, delay in sending of the sample in FSL, without any evidence of tampering with the samples, is of no adverse consequence to the prosecution. Also, Held, merely because prosecution witnesses are police officials, they do not cease to be competent witnesses and their testimony cannot be doubted merely because they were police officials. Non-joining of public persons especially when the reason has been explained, is not fatal to the prosecution's case and conviction can be based on the testimony of police officials which is corroborated by ocular as well as documentary evidence. Also, held, minor omissions in the testimonies of police officials not fatal especially when the police officials

witness many such criminal cases in discharge of their official duties.

[Di VI]

APPEARANCES:

FOR THE APPELLANT : Ms. Rakhi Dubey, Advocate.

FOR THE RESPONDENT : Mr. O.P. Saxena, APP for the State Along with SI Karamveer, Narcotics Cell, P.S. Shakarpur, Delhi.

CASES REFERRED TO:

1. *Bilal Ahmed* vs. *State,* reported as 2011(1)JCC 27.
2. *Hardip Singh* vs. *State of Punjab* MANU/SC/7956/2008 : 2008 (8) SCC 557.

RESULT: Appeal Dismissed.

DEEPA SHARMA, J.

1. The present appeal has been filed against the order of conviction of the appellant dated 11th July, 2012 for the offence under Section 21 (b) of the Narcotics Drugs and Psychotropic Substances Act (hereinafter referred to as 'the NDPS Act') and order on sentence dated 17th July, 2012 in Sessions Case no.97/2007 in FIR No.87/2006, PS Narcotics Branch.

2. The brief facts are that SI Sunil Jain (PW9), the Investigating Officer on receiving a secret information at about 1.30 p.m. recorded the same as D.D.No.10A (Ex.PW8/A) and produced the secret informer before the SHO of Narcotics Branch Inspector Kharak Singh (PW8). He conveyed the said information to ACP Mehar Singh on telephone in compliance of the provisions under Section 42 of the NDPS Act. On being directed by Inspector Kharak Singh (PW8), IO/SI Sunil Jain (PW9), Constable Om Prakash, HC Satbir (PW6) HC Vijay Pal (PW10) and secret informer along with his investigating kit reached at the spot in vehicle no.DL 1CF 3426 driven by Ct.Parveen at about 2.00 p.m. after making departure entry as DD No.11A (Ex.PW9/A). On refusal by the public persons to join investigation, the raiding party took their respective positions and saw the appellant coming from the side of Seelampur Red Light on foot and he was identified by the secret informer who thereafter

left the spot. When after waiting for about 3-4 minutes, the appellant tried to move away, the raiding party apprehended him. The legal rights of the appellant were apprised to him. He was also informed about the secret information which the police party was having and he was also informed about his rights to get his search conducted in the presence of a gazetted officer or a magistrate and was offered the search of the raiding party and that of official vehicle prior to his search and on refusal of the appellant (Ex.PW6/2) to the offers, a notice under Section 50 of the NDPS Act (Ex.PW6/1) was given to him. At that stage efforts were also made to include the public persons into the search and on their refusal, search of the appellant was conducted and from his right side pocket of wearing pant smack was recovered. It is weight was found to be 320 gms. Thereafter two samples of 5 gms. each were taken out and were sealed into a parcel and FSL form was filled and the remaining smack was also sealed into a separate parcel and all the three parcels were given the marking of 'A', 'B' and 'C'. Seal of "5BPSNBDELHI" was affixed on all the four articles and these were seized vide memo Ex.PW6/3. Seal after use was handed over to HC Satbir. Rukka Ex.PW9/B was prepared and HC Vijay Pal (PW10) was sent to the Police Station along with three FSL Forms and carbon copy of the seizure memo and the rukka and he on reaching at police station handed over the rukka to Duty Officer ASI Ghasi Ram (PW3) and handed over the articles along with parcels to SHO Kharak Singh (PW8) who had fixed his seal "1SHONBRDELHI" on three parcels and FLS Form and put FIR No. and his signatures on all these articles and thereafter handed over the same to MHCM HC Jagdish Prasad (PW7) who made relevant entries in the Register No.19 and deposited these articles along with FSL form into the Malkhana vide entry Ex.PW7/A. On the basis of DD no.14A (Ex.PW3/3), FIR No.87/2006 (copy of which is Ex.PW3/2) was registered and endorsement (Ex.PW3/1) on the rukka was made. Entry of closure of the FIR was also made vide DD No.16A (Ex.PW3/4). Subsequent investigation was handed over to ASI Anoop Singh (PW5) who on reaching at the spot took over the investigation from SI Sunil Jain (PW9). He prepared the site plan (Ex.PW5/1) on the pointing out and arrested the accused-appellant vide arrest memo Ex.PW5/3 and conducted his personal search vide memo Ex.PW5/4. The articles recovered on the personal search of the accused-appellant includes carbon copy of notice under Section 50 of NDPS Act (Ex.PW6/4) and cash amount of Rs.170/-, one wrist watch, one golden chain, one black colour purse containing some

visiting cards and documents etc. He remained at the spot till 10 p.m. and reached at the police station at 10.45 p.m. and produced the accused-appellant before SHO Inspector Kharak Singh (PW8) and articles of personal search of appellant were deposited with MHCM. Report (Ex.PW2/3) under Section 57 of the NDPS Act was prepared and forwarded to senior officers by Insp.Kharak Singh (PW8) which was received in the DCP office vide diary No.4419 and 4420 (copy of which is Ex.PW2/1). The original report under Section 57 of NDPS Act received in the office of DCP is Ex.PW2/2. The samples were sent to FSL on 18.10.2006 by MHCM HC Ishwar Singh (PW4) vide RC No.126/21 (Ex.PW4/C) and acknowledgement receipt (Ex.PW4/B) was obtained. The sample Mark A which was sent to FSL was chemically analysed by Dr.Madhulika Sharma, Assistant Director (Chemistry), Forensic Science Laboratory, Rohini, Delhi and she submitted her report bearing no.FSL.2006/C-3524 dated 02.01.2007 which is admissible in evidence under Section 293 of the Code of Criminal Procedure, 1973.

3. The prosecution had examined ten witnesses who have duly supported the prosecution case.

4. After considering the arguments of learned counsel for the appellant and of learned APP for the State, the trial court had convicted the appellant for the offence under Section 21 (b) of the NDPS Act.

5. The main arguments which has been put forth in the appeal is that there was a delay of 25 days in depositing the samples to FSL, Rohini and that Constable Mahesh who took the sample even prior to the date 18.10.2006 and the same could not be deposited in the FSL was not examined by the prosecution and thereafter chances of tampering of the sample cannot be ruled out.

6. The same contention had been raised by learned counsel before the trial court as well. The trial court has very elaborately dealt with this argument. The relevant portion of the trial court judgment is quoted as under:

> Para 21. ".... .... I do not find any merit in this submissions of the Ld. Defence Counsel as the prosecution witnesses have deposed in a consistent and trustworthy manner, regarding the recovery of the contraband from the possession of the accused, the seizure of the case property, preparation of the samples and deposition of the samples at the Malkhana and sending of the sample to the FSL, Rohini for chemical analysis and thereafter, receiving the remnants of the sample alongwith the FSL Report, at the Malkhana.
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> 22. Furthermore, it has been held by the Hon'ble High Court of Delhi in the case of **Bilal Ahmed Vs. State,** reported as 2011(1)JCC 27, as under:
>
> *"10. I also do not find any merit in the contention that the form FSL was not deposited in the malkhana or that the same was not sent to the CFSL. PW3 Inspector Jeevan Singh has stated that the form FSL was filled and the pulanda was taken into possession vide Seizure Memo Ex. PW3/A. He took the pulanda and the FSL form in his possession along with the seizure memo and deposited the pulanda and FSL form along with a copy of the seizure memo in the malkhana on 2nd May,1999 at around 10 p.m. The testimony of PW3 InspectorJeevan Singh also finds support from the testimony of PW 9 Bhagmal Singh who also states that the samples and pulanda were deposited with him duly sealed with the seal of R.K. and J.S. He made the entry in the register No.19, Ex. PW9/A. The contention that the form FSL was not sent to CFSL Chandigarh, is unfounded. The CFSL report Exhibit PX states that "Seals were intact, and tallied with specimen seals impressions". The seals on the samples cannot be tallied except with the specimen seals on the FSL form. Thus, even without specifically stating that form FSL has been received with the samples, this endorsement clarifies that the form FSL was received. Delay in sending parcel to the CFSL is not fatal especially when as per the CFSL report, the seals are intact and tallied with the specimen seals. In State of Rajasthan v. Daul @ Daulat Giri MANU/SC/0881/2009 : 2009 (14) SCC 387 it was held:*
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> *1. The factual scenario goes to show that Jaswant Singh (PW.1), the I.O., seized the articles on 15/6/1995. The search memo is Ex. P.4 and the specimen impression of the seal Ex. P.5. PW.1deposited the seized articles and*

sample with Bhanwarlal (PW.8) who was the Malkhana In Charge in the Malkhana register in Ex. P.15A. PW.8 handed the material to Surendera Singh (PW.5) for depositing the sample in FSL. PW.5 reached the Superintendent of Police office and gave the samples to Jamnalal at 10.00 a.m. and received back the samples from Jamnalal at 5.00 p.m. and also obtained forwarding letter which is Ex. P.12 and is dated 20/6/95. PW.5 submitted the samples to FSL and obtained acknowledgment receipt it is Ex. P.13. The role of Jamnalal is very limited; that is receiving sample at 10.00 a.m. and handing samples back at 5.00 p.m. It is not understandable as to how the non examination of Jamnalal in any way affected the veracity of the prosecution version. The High Court came to an attempt and unsustainable conclusion that because Jamnalal was not examined "possibility of the sample having been tampered with could not be ruled out". The conclusion is unsustainable in view of the FSL report which clearly stated that the seals were intact and matched with the specimen seals.

*11. In **Hardip Singh v. State of Punjab** MANU/SC/7956/2008 : 2008 (8) SCC 557 it was held:*

16. So far as the question of delay in sending the samples of opium to the Forensic Science Laboratory (FSL) is concerned, the same in our opinion has no consequence for the fact that the recovery of the said sample from the possession of the Appellant stands proved and established by cogent and reliable evidence led in the trial. PW 5 has categorically stated and asserted about the recovery of opium from the possession of the Appellant, which fact is also corroborated by a higher officer, namely, SS Mann, DSP who was also examined at length during the trial. The said recovery was effected in the presence of the said SS Mann, DSP, as senior police officer, who also put his seal on the said parcels of opium.

17. The then Station House Officer, Inspector Baldev Singh, who was examined as PW 1, was posted at Police Station Ajnala on the date of occurrence. He received the

said samples of opium along with case material, being produced before him by PW 5. It has come on evidence that Inspector Baldev Singh kept the entire case property with him till it was deposited in the office of Chemical Examiner, Amritsar on 30.9.1997 through ASI Surinder Singh, (PW3). It has also come on evidence that till the date the parcels of sample were received by the Chemical Examiner, the seal put on the said parcels was intact. That itself proves and establishes that there was no tampering with the aforesaid seal in the sample at any stage and the sample received by the analyst for chemical examination contained the same opium which was recovered from the possession of the Appellant. In that view of the matter, delay of about 40 days in sending the samples did not and could not have caused any prejudice to the Appellant. The aforesaid contention, therefore, also stands rejected."

23. In the present case also, IO SI Sunil Jain has categorically stated that he sealed the samples with his seal of '5BPSNBDELHI', after recovery of the contraband from the accused. HC Vijay Pal has also categorically stated that he took the sample with other case property and the documents and handed over the same to SHO, Inspector Kharak Singh at PS Narcotics Branch. Inspector Kharak Singh has also stated that he put his initials and particulars of the case on the documents and the sealed parcels and also affixed his seal of '1SHONBRDELHI' and handed over the parcels and the documents to the MHCM. The MHCM have also categorically stated in the Court that the samples were not tempered, during the time, it remained in their custody. PW1 Ct. Satpal, who took the sample parcel Mark A for deposition at FSL, Rohini on 18.10.2006 has also stated that the seals were intact and the samples were not tempered by anybody, till the time, it remained in his custody. FSL Report dated 02.01.2007 also states that the sample seals were intact and was tallied with the specimen seal impression forwarded alongwith the FSL form. In view of the depositions of these witnesses, it cannot be said that the samples were tempered. Therefore, the delay in sending the samples to the FSL, Rohini for chemical analysis is not fatal

to the present case."

7. From this it is apparent that the learned trial court has correctly reached to the conclusion after considering the evidences on record and also relying on the case law that the delay in sending the sample is well explained and there is no evidence on record to suggest that during this period there was any tampering of the sample.

8. I have also perused the trial court record.

9. The learned counsel for the appellant has failed to point out even an iota of the evidence on record to suggest that there was tampering of the samples. Argument of learned counsel, therefore, has no merit.

10. The next argument which has been raised by learned counsel for the appellant is that the entire case of the prosecution is based on the testimonies of the police witnesses and although the recovery had been made at a public place and the availability of the public persons at the spot is also not denied by the prosecution, but still the prosecution has not made any person a witness to the recovery. It is further argued that this makes the recovery doubtful.

11. There is no doubt that the recovery has been made from the accused at public place. The investigating officers have duly explained that they had asked several persons to join the investigation but all of them had refused. There is no doubt that today in the society there is apathy in the public. Even if somebody is lying in an injured condition, people just look at the injured and walk away. It is very seldom that people stop and try to help the injured or make an effort to remove the person to a nearby hospital. This court as well as the apex court has been crying about the insensitivity of public in catena of cases. It is a hard fact that nobody wants to get involved into police cases. People are becoming on lookers. When they are asked to witness anything they just show their difficulty and try to stay away. In view of this apathy of the public, the police have to act on their own. It, thus, cannot be said that because public persons were not made a witness, the entire proceedings are vitiated. The prosecution has successfully proved the due compliance of the entire procedure laid down under the various provisions of NDPS Act and in the cross-examination of the prosecution witnesses, there is nothing to create a doubt in the testimonies of the witnesses. Merely because the prosecution witnesses are police officials, they do not cease to be a

competent witness. If the police official had witnessed the offence, he is a competent witness and his testimony cannot be doubted merely because he happens to be a police officer. Non-joining of a public person specially when the reason has been well explained is not fatal to the prosecution case and the conviction can be safely based on the testimonies of the police officials who have fully corroborated each other orally and their testimonies are corroborated by the documentary evidences on record. The omissions and commissions of minor nature in the testimonies of these police officials are not fatal especially when in discharge of their official duties, they witness many such crimes. In order to be entitled to benefit of doubt, the appellant-accused has to show on record such evidences which by preponderance suggest his false implications. The appellant-accused has failed to point out any evidence on record, showing his false implication.

12. Learned counsel for the appellant has also argued that the punishment of five years and fine of Rs.50,000/- is towards higher side and it be reduced.

13. From the record, it is apparent that accused is not a first offender. He has been convicted and punished in other case under NDPS Act in FIR No.43/2002 under Section 21/29 of NDPS Act of PS Narcotics Branch.

14. In view of the previous conviction of the accused-appellant the sentence and fine is not towards higher side.

15. The appeal has no merit. Same is dismissed.

16. Trial court record be sent back along with copy of this order.

17. The Registry is directed to send a copy of the order to the Jail Superintendent, Central Jail, Tihar for compliance and to supply the same to the appellant.

ILR (2014) III DELHI 1763
CRL. A.

SHIVENDER PANDEY @ PANDIT & ORS ....APPELLANTS

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 644 & 648/2012 DATE OF DECISION: 30.04.2014

Indian Penal Code, 1860—S.307/308/34—Accused acquitted U/s.307 but convicted U/s.308/34 of the IPC. TIP of one of the accused not conducted despite the occurrence taking place at night and despite the accused not acquainted with victim prior to the occurrence—Identification of said accused for the first time in the Court not enough to prove his involvement specially when no crime weapon was recovered and other recoveries were disbelieved by trial court. In the initial information, victim did not give exact number of assailants—Names of assailants not disclosed to the police and to the doctors initially despite acquainted with three accused prior to the incident-Inordinate delay in recording statement of witness which remained unexplained—Apparently the prosecution witnesses presented untrue facts and improved their versions from time to time—All accused acquitted.

[Di Vi]

APPEARANCES:

FOR THE APPELLANTS : Mr. Rajender Yadav, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

RESULT: Appeal allowed.

S.P. GARG, J.

1. Shivender Pandey @ Pandit (A-1), Virender @ Kalia (A-2), Pushpender @ Praveen (A-3) and Dinesh @ Guddu (A-4) impugn a judgment dated 25.04.2012 in Sessions Case No.41/2011 arising out of FIR No.102/2011 registered at Police Station Ashok Vihar by which they were convicted under Section 308/34 IPC. By an order dated 08.05.2012 they were sentenced to undergo RI for three years with fine Rs. 2,000/ -each.

2. Allegations against the appellants, as projected in the charge-sheet, were that on the night intervening 20/21.04.2011 at around 12.15 AM (night), A-1 to A-3 took victim-Rohit to Wazirpur Industrial Area, near Railway Line, in front of Jhuggi No.N-28A-591, Chander Shekhar Azad Colony. The fourth accused (A-4) was already present there with a country-made pistol. It is alleged that A-4 handed over the 'katta' to A-1. A-2 and A-3 caught hold of Rohit and raised his hands in different directions; A-1 fired at him as a result of which Rohit fell down. It is further alleged that, thereafter, A-1 took out Rohit's mobile bearing No.9278857814 and A-4 took out his purse containing identity card and cash '200/-. Someone made a call to the police at 100. PCR van arrived at the spot; took Rohit to Babu Jagjivan Ram Memorial hospital; and referred to Lok Nayak Jai Prakash Narayan hospital from there. DD No.3A (Ex.PW19/A) was recorded at police station Ashok Vihar at 01.05 A.M. regarding the incident. The investigation was assigned to ASI Om Pal who with Ct. Devendra went to the spot. The victim was 'unfit' to make statement. The Investigating Officer lodged First Information Report by sending rukka (Ex.PW-19/C). During investigation, statements of witnesses conversant with the facts were recorded. The accused persons were arrested and pursuant to their disclosure statements, mobile phone and purse belonging to the victim were recovered. Exhibits were sent to Forensic Science Laboratory. After completion of investigation, a charge-sheet was submitted against the accused persons for committing offences under Section 307/201/34 IPC; they were duly charged; and brought to trial. To substantiate the charges the prosecution examined 20 witnesses in all. In 313 statements, the accused persons pleaded false implication and denied their complicity in the crime. They examined DW-1 (Ram Prakash) in defence. After considering the rival contentions of the parties and appreciating the evidence and documents on record, the trial court by the impugned judgment held all of them guilty under Section 308/34

IPC. It is relevant to note that the State did not challenge the conviction under Section 308/34 IPC instead of Section 307 IPC. Being aggrieved and dissatisfied, the appellants have preferred the appeals.

3. I have heard the learned counsel for the parties and have examined the record. The occurrence took place on the night intervening 20/21.04.2011 at about 12.15 A.M. PW-4 (SI Zile Singh) in his affidavit (Ex.PW-4/1) stated that at about 01.00 A.M. on receipt of a call from Police Control Room, he went to the spot i.e. railway line, near Aara machine chowk, in front of jhuggies of Chander Shekhar Colony, and found a boy lying there in injured condition. He revealed his name Rohit s/o Kalicharan. He was taken to BJRM hospital. In the cross-examination, he revealed that when the injured met him, he was conscious and did not tell him the name of the assailants. He merely told him that 34 persons had fled after firing at him. The victim was treated first at Babu Jagjivan Ram Memorial hospital and MLC (Ex.PW-6/A) records the arrival time of the patient there at 01.30 a.m. brought by ASI Zile Singh of PCR. It further records that the patient was 'unfit' for statement at that time though he was oriented and conscious. There are endorsements dated 21, 22, 23 and 26.04.2011 when the victim was not 'fit' to give statement. On 04.05.2004, the victim was declared 'fit' for statement. The nature of injuries was opined as 'grievous.' The prosecution produced PW-6 (Dr.Lavnish), PW-7 (Dr.Neeraj Chaudhary), PW-10 (Dr.Brahmanand Lal) and PW-15 (Dr.Vikas Singh Tomar), who examined the patient who underwent exploratory laparotomy and was discharged from the hospital on 13.05.2011. Injuries suffered by the victim are notunder challenge. Appellants' only plea is that they were not the author of the injuries and have been falsely named by the victim due to previous enmity.

4. So far as A-4 is concerned, it is on record that he was not acquainted with the victim and had no animosity with him. It is pertinent to note that A-1 arrested on 24.04.2011 in the disclosure statement (Ex.PW-14/C) did not attribute any role to A-4 and claimed that only he, A-2 and A-3 had caused injuries to the victim. Subsequently, on 25.04.2011, supplementary disclosure statement (Ex.PW-14/L) was recorded where A-1 implicated A-4 and disclosed that he had handed over a country made pistol to him at the crime spot to fire at Rohit and had removed a purse from Rohit's pocket. Prior to that, the Investigating Officer had no incriminating material to effect A-4's arrest on 25.04.2011 itself on the pointing out of the secret informer. Allegedly, pursuant to

his disclosure statement (Ex.PW-14/O), purse (Ex.P-5) containing I-card and 2-3 visiting cards of the victim were recovered and seized vide seizure memo (Ex.PW-14/Q). Despite attempts made by the prosecution, the crime weapon i.e.pistol could not be recovered. It is relevant to note that the trial court in the impugned judgment did not believe the recovery of mobile phone and purse. Only evidence that emerged against A-4 was the sole testimony of PW-8 (Rohit), who identified him in the court as the assailant who had made available the country-made pistol to A-1 to fire at him and had taken out his purse. PW-8 (Rohit) did not assign any motive to A-4 for assisting or facilitating A-1 to A-3 to inflict injuries to him. He (A-4) had not accompanied them (A-1 to A-3) at the house of the victim when allegedly they had taken him along. PW-16 (Ravi), Rohit's brother and (PW-17) Rohit's father, did not ascribe any role to A-4 in taking away Rohit from the house. There was no earthy reason for A-1 to A-3 to involve A-4 in the conspiracy. Admittedly, after A-4's apprehension, the Investigating Officer did not move any application for holding Test Identification Proceedings. The occurrence had taken place at night time and A-4 was not acquainted with the victim prior to the occurrence. It was expected to get his identity established from the victim whose statement was recorded after a considerable delay on 05.05.2011. A-4's identification for the first time in the court is not enough to prove his involvement in the crime particularly when no crime weapon was recovered at his instance and the recovery of the purse was disbelieved by the trial court. Even in Court statement, Rohit did not identify A-4 by name and merely pointed at him as one of the assailants to whom A-1 to A-3 had met at the crime spot. In the information recorded in PCR Form (Ex.PW-12/A), the victim did not give the exact number of assailants and merely described it three-four. Earlier the information conveyed to the PCR was that an individual has been stabbed by a 'knife'. The complainant who had revealed his name to PW-4 (ASI Zile Singh) did not name A-4 as one of the assailants. Considering all these deficiencies in the evidence, it was not safe to convict A-4 with the aid of Section 34 IPC. A-4 deserves benefit of doubt and is acquitted.

5. Regarding A-1 to A-3, admitted position is that they were known to the victim prior to the incident. The victim-Rohit admitted in his Court statement that he knew A-2 and A-3 who were related to each other and lived in Azadpur and Sawan Park respectively. He also knew A-1 who used to reside in A-2's house. They all were friends. Injuries sustained

by the victim-Rohit are not under challenge. The incident took place on the night intervening 20/21.04.2011. Information was conveyed from mobile No.9599876649 to Police Control Room at 0:58:59 about the 'stabbing' of an individual by a knife and it was recorded in the PCR form (Ex.PW-12/A). As observed above, PW-4 (SI Zile Singh) of PCR found the injured conscious at the spot. The victim, however, did not tell him the names of the assailants and merely informed that three/four persons had run away after firing at him. He claimed that the PCR van reached at the spot within three minutes after receipt of information. No eye-witness/informant was found present at the spot. The victim claimed that when he was lying on the railway line after sustaining injuries, to attract the attention of a passerby, he threw stones at him. The said passerby made a telephone call to PCR. The said informant has not been examined and his identity could not be established. It is unclear as to how the informant came in possession of mobile bearing No. 9599876649 whose SIM was in the name of Ravi (PW-16), victim's brother, and was allegedly given about 15 days prior to the incident to A-1. As discussed above, MLC (Ex.PW-6/A) records that the patient was orient and conscious. However, the victim did not narrate the name of the assailants to the doctors. Since the victim was unfit to make statement, the Investigating Officer lodged First Information Report after making endorsement on DD No.3A (Ex.PW-19/A) at 03.15 a.m. The victim was not found to have sustained any injury by a knife. Rather it was a case of 'gunshot' injury sustained by him. Apparently, the information conveyed and recorded in PCR Form (Ex.PW-12/A) was incorrect. Statement of the victim was recorded under Section 161 Cr.P.C. for the first time after a considerable delay on 05.05.2011. It is alleged that the victim's statement could not be recorded earlier as he was 'unfit' to make statement. Medical record, however, does not substantiate the explanation. MLC (Ex.PW-6/A) records that the patient was 'unfit' for statement on 21/22/23/26.04.2011. The inordinate delay to record the statement on 05.05.2011 has remained unexplained. It is not clear if the victim was 'fit' to make statement in between 26.04.2011 and 04.05.2011. It is unclear if the Investigating Officer visited the patient to record his statement during that period.

6. The material/crucial document is PCR Form (Ex.PW-12/A). It records various pieces of information received at Police Control Room from time to time till 02:38:38. It is recorded therein that an individual

was being taken to hospital; he was disclosing that three/four individuals had fired at him; the victim-Rohit was handed over to the Duty Head Constable at BJRM hospital and he had sustained bullet injury on his chest. It further records that the victim disclosed that three/four individuals were on foot; met him near Wajir Pur Industrial Area, Aara Chowk, and fled away after firing at him. It further disclosed that the victim was coming after meeting his friend. Apparently, the victim did not disclose the name of the assailants to PCR officials or to the doctor. The victim did not give any reason for not disclosing the names of A-1 to A-3, who were well acquainted with him prior to the incident. While appearing as PW-8, in his Court statement, he identified all of them and assigned a specific and definite role to each of them. He did not claim that he was unable to identify the culprits at that time or was not physically fit to name them. The very fact that the victim had attracted the attention of a passerby by throwing stones at him, reveals that he was conscious and was in a position to reveal the name of the assailants. A-1 to A-3's involvement emerged only on 05.05.2011 when the complainant recorded 161 statement. In this statement (Ex.PW-8/DA), there is no mention if the victim had any conversation with any of the appellants on mobile. Only in the supplementary statement recorded on 14.07.2011, the victim informed that he had conversation with the appellants on mobile before he accompanied them to the place of occurrence. Again, no reasons have given to omit these facts in his earlier statement recorded on 05.05.2011. The complainant/victim disclosed that after causing injuries to him, A-1 took out his mobile phone make Tata indicom having SIM No.9278857814 from his pocket and A-4 took out his purse containing '200/-and I-card. The Trial Court, however, did not believe the recovery of mobile (Ex.P-4) and purse (Ex.P-5). The crime weapon i.e. pistol could not be recovered during investigation. The Trial Court examined the call details of mobile phone Nos. 9278857814 and 9266485948. As per the call details from 19.04.2011 to 22.04.2011, three calls were made from mobile No. 9278857814 to mobile No. 9266485948 at 22:40:29; 23:40:45; and 00:07:25. The Trial Court concluded that these calls were made by the victim to A-2 and not vice-versa as claimed by him. The victim did not explain as to why at odd hours, he had made repeated calls to A-2 and what were the contents of the said conversation. The call details proved on record falsifies the victim's plea that the appellants had made a plan and had conversation with him on mobile before taking him to the place of occurrence with them.

7. Besides above, no cogent evidence has come on record to establish as to, to whom these mobile numbers belonged. It has come in evidence that mobile No. 9266485948 was in the name of Kusum, wife of Virender @ Kalia (A-2). PW-9 (M.N.Vijayan) and PW-11 (S.N.Jha) proved that mobile No. 9278857814 was in the name of one Dolly, d/o Kamal Singh, r/o A-15, Nihal Vihar, Phase-2, Nilothi Ext., Nangloi, Delhi. He proved customer application form (Ex.PW-9/D), Election Card (Ex.PW-/E) and call detail record (Ex.PW-9/F). The complainant did not divulge as to how the number taken in the name of Dolly came into his possession. Dolly has not been examined. Similarly, PW-11 (S.N.Jha) proved that mobile No.9599876649 was in the name of Ravi Kumar Shahu (Victim's brother). The complainant disclosed that he had given his SIM issued in the name of his brother Ravi, to A-1 about 15 days prior to the incident. PW-16 (Ravi Kumar Shahu) did not claim so. The victim further claimed that SIM No. 9278857814 was taken by him from his friend Narender. Narender has not been examined to substantiate it.

8. PW-16 (Ravi) deposed that his mother received a call from PCR about the incident and handed over the phone to him. He, however, did not reveal the mobile number on which he or his mother had received information from PCR. PW-17 (Kali Charan) on the contrary claimed that at about 01.45 am, he received a call from his son Ravi about the incident. Again, telephone numbers in possession of Kali Charan and Ravi, on which they exchanged the information, have not been revealed. PW-8 (Rohit), in the cross-examination disclosed that at the time of incident three mobile phones were in use in his family. However, he did not disclose their mobile numbers. Apparently, the prosecution witnesses including the victim have not presented true facts about the incident and have improved their version from time to time. Mere conversation between the victim and A-2 on the relevant date cannot be taken as incriminating circumstance as they were known to each other and were friends. The statements of PW-16 (Ravi) and PW-17 (Kali Charan) that the assailants had taken Rohit with them cannot be taken at their face value for the reasons mentioned above. There is no mention in the statement of PW-16 that the victim's father had any confrontation or conversation with the assailants at that time. There was no sound reason for all the assailants to go to the victim's house when the victim was in touch with A-2 on phone.

In the light of the above discussion, conviction and sentence of

appellant Nos.1 to 3 also cannot be sustained. They also deserve benefit of doubt.

9. The appeals preferred by the appellants are accepted and their conviction and sentence are set aside. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back along with a copy of this order. The appellants shall be released forthwith if not required to be detained in any other case. The bail bonds and surety bonds also stand discharged.

ILR (2014) III DELHI 1770
W.P. (C)

UNION OF INDIA & ORS ....PETITIONERS

VERSUS

JATASHANKAR ....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 2053/2014 & CAV. NO. : 291/2014 & CM NOS. : 4301-4302/2014 DATE OF DECISION: 30.04.2014

Railway Servants (Disciplinary & Appeal) Rules, 1968—Rule 18 and 25—Indian Evidence Act, 1872—Section 108—Respondent stopped attending duties and he was issued a charge memo proposing to conduct disciplinary proceedings against him on charge of absenting himself from duty unauthorisedly—One of his relatives lodges a police complaint with regard to his being missing—Charge-sheet sent to respondent by registered post was returned undelivered with remark that "person who has to receive it remains out without intimation. No hope that he will return, hence returned"—Notice on inquiry proceedings issued by

Inquiry Officer (IO) was also returned with same remark as before—Report of IO holding that charges framed against respondent were proved correct was sent to respondents permanent address and was returned undelivered with was remark as before—Disciplinary Authority (DA) accepted recommendations of IO and imposed penality of removal from service with immediate effect—Respondent was finally traced in a condition as that of a mad person in Ayodhya-Application filed by respondent before Administrative Tribunal was allowed holding that IO & DA arbitrarily concluded that applicant's absence was unauthorized—Order challenged before High Court—Held—Petitioners had before them evidence of police report as well as confirmation by police that respondent was not traceable—Tribunal had found decision of DA to initiate disciplinary action against respondent on charge of unauthorized absence from duties as arbitrary and hasty—Inquiry proceedings conducted by IO has been held to be a formality inasmuch as telegram and registered letters were being sent to a person who was missing and was admittedly not available at address to which they were sent—Nothing has been pointed out to us which would enable us to take a view which is contrary to view taken by Tribunal—Petitioners would be entitled to subject respondent to a medical examination.

Important Issue Involved: Inquiring proceedings conducted by the Inquiry Officer would be a formality if notices were being sent to a person who was missing and was admittedly not available at the address to which they were sent.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Jitendra Kumar Singh, Adv.

FOR THE RESPONDENT : Mr. A.K. Bhakta, Adv.

CASE REFERRED TO:

1. *Dr. Ramesh Chandra Tyagi* vs. *Union of India* 1994 (2) SCC 416.

RESULT: Disposed of.

GITA MITTAL, J. (Oral)

Cav.No.291/2014

1. The caveator is represented. Therefore, caveat notice is discharged.

WP (C) No.2053/2014

2. The instant writ petition has been filed by the petitioners assailing the order dated 9th December, 2013 passed by the Central Administrative Tribunal allowing OA No.4279 of 2011. The facts giving rise to the instant writ petition are within a narrow compass. The respondent before us was appointed as casual labourer on the 23rd November, 1988 with the petitioners; was granted a temporary status in 1989 and his services were subsequently regularised. The admitted facts before us are that the respondent stopped attending his duties w.e.f. 31st May, 1999. The respondent has contended that one of his relatives lodged a police complaint on 27th June, 1999 with the police station at Patiala with regard to his being missing. It is further claimed by the respondent that his wife and relative Chandrika Prasad made representations and informed the petitioners about this position. We may note that this fact was disputed on behalf of the petitioners.

3. On 3rd April, 2002, the respondent was issued a charge memo proposing to conduct disciplinary proceedings against him on the following charge:-

> "During the month of May-1999 Sh. Jatta Shanker while functioning as Khalasi/Semi Skilled in the office of the undersigned indulged himself in act of serious misconduct/misbehaviour and failed to maintain devotion to duty as well as engaged himself in act which is unbecoming of Railway servant since Shri Jatta Shanker has absented himself from duty since 31.05.1999 (A/N) unauthorisedly. In spite of telegrams sent to him from time to

time for resuming duty, Shri Jatta Shanker has neither resumed duty nor given information for absence from duty till date.

By acting in such a manner Shri Jatta Shanker has violated the provisions of Rule 3(I)(ii) (iii) of Railway Service (Conduct) Rules, 1966."

4. The chargesheet sent to the petitioner by registered post was returned undelivered on 6th April, 2002 with the remark that "the person who has to receive it remains out without intimation. No hope that he will return, hence returned". Despite this remark, the chargesheet was pasted at the respondent's workplace on 3rd May, 2002 in the presence of three staff members.

5. The Disciplinary Authority proceeded to appoint an inquiry officer who also sent the notice on the inquiry proceedings on permanent address which was also returned with the same remark as before. The Inquiry Officer adjourned the matter on 7th October, 2002 & 28th October, 2002 notices for which hearings were also returned with the remark that "the person who has to receive it remains out and his family members refused to accept it, hence returned". It is apparent, therefore, that neither was the charge memo served on the respondent who was not available at this address nor any other notices for the dates fixed. Even though it was the charge against the respondent that he was unauthorisedly absent from duty, the petitioners effected pasting of the charge memo at his workplace. Despite this position, the Inquiry Officer proceeded ex parte in the matter and submitted his report on 2nd November, 2002 holding that the charges framed against the respondent were proved correct.

6. It is noteworthy that the report of the inquiry officer which was sent under registered post to the respondent's permanent address on 16th January, 2003 was also returned undelivered with the same remark as before. The respondent again pasted copy of the inquiry report on 4th February, 2003 on the Notice Board at the workplace of the respondent.

The recommendations of the inquiry officer were accepted by the disciplinary authority which proceeded to pass an order dated 16th April, 2003 whereby the penalty of removal from service with immediate effect was also imposed upon the respondent.

7. The factual narration noted in the order dated 9th December,

2013 would show that vide a letter dated 22nd December, 2004, the Inquiry Officer made an inquiry from the chowki incharge, Urban Estate Chowki, Patiala asking for the status of the FIR lodged by Chandni Prasad on the 27th June, 1999 in respect of the respondent against diary no.S-18, Police Station Urban Estate II, Patiala. The Inquiry Officer was informed by the police authority on 23rd December, 2004 as well as on 27th December, 2004 that the respondent was still not traceable.

8. The Tribunal has noted that despite these communications which were on the record of the inquiry officer and also placed before the Disciplinary Authority, they arbitrarily concluded that the applicant's absence was unauthorised. They were admittedly aware that the FIR regarding the respondent being missing since 1st May, 1999 was before them which ought not to have been ignored.

9. The respondent was finally traced out on 22nd April, 2006 by one Shri Ram Shankar, an acquaintance in a condition as that of a mad person in an ashram in Ayodhya. The respondent's wife took him to the concerned police station in Patiala.. The respondent also submitted a representation dated 27th April, 2006 to the petitioners to reinstate him and to give him medical treatment.

10. The Tribunal has noted that the respondent was given medical treatment for a mental problem and has detailed several prescriptions in this regard commencing from 18th June, 2006 till 27th February, 2011. As per these prescriptions, the respondent was treated for some mental disorder for which he received medication as well. This sickness was the reason claimed by the respondent for the delay in making the appeal against the order of the disciplinary authority dated 16th April, 2003 within the statutory period.

11. It is also essential to note that the respondent's representation to the Ministry of Railways, complaining that the respondent was not being permitted to join was answered by the Ministry by a letter dated 10th October, 2008 informing the respondent that he had been removed from service by the order dated 16th April, 2003 that he had not filed any appeal against it within the stipulated period and, therefore, it was not possible to rejoin him.

12. In this background, the respondent filed a revision dated 12th May, 2009 under Rule 25 of the Railway Servants (Disciplinary & Appeal)

Rules, 1968. The petitioners failed to consider the same. As a result, the respondent was compelled to approach the Central Administrative Tribunal vide OA No.182/2010. This application was disposed of by the Tribunal by its order dated 29th April, 2010 directing as follows:-

> "We are, therefore, of the view that since there are rules and instructions relating to missing Government Employee, which do not seem to have been taken in view while passing the impugned orders, let the respondent reconsider the case of the applicant's husband in view of the submissions noted above as well as the other ground put forward by the applicant in the OA and take a decision on the prayer therein by treating it as the applicant's representation in that regard informing her by a reasoned and speaking order within a period of 3 months from the date of receipt of a certified copy of this order. The OA is disposed of in the above terms. No costs."

13. In view of the afore-said directions, the Appellate Authority passed an order dated 24th July, 2010, holding inter alia that the medical treatment of the respondent was an after thought; that in the personal hearing on 2nd July, 2010, there was nothing abnormal in the respondent's behaviour and that his mental status was normal and that the respondent's family members knew of his whereabouts which they intentionally did not disclose and that the claim of the respondent that he was missing was not authentic. The appeal was, therefore, rejected and the penalty imposed upon disciplinary authority of removal from service was upheld by the appellate authority.

14. The respondent's revision against this order was also rejected by an order dated 2nd February, 2011. Aggrieved by this order, the respondent had filed OA No.4279 of 2011 which has been rejected by the impugned order.

15. We have heard learned counsel for the parties and carefully scrutinized the record. It is not disputed that the respondent was not attending his duties w.e.f. 31st May, 1999. The petitioners had before them evidence of the police report as well as the confirmation by the police as late as on 23rd and 27th December, 2004 that the respondent was not traceable. The Tribunal has found the decision of the disciplinary authority to initiate disciplinary action against the respondent on 3rd April, 2002 on the charge of unauthorised absence from duties as arbitrary

and hasty. Furthermore, the inquiry proceedings conducted by the inquiry officer has been held to be a formality inasmuch as telegram and registered letters were being sent to a person who was missing and was admittedly not available at the address to which they were sent. All these communications were returned to the petitioners who thereafter proceeded to paste the same at his workplace.

16. The Tribunal has placed reliance on Section 108 of the Indian Evidence Act, 1872 to point out that the petitioners could have drawn a presumption against the respondent only after passage of seven years after he had gone missing.

17. The Tribunal has also faulted the inquiry proceedings and held that the same was not in accordance with Rule 18 of the Railway Servants (Disciplinary & Appeal) Rules, 1968 and that there was no evidence brought on record against the respondent. Despite two listed documents and four listed witnesses, no evidence was recorded by the petitioner. Reliance has been placed on the pronouncement of the Supreme Court in 1994 (2) SCC 416 **Dr. Ramesh Chandra Tyagi Vs. Union of India** that an ex parte inquiry held without sending the notice properly is an invalid inquiry.

18. Nothing has been pointed out to us which would enable us to take a view which is contrary to the view taken by the Tribunal. We find no infirmity in the order passed by the Tribunal quashing the order dated 2nd February, 2011; the inquiry officer's report dated 2nd November, 2002; the Disciplinary Authority's order dated 16th April, 2003; the Appellate Authority's order dated 24th July, 2010 and the revisional authority's order dated 2nd February, 2011. The writ petition is therefore dismissed.

19. Detailed directions have been made in para 15 of the impugned order which notes that the respondent's wife brought to him to the petitioners on 27th April, 2006 and requested them to conduct medical treatment. The Tribunal has directed that in view of the quashing of the order of the removal from service, the respondent shall be deemed to have re-joined duties on 8th January, 2010 when OA No.182 of 2010 was filed and be paid his emoluments with effect from the same date. The petitioner shall abide by the time bound directions within the period stipulated.

20. Learned counsel for the petitioners has contended that it was the respondent's stand that he was unwell. Medical prescriptions placed on record show that the respondent was under heavy neurological medication. Without commenting on the authenticity thereof, the petitioners would be entitled to subject the respondent to a medical examination.

This writ petition is disposed of in the above terms.

CM No.4301/2014

21. In view of the order passed in the writ petition, this application does not survive.

ILR (2014) III DELHI 1777
CRL. A.

DINESH ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S. MURALIDHAR, J.)

CRL.A. NO. : 272/2008 DATE OF DECISION: 01.05.2014

Prevention of Corruption Act, 1988—S. 7, 13 (1)(d) r/w S. 13(2)—Conviction—Challenged—Accused caught with treated government currency notes in left pocket of his shirt—Hands as well as pocket of the shirt turned pink on handwash—Accused admitted his presence at the spot but claimed that his shirt was lying on the bench nearby which was found to be having currency notes when he was apprehended by the raid officer—Explanation appears to be afterthought and weak defence—Evidence was unimpeachable—Conviction upheld—Appeal dismissed.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. K.B. Andley, Senior Advocate with Mr. M.L. Yadav, Mr. M. Shamikh and Mr. Lokesh Chandra, Advocates.

FOR THE RESPONDENT : Ms. Aashaa Tiwari, APP.

RESULT: Appeal dismissed.

S. MURALIDHAR, J.

JUDGMENT

01.05.2014

1. This appeal is directed against the impugned judgment dated 13th March 2008 passed by the learned Special Judge in CC No. 1/03 holding the Appellant guilty for the offences under Section 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 ('PC Act') and the order on sentence dated 17th March 2008 sentencing him to rigorous imprisonment ('RI') for two years and fine of Rs. 2,000, and in default, to undergo simple imprisonment ('SI') for a period of one month for the offence under Section 7 of the PC Act. For the offence under Section 13(1)(d) read with Section 13(2) of the PC Act, the Appellant was sentenced to undergo rigorous imprisonment for two years with a fine of Rs. 2,000, and in default, to undergo simple imprisonment ('SI') for two months.

2. The case of the prosecution is that the Complainant, Radhey Shyam (PW4) was running a soda/ cold drinks business at Shop No. 280, Subzi Mandi, Delhi. The Appellant Dinesh Kumar was working as Vaccinator in S.P. Zone, Municipal Corporation of Delhi ('MCD'). According to PW4, the Appellant demanded from him a bribe of Rs. 1,000 per month for not sealing the cold drink unit and for not challaning the shop. On 17th July 2001, the Appellant is stated to have gone to the shop of PW4 and demanded a bribe of Rs. 1,000 per month. Pursuant to negotiations, it was agreed between them that PW4 would pay Rs. 500 and that the Appellant would come at around 11:00 am on 18th July 2001 to collect the bribe amount.

3. Since PW4 was against giving the bribe, he went to the Anti Corruption Branch (ACB) and got his complaint (Ex.PW4/A) recorded in the presence of the panch witness, Vinay Kumar (PW8). PW4 produced one government currency ('GC') note of Rs. 100 and eight GC notes of Rs. 50. Inspector M.S. Sanga (PW7), the raid officer ('RO') noted the serial numbers of the GC notes in his pre-raid report (Ex.PW4/B). The RO applied phenolphthalein powder on the GC notes and gave a demonstration to PWs 4 and 8. Thereafter, the treated GC notes were given to PW4 and he kept them in the left pocket of his shirt. PW7 was instructed to remain close to PW4 and to overhear the conversation between PW4 and the Appellant and to give a signal after the bribe amount was paid.

4. At around 10:30 am on 18th July 2001, the RO, PW4, PW7, Inspector N.S. Minhas (PW6), the Investigating Officer ('IO') and the other members of the raiding team left the ACB for the spot in a government vehicle. The government vehicle was left near Robin Cinema on the main road at a distance from the spot with the PW6 and the driver remaining in the vehicle. PWs 4 and 7 moved towards the Pappu Barber shop adjacent to Pappu Lemon shop of PW4. The other members of the raiding party followed them and took suitable positions.

5. At around 12:20 pm, the Appellant is stated to have come there on a Kawasaki Bajaj motorcycle. He entered the barber shop at 12:30 pm. In his deposition, PW4 stated that the Appellant came to his shop and inquired about his health and sat on a chair. PW4 requested the Appellant not to demand the bribe amount but the Appellant insisted on PW4 paying the amount of Rs. 1,000 per month; then the Appellant asked him to pay Rs. 600 as a monthly bribe but PW4 replied that he had only Rs. 500 and would pay the balance Rs. 100 after a few days. He then took out the treated GC notes and gave it to the Appellant who accepted them with his right hand and kept them in the left pocket of his shirt. At that point, PW8 gave a pre-determined signal and the raiding party rushed in. The RO disclosed his identity and challenged the Appellant.

6. PW8 corroborated the above version in part. PW8 has, in his deposition, stated that he was sitting in the barber shop which was situated near the shop of PW4. Thereafter when the Appellant came and had talks with PW4 which could not be heard by him. There was a hue and cry outside the shop and when he reached the spot, some proceedings

regarding hand wash and preparation of documents were being conducted. He claimed that no money was recovered from the possession of the Appellant in his presence.

7. PW8 was declared hostile and was cross-examined. However, in his cross-examination, he admitted that around 10:30 am, he and PW4 along with the members of the raiding party left the ACB and reached Robin Cinema in a government vehicle and that he and PW4 went towards the shop of PW4 and that he (PW8) sat in the barber shop. He, however, denied the other happenings. He identified his signatures on the pre-raid proceedings and the seizure memo. He admitted as correct the fact that the Appellant was arrested and his personal search was taken and that the motorcycle was also seized.

8. As far as PW4 is concerned, he confirmed the recovery of the GC notes from the Appellant. He also confirmed that the hand wash and the wash of the pocket of the shirt of the Appellant taken at the spot turned pink and that the washes were transferred to clean bottles, sealed and labeled. In his cross-examination, PW4 stated that he did not have any license to run his cold drink making unit. He admitted that he had been challaned several times by the MCD for encroachment or on health grounds. He stated that the police had implicated him in more than ten cases and that he was facing a dispute in the civil Court with his landlord in two cases. PW4 was accused in 12 criminal cases. He admitted as correct that the police had declared him as a bad character of the area but claimed that this was a wrong declaration. However, he stood firm as far as the raid proceedings were concerned.

9. The learned trial Court, on an analysis of evidence, held that while PW8 had not supported the case of the prosecution, his entire deposition could not be wiped off the record. To the extent that he admitted that PW4 had, in his presence at 3:30 pm on 18th July 2001, recorded the complaint (Ex.PW4/A) and to the extent that he admitted that he went along with the members of the raiding party to the spot and further to the extent of his confirming that the Appellant was arrested and his search was taken, his evidence could be relied upon.

10. The learned trial Court next discussed the evidence of Mr. Dev Raj (DW1) who was examined by the Appellant. Although DW1 stated that the Appellant was taken from the shop of DW1 by PW4, the said evidence was inconsistent with the clear evidence of both the PW4 and

the RO. Accordingly, the evidence of DW1 was disbelieved. It was further noted that the involvement of PW4 in criminal cases was irrelevant as long as the facts concerning the demand and the acceptance of the bribe was clearly made out.

11. Learned counsel for the Appellant reiterated that with the panch witness (PW8) turning hostile, and the criminal antecedents of PW4, there was no reliable evidence to prove the guilt of the Appellant beyond all reasonable doubt. There were also contradictions in the depositions of PWs 4 and 8 as to the place where the demand and the acceptance of the bribe took place. While PW4 stated that the Appellant had come to his shop and that PW8 was present there, the deposition of PW8 was that he was in the barber shop.

12. It is seen from the evidence of PW7, the RO, that the Appellant entered the barber shop and the demand and the acceptance took place there. What is significant is that the Appellant was caught with the treated GC notes in the left pocket of his shirt. Both the hand washes as well as the pocket of the shirt turned pink. There is nothing in the cross-examination of PWs 4 or 7 that discredits their versions as regards the hand washes and the wash of the shirt turning pink and the Appellant being arrested on the spot.

13. Interestingly, in his statement under Section 313 of the Code of Criminal Procedure, 1973 ('Cr. PC'), the Appellant does not deny being in the shop of PW4. When asked about the recovery of the GC notes from his shirt pocket, he stated that "my shirt was lying on the bench in the Pappu Lemon Shop as I was already having talking terms with the complainant because in that area my maternal uncle is residing." This makes it clear that even according to the Appellant, he was present at the spot. In response to another question, he stated "I was called out of the shop by one person, whose identity was revealed later on as Raid Officer and complainant disappeared at the same moment the said Raid Officer asked me to bring my shirt which I took from the bench. I was asked by Raid Officer to check my shirt as I have received the bribe from the complainant as and when I put my hands in my shirt I found some notes therein which was handed over to Raid Officer."

14. The above explanation appears to be an after-thought and indeed a very weak defence. There is no reason to disbelieve PWs 4 and 7 as regards the raid proceedings and the recovery of the treated GC notes

from the Appellant. As rightly pointed out by the learned trial Court, the prosecution had proved beyond all reasonable doubt the fact that PW4 gave a complaint; that the treated GC notes were given to him in the presence of PW8; that PWs 4 and 8 went with the raiding party to the spot; that the Appellant was found with the treated GC notes in the pocket of his shirt when the raiding party reached on receiving the signal from PW8; that the Appellant was arrested after the recovery of the treated GC notes from the pocket of his left shirt which tallied with the notes noted in the pre-raid proceedings.

15. It was be urged by counsel for the Appellant, that the RO Mr. Sanga was himself an accused in certain criminal cases against him under the PC Act and had even been convicted by the judgment dated 20th May 2011 of the learned trial Court for the offences punishable under Section 13(1)(d) read with 13(2) of the PC Act. It was also pointed out that a departmental inquiry had been ordered against him.

16. In the considered view of the Court, the evidence on record in the present case is unimpeachable and clearly points to the guilt of the accused. The above facts concerning the RO do not in any way impinge upon the raid proceedings that took place in 2001 and which have been proved by the prosecution beyond all reasonable doubt.

17. Lastly, it was submitted that the sanction for prosecution was bad in law as sanction was granted by an officer who was not authorized to do so. This aspect of the matter has been discussed by the learned trial Court in the impugned judgment. The sanction order was proved by PW1, Mr. Anand Prakash. The learned trial Court noted that the appointing and removal authority for the Appellant was the Additional Commissioner, MCD and PW1 was posted as the Additional Commissioner at the relevant point in time. The Court is, therefore, unable to find any illegality as far as the sanction order is concerned.

18. For the aforementioned reasons, this Court is unable to find any grounds whatsoever to interfere with the impugned judgment of the learned trial Court.

19. As far as the sentence is concerned, the Court finds that the sentence of RI for two years and fine of Rs. 2,000 for each of the offences under Sections 7 and 13(1)(d) read with 13(2) of the PC Act are perfectly valid and do not call for interference.

A

20. The appeal is accordingly dismissed but with no order as to costs. The Appellant is directed to be taken into custody forthwith to serve out the remaining sentence.

21. A certified copy of this order along with the trial Court record be delivered by Special Messenger to the trial Court concerned forthwith.

B

C

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CRL. A.

D

BABU RAM ....APPELLANT

VERSUS

CENTRAL BUREAU OF INVESTIGATION ....RESPONDENT

E

(S. MURALIDHAR, J.)

CRL. A. NO. : 29/2008 DATE OF DECISION: 02.05.2014

F

Prevention of Corruption Act, 1988—S. 7, 13(1)(d) r/w S. 13(2)—Conviction—Appeal against—Complainant PW3 in his examination in chief confirmed the demand made by accused and acceptance of the bribe and the fact that after accepting the bribe amount accused had kept it in the right side pocket of his pant—However in his cross-examination, after one month, PW3 resiled and claimed that he had purchased a scooter from accused and owed Rs. 5000/- as balance consideration to the accused—PW3 admitted in his chief that a trap was laid and that accused was arrested after his right hand and right side pocket of pant turned pink on wash—Accused also claimed that he took money as balance consideration of sale of scooter from PW3, which explanation was not offered soon after his apprehension—Accused did not deny that his hand and pant turned pink on wash—Defence of

G

H

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accused is an afterthought—Shadow witness and recovery witness supported prosecution—Relying on the case of *Khujji v. State of M.P.:* AIR 1991 SC 1953 contrary statement of PW3 in cross-examination discarded—Appeal dismissed.

B

[Di Vi]

APPEARANCE:

C

FOR THE APPELLANT : Mr. Saurabh Kirpal with Mr. Akshay Bhatia and Mr. Bharat Bhushan Bhatia, Advocates.

FOR THE RESPONDENT : Mr. Manoj Ohri, Spl. PP.

D

CASES REFERRED TO:

1. *Banarsi Dass* vs. *State of Haryana* AIR 2010 SC 1589.
2. *Yakub Ismail Bhai Patel* vs. *State of Gujarat* 2004 Cri LJ 4205.
3. *Sohan Lal* vs. *State of Punjab* 2004 SCC (Crl) 226.
4. *Khujji* vs. *State of M.P.* AIR 1991 SC 1853.
5. *Ram Kishore* vs. *State* 31 (1987) DLT 312.

E

F

RESULT: Appeal dismissed.

S. MURALIDHAR, J.

G

JUDGMENT

02.05.2014

1. This appeal is directed against the judgment dated 13th December 2007 passed by the learned Special Judge (CBI) in CC No. 05/05 convicting the Appellant under Section 7 and 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 ('PC Act') and the order on sentence dated 14th December 2007 sentencing him to one year's rigorous imprisonment ('RI') with a fine of Rs. 3,000, and in default, to undergo simple imprisonment ('SI') for fifteen days for the offence under Section 7 of the PC Act and RI for two years with a fine of Rs. 7,000, and in default, to undergo SI for fifteen days for the offence under Section 13(2) read with 13 (1) (d) of the PC Act. Both the sentences were

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directed to run concurrently.

2. By an order dated 10th January 2008, this Court suspended the sentence awarded to the Appellant during the pendency of the appeal, subject to terms. The case of the prosecution.

3. The Complainant, Rakesh (PW-3) was running a dairy business at 176-B, Prajapat Nagar, Near Gulmohar Park, New Delhi. PW-3 had 25 cows which he used to tie with ropes in front of his house. The cattle catching staff of the Municipal Corporation of Delhi ('MCD'), including the Appellant, Babu Ram, who was working as a Cattle Catcher at MCD, Green Park, New Delhi, would impound the untied cows wandering on the road.

4. On 9th December 2004, PW-3 gave a complaint (Ex.PW-3/A) in the Central Bureau of Investigation ('CBI') stating that on 8th December 2004, when he went to Malviya Nagar, the Appellant met him at the cattle pond and demanded a bribe of Rs. 5,000 to enable PW-3 to carry on his dairy business smoothly. According to PW-3, the Appellant threatened him that if the bribe was not paid, the cattle of PW-3 would be impounded and his business would be ruined. When PW-3 expressed his unwillingness to pay bribe of Rs. 5,000, the Appellant reduced it to Rs. 2,500 and told him to bring the amount of Rs. 2,500 to his office at Green Park on the following day, i.e., 9th December 2004 at 10 am. When PW-3 met the Appellant at the MCD office, Green Park on 9th December 2004, the Appellant is stated to have repeated his demand of Rs. 2,500 as bribe and asked PW-3 to bring the said amount on the following day, i.e., 10th December 2004 at 10 am. It was at that stage that PW-3 had lodged a complaint with the CBI.

5. It had come in the evidence of PW-6, A.A. Srikant, Upper Division Clerk in the office of Directorate General of Health Service ('DGHS'), Nirman Bhawan, New Delhi that he was asked by his Director (Vigilance) to report to Mr. N.S. Yadav, DSP (PW-9), STF Branch, CGO Complex, New Delhi for some secret duty. He went on 9th December 2004 to the CBI office between 7 or 7.30 pm and met PW-9. One Rattan Singh, UDC, DGHS (PW-5) was also deputed for that purpose. PW-9 directed PW-5 and PW-6 to come at 8 am on the following day, i.e., 10th December 2004.

6. In his evidence PW-9 stated that the complaint given by PW-3

to the CBI on 9th December 2004 was marked to him and, after verifying the allegations, he found that the Appellant was not enjoying a good reputation and was in the habit of taking bribes. He accordingly informed Mr. O.P. Chatwal, DIG, STF Branch, CBI and the DIG ordered for registration of the case and laying of a trap. Accordingly, FIR No. 3(S)/2004 was registered on 9th December 2004 against the Appellant under the signature of DIG. The contents of the FIR were also read over to the PW-3 and he appended his signature thereon.

The pre-raid proceedings

7. PW-9 further stated in his evidence that on the following day, i.e., 10th December 2004 both PW-5 and PW-6 reached the office of CBI in the morning. They were introduced to PW-3 and his complaint was also shown to them. PW-3 produced five Government Currency ('GC') notes of Rs. 500 each and their numbers were noted down in the pre-trap proceedings. A demonstration regarding the effect of phenolphthalein powder with sodium carbonate was also shown and the GC notes were treated with phenolphthalein powder. The tainted GC notes were given to PW-3 and he kept them in his left side upper shirt pocket. He was directed to give the tainted money to the Appellant only on his specific demand. PW-6 was asked to act as a shadow witness and to overhear the conversation between PW-3 and the Appellant and also to see the transaction of money between them. After payment of the bribe amount, PW-6 was directed to give a signal by scratching his head with both hands. The pre-trap proceedings were recorded in the Handing Over Memo (Ex. PW-3/B).

The trap proceedings

8. Thereafter, the team members comprising of PW-3, PW-5, PW-6, PW-9 and others reached near the vicinity of MCD office at Green Park at about 9.45 am on 10th December 2004. The team members were deployed in a scattered manner near the office of the MCD. A digital recorder, which was switched on, was handed over to PW-3 for the purpose of recording the conversion between the Appellant and him. PW-6 was asked to follow PW-3 into the MCD office to see the transaction of bribe money and to overhear the conversation between the Appellant and PW-3. At about 9.55 am, PW-3 and PW-6 entered into the MCD office at Green Park and after a few minutes came back and stood in front of the office.

9. PW-6 in his evidence stated that at around 11 am, the Appellant came to the MCD office and that PW-3 gave a signal that the Appellant had arrived. Both the Appellant and PW-3 went aside and started talking to each other. PW-6 was standing at a distance of about 8-10 ft. It is stated that after some time the Appellant demanded money from PW-3 by gesturing with his right hand fingers. PW-3 gave the smeared GC notes to the Appellant who accepted it in his right hand and kept the same in his right side pant pocket.

10. PW-5 in his evidence stated that he was standing at a distance of about 10-12 ft from PW-3. PW-5 stated that "I saw accused making signs by moving his fingers towards the Complainant for demanding money and the Complainant paid money Rs. 2,500 to the accused after taking out the same from his shift pocket. Babu Ram accepted those currency notes in his right hand and kept the money in his right hand side pant pocket."

11. In his examination-in-chief, PW-3 stated that "Babu Ram talked with me about the money. Babu Ram demanded the bribe amount from me and I handed over to him the powder treated notes which he accepted in his right hand and kept the same in his right side pant pocket."

12. All the three witnesses spoke about the pre-determined signal being given by PW-6, immediately upon which the CBI trap team surrounded the Appellant. PW-9 introduced himself to the Appellant. PW-5 stated that S.S. Rawat caught hold of one hand of the Appellant and A.K. Pandey caught hold of the other hand. Thereafter, the Appellant was taken into the office of Dr. Pradeep Kumar (PW-8). When PW-9 asked the Appellant about accepting the bribe money of Rs. 2,500 from PW-3, the Appellant "kept mum and became perplexed."

13. Then, in the office of PW-8, on instructions, PW-5 brought out the currency notes of Rs. 2,500 from the right side pant pocket of the Appellant. The numbers of the recovered currency notes were tallied with those numbers noted down in the Handing Over Memo. Thereafter, the right hand as well as the right side pocket of the pant of the Appellant were washed with Sodium Carbonate solution which turned pink. They were preserved in separate bottles and seized and labelled.

14. In his deposition, PW-6 more or less corroborated the above version of PW-5. He stated that two inspectors caught the Appellant by

his wrists and then took him inside the office of PW-8. PW-8 also joined the proceeding. PW-6 took out the smeared GC notes from the right side pocket of the pant worn by the accused. The recovered GC notes were tallied with the numbers mentioned in the Handing Over Memo and the numbers of GC notes were found to be the same.

15. PW-9 stated that "digital recorder was taken back from PW-3 and it was played on the spot and recorded conversion confirmed demand and acceptance of bribe money. Recorded conversation was transferred in two micro audio cassettes from digital recorder. One micro cassette was sealed in cloth wrapper on the spot."

Arrest and investigation

16. The Appellant was arrested and the seized articles were noted down in the recovery memo (Ex.PW-3/C). The arrest-cum-personal search memo of the Appellant was prepared (Ex.PW-5/A). On 11th December 2004 specimen voice of the Appellant was recorded in presence of PW-5 and PW-6 in an audio cassette and voice recording memo (Ex.PW-5/C) was prepared.

17. The report dated 31st December 2004 of the Central Forensic Science Laboratory ('CFSL') confirmed the presence of phenolphthalein in the right hand wash as well as right side pocket of pant wash of the Appellant. The audio recording on the tape was found not to be clear and therefore could not be authenticated.

Charge

18. By an order dated 1st July 2005 of the trial Court, charges were framed against the accused under Section 7 and Section 13 (2) read with Section 13 (1) (d) of PC Act. The Appellant pleaded not guilty and claimed trial. At that stage, he stated as under: "The amount of Rs. 5,000 was due against the Complainant in respect of Chetak Vespa Scooter which I had sold about three years back. The final settlement regarding the balance payment was arrived in the presence of Sh. Dinesh and Sh. Jagat and in view of that settlement the Complainant had come with the amount of Rs. 2,500 for payment to me which was die against him and he got planted false case against me on that account."

19. It may be mentioned at this stage that on 10th December 2007, after the evidence was recorded and arguments heard, some defects

were noticed by the learned trial Judge as regards the dates and some facts. By an order dated 10th December 2007 passed under Section 216 Cr.PC, the charge was altered with the consent of prosecution as well as the accused and the amended charge was again put to the accused to which he pleaded not guilty.

Statement of the Appellant under Section 313 Cr PC

20. The prosecution examined ten witnesses. In his statement under Section 313 Cr.PC, in response to the incriminating evidence put to him, the Appellant stated, inter alia, that about two years prior to the incident he had sold to PW-3 a scooter for Rs.19,000. PW-3 paid Rs. 14,000. The Appellant did not sign the sale letter since PW-3 did not pay the balance consideration. Two persons, Jagat (DW-2) and Dinesh (DW-1), were stated to have helped the Appellant and PW-3 in settling the matter, in terms of which PW-3 agreed to pay the Appellant Rs. 2,500. The Appellant claimed that on 9th December 2004, PW-3 paid the balance consideration of Rs. 2,500 for the scooter. 21. In his statement under Section 313 Cr PC, the Appellant claimed that he was not aware of the trap proceedings. He stated that he had kept in his right side pocket of the pant the balance sale consideration for the scooter. In response to question No. 19 that upon PW-6 giving the signal, the trap team had reached towards him and PW-9 had challenged him about demanding and accepting Rs. 2,500 as bribe money from PW-3, the Appellant stated: "I was caught by CBI officials. I told them that I have not taken any bribe. I also told them that I had taken the remaining amount of the sale consideration of my scooter which I had told to Sh. Rakesh." He further stated in response to Question No. 20, "First I got perplexed but later on I disclosed that I had not demanded and accepted bribe money."

22. The Appellant stated that he himself went inside the office room of PW-8 after taking Rs. 2,500 from PW-3. He denied that his right hand wash and the pant wash turned pink and stated that the recovery proceedings were falsely prepared by the CBI. PW-3 admitted that he had been asked to take off his pant; that the recovery memo had been prepared and given to him, which he signed. However, the Appellant claimed that he did not know the contents of the recovery memo.

The defence witnesses

23. The Appellant examined three witnesses. Mr. Dinesh Kumar

(DW-1) stated that the dispute between the Appellant and PW-3 regarding the balance consideration of Rs. 5,000 for the scooter had been settled in his presence. However, in his cross-examination, he stated that he did not see the papers of the scooter, i.e., registration certificate ('RC'), insurance etc., and that the Appellant had not shown those documents to him till date. DW-1 claimed to be a friend of the Appellant since he was also working in the same MCD office at Green Park. He had not seen any sale letter or any writing/agreement regarding sale of the scooter between the Appellant and PW-3. He was not aware as to what was the actual price of the scooter and when the Appellant purchased that scooter. The scooter was not sold in his presence. DW-1 could not recollect the date, month and year in which the Appellant told him about having sold the scooter to PW-3. DW-1 had not disclosed to any of the officers of the MCD about the sale of the scooter by the Appellant to PW-3 and about the dispute over payment of money and settlement.

24. DW-2, Jagat Singh, was a milk supplier. He used to collect milk from the dairy of PW-3 and then used to supply milk to the customers. He also claimed to know of the settlement between the parties whereby PW-3 agreed to pay Rs. 2,500 to the Appellant. The payment was not made in his presence. However, he stated that he was not aware of the facts of the case. The scooter was not sold in his presence and he had not seen any agreement to sale regarding sale of the scooter. DW-2 too had not disclosed till date to any of the officer of MCD or the officers of CBI regarding the above facts.

The judgment of the trial Court

25. The trial Court on analysing of the evidence first held that the order of sanction for prosecuting the Appellant (Ex.PW-2/A) was validly issued by Ms. Rina Ray, Secretary (Education), Govt. of NCT of Delhi (PW-2) who at the relevant point of time was working as Additional Commissioner, MCD, Town Hall, Delhi. It was held that she had applied her mind before granting the sanction.

26. The trial Court in the impugned judgment dated 13th December 2007 noted that despite PW-3 turning hostile when he was cross-examined more than one month after his examination-in-chief, he had in certain parts of his examination-in-chief fully supported the prosecution case and at certain points in his cross-examination by the learned Senior Public Prosecutor ('SPP') for the CBI. It was held that the statement made by

PW-3, to the extent he supported the case of the prosecution, could not be washed off the record and could be relied upon if it was corroborated, as it was in this case, by PW-5 and PW-6. Inasmuch as at the time of trap proceedings, the Appellant did not inform the Trap Laying Officer ('TLO') that he had accepted a sum of Rs. 2,500 from PW-3 as balance sale consideration of the scooter, the said defence was held not to be a genuine one. It was also not shown that PW-5, PW-6, PW-8 and PW-9 had any enmity towards the Appellant. Accordingly, it was held that the above witness had fully supported the case of the prosecution beyond reasonable doubt. The trial Court issued notice to PW-3 under Section 344 Cr.PC for having committed perjury. By the separate order on sentence dated 14th December 2007, the trial Court sentenced the Appellant in the manner noticed hereinbefore.

Submissions of counsel

27. This Court has heard the submissions of Mr. Saurabh Kirpal and Mr. Bharat Bhushan Bhatia, learned counsel for the Appellant as well as Mr.Manoj Ohri, learned Special Public Prosecutor for the CBI.

28. It was first submitted by Mr. Kirpal that there was no credible evidence to prove the demand of bribe by the Appellant particularly when PW-3 had turned hostile. As regards the demand of bribe, it was pointed out that the conversation purportedly recorded on the digital tape recorder could not be proved in accordance with law. Further, a false statement was made by PW-9 that the conversation was audible when he played the recording soon after the trap proceedings, whereas the CFSL report indicated to the contrary. The best evidence to prove the demand of bribe was, in fact, not produced. It was further submitted that there were several contradictions in the description of the events by PW-5, PW-6, PW-9 and this itself made their evidence unreliable. Relying on the decisions in **Banarsi Dass v. State of Haryana** AIR 2010 SC 1589 and **Ram Kishore v. State** 31 (1987) DLT 312 it was submitted that no presumption under Section 20 PC Act would be attracted if the basic element of demand and acceptance of bribe by the Appellant was not proved by the prosecution. Reliance was placed on the decision dated 3rd March 2014 of this Court in Criminal Appeal No. 151 of 2008 (**Kanti Prasad Tyagi v. State of Delhi**).

29. It was next submitted by Mr. Kirpal that the trial Court erred

in simply rejecting the evidence of DW-1 and DW-2 only on the ground of their being friends and acquaintances of the Appellant. It was submitted that any transaction involving the sale of the scooter for Rs. 20,000, the expectation of any written agreement to sell was unrealistic. The Appellant had provided a valid explanation as to why the Appellant did not part with the RC. However, in his cross-examination, PW-3 stated that the RC was in his possession and that he could produce it. In the circumstances, it was for the prosecution to prove that no such sale had taken place. It was further submitted that on the preponderance of probabilities, the Appellant had been able to rebut the presumption under Section 20 of the PC Act and had created reasonable doubts about the case of the prosecution. Therefore, the Appellant could not be held guilty of the offences under Section 7 and Section 13 (1) (d) read with Section 13 (2) of the PC Act.

30. Countering the above submission, Mr. Manoj Ohri, learned SPP, took the Court through the deposition of witnesses and submitted that notwithstanding the fact that PW-3 turned hostile, the evidence of the shadow witness (PW-6), the recovery witness (PW-5), and PWs 8 and 9 was clear and cogent and was by itself sufficient to prove the guilt of the Appellant beyond reasonable doubt. It was pointed out that story of the amount of Rs. 2,500 being accepted by the Appellant as balance sale consideration of the scooter purportedly sold by him to PW-3 was clearly an afterthought and was not proved even on the preponderance of probabilities by the Appellant.

The evidence of PW-3

31. In the first place it requires to be noticed that PW-3, in his examination-in-chief on 15th September 2005, fully supported the case of the prosecution. He was further examined by the learned SPP only to clarify certain averments that were recorded in the previous statement (Ex.PW-3/D). In particular he stated that:-

> "It is also correct that I stated before CBI that when Babu Ram was demanding money from me, he said to me that there is pressure on him from higher circle for the money (uppar se pressure hain)."

32. In his examination-in-chief, PW-3 confirmed the fact of the Appellant's demand and acceptance of the bribe amount and the fact that

the Appellant had after accepting the bribe money, kept it in the right side pocket of his pant. However, when he was cross-examined one month later on 20th October 2005, PW-3 resiled from what he stated in his examination-in-chief. PW-3 now stated that he had purchased a scooter from the Appellant for Rs.20,000 and that he owed the Appellant the balance sale consideration of Rs. 5,000. He named DW-1 and DW-2, as the persons who were present at the time the dispute was allegedly settled between the Appellant and PW-3. He stated that in terms of the settlement he was to pay Rs. 2,500 to the Appellant in the Green Park office of the MCD. He offered an explanation for his about turn as under:-

> "There was a quarrel with the accused as he came to catch my cattles and then I lodged a complaint with CBI. The amount paid by me during trap was the balance price of the scooter but due to ill-will I paid this amount when I visited his office with CBI team showing it to be a bribe amount. I lodged the complaint with CBI office because accused was harassing me. I visited the office of the accused with CBI only once. The proceedings of this case had taken place in the office of Dr. Pradeep in Green Park. At that time I was sitting in a car at a distance of 20 yds. from that room. My signatures were obtained by calling me inside the room at later stage. The proceedings were not conducted in my presence. Prior to this complaint Ex.PW3/A, I have not lodged any complaint against the accused before any authority. It is correct that I have falsely implicated the accused in this case."

33. At that stage, the learned SPP cross-examined PW-3 in which he admitted as under:-

> "It is correct that I did not reveal the fact of purchase of two wheeler scooter by me from the accused or any dispute about the balance payment and non-handing over of RC by the accused."

34. PW-3 however admitted as under:-

> "It is correct that the accused had caught my cattles several times and that was the reason that I had lodged the complaint Ex.PW-3/A against the accused as he was demanding bribe from me for not catching my cattles. It is correct that the accused

> was apprehended on the day of trap on the basis of my complaint. It is correct that the hand washes of accused were taken in my presence. It is correct that I had given the powder treated GC notes to the accused so that he does not catch my cattles in future. It is incorrect to suggest that I had given a wrong version during the cross-examination by the learned Defence counsel regarding deal of scooter with the accused. My statement on the last date, i.e., 15th September 2005 in the Court was correctly made by me."

35. PW-3 was nevertheless cross-examined by learned counsel for the Appellant as well. PW-3 now stated that "now the RC is with me but the sale letter has not been given to me till date."

36. In similar circumstances, in **Khujji v. State of M.P.** AIR 1991 SC 1853 the Supreme Court held that where after a gap of one month the Complainant resiled from his previous statement, it would be open to the Court to discard the contrary statement made in his cross-examination and continue to rely on the statement made in his examination-in-chief if the same was found to be dependable and acceptable. A similar approach was adopted by the Supreme Court in **Yakub Ismail Bhai Patel v. State of Gujarat** 2004 Cri LJ 4205 and **Sohan Lal v. State of Punjab** 2004 SCC (Crl) 226.

37. In the present case, the Court finds that notwithstanding that PW-3 resiled from his earlier statement in his examination-in-chief, he admitted that there was a trap laid for the Appellant and that he was arrested pursuant to his right hand and right side pocket of the pant turning pink. PW-3 did not, at the first opportunity i.e., soon after his apprehension, explain that he had accepted the amount of Rs. 2,500 as balance consideration for the sale of the scooter. In his statement under Section 313 Cr.PC, he admitted that he became perplexed when confronted by PW-9. He claimed that he was falsely implicated. When PW-9 asked the Appellant about accepting the bribe money of Rs. 2,500 from PW-3, he kept mum. Clearly, therefore, that part of the defence of the Appellant appears to be an afterthought.

38. The reliance placed by the learned counsel for the Appellant on the decision in **Banarsi Dass v. State of Haryana** is misplaced. In that case not only the Complainant but also the shadow witness turned hostile. This is evident from the observations in para 16 of the decision which

read as under:

"In light of the statement of two hostile witnesses PW-2 and PW-4, the demand and the acceptance of illegal gratification alleged to have been received by the accused for favouring PW-2 by recording the Khasra Girdawaris in the name of her mother cannot be said to have been proved by the prosecution in accordance with law. We make it clear that it is only for the two witnesses having turned hostile and they having denied their statement made under Section 161 of the I.P.C. despite confrontation, that the accused may be entitled to acquittal on technical ground. But, in no way we express the opinion that the statement of witnesses including official witnesses PW-10 and PW-11, are not accepted by the Court. Similarly, we have no reason to disbelieve the recovery of Ex.P-1 to P-4 vide Ex.P-D."

39. In the present case, it is not just the official witnesses, i.e., PW-8 and PW-9 who fully supported the case of the prosecution, but the shadow witness (PW-6) and the recovery witness (PW-5) as well. It is indeed significant that neither PW-5 nor PW-6 have resiled from their statement to the police. Consequently, the portions of the evidence of PW-3 to the extent they support the prosecution and have been corroborated by PWs 5, 6, 8 and 9 can be relied upon. The tape recorded conversation

40. A perusal of the depositions of both PW-5 and PW-6 shows that both of them denied that the conversation was audible. Significantly, both of them spoke of the Appellant demanding the money from PW-3 by gesture of his hands. The fact that the tape recorded conversation could not be proved does not in any manner dilute the strength of the deposition of PW-5 and PW-6 as regards the demand of bribe.

41. It is true according to PW-9, when the tape was played soon after the trap proceedings, it was audible. It must be remembered that the recovery memo mentioned that the tape recorded conversation was then transferred to micro audio cassettes. It is possible that the tapes were corrupted in that process and therefore, were inaudible when played at the CFSL. In any event, since the prosecution had not placed reliance on the tape recorded conversation, it cannot be said that failure to prove the tape recorded conversation weakened the case of the prosecution.

Acceptance of bribe

42. The fact of the hand and pant washes turning pink has not been denied by the Appellant. In any event the forensic evidence has fully corroborated the ocular testimonies of PWs 5 and 6 who have been consistent in their versions regarding the demand and acceptance of the bribe amount by the Appellant. Their evidence is fully corroborated by the evidence of PW-8 and PW-9.

43. As far as the decision of this Court in **Ram Kishore v. State** is concerned, the proposition laid down therein is unexceptionable. While the Appellant is not required to prove his defence beyond reasonable doubt, he nevertheless had to offer a defence which is a probable one. In the present case, the defence offered by the Appellant has not been proved by him even on a preponderance of probabilities. The entire story of the sale of scooter by the Appellant to PW-3 and that he paid Rs. 2,500 the Appellant on 10th December 2004 at the MCD office towards balance sale consideration was clearly an afterthought.

44. The evidence of DW-1 does not inspire confidence. For a person who is supposed to have mediated a settlement between PW-3 and the Appellant regarding the sale of scooter, he does not appear to know about the details concerning the sale transaction. Since it was his defence that there was a sale of the scooter, it was incumbent on the Appellant to make good that defence by producing documents in his possession before the Court which would establish that the scooter originally belonged to the Appellant and was subsequently sold to PW-3. This was within the exclusive knowledge of the Appellant and the burden of proving that fact could not be shifted to the prosecution.

45. The facts in **Kanti Prasad Tyagi v. State of Delhi** were entirely different from the facts of the present case. That decision is, therefore, of no assistance to the Appellant.

46. In the present case, the prosecution has by cogent evidence proved beyond all reasonable doubt the demand and acceptance of the bribe by the Appellant. This Court is unable to find any legal infirmity in the impugned order of the trial Court convicting the Appellant of the offence under Section 7 and Section 13 (2) read with Section 13 (1) (d) of PC Act.

Sentence

47. On the question of sentence, it is stated that since the Appellant is 62 years of age, and has suffered the ordeal of the trial for over nine years, a lenient view may be taken.

48. The Court finds that for the offence under Section 7, the Appellant has been sentenced to undergo one year RI with fine and for the offence under Section 13 (2) read with Section 13 (1) (d) PC Act to two years. RI with fine. In the facts and circumstances of the case, the said sentences cannot be said to be disproportionate.

Conclusion

49. The appeal is accordingly dismissed. The bail bonds are cancelled. The Appellant will be taken into custody forthwith to serve out the remainder sentence.

50. The trial Court record be sent back forthwith. A copy of this order be given dasti under the signature of Court Master.

ILR (2014) III DELHI 1797
RC. REV.

KEDARI LAL GUPTA ....PETITIONER

VERSUS

CB SINGH RAJA ....RESPONDENT

(NAJMI WAZIRI, J.)

RC.REV. NO. : 137/2012, DATE OF DECISION: 05.05.2014
CM APPL. NO. : 5502/2012

Delhi Rent Control Act, 1958—Eviction Petition Under Section 14(1)(e)—Leave to defend granted by ARC—Challenged. Held, Property which is not owned by the landlord and not in possession of the landlord cannot

be deemed to be alternative suitable accommodation to be taken into consideration as a defence by the tenant opposing his eviction. A landlord cannot be made to lean upon his relatives to provide accommodation. It is not for a tenant to dictate how else the landlord could adjust himself so as to obviate the need of the tenant's eviction. Revision allowed.

[Di Vi]

APPEARANCES:

FOR THE PETITIONER : Mr. Tanuj Khurana with Mr. Honey Jain, Mr. Ashish Batra & Mr. Gaurav Malik, Advs.

FOR THE RESPONDENT : Mr. Ram Lal, Adv.

CASE REFERRED TO:

1. *Jitender Kumar Jain & Ors.* vs. *M/s. J.K. Horticultural Produce Marketing & Processing Cor. Ltd.,* 110 (2004) Delhi Law Times 193.

RESULT: Revision Allowed.

NAJMI WAZIRI, J. (Open Court)

The petitioner/landlord is aggrieved by an order dated 14.2.2012 whereby the respondent/tenant was granted leave to defend, in a petition filed under Section 14(1)(e) of the DRC Act, 1958 seeking eviction of the respondent/tenant from the tenanted premises i.e. property bearing No. 106, Ground Floor, Janta Flats, GTB Enclave, Delhi-110093. The case of the petitioner is that he had only two residential premises; one of which has been sold out and the other is occupied by the respondent. He is presently living in a rented accommodation and is having to suffer the tenancy at a mere rent of Rs. 550/- per month, whereas the landlord himself is having to pay an amount of Rs. 1,500/-. He contends that the impugned order erred in granting leave to defend, inasmuch as the application for leave to defend, along with the affidavit, discloses no triable issues; that the issues purporting to be triable are ex facie vague and cannot be deemed to be of any substantive value which would prima facie lead to denial of the issuance of an eviction order. He contends that

the issues raised in the leave to defend were as under :-

i) That the so-called sale of House No. 1560, Janta Flats, GTB Enclave in favour of Mr. Nirmal Garg was a sham. In response, the learned counsel for the petitioner submits that the sale was by way of a registered sale deed and it would not been open to a tenant to question the legitimacy of the sale documents. This Court is mindful of the settled law that the question of legitimacy of a registered sale deed cannot be determined at the instance of a tenant in a petition under Sections 14(1)(e) and 25 B of the DRC Act.

ii) The tenant then argued that the landlord's alleged tenancy apropos House no. 1483 Janta Flats, GTB Enclave too is a sham and is fabricated. However, this Court is of the view that the said contention is self-destructive since the tenant does not disclose the address where the landlord is residing. After all a person would be residing at some address. If the tenant argues that the landlord is not resident of the address claimed by the latter, then the tenant must furnish the actual address with documents to disprove the landlord. Mere denial of the residential address as claimed by the landlord would not be sufficient.

iii) The tenant argued that the landlord has five houses which are in his name. However, the details of the same were not given.

iv) Finally, the tenant argued that none of the relatives of the landlord were dependent upon him for accommodation. Therefore, the alleged need was not bona fide.

The learned counsel for the petitioner submits that the Trial Court had fallen into error in assuming that three flats which are said to be owned by the petitioner are not even mentioned in the leave to defend. In his reply, to the application for leave to defend, the landlord has categorically denied that he had three flats bearing Nos.1559,1560 & 1670 in GTB Enclave. He submits that the petitioner was residing in a rented accommodation, i.e. property No.1483, 1st Floor, Janta Flats, GTB Enclave, Delhi-110093 because of a strained relationship with his family. He further submits that the petitioner did not have sufficient accommodation for himself and that after the demise of his brother Gopal, the latter's widow and his three children were dependent upon him. Furthermore, it is submitted, the petitioner being the elder member of the family had social responsibilities towards the care and

accommodation of the deceased brother's family of four persons.

The learned counsel further submits that the impugned order erred inasmuch it concludes, quite contrary to the settled law, that it is for the landlord to show that he did not have sufficient accommodation and that the flats mentioned in the leave to defend were owned by some other person(s). He relies upon seven judgments, which have been dealt with in the impugned order, to emphasise that it is not for the landlord to prove beyond a prima facie case, at the stage of consideration of the application for leave to defend. He submits that the courts are to lean in favour of the presumption that the landlord's need was bona fide unless, the tenant shows something to the contrary.

He also relies upon this Court's judgment in **Jitender Kumar Jain & Ors. V. M/s. J.K. Horticultural Produce Marketing & Processing Cor. Ltd.,** 110 (2004) Delhi Law Times 193. In particular, reliance has been placed on paragraph nos. 4 and 5, which reads as under :-

> *"The accommodation available with the petitioner at Greater Kailash is one drawing-cum-dining room and three bed rooms. By no stretch of imagination such an accommodation be treated or deemed as reasonable, suitable or sufficient for the petitioners. Family of petitioner no. 1 consists of his wife, married son and unmarried daughter. Similarly the family of the deceased brother consists of his wife, two married daughters and one married son. To say that three bed-rooms accommodation for the size of such a family is sufficient and reasonable is to negate the concept of requirement of the premises by the landlord who at given point of time wants to live comfortably and not in crowded conditions.*
>
> *It appears from the impugned order that the learned ARC was more swayed and influenced from the allegations that the petitioners have concealed the question of vacation of the first floor premises. The fact remains that the premises on the first floor was not owned by the petitioners. It was bequeathed by their mother in favour of their sister. Any property or accommodation over which the landlord has no legal control or legal right to occupy cannot be included in the accommodation available with such a landlord for the purpose of ascertaining the requirement or need."*

In reply the learned counsel for the respondent refers to a statement of the landlord where he has admitted as under :-

> *"I have only two houses in Delhi. My other family members are having five flats in the name in DDA Janta Flats, GTB Enclave, Delhi. My family and myself have own three flats in the same vicinity. Two flats are adjoining are each other and third is in the same street at some distance."*

The counsel for the respondent further submits that this admission was available to the Trial Court at the time of consideration of the leave to defend application and it is only after having appreciated the facts & circumstances of the case that the leave was granted. He submits that the impugned order does not suffer from any infirmity. However, this Court finds that the aforesaid argument of the respondent is specious since a perusal of the document would show that what has been admitted by the landlord is his ownership of only two premises, i.e., the one which was with him and the other which was occupied by the tenant. The other properties were not owned by him but were owned by his relatives. The adjoining flats could well have been put to use as a single unit depending upon the requirement of his extended family. However, it cannot be the case that a relative's property can be deemed to be the property of the landlord. It is settled law that the property which is not in possession of the landlord cannot be deemed to be an alternative suitable accommodation to be taken into consideration as a defence by the tenant opposing his own eviction. Logically, therefore, the property which was not owned by the landlord cannot be considered as an alternative accommodation available to him. This Court is of the view that the leave to defend application did not disclose any triable issue especially since the record before the Trial Court stated that the landlord owned only two premises. Thus, leading to a denial of the eviction in the summary procedure envisaged in Section 25B of the Delhi Rent Control Act, 1958. A landlord cannot be made to lean upon his relatives to provide him accommodation. It is not for a tenant to dictate how else the landlord could adjust himself so as to obviate the need of the tenant's eviction. Evidently, the Trial Court fell into an error in considering such properties which were not available to the landlord as being alternate suitable accommodation. In the circumstances there were obviously no triable issues and hence the grant of leave to defend the eviction petition was unwarranted. In view of the aforesaid discussion, the petitioner's

bona fide need is clearly made out.

In the circumstances the petition is allowed and the impugned order is set aside and the respondent is directed to be evicted from premises No.106, Janta Flats, G.T.B. Enclave, Delhi-110093.

No orders as to costs.

ILR (2014) III DELHI 1802
MAC. APP.

NEENA DEVI & ORS. ....APPELLANT

VERSUS

ASHOK YADAV & ORS. ....RESPONDENTS

(DEEPA SHARMA, J.)

MAC APP. NO. : 731/2010 DATE OF DECISION: 07.05.2014

Motor Vehicles Act, 1988—Challenge to award of compensation on the ground that Tribunal wrongly calculated income of deceased as GPF, Gratuity and other benefits which the deceased was getting not added and loss of consortium and love and affection not included. Held—Settled law that while calculating the income of the deceased for the purpose of calculation of loss of dependency, the income includes all the perks and benefits which were beneficial to the family of the deceased. Tribunal erred in not adding this amount while calculating income. Held—From the principles laid down by the Hon'ble Supreme Court in Rajesh and others v. Rajbir Singh & Ors. Appellants and wife and minor children of the deceased are entitled to Rs. 1,00,000/- towards loss of consortium and Rs. 1,00,000/- towards loss of love and affection.

Compensation re-assessed from the date of filing of petition.

The award has been assailed by the claimants on two grounds. Firstly that the Tribunal has wrongly calculated the income of the deceased. It is contended that the Tribunal has not added the GPF , Gratuity and other benefits which the deceased was getting along with his salary. Reliance is placed on **National Insurance Company v. Indra Srivastava and ors.** (2007 (14) SCALE) **Shyamwati Sharma and others v. Karan Singh and others** (2010 ACJ 1968). Secondly, the Tribunal has not computed the loss of consortium and love and affection as per law laid down in case titled as **Rajesh and others V. Rajbir Singh & Ors** (2013 (6) SCALE). **(Para 5)**

It is a settled law that while calculating the income of the deceased for the purpose of calculation of loss of dependency, the income includes all the perks and benefits which were benefitial to the family of the deceased. The Learned Tribunal while calculating income for the purpose of calculation of loss of dependency has not added the amount of GPF and Gratuity. In the case **National Insurance Company v. Indra Srivastava and ors.** (2007 (14) SCALE) and also in the case **Shyamwati Sharma and others v. Karan Singh and others** (2010 ACJ 1968), the Apex court has clearly held that the term " income" include other perks which are beneficial to the entire family and the deductions towards provident fund and gratuity should be added while calculating the income for this purpose. In the case **Shyamwati Sharma and others** (supra), the learned Apex court has added the repayment of loan also into the income of the deceased for calculation of loss of dependency. However, the leave travelling allowance is not required to be added into the income as it was not for the benefit of the family. As per the salary certificate Ex. PW3/D, deceased was getting Rs.1788/- towards his GPF, Rs. 716 as gratuity and Rs. 1448/- as P.L. Encashment. The total income of the deceased for the purpose of calculation of the compensation

comes to Rs.17,864 + Rs.1788 + Rs.716 + Rs.1448 = Rs. 21,816/-. The learned Tribunal has thus erred in not adding this amount while calculating the income of deceased for the purpose of loss of dependency. **(Para 10)**

The learned Tribunal has awarded Rs. 10,000/- towards loss of consortium and Rs.10,000/- for the loss of love and affection for the minors. The appellant has claimed Rs. 1,00,000/- towards loss of consortium and Rs.1,00,000/- towards loss of love and affection relying on the findings of the Apex court in **Rajesh** case (supra). **(Para 11)**

The relevant paragraph of the said judgment is reproduced as under :-

> "...20. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in **Santhosh Devi** (supra). We may therefore, revisit the practice of awarding compensation under conventional heads : loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs.2,500 to Rs.10,00/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In **Sarla Verma's** case (supra), it was held that compensation for loss of consortium should be in the range of Rs.5,000 to Rs.10,000. In legal parlance, "consortium" is the right of the spouse to the company, care, help , comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, love, care and protection, etc. , the spouse is entitled to get, has to be compensated appropriately. The

concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement by loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss o consortium." **(Para 12)**

From the principles laid down by the Hon'ble Supreme Court in the above mentioned case, I hold that the appellants are wife and minor children of the deceased are entitled to Rs.1,00,000/- towards loss of consortium and Rs.1,00,000/- towards loss of love and affection. **(Para 13)**

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Amit Kumar Pandey, Adv.

FOR THE RESPONDENTS : Mr. Jai Bansal, Adv. for R-1.

RESULT: Appeal disposed of.

DEEPA SHARMA, J. (Oral)

1. Vide this appeal, the LRs of deceased Kashmir Singh has challenged the award dated 8th July, 2010 by which a compensation of a sum of Rs.28,26,784/- had been awarded. The notice of this appeal was issued to respondents No. 1 but he did not contest the present

appeal. The respondent No. 2 had expired and his LRs were brought on record but none has appeared on their behalf. The appeal is contested only by respondent No. 3, the Insurance company.

2. The brief facts of the case are that on 9th May, 2007 at about 4 a.m., Sh. Kashmir Singh was riding as a pillion rider on a Motor Cycle No. DL4SZ6989 (Hero Honda) being driven by his colleague Sh. Subash Chand Sharma. At the time of accident, they were coming back from their office and when they reached near Akshardham Mandir, Pandav Nagar, Delhi, they stopped their Motorcycle at one side of the road. One truck bearing No. HR-38 B- 2344 driven by respondent No. 1 hit their vehicle from behind resulting into suffering fatal injuries. The said truck was being driven at a very high speed at that time.

3. There is no contest to the finding of the Tribunal that the accident had taken place due to rash and negligent driving of Truck No. HR-38 B- 2344 driven by respondent No. 1. The findings of the Tribunal on this issue thus becomes final.

4. Sh. Kashmir Singh suffered fatal injuries and died in this accident at GTB Hospital on the very same day. An FIR No. 248/2007 under Sections 279/337/304 A IPC was registered. A claim under Section 140 & 166 Motor Vehicle Act, 1988 was filed by the legal representatives of deceased Sh. Kashmir Singh which was registered as Suit No. 409/2007.

5. The award has been assailed by the claimants on two grounds. Firstly that the Tribunal has wrongly calculated the income of the deceased. It is contended that the Tribunal has not added the GPF , Gratuity and other benefits which the deceased was getting along with his salary. Reliance is placed on **National Insurance Company v. Indra Srivastava and ors.** (2007 (14) SCALE) **Shyamwati Sharma and others v. Karan Singh and others** (2010 ACJ 1968). Secondly, the Tribunal has not computed the loss of consortium and love and affection as per law laid down in case titled as **Rajesh and others V. Rajbir Singh & Ors** (2013 (6) SCALE).

6. The appeal is contested only by the Insurance Company/ respondent No. 4. The Insurance Company has alleged that the award has been correctly passed after taking into consideration all the relevant factors.

7. I have carefully perused the trial court record and the impugned

award dated 8th July, 2010.

8. In this case there is no challenge to the fact that the accident was a result of rash and negligent driving of offending vehicle. The finding on this count has thus attained finality.

9. The first contention of the appellant is that the Tribunal has taken the amount of Rs.19,263.51 paise as the gross salary whereas the salary slip which is Ex.PW3/D shows the other benefits which the deceased was drawing as part of his salary. This includes Provident Fund share, LTA, Gratuity, and P.L. encashment. It is argued that these benefits were for the benefits of dependents of the deceased and ought to have been added and the gross salary should have been taken as Rs.23,668.51 paise.

10. It is a settled law that while calculating the income of the deceased for the purpose of calculation of loss of dependency, the income includes all the perks and benefits which were benefitial to the family of the deceased. The Learned Tribunal while calculating income for the purpose of calculation of loss of dependency has not added the amount of GPF and Gratuity. In the case **National Insurance Company v. Indra Srivastava and ors.** (2007 (14) SCALE) and also in the case **Shyamwati Sharma and others v. Karan Singh and others** (2010 ACJ 1968), the Apex court has clearly held that the term " income" include other perks which are beneficial to the entire family and the deductions towards provident fund and gratuity should be added while calculating the income for this purpose. In the case **Shyamwati Sharma and others** (supra), the learned Apex court has added the repayment of loan also into the income of the deceased for calculation of loss of dependency. However, the leave travelling allowance is not required to be added into the income as it was not for the benefit of the family. As per the salary certificate Ex. PW3/D, deceased was getting Rs.1788/- towards his GPF, Rs. 716 as gratuity and Rs. 1448/- as P.L. Encashment. The total income of the deceased for the purpose of calculation of the compensation comes to Rs.17,864 + Rs.1788 + Rs.716 + Rs.1448 = Rs. 21,816/-. The learned Tribunal has thus erred in not adding this amount while calculating the income of deceased for the purpose of loss of dependency.

11. The learned Tribunal has awarded Rs. 10,000/- towards loss of consortium and Rs.10,000/- for the loss of love and affection for the minors. The appellant has claimed Rs. 1,00,000/- towards loss of consortium and Rs.1,00,000/- towards loss of love and affection relying on the findings of the Apex court in **Rajesh** case (supra).

12. The relevant paragraph of the said judgment is reproduced as under :-

> "...20. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in **Santhosh Devi** (supra). We may therefore, revisit the practice of awarding compensation under conventional heads : loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs.2,500 to Rs.10,00/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In **Sarla Verma's** case (supra), it was held that compensation for loss of consortium should be in the range of Rs.5,000 to Rs.10,000. In legal parlance, "consortium" is the right of the spouse to the company, care, help , comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, love, care and protection, etc. , the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement by loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that

the courts award at least rupees one lakh for loss o consortium."

13. From the principles laid down by the Hon'ble Supreme Court in the above mentioned case, I hold that the appellants are wife and minor children of the deceased are entitled to Rs.1,00,000/- towards loss of consortium and Rs.1,00,000/- towards loss of love and affection.

14. The compensation in this case is re-assesed as follows:-

SL. No.	Heads	Calculation
(i)	Salary	Rs.21,816/-
(ii)	30% of (i) above to he added	Rs.6,544.80
	as future prospects.	
(iii)	¼ the of (ii) deducted as personal expenses of the deceased	Rs.5465/-
(iv)	Monthly loss of dependency	Rs.21816 + 6544 - 5465= Rs.22,895.80
(v)	Annual loss of dependency	Rs.22895.80 x 12 = Rs.274749.60
(vi)	Age of deceased 46 years, multiplier as per Sarla Verma v. DTC (2009 ACJ 129 A)	= 13
(vii)	Total loss of dependency	Rs. 274749.60 x 13 = Rs.3571744.80= rounded to Rs.35,71,745/-
(viii)	Loss of care and guidance for minor children	Rs.1,00,000/-
(ix)	Loss of constorium	Rs.1,00,000/-
(x)	Loss of estate	Rs.10,000/-
(xi)	Funeral expenses	Rs.10,000/-
	Total	Rs.37,91,745/-

15. In view of above, I award an amount of Rs.37,91,745/- alongwith interest @ 9 % per annum from the date of filing of the petition.

16. The respondents shall deposit this amount before the Tribunal within a period of six weeks from today. In case the respondent has already deposited the compensation awarded by the Tribunal, they shall deposit the enhanced amount with the Tribunal along with interest at the rate of 9 % per annum within six weeks from today. In case the respondents fail to deposit the amount within a period of six weeks, the appellant shall be entitled for interest @ 12 % per annum from the date of default. The enhanced amount shall be distributed among the petitioners as per the directions of the Tribunal in the original award dated 8th July, 2010.

17. The Tribunal has granted the recovery rights to the Insurance company. The recovery rights are granted to the Insurance company of the enhanced amount as well.

18. The appeal stands disposed of in the above terms.

ILR (2014) III DELHI 1810
CM (M)

FEDERAL MOTORS PVT. LTD. ....PETITIONER

VERSUS

ATMA RAM PROPERTIES PVT. LTD. ....RESPONDENT

(NAJMI WAZIRI, J.)

CM (M) NO. : 4/2014 & CM NOS. : 115-116/2014 DATE OF DECISION: 07.05.2014

(A) Delhi Rent Control Act, 1958—Section 6, 6A, 14(1)(b) and 38—Order of Appellate Court directing petitioner/ tenant to deposit amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) per mensem towards user charges of suit property challenged before High Court—Plea taken, application by landlord is nothing short of a unilateral attempt by landlord to increase rent payable qua leased premises, exercise prohibited

by law—Provisions of Act, specifically Sections and 6-A thereof specifically disentitles landlord from unilaterally increasing rent payable qua premises—Onerous condition cannot be imposed on tenant, which is exercising its statutory right of appeal—Principles laid down for increase of rent under Section 6A have been given a complete go by in impugned order—Held—Tenancy comes to end upon order of eviction being passed and none of provisions of Delhi Rent Control Act would apply to govern relationship between parties—Provisions of Section 6 and 6A of Act would have no applicability in determination of charges to be deposited by tenant as use and occupation charges during pendency of appeal—Present contention on behalf of tenant hardly inspires any confidence in mind of Court.

(B) Code of Civil Procedure, 1908—Order VI Rule 17—Order XLI Rule 5—Section 11, 13, 114 and 151—Plea taken, issue of tenant being put to terms was already considered and decided by Appellate Court—Appellate Court cannot reopen issue. Whether on its own motion or on application of a party—This is in view of fact that Order XLI Rule 5 is for purpose of protecting interest of parties, not to further interest of one party to detriment of other—Per contra plea taken, tenant who continues in property after order of eviction stays at sufferance of landlord and ought not to be allowed to enjoy premises at contractual rate of interest—Held—Principle of Res-judicata by its very nature, is intended to provide finality to judicial orders, ought to not lightly be applied to interim arrangements/orders—That not all interlocutory orders ought to not be subject to rigours of res judicata is a principle not merely of convenience in administration of justice, but also of a long standing, well established and judicially as well as a legislatively recognised rule of law—Order of Appellate Court directing deposit of

amount per mensem cannot be subject to principle of res judicata, being not final and being amenable to further modification—These orders would doubtless not be modified without sufficient cause for such modification by Court either on its own motion or upon application by party—When initial condition of deposit was to be of reasonable user charges commensurate with market rate, it cannot, by any stretch of imagination, be said that interest of landlord remains protected when quantum of deposit remains unchanged for over twenty years—Order under Order XLI Rule 5 imposing a condition of deposit/payment of reasonable user charges for continued user of premises from date of order of eviction is not final and may be altered at a later stage in proceedings—This may be done by Appellate Court on its own motion or on application of either of parties—Alteration may be either to increase or decrease amount earlier set and will depend upon facts and circumstances of case—No straitjacket formula can be laid down as to how often or to what extent quantum ought to be modified; same shall be at discretion of Appellate Court to be decided based on specific circumstances attendant to each case—However, no such application could be entertained unless party seeking modification is able to show changed circumstances as would warrant modification.

(C) Code of Civil Procedure, 1908—Order XLI Rule 5—Plea taken, first order of Appellate Court imposing condition merged with order of Supreme Court, condition of deposit imposed earlier may be modified only by Supreme Court—Held—Nothing will bar either party from reapplying to Court seized of appeal seeking that grant of stay, condition to be imposed therefor, and/or quantum of deposit be reconsidered- even if same were approved, modified or set aside in appeal or revision prior to such second and/or further

application—Where such new and fresh facts are indeed shown—Doubtless facts that did not exist or could not be ascertained despite exercise of due diligence at time when original order was made—Court seized of appeal would be bound to consider new facts and pass a fresh order as to either grant of stay, condition to be imposed therefor, and/or quantum of deposit, as may be prayed for.

(D) Constitution of India, 1950—Article, 136, 141 and 227—Plea taken, application was filed to delay proceedings at a juncture when appeal was fixed for final hearing—Prior to passing impugned order, no trial was conducted, nor was any evidence permitted to be led by parties in respect of value that could have been fetched by premises—Fixation of quantum of deposit at Rs. 1,60,000/- (Rupees One lakh sixty thousand only) per mensem towards user charges for leased premises is wholly onerous—Appellate Court has not given any reasons for fixing quantum at figure it has and has proceeded almost entirely on surmises and conjectures and impugned order ought to be set aside—Held—Order passed in exercise of a power vested in authority, directing parties to furnish documents to enable authority to appropriately exercise power can hardly be regarded as illegal or contrary to material on record—Merely because Appellate Court has proceeded to ascertain quantum based on affidavits and documents filed by parties, same cannot be considered as error so gross and patent as to warrant interference under Article 227; this Court is of view that this is not error, but appropriate course to have been followed—Where both parties have been given equal and sufficient opportunity to make their case as to quantum to be fixed, and where Court considers all material available on record and comes to a conclusion on basis thereof, same cannot be regarded as being patently illegal and warranting interference—Appellate

Court has given due consideration to all material available on record and facts and attendant circumstances relevant to issue to arrive at its conclusion as found in second impugned order—Tenant is, in effect, praying that this Court reconsider material to arrive at its own conclusion; this Court sees no justification to so apply itself—This Court, in exercise of its supervisory jurisdiction, will not convert itself into a Court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

Important Issue Involved: (A) This Court would ordinarily, when called upon to exercise its supervisory jurisdiction under Article 227, be reluctant to interfere in exercise of discretion especially of an interim nature by the Appellate Court.

(B) None of the provisions of the Delhi Rent Control Act would apply to govern the relationship between the parties, once the tenancy comes to an end upon the order of eviction being passed.

(C) Principle of Res-judicata by its very nature, is intended to provide finality to judicial orders, ought to not lightly be applied to interim arrangements/orders.

(D) Order of Appellate Court directing deposit of an amount per mensem pendency of appeal cannot be subject to the principle of res judicata, being not final and being amenable to further modification. These orders would doubtless not be modified without sufficient cause for such modification by the Court - either on its own motion or upon application by the party.

(E) When the initial condition of deposit was to be of reasonable user charges commensurate with the market rate, it cannot, by any stretch of imagination, be said that the interest of the landlord remains protected when the quantum of deposit remains unchanged for over twenty years.

(F) An order under Order XLI rule 5 of CPC imposing a condition of deposit/payment of reasonable user charges for the continued user of the premises from the date of order of eviction is not final and may be altered at a later stage in the proceedings.

(G) Nothing will bar either party from reapplying to the Court seized of the appeal seeking that the grant of stay, condition to be imposed therefor, and/or the quantum of deposit be reconsidered even if the same were approved, modified or set aside in appeal or revision prior to such second and/or further application.

(H) An order passed in exercise of a power vested in the authority, directing the parties to furnish documents to enable the authority to appropriately exercise the power can hardly be regarded as illegal or contrary to material on record.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ravi Gupta, Sr. Adv. with Mr. Yogender Vasisht, Adv.

FOR THE RESPONDENTS : Mr. J.P. Sengh, Sr. Adv. with Mr. Amit Sethi, Adv., Ms. Puja Anand and Mr. Sachin Aneja, Adv.

CASES REFERRED TO:

1. *Brij Nwam* vs. *Tijbal Bikram,* (1910) 37 IA 70 : ILR 32 All 295.

2. *Bhup Indar* vs. *Bijai,* (1900) 27 IA 209 : ILR 23 All 152 : 5 CWN 52.].

RESULT: Dismissed.

NAJMI WAZIRI, J.

1. The present petition under Article 227 of the Constitution of India arises from the orders dated 29th April, 2013 ("first impugned order") and 28th September, 2013 ("second impugned order") (hereinafter collectively referred to as "impugned orders") of the learned ADJ – 02 & Wakf Tribunal, New Delhi ("Appellate Court") in ARCT No. 1 of 2011 (formerly RCA No. 279 of 2001) ("Appeal"). By the impugned orders, the learneds Appellate Court directed the petitioner/tenant herein to deposit an amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) per mensem towards user charges of half portion of showroom no. 9, together with one bathroom at ground floor, kolki and garages no. 12 and 13 of the Atma Ram Mansion (formerly Scindia House) ("leased premises") pending decision of the Appeal. The petitioner will hereafter be referred to as the tenant and the respondent, as the landlord.

2. This Court would ordinarily, when called upon to exercise its supervisory jurisdiction under Article 227, be reluctant to interfere in such exercises of discretion – especially of an interim nature – by the Appellate Court. However, owing to the nature of the averments raised in the petition – specifically qua the issues of the maintainability of the application giving rise to the impugned orders and of the jurisdiction of the Appellate Court to have passed the impugned orders – and given its peculiar circumstances this Court has heard the matter

3. The dispute between the parties, which has now survived two decades and has also given rise to a judgement of the Supreme Court – a locus classicus in itself,[1] traces back to an eviction petition filed by the landlord against the tenant in 1992 in respect of the leased premises, which was under tenancy since about 1944. Filed under section 14 (1) (b) of the Delhi Rent Control Act, 1958 ("Act"), the petition was allowed on 19th March, 2001 and the tenant was directed to vacate the leased premises in view of its having sub-let a part thereof without permission from the landlord ("order of eviction").

1. Atma Ram Properties Pvt. Ltd. v. Federal Motors Pvt. Ltd., (2005) 1 SCC 705.

4. A statutory appeal was preferred under section 38 of the Act to challenge the order of eviction, which is admittedly pending final hearing before the Appellate Court. Pertinently, when registering the appeal and staying the order of eviction, the Appellate Court, by its order of 12th April, 2001, directed the tenant inter alia to deposit an amount of Rs. 15,000/- (Rupees fifteen thousand only) per mensem in Court. The deposit was towards continued use and occupation charges of the leased premises from the date of the order of eviction. The stay was made conditional upon the deposit of the said amount, over and above the rent at the contractual rate – which was to be paid directly to the landlord. This imposition of condition for admission of the appeal/staying of the impugned orders was challenged by the tenant in this Court by CM (M) No. 280 of 2001. This Court, by its order of 12th February, 2002, set aside the condition of deposit and directed that the tenant may remain in the premises subject to his paying the rent at the contractual rate to the landlord.

5. Aggrieved by the order setting aside the condition of deposit, the landlord filed a petition seeking leave to appeal to the Supreme Court under Article 136 of the Constitution of India, which leave was granted. The judgement dated 10th December, 2004 in the resulting Civil Appeal No. 7988 of 2004 – being the locus classicus earlier adverted to – set aside the judgement dated 12th February, 2002 of this Court and thus restored the condition of deposit of Rs. 15,000/- (Rupees fifteen thousand only) per mensem for the stay of the order of eviction to remain in force. While the reasoning of the Supreme Court will be discussed in further detail at a more appropriate juncture, it requires noticing herein that the Supreme Court held *inter alia* that *the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter (sic: later) date.*[2]

6. Thereafter, in 2007, the tenant sought to file an application under order VI rule 17 of the Code of Civil Procedure, 1908 ("Code") in the Appeal. When issuing notice upon the same to the landlord on 31st January, 2007, the Appellate Court suo motu directed the tenant to deposit a monthly amount of Rs. 25,000/- (Rupees twenty five thousand only), instead of Rs. 15,000/- (Rupees fifteen thousand only). The Appellate

2. Id., at para. 19(3), p. 718.

Court, when passing the order of 31st January, 2007, observed that the amount of deposit ought to be increased in view of the order of the Supreme Court and the increase in value of the property. This order, admittedly, has not been challenged by the tenant. Thereafter, by an order of 11th October, 2007, the learned Appellate Court remanded the matter to the Trial Court directing it to return its findings as to a particular matter the parties were at issue on. While the particulars thereof are irrelevant for the present dispute, by its judgement and order of 14th July, 2010, returned its finding on the issue and the Appellate Court proceeded thereafter with the Appeal.

7. On 5th November, 2011, the landlord moved an application under order XLI rule 5 read with section 151 of the Code, seeking directions to the tenant to deposit (a) Rs. 370/- (Rupees three hundred seventy only) per square foot of half portion of the showroom, and (b) Rs. 1,00,000/- (Rupees one lakh only) each for the garages, from the date of the application till the disposal of the appeal. The landlord had contended that it is in the interest of justice that the amounts to be deposited be increased as prayed for. It was submitted that the value of the leased premises has skyrocketed over the years and the tenant is enjoying the same by depositing a meagre amount of Rs. 25,000/- (Rupees twenty five thousand only). The earnings from similarly placed premises was sought to be relied upon to show both market rate of the leased premises as well as the steady increase in the same.

8. The tenant had opposed the application and contended that (a) the order of 12th April, 2001 whereby the tenant was directed to deposit Rs. 15,000/- (Rupees fifteen thousand only) had merged with the order of the Supreme Court and hence cannot be modified by the Appellate Court; (b) that even the order of 31st January, 2007 whereby the amount was increased from Rs. 15,000/- (Rupees fifteen thousand only) to Rs. 25,000/- (Rupees twenty five thousand only) is without jurisdiction; (c) the documents indicating earnings from similarly placed premises are irrelevant as they are collusive and not binding on the tenant; (d) the increase in rent cannot be made unilaterally by the landlord contrary to the provisions of section 6A of the Act; (e) the landlord had already filed a similar application in the past and is hence precluded from filing the present application; and (f) the purpose of order XLI rule 5 of the First Schedule to the Code is to secure the interest of the parties and hence enhancement of the amount of deposit cannot be sought.

9. By the first impugned order, the Appellate Court held that the application is maintainable but directed that appropriate documents supported by an affidavit be filed for calculating market value of the leased premises. It reasoned:

9.1. The doctrine of merger qua orders challenged in appeal is not of universal application; it would apply only where the superior court has dealt with the issue that the lower Court has adjudicated upon.

9.2. The order of the Supreme Court only dealt with the issue of whether the Appellate Court had jurisdiction to impose the condition of a deposit while admitting an appeal; it did not consider the issue of quantum of deposit.

9.3. Hence, the order of the Appellate Court qua quantum of deposit does not merge with the order of the Supreme Court.

9.4. Judgements regarding section 6A of the Act would have no relevance in the present matter as the landlord has not increased the rent unilaterally before filing the suit.

9.5. The record bears out that the landlord has not filed any application in the past seeking the same or similar relief.

9.6. The issue involved is not of maintainability of the application, but of the power of the court to enhance the amount to be deposited.

9.7. From the judgement of this Court in **Dhruv Goel v. Anand Parkash Goyal,**[3] it is evident that the Appellate Court has power to enhance the amount to be deposited; the reasoning therefor can be found in the order of the Supreme Court itself.

9.8. While it is doubtless that the purpose of Order XLI rule 5 of the Code is to secure the interests of the parties, the interest of the parties may change over time.

9.9. The tenant has enjoyed use of the property since the order of eviction at a nominal cost of Rs. 15,000/- (Rupees fifteen thousand only) per mensem for the first six years and of Rs. 25,000/- (Rupees twenty five thousand only) per mensem for the next six years, over and above the admitted rent of about Rs. 300/- (Rupees three hundred only).

3. Judgement dated 19th March, 2010 in CS (OS) 420 of 1982.

9.10. The value of the property would doubtless have increased manifold owing to the lapse of time.

9.11. The principles and objectives laid down by the Supreme Court when upholding the power of the Appellate Court to impose the condition of deposit of use and occupation charges applies pro tanto to increase of use and occupation charges.

9.12. The application seeking increase of the amount of security deposit is therefore maintainable.

10. As earlier observed, the first impugned order had, while holding that the application seeking increase of the amount of deposit was maintainable had directed both parties to file appropriate documents supported by affidavits to show the prevailing rate of rent in the immediate vicinity generally. It observed that the landlord had merely filed documents and other agreements that it had entered into with other parties, but has not filed any affidavit in support thereof. It observed further that the tenant has not filed any documents or affidavit in this regard. In these circumstances, directions were issued to file further material. Following this, the landlord had filed an affidavit in addition to the agreements already filed by it and the tenant filed an affidavit, but did not file any documents. Thereafter, the parties were heard qua the issue of the quantum by which the deposit ought to be increased.

11. The tenant contended against maintainability of the application and need for an enhancement. Both issues were refused to be considered by the Appellate Court at this stage as the first impugned order had already dealt with the same in extenso. The landlord had set out in its affidavit the relative merit of the leased premises in view of its location as well as amenities available nearby. It had brought on record the agreements entered into with other merchants in the same building, and supported the same with due averments in the affidavit earlier adverted to. Based on the agreements, the landlord contended that the other properties in the building are fetching it income in the range of Rs. 279/- (Rupees two hundred seventy nine only) and Rs. 420/- (Rupees four hundred twenty only) per square foot per mensem. The landlord had further contended that the garages are capable of earning Rs. 1,00,000/- (Rupees one lakh only) per mensem. The tenant opposed reliance on the said agreements, contending that the same have been entered into after the disputes have arisen between the parties and are false/collusive

documents prepared by the landlord merely to create an illusion of high value of the property. The tenant had further contended that since the infrastructure status and facilities provided/available to the tenants of the premises under the said agreement was not known, the same cannot be considered to ascertain market value of the leased premises.

12. The second impugned order rejected the contention of the tenant qua the inadmissibility of the agreements entered into by the landlord with the other merchants in the same building. It observed that it is inconceivable that a business house would enter into registered lease deeds with inflated rent values merely at the instance of the landlord and that the contention to the contrary inspires no confidence. It observed further that the premises are the closest available premises to the leased premises for the purpose of comparison, being located in the same building. It observed that the tenant cannot be heard to contend that the particulars of infrastructure status and facilities provided/available in the said premises are unknown, given that they are located in the same building. It observed that if the tenant had desired to contend that the infrastructure or facilities provided to these premises are in any way different from what is provided to the tenant, the tenant ought to have taken steps to ascertain the same and state as much in its affidavit. It remarked particularly on the complete lack of particulars or assistance from the tenant qua the market value of the leased premises. It observed that the tenant has, in any case, not impugned the agreements on the basis that the premises have not been let out to the entity mentioned in the agreements, or that the businesses stated to be run from the said premises are not actually being so run therefrom.

13. The second impugned order observed that the landlord has shown that the leased premises are likely to fetch income in the range of Rs. 279/- (Rupees two hundred seventy nine only) and Rs. 420/- (Rupees four hundred twenty only) per square foot per mensem. It observed that in view of the wide range and the possibility of variation on account of the facilities provided, the lower of the two figures ought to be considered as the income the leased premises is likely to fetch. It rejected the contention that the garages are likely to fetch Rs. 1,00,000/- - (Rupees one lakh only) each per mensem as being unsupported by any evidence or material. It held, however, that owing to their accessibility and location, they are likely to fetch at least Rs. 25,000/- (Rupees twenty five thousand only) each per mensem. It took into consideration the

submission that the landlord seeks only fifty percent of the market rate, on the basis of the trend in recent decisions of the Supreme Court. On the above basis, the second impugned order directed the tenant to deposit an amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) per mensem, as use and occupation charges for the portion of the showroom and the two garages.

14. The propriety or otherwise of the impugned orders are now in dispute before this Court and this Court took time to consider. However, this Court was mindful of the dictum of the Supreme Court in **Surya Devi Rai v Ram Chander Rai & Ors.,**[4] where, relying to a wide range of authorities on the issue,[5] including the dicta of the Supreme Court in **Waryam Singh v Amarnath,**[6] the Supreme Court warned against the indiscriminate exercise of the power of superintendence under the supervisory jurisdiction of the Court under Article 227. Pertinently, in its summary, which was quoted with approval by the Supreme Court more recently in **Sameer Suresh Gupta v. Rahul Kumar Agarwal,**[7] it observed:[8]

> *"38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:*
>
> ***
>
> *(4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a*

4. (2003) 6 SCC 675.

5. *Corpus Juris Secundum* (Vol. 14, p. 121); *Administrative Law, 8th Edn., p. 591; Ryots of Garabandbo v. Zamindar of Parlakimedi,* AIR 1955 SC 233: (1955) 1 SCR 1104; *Custodian of Evacuee Property v. Khan Saheb Abdul Sukoor,* AIR 1961 SC 1087 : (1961) 3 SCR 855; *Nagendra Bora v. Commr. of Hills Division and Appeals,* AIR 1958 SC 398: 1958 SCR 1240; *T.C. Basappa v. T. Nagappa,* AIR 1954 SC 440 : (1955) 1 SCR 250; *Satyanaryan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale,* AIR 1960 SC 137 : (1960) 1 SCR 890; *Umaji Keshao Meshram v. Radhkabai,* 1986 Supp SCC 401; *Chandrasekhar Singh v. Siya Ram Singh,* (1979) 3 SCC 118 : 1979 SCC (Cri) 666.

6. AIR 1954 SC 215 : 1954 SCR 565.

7. (2013) 9 SCC 374.

8. *Surya Devi Rai v. Ram Chander Rai & Ors.,* supra, n. 4, at p. 694-696.

jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and

indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

***"

(Emphasis supplied)

15. The Supreme Court, in conclusion, clarified that the injunction is not from exercising power under Article 227 in any case whatsoever, but to exercise the same sparingly and to correct errors of moment that need immediate attention. It held:[9]

"39. Though we have tried to lay down broad principles and working rules, the fact remains that the parameters for exercise of jurisdiction under Articles 226 or 227 of the Constitution cannot be tied down in a strait-jacket formula or rigid rules. Not less than often, the High Court would be faced with a dilemma. If it intervenes in pending proceedings there is bound to be delay in termination of proceedings. If it does not intervene, the error of the moment may earn immunity from correction. The facts and circumstances of a given case may make it more appropriate for the High Court to exercise self-restraint and not to intervene because the error of jurisdiction though committed is yet capable of being taken care of and corrected at a later stage and the wrong done, if any, would be set right and rights and equities adjusted in appeal or revision preferred at the conclusion of the proceedings. But there may be cases where "a stitch in time would save nine". At the end, we may sum up by saying that the power is there but the exercise is discretionary which will be governed solely by the dictates of judicial conscience enriched by judicial experience and practical wisdom of the judge." (Emphasis supplied)

16. Thus, with the consent of the learned Senior Advocates appearing for the parties, the matter has been heard finally at this stage, but solely to identify whether the impugned orders is of such a nature as to warrant exercise of this discretionary power of superintendence that the Supreme Court has consistently warned against lightly exercising.

9. Id., at p. 696.

As to Section 6A of the Act.

17. Mr. Ravi Gupta, learned Senior Advocate appearing for the tenant, contended that the present matter is, indeed, one rightly deserving interference with under Article 227. He contended that the application by the landlord is nothing short of a unilateral attempt by the landlord to increase the rent payable qua the leased premises – an exercise prohibited by law. He contended that the provisions of the Act, specifically sections 6 and 6A thereof specifically disentitles the landlord from unilaterally increasing the rent payable qua the premises. He contended that an onerous condition – which is the expression sought to be assigned to the condition imposed by the impugned orders – cannot be imposed on the tenant, which is exercising its statutory right of appeal. He contended that the principles laid down for increase of rent under section 6A of the Act have been given a complete go by in the impugned orders. He contends that a wholly arbitrary figure has been specified as the amount to be deposited, without any regard to the mandate of the law. He submits that on this ground alone, the impugned orders deserve to be set aside as being in excess of law. He placed reliance on the judgement of the Supreme Court in **Niyas Ahmad Khan v. Mahmood Rahmat Ullah Khan & Anr.**[10] in support of his contention.

18. The premise of this contention is, in the opinion of this Court, somewhat misplaced. It must be clarified that the pronouncement in ***Atma Ram Properties Pvt. Ltd.* v. *Federal Motors Pvt. Ltd.,***[11] was not that the Court may direct payment of rent over and above the contractual or standard rent before staying the order of eviction. To the contrary, the judgement of the Supreme Court was that as the tenancy comes to an end upon the pronouncement of order of eviction, a reasonable sum may be directed to be deposited as use and occupation charges during pendency of the appeal. The provisions of sections 6 and 6A of the Act would have no applicability in determination of such charges. Rather, it would not be wholly incorrect to state that none of the provisions of the Act would apply to govern the relationship between the parties, for the tenancy comes to an end upon the order of eviction being passed.[12] Given the

10. (2008) 7 SCC 539.

11. Supra, n.1.

12. 17. In the Delhi Rent Control Act, 1958, the definition of a "tenant" is contained in clause (l) of Section 2. Tenant includes "any person against whom an order or decree for eviction has been made." [Section 2(l)(A)]. This definition is identical with the definition of tenant dealt with by his Court in Chander Kali Bai Case [(1977) 4 SCC 402]. The respondent tenant herein having suffered an order for eviction on 19-3-2001, his tenancy would be deemed to have come to an end with effect from that and he shall become an unauthorised occupant. It would not make any difference if the order of eviction has been put in issue in appeal or revision and is confirmed by the superior forum at a latter (sic) date. The date of termination of tenancy would not be postponed by reference to the doctrine of merger. [Atma Ram Properties Pvt. Ltd. v. Federal Motors Pvt. Ltd. supra n.1 at p. 717].

same, the present contention on behalf of the tenant hardly inspires any confidence in the mind of the Court.

19. The pronouncement in **Niyas Ahmad Khan v. Mahmood Rahmat Ullah Khan & Anr.,**[13] would have no application in the present case for the reason that the facts of that case were diametrically opposite to the present case. In the said case, the landlord had initiated proceedings under section 21 (1) (a) of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 against the tenant, but was unsuccessful in the same. Even in the appeal therefrom, the landlord was unsuccessful and the matter was thereafter taken to the Allahabad High Court under Articles 226 and 227 of the Constitution of India. The Allahabad High Court had directed payment of an amount of Rs. 12,050/- (Rupees twelve thousand fifty only) as rent by the tenant to the landlord pending decision of the writ petition. It is in the aforesaid fasciculus of facts, and given that there was no order of eviction against the tenant therein that the Supreme Court deemed it appropriate to set aside the order of the Allahabad High Court. The same would have no applicability to the present case. A Bench of three judges of the Supreme Court that was called upon to clarify the apparent difference of opinion between **Atma Ram Properties Pvt. Ltd. v. Federal Motors Pvt. Ltd.,**[14] and **Niyas Ahmad Khan v. Mahmood Rahmat Ullah Khan & Anr.,**[15] gave a similar opinion.[16]

As to res judicata and maintainability of the application

20. Mr. Gupta then contended that the application is per se not maintainable. This he contends on the basis that the issue of the tenant being put to terms was already considered and decided by the Appellate

13. *Supra, n*.10.

14. *Supra, n*.1.

15. *Supra, n*.10.

16. State of Maharashtra & Ors. v. Supermax International Private Limited & Ors., (2009) 9 SCC 772, at para 13, p.778.

Court when it issued notice on the application under Order XLI rule 5. He submitted that there can be no review of the order already passed by the Appellate Court on 12th April, 2001. He contended that even the order of 31st January, 2007 whereby the amount fixed on 12th April, 2001 of Rs. 15,000/- (Rupees fifteen thousand only) per mensem was without jurisdiction, but the tenant had bona fide complied with the same in the hope and belief that the appeal would soon be heard finally and disposed off. He submitted that the Appellate Court, once it has considered and passed an order on the issue of deposit to be made under Order XLI rule 5, cannot reopen the issue, whether on its own motion or on application by a party. This, he submits, is in view of the fact that Order XLI rule 5 is for the purpose of protecting the interest of the parties, not to further the interest of one party to the detriment of the other. He contends that neither was the application maintainable, nor was the order directing enhancement of the deposit amount specified in the order of 12th April, 2001 maintainable. He lastly contended that the reliance placed on the judgements of the Supreme Court in **Crompton Greaves Ltd v. State of Maharashtra,**[17] and **Anderson Wright & Co v. Amar Nath Roy & Ors.,**[18] to hold that the judicial trend has changed to the extent that even market rate may be imposed as user charges was incorrect. He submitted that inasmuch as these judgements do not set out the reasons why the final order was passed, they cannot be regarded as authoritative pronouncements.

21. In response, Mr. J. P. Sengh, learned Senior Advocate appearing on advance notice on behalf of the landlord, contended that the application would indeed be maintainable and that there was no infirmity in the impugned orders. He relied extensively on the dictum of the Supreme Court in **Atma Ram Properties Pvt. Ltd. v. Federal Motors Pvt. Ltd.,**[19] and contended that the issue of the liability – to pay user charges – of the tenant who seeks to remain in the property after the order of eviction is no longer res integra. He contended that the tenant who continues in the property after the order of eviction stays at the sufferance of the landlord and ought to not be allowed to enjoy the premises at the contractual rate of rent. He further relied on the judgements of the

17. (2005) 11 SCC 547.

18. (2005) 6 SCC 489.

19. *Supra, n*.1.

Supreme Court in the case of **Crompton Greaves Ltd v. State of Maharashtra,**[20] as well as **Anderson Wright & Co v. Amar Nath Roy & Ors.,**[21] to contend that the principle laid down in **Atma Ram Properties Pvt. Ltd. v. Federal Motors Pvt. Ltd.,**[22] was reaffirmed by subsequent judgements in relation to rent control laws even in other states. He submitted that these judgements clearly establish the power of the Court to impose conditions for the stay of the order of eviction and the power of the Court to consider the material submitted by the parties to come to a conclusion as to the rent to be paid. He thereafter drew attention of the judgement of the Supreme Court in **Mohammad Ahmad & Anr. v. Atma Ram Chauhan & Anr.,**[23] as an illustrative instance where the Supreme Court had upheld the enhancement – on application by the landlord – of the interim user charges payable.

22. The contentions of the tenant as to the power of the Appellate Court to review the order of 12th April, 2001 are irrelevant in the present circumstances. The Appellate Court has not passed the impugned orders under Section 114, read with Order XLVII of the Code. Nor has the Appellate Court purported to have reviewed the earlier order by the impugned orders. At the root of the contention of the tenant is the doctrine of res judicata. That the doctrine's boundaries far exceed the scope of section 11 of the Code is a well established principle as seen from the judgement of a Bench of three judges of the Supreme Court in **S. Pl. Narayanan Chettiar v. M. Ar. Annamalai Chettiar.**[24] That the principle of res judicata would apply to the same proceedings at different stages is also the undisputable position in law.[25] However, whether this wide ambit can be extended to contend that once an amount of security and/or deposit has been set under Order XLI rule 5 it cannot be subsequently modified, is in issue.

23. While the judgement of the Supreme Court in **Mohammed Ahmad & Anr. v. Atma Ram Chauhan & Anr.**[26] appears at first blush

20. *Supra, n*.17.

21. *Supra, n*.18.

22. *Supra, n*.1.

23. (2011) 7 SCC 755.

24. 1959 Supp (1) SCR 237 : AIR 1959 SC 275.

25. Satyadhyan Ghosal & Ors. v. Deorajin Debi (Smt.) & Anr., (1960) 3 SCR 590 : AIR 1960 SC 941.

26. *Supra, n*.23.

to answer this issue in favour of the landlord, it may not be wholly apposite to decide the present issue on the basis of the said judgement for two reasons. Firstly, the issue of applicability of the doctrine of res judicata to orders under Order XLI rule 5 was not directly in issue therein; it appears to have considered only the issue of whether the enhancement of the amount of deposit under Order XLI rule 5 was justified. Secondly, the judgement seems to indicate that the Supreme Court has proceeded on a concession made by the tenant therein as to maintainability of the proceedings and as to power of the Court to enhance the deposit, and the Supreme Court has cited the same as the reason for not looking into precedents or the law qua the same.[27] In other words, being decided on its peculiar facts and having not considered the issue, the judgement may not be considered as a binding precedent qua the issue of applicability of the principle of res judicata to orders passed under Order XLI rule 5 of the Code.

24. However, this cannot be read to mean that the Appellate Court is, indeed, barred by res judicata from passing an order in the nature of the impugned orders. That res judicata as a salutary principle of law ought to apply to ensure that a sense of finality is attached to judicial orders is well established. Indeed, it is based on three irrefutable principles, both of private law: (a) Nemo debet bis vexari pro una et eadem causa,28 and of public law: (b) Res judicata pro veritate accipitur[29] and interest reipublicae ut sit finis litium.[30] However, to apply this ipse dixit to every order would run counter to the very intent of the rule. A rule that, by its very nature, is intended to provide finality to judicial orders, ought to not lightly be applied to interim arrangements/orders.

25. That not all interlocutory orders ought to not be subject to the

27. The Court observes in paragraph 14 of the report: 14. A critical scrutiny of the aforesaid judgments/orders would show that in these cases neither was there any offer made by the landlord nor any corresponding acceptance by the tenant, still the High Courts, in each of these cases, had enhanced the rates of rent unilaterally. <u>But in the case in hand it is clearly reflected that the respondent landlords made an offer to the appellants/ tenants to which they agreed, only thereafter the rent was enhanced from Rs 600 per month to Rs. 2100 per month, for both the shops. Thus, the ratio of the aforesaid judgments cited by the learned counsel for the appellants has no application to the facts of the present case.</u> (Emphasis supplied) [Ibid. at p. 759].

28. Latin: No one should be tried twice for one and the same cause.

29. Latin: A matter decided is accepted as correct.

30. Latin: It is in the interest of the Commonwealth that there be an end to litigation.

rigours of *res judicata* is a principle not merely of convenience in administration of justice, but also of a long standing, well established and judicially as well as a legislatively recognised rule of law. The basis for this is that interlocutory orders, as recognised by the Supreme Court in **Arjun Singh v. Mohindra Kumar & Ors.,**[31] may also be designed to maintain status quo or preserve property pending the delay of the adjudicatory process, or to ensure the just, smooth, orderly and expeditious disposition of the suit.

26. These orders cannot be subject to the principle of res judicata, being not final and being amenable to further modification. These orders would doubtless not be modified without sufficient cause for such modification by the Court – either on its own motion or upon application by the party. However, the same cannot be construed to mean that the bar is due to res judicata. The second and/or successive application/s will be rejected – as the Supreme Court in **Arjun Singh v. Mohindra Kumar & Ors.**[32] held either as an abuse of process of law or for the same reasons on which the earlier application be done – on general principles of law analogous to res judicata.[33]

27. The inapplicability of res judicata to interlocutory orders amenable to alteration was also recognised by the legislature in the first part of the fourth explanation to section 13 of the Code of Civil Procedure, 1882, which provided for res judicata.[34] What needs consideration when applying the rule to interlocutory orders is borne out from the Explanation IV itself – whether the Court would have the power to alter the order de hors an application for review. This is also indicative of the legislative intent in the Code of Civil Procedure to empower Courts to alter certain interlocutory orders, i.e., those that have not attained finality. It is in this context that the Supreme Court, in **Arjun Singh v. Mohindra Kumar & Ors.,**[35] after discussing the principle of res judicata as enunciated in **Satyadhyan Ghosal & Ors. v. Deorajin Debi (Smt.) & Anr.,**[36] observed:

31. AIR 1964 SCC 993, at para. 13, p. 1001 : [1964] 5 SCR, at p. 960.

32. Id., at para 13, p. 1001: pp. 960-961.

33. Ram Kripal Shukul v. Mussummat Rup Kuari, (1883) 6 All 269 (PC).

34. Explanation IV.—A decision is final within the meaning of this section when it is such as the Court making it could not alter (except on review) on the application of either party or reconsider of its own motion. A decision liable to appeal may be final within the meaning of this section until the appeal is made.

35. Supra, n.31, at pp. 999-1000 : at pp. 957-958.

36. Supra, n.25.

"(11) We agree that generally speaking, these propositions are not open to objection. If the court which rendered the first decision was competent to entertain the suit or other proceeding, and had therefore competence to decide the issue or matter, the circumstance that it is a tribunal of exclusive jurisdiction or one from whose decision no appeal lay would not by themselves negative the finding on the issue by it being res judicata in latter proceedings. Similarly, as stated already, though S. 11 of the Civil Procedure Code clearly contemplates the existence of two suits and the finding in the first being res judicata in the later suit, it is well established that the principle underlying it is equally applicable to the case of decisions rendered at successive stages of the same suit or proceeding. But where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable." (Emphasis supplied)

28. The impugned orders draw reference to the said judgement in **Arjun Singh v. Mohindra Kumar & Ors.,**[37] and hold that orders under Order XLI rule 5 are amenable to subsequent modification. It observes that an order under Order XLI rule 5 is passed to protect the interest of the parties and the "interest of the parties" may change with the passage of time. Consequently, the impugned orders proceeded to enhance the amount of deposit in the manner earlier rehearsed. This Court finds no impropriety in the same as to warrant interference. Although the impugned orders have not entered upon the inquiry as to why the order of deposit under Order XLI rule 5 is immune from the principle of res judicata, the conclusion it had come to was not incorrect.

29. An order imposing a condition of deposit at the time of granting stay of the decree appealed from is an order in equity, not in law.[38] The condition is imposed to afford reasonable compensation to the party successful at the end of the appeal. The purpose of the order is not to put an end to the proceedings or decide any of the controversies in issue.

37. Supra, n. 31.

To the contrary, it is fashioned solely to ensure that the successful party in the Trial Court is not unduly deprived of the fruits of the decree; it is secured merely because of the delay that the appeal's adjudication is bound to take. Neither is the grant of the stay (or, as a corollary, the refusal thereof), nor are the conditions imposed therefor intended to conclusively determine any issue between the party. Even the inquiry that the Court undertakes to make a determination of the quantum of the deposit is of a summary nature – being usually done on the basis of affidavits filed by the parties and/or submissions of the Counsel for the parties. This is in view of the fact that the condition has to be imposed alongwith the stay; the stay will not operate unless the conditions are fulfilled. Given the same, the Court could hardly initiate a detailed trial with witnesses being summoned to ascertain the question of whether the stay ought to be granted with or without conditions. An order under Order XLI rule 5 is, in the opinion of the Court, doubtless an interlocutory order to which the rigours of res judicata cannot apply.

30. This Court finds support in the above conclusion by two factors; firstly, as far as it can ascertain, the issue of an order under Order XLI rule 5 being subject to res judicata was considered only in one judgement, and secondly, the Andhra Pradesh High Court rejected the plea in the said case. The case, **Bathini Syam Prasad v. Bathini Mastanamma & Anr.,**[39] found CHANDRA REDDI J. (as he then was) tracing out the very law that the Supreme Court would reiterate ten years later in **Arjun Singh v. Mohindra Kumar & Ors.,**[40] – that the Court has the inherent power to modify certain interlocutory orders ex debito justitiae.[41] He found support in this view from the order of RANGNEKAR J. of the Bombay High Court in **Yusuf IA Lalji & Ors. v. Abdullabhoy Lalji & Ors. (No. 1),**[42] the commentary of Sir D. F. Mulla on the Code,[43] and the commentary of Mr. S. C. Sarkar on the Code.[44] The said commentaries, in turn placed reliance on the judgement of SIR JOHN EDGE C.J. (as he then was) of the Allahabad High Court in **Amir Hasan**

38. Supra, n.1, at p. 713.
39. AIR 1954 Andh. 40.
40. Supra, n.31
41. Bathini Syam Prasad v. Bathini Mastanamma & Anr., Supra, n.31, at p. 43.
42. AIR 1930 Bom. 294, at p. 295.
43. Sir Dinshaw Fardunji Mulla, The Code of Civil Procedure (Twelfth Edition, edited by Sir Rupendra Coomar Mitter, Eastern Law House Ltd., Calcutta, 1953) at p. 1191.
44. SC Sarkar, The Law of Civil Procedure in India & Pakistan (Thrid Edition, SC Sarkar & Sons Ltd., Calcutta, 1954) at p. 871.

v Ahmad Ali,[45] where the issue of the appellate Court's power to review an order staying execution was considered. The learned judge, in the said case, held that the order granting stay could indeed be reviewed under section 623 of the Code of Civil Procedure, 1882[46] and proceeded to set aside the stay granted therein.

31. CHANDRA REDDI J. observed[47] that while the judgement of the Judicial Committee of the Privy Council in **Chajju Ram v. Neki & Ors.,**[48] on Order XLVII rule 1 of the Code precludes a review of the nature contemplated in **Amir Hasan v. Ahmad Ali,**[49] the learned commentators earlier alluded to have nonetheless deemed it appropriate to consider the said judgement of the Allahabad High Court an authority for the proposition of amenability of an order under Order XLI rule 5 of the Code to alteration. Relying on this as well as the opinion of RANGNEKAR J. in **Yusuf IA Lalji & Ors. v. Abdullabhoy Lalji & Ors.** (No. 1),[50] CHANDRA REDDI J. concurred with the final order in **Amir Hasan v. Ahmad Ali**[51] and held that an order under Order XLI rule 5 is doubtless not a final order and would be amenable to alteration.

32. Mr. Gupta placed reliance on the judgement of a learned single judge of this Court in **Ram Singh & Ors. v. Sohinder Singh Bedi,**[52] to contend that once an application under Order XLI rule 5 is made and the Court, after consideration thereof, has imposed certain conditions subject to which the order appealed from was to be stayed, there is a bar upon the re-agitation of the same issue by filing a further application. He contends that the said judgement clearly lays down that once an appellate court comes to a conclusion that no security needs to be furnished by the appellant, the appropriate remedy for the aggrieved respondent is by way of an appeal. He further contends that should this Court arrive at a conclusion different from the observations of the learned Single Judge in the said judgement, judicial discipline dictates that it ought to refer the matter to a larger bench for deciding the issue.

45. (1887) ILR IX All. 36.
46. Id., at p 40-41.
47. Bathini Syam Prasad v. Bathini Mastanamma & Anr. Supra n. 39 at p. 43.
48. AIR 1922 PC 112.
49. Supra, n.45.
50. Supra, n.42, at p. 295..
51. Supra, n.45.
52. 2010 (118) DRJ 510.

33. While it is indisputable that judicial discipline requires this Court to refer the issue to a larger bench if it differs in its opinion from those of a coordinate or larger bench on the same question of law, the present matter does not require any such exercise being undertaken. The said judgement of **Ram Singh & Ors. v. Sohinder Singh Bedi**[53] is clearly distinguishable in the issue of law before it from the matter before this Court. The said matter did not require the attention of the Court being directed towards the issue of whether an order made under Order XLI rule 5 of the Code is subject to res judicata. The said matter was not concerned with the issue of whether a Court is prohibited from imposing fresh conditions under Order XLI rule 5 of the Code if fresh facts are brought before it; indeed, no new facts were pleaded before it. To the contrary, the only reason given for invoking Order XLI rule 5 for a second time in the said case was that the Court therein had ignored the legislative mandate by not requiring the appellant to furnish security for stay of the impugned order.[54] The party who sought to invoke Order XLI rule 5 therein had contended that furnishing of security was a mandatory requirement under the said provision and since the stay was issued without imposing condition of furnishing of security, the order issuing stay was contrary to the mandate of the said provision. It was in these circumstances that the learned Single Judge observed that the appropriate proceedings for agitating these questions of law is by way of an appeal.[55]

34. Further, the Court also took notice of the fact that the order confirming the ex parte stay order sans security was confirmed by an order passed in the presence of the counsel for the aggrieved party, who had then not raised any issue as to lack of security.[56] It noted in its order that despite the fact that the party was duly represented and had not raised any objections to the lack of security at the time of confirmation of the order of stay, the party did not raise any objection for a period of over four and a half years thereafter as well.[57] It was in these circumstances that the second application under Order XLI rule 5 came to be dismissed. By no stretch of imagination can the said judgement – given the above distinguishing factors and given the nature of facts

53. Ibid.
54. Id., at para. 3, p. 511.
55. Id., at para. 11 et. seq., pp. 516-517.
56. Id., at para. 9, pp. 515-516.
57. Id., at para. 9, p. 515.

placed and contentions made before the Court – be said to be one involving the same question of law in the present matter. This Court finds no reason to regard the said judgement as an authority on the issues before it.

35. Further, this Court bears in mind the very purpose of imposing such conditions when granting a stay against an order of eviction: to protect the interests of and to ensure compensation to the successful landlord who is being deprived of the fruits of the order of eviction. Even if the judgements in **Crompton Greaves Ltd v. State of Maharashtra,**[58] as well as **Anderson Wright & Co v Amar Nath Roy & Ors.,**[59] cannot be regarded as authorities because they have not set out the reasons for the final order, it cannot be said that the judicial trend in such matters has remained unchanged. The Bench of three judges of the Supreme Court, in **State of Maharashtra & Ors. v. Supermax International Private Limited & Ors.,**[60] repelling the contention that the principle enunciated in **Atma Ram Properties Pvt. Ltd. v. Federal Motors Pvt. Ltd.,**[61] applies only in respect of proceedings under the Act and not under diverse rent control legislations of other states observed:[62]

> *"66. The Rent Act was the socio-legal response to certain historical developments, namely, the acute shortage of housing in the aftermath of the World War, the great influx of refugees in a number of States of the Union following the partition of the country and the massive migration inside the country from rural areas to the urban centres as a result of rapid urbanisation. All these developments that took place almost at the same time skewed the law of supply and demand totally in favour of the landlord. The need of the hour, therefore, was to protect the tenant, who would have otherwise been left completely at the mercy of the landlord. The legislature intervened and brought in the Rent Act, severely restricting the grounds for enhancement of rent and for eviction of the tenant from the rented premises, thus regulating the relationship between the landlord and the tenant beyond the general law under the Transfer of Property Act,*

58. Supra, n. 17.
59. Supra, n.18.
60. Supra, n. 1.
61. Supra, n. 1.
62. Supra, n. 16, at p. 793

> *1882. In this regard the Court responded in equal, if not greater measures. But after about three quarters of a century and three generations later when things are no longer the same and the urban centres are faced with newer problems, some of those having their origin in the Rent Act itself, there is the need to take a relook on the Court's attitude towards the relationship between the landlord and the tenant and to provide for a more level ground in the judicial arena."*

(Emphasis supplied)

36. Going further, AFTAB ALAM J., who was speaking for the Bench, reiterated certain of the observations of G. S. SINGHVI J. in *Satyawati Sharma (Dead) by LRs v. Union of India & Ors.,*[63] especially as to the doctrine of temporal reasonableness and affirming the same, observed:[64]

> *"71. We reaffirm the views expressed in **Satyawati Sharma** [(2008) 5 SCC 287] and emphasise the need for a more balanced and objective approach to the relationship between the landlord and tenant. This is not to say that the Court should lean in favour of the landlord but merely that there is no longer any room for the assumption that all tenants, as a class, are in dire circumstances and in desperate need of the Court's protection under all circumstances. (The case of the present appellant who is in occupation of an area of 9000 sq ft in a building situate at Fort, Mumbai on a rental of Rs 5236.58, plus water charges at the rate of Rs 515.35 per month more than amply highlights the point.)"* (Emphasis supplied)

37. An order directing tenant to make payment of reasonable user charges commensurate with the market value of the leased premises is but a reflection of this changing trend in judicial approach to disputes that may more appropriately be termed rent control disputes than tenancy disputes. The interest of the landlord who obtains a decree of eviction but is refused the premises – doubtless to enable the tenant an opportunity to exercise his right of appeal – cannot be regarded as being protected

63. (2008) 5 SCC 287, paras. 14, 29 and 32.
64. State of Maharashtra & Ors. v Supermax International Private Limited & Ors., supra, n. 16, at p.794.

merely because at the time of granting stay, a condition of deposit was imposed. This Court is of the view that when the initial condition of deposit was to be of reasonable user charges commensurate with the market rate, it cannot, by any stretch of imagination, be said that the interest of the landlord remains protected when the quantum of deposit remains unchanged for over twenty years.

38. Given the above, this Court has no hesitation in coming to the conclusion that an order under Order XLI rule 5 imposing a condition of deposit/payment of reasonable user charges for the continued user of the premises from the date of order of eviction is not final and may be altered at a later stage in the proceedings. This may be done by the Appellate Court on its own motion or on the application of either of parties. The alteration may be either to increase or decrease the amount earlier set and will depend upon the facts and circumstances of the case. No straitjacket formula can be laid down as to how often or to what extent the quantum ought to be modified; the same shall be at the discretion of the Appellate Court to be decided based on the specific circumstances attendant to each case. However, no such application could be entertained unless the party seeking modification is able to show changed circumstances as would warrant the modification.

As to the doctrine of merger

39. This brings us to the second of Mr. Gupta's contentions; that in the present matter, the appropriate Court which could have modified the condition of deposit for stay is the Supreme Court. He contended that the order of 12th April, 2001 by the Appellate Court that imposed the condition merged with the order dated 10th December, 2004 of the Supreme Court in Civil Appeal No. 7988 of 2004. Given that the order of 12th April, 2001 merged with the said order of the Supreme Court, it is contended that the condition of deposit imposed under Order XLI rule 5 may be modified only by the Supreme Court.

40. He contended that once the Supreme Court considered the issue of quantum of the deposit and, in the penultimate paragraph of the judgement upheld the imposition of Rs. 15,000/- (Rupees fifteen thousand only) per mensem as the condition of deposit, the same cannot now be modified by the Appellate Court in view of the doctrine of merger. The impugned orders observed that the doctrine of merger cannot apply in the matter as the order of 10th December, 2004 of the Supreme Court

did not consider the issue of quantum of deposit. It relied on **Kunhayammed & Ors. v. State of Kerala & Anr.,**[65] to hold that doctrine of merger does not apply where the judgement of the appellate court is sub silentio on a particular issue. This Court finds itself unable to agree with this contention of the tenant, as well as the basis of the findings of the Appellate Court. It proceeds on an incorrect understanding of the doctrine of merger and an incorrect understanding of the nature of the order imposing condition of deposit for stay of the order of eviction.

41. The doctrine of merger as expressed by a bench of three judges of the Supreme Court as early as in 1958 in **Commissioner of Income Tax, Bombay v. Amrit Bhogilal & Co.,**[66] and reiterated and affirmed by two separate benches of three judges of the Supreme Court, in **Gojer Bros. (Pvt.) Ltd. v Ratan Lal Singh,**[67] and in **Kunhayammed & Ors. v. State of Kerala & Anr.,**[68] was as under:

> *"10. There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the Appellate Authority is the operative decision in law. If the Appellate Authority modifies or reverses the decision of the Tribunal, it is obvious that it is the appellate decision that is effective and can be enforced. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal. As a result of the confirmation or affirmance of the decision of the Tribunal by the Appellate Authority, the original decision merges in the appellate decision and it is the appellate decision alone which subsists and is operative and capable of enforcement..."* (Emphasis supplied)

42. In **Gojer Bros. (Pvt.) Ltd. v Ratan Lal Singh,**[69] the Court observed:

> *"11. The juristic justification of the doctrine of merger may be*

65. (2000) 6 SCC 359.
66. (1959) SCR 713 : AIR 1958 SC 868.
67. (1974) 2 SCC 453.
68. Supra, n. 65.
69. Supra, n. 67, at p. 458.

sought in the principle that there cannot be, at one and the same time, more than one operative order governing the same subject-matter. Therefore the judgment of an inferior court, if subjected to an examination by the superior court, ceases to have existence in the eye of law and is treated as being superseded by the judgment of the superior court. In other words, the judgment of the inferior court loses its identity by its merger with the judgment of the superior court." (Emphasis supplied)

43. After quoting from the decision of the Judicial Committee of the Privy Council in **Saiyid Jowad Hussain v. Gendan Singh (since deceased) and Ors.,**[70] to the effect that the decree to be executed is the decree of the appellate court and not the original decree, the Court further observed:[71]

*"17. An application of this very principle yields the result that if the court of appeal confirms, varies or reverses the decree of the lower court, the decree of the appellate court is the only decree that can be amended [**Brij Nwam v. Tijbal Bikram,** (1910) 37 IA 70 : ILR 32 All 295.] ; or that the limitation for executing a decree runs from the date of the decree capable of execution and that is the decree of the appellate court which supersedes that of the court of first instance [AIR 1926 PC 63 : 51 MLJ 781 : 53 IA 197] ; or that if mesne profits are ordered from the date of suit until the expiry of three years after the date of the decree, the decree to be considered is the decree capable of execution so that if the decree of the trial Court is confirmed in appeal, three years will begin to run from the date of the appellate decree [**Bhup Indar v. Bijai,** (1900) 27 IA 209 : ILR 23 All 152 : 5 CWN 52.]."* (Emphasis supplied)

44. After discussing the above authorities and before proceeding to consider the merits of the issue of law being considered by it, the Supreme Court, in *Kunhayammed & Ors. v. State of Kerala & Anr.,*[72] observed in a prolegomenary fashion:

"12. The logic underlying the doctrine of merger is that there

70. (1925-26) 53 IA 197 : AIR 1926 PC 93.

71. Supra, n. 67, at p. 460.

72. Supra, n. 65, at p. 370.

cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way – whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below." (Emphasis supplied)

45. The Supreme Court, in that case, was considering the issue of whether an application for review was maintainable qua a judgement despite a petition for special leave to appeal under Article 136 of the Constitution of India being heard and dismissed without grant of leave. It concluded that where the leave to appeal is granted and the appeal is decided with a reasoned order or otherwise, the original order merges with the appellate order and cannot be reviewed, being non existent by operation of the doctrine of merger.[73] It also observed inter alia that where the leave to appeal is not granted or, on being granted, the appeal is dismissed without a reasoned order, the original order will continue to subsist and an application for review would indeed be maintainable, although the final decision may not differ from the opinion of the Supreme Court due to factors other than the doctrine of merger.[74]

46. The above pronouncements all lead to the inevitable conclusion that the operation of doctrine of merger is qua operative effect of the subject order. The contention of the tenant before this Court is that the doctrine of merger would operate to prevent the quantum being revised by the Appellate Court at this stage inasmuch as the order of the Appellate Court as to the quantum of deposit has merged with the order of the Supreme Court. This cannot be accepted – at least not without mutilating the concept of the doctrine. The doctrine of merger, being an estoppel operating by record, is but an extension of the doctrine of res judicata.

73. Id., at para. 41, p. 383.

74. Id., at para. 40, 382-383.

It operates against multiplicity of operative decrees/orders, not against the competence of a Court to issue an order or to draw up a decree. When an original decree/order merges by operation of the doctrine with the appellate decree/order, there are 3 incidents thereof:

46.1. The necessary incidents of the original decree/order cease to exist – they merge with and become the same as the incidents the appellate decree/order.

46.2. The findings in the original decree/order cease to exist and are not amenable to amendment or modification.

46.3. The judgement/reasoning in the original decree/order ceases to exist and cannot be regarded as having any authority as a precedent.

47. It was in similar circumstances that the authoritative pronouncements of the past have applied the doctrine of merger – such as to ascertain necessary incidents such as limitation[75] and executability,[76] or to consider whether a judgement would have authority as a precedent,[77] or to consider whether an order is final and unamendable.[78] In the instant case, the impugned orders have not sought to amend the earlier order, nor has it become final qua any issue. As already held, the order imposing the condition of deposit is not res judicata as to the condition or the quantum; nor does it preclude the Court from reconsidering the condition or the quantum. The observations of the **Supreme Court in Arjun Singh v. Mohindra Kumar & Ors.,**[79] is instructive in this regard:

> *"(13) ...Thus if an application for the adjournment of a suit is rejected, a subsequent application for the same purpose even if based on the same fact, is not barred on the application of any rule of res judicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of res judicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issues, whereas in the other case, on proof of fresh facts, the court would be competent, nay would be bound to take those into account and make an order conformably to the new facts freshly brought before the court."* (Emphasis supplied)

75. Batuk Nath v. Musammat Munni Dei & Ors., (1913-14) 41 IA 104: AIR 1914 PC 65; Hukumchund Boid, since deceased (now represented by Juscurn Boid and Anr.) v. Prithichand Lal Chowdhury, (1918-19) 46 IA 52: AIR 1918 PC 151; Saiyid Jowad Hussain v. Gendan Singh (since deceased) and Ors., (1925-26) 53 IA 197: AIR 1926 PC 93 S.S. Rathore v. State of Madhya Pradesh, (1998) 4 SCC 582.

76. Batuk Nath v Mussamat Munni Dei & Ors., (1913-14) 41 IA 104: AIR 1914 PC 65 ; Gojer Bros. (Pvt.) Ltd. v Ratan Lal Singh, supra, n. 67.

77. State of Madras v Madurai Mills Co. Ltd., (1967) 1 SCR 732: AIR 1967 SC 681.

78. Commissioner of Income Tax, Bombay v Amrit Bhogilal & Co., supra, n. 66; kunhayammed & Ors.v State of Kerala & Anr., supra, n. 65.

79. Supra, n. 31, at para. 13, p. 1001: at p. 961.

48. This Court is of the view that these principles would apply on all fours to an order under Order XLI rule 5 of the Code imposing a condition of deposit for grant of stay of the order of eviction. As earlier held, nothing will bar either party from reapplying to the Court seized of the appeal seeking that the grant of stay, condition to be imposed therefor, and/or the quantum of deposit be reconsidered – even if the same were approved, modified or set aside in appeal or revision prior to such second and/or further application. However, a note of caution must be struck in this regard: the second and/or further application shall not be maintainable unless further facts are shown warranting the Court's undertaking the exercise again. It must also be noted that moving such an application sans such further facts may also amount to an abuse of the process of the Court.

49. However, where such new and fresh facts are indeed shown – doubtless facts that did not exist or could not be ascertained despite exercise of due diligence at the time when the original order was made – the Court seized of the appeal would be bound to consider the new facts and pass a fresh order as to either the grant of stay, the condition to be imposed therefor, and/or the quantum of deposit, as may be prayed for. A further note of caution must be struck in this regard, for the Court considering the second and/or further application must ensure that it pays due attention to any law laid down by the appellate or revisional Court at the earlier instance. The Court ought to not give a go by to the provisions of Article 141 of the Constitution of India, the doctrine of precedent and the doctrine of stare decisis merely because the doctrine of res judicata and the doctrine of merger do not apply to an order under Order XLI rule 5. Indeed, this was the very note of caution struck by

the Supreme Court in **Kunhayammed & Ors. v. State of Kerala & Anr.**[80]

50. In view of the above, this Court is of the view that while the reasoning given by the Appellate Court in respect of the issue of doctrine of merger was inaccurate, the conclusions do not warrant interference. The order of 12th April, 2001 of the Appellate Court indeed merged with the order dated 10th December, 2004 of the Supreme Court. However, the same does not preclude the Appellate Court from considering the application newly filed by the landlord and its having so done, this Court finds no reason to interfere with the same.

As to the procedure adopted by the Appellate Court and the quantum

51. At this juncture, ordinarily this Court would have dismissed the petition, inasmuch as it has been held that the Appellate Court indeed had jurisdiction to pass the impugned orders. However, Mr. Gupta has raised various further grounds challenging the impugned orders. He contends that each of these grounds in themselves, as well as all of them taken together, amount to material irregularity and/or patent illegality. He contends that these irregularities are of such a nature as to warrant interference with under article 227 of the Constitution of India.

52. He contended that the application under Order XLI rule 5 of the Code was filed at a juncture when the appeal was fixed for final hearing. He further argued that the application was clearly filed with the intent to delay the proceedings. He submitted, thus, that the application ought to not have been heard at all. This Court is of the opinion that this ground, by itself, cannot be a ground for interference with the impugned orders. The landlord has a right to file the application under Order XLI rule 5 of the Code, which has been exercised in the instant matter. The Appellate Court was duty bound to consider the application and pass an order thereon, which has been done by it in the form of the impugned orders. De hors particulars of fraud, mala fide, or any attempt at abuse of process of the Court, neither the filing of the application, nor the passing of the impugned orders can be considered materially irregular or patently illegal.

53. He thereafter contended that the manner in which the application

80. Supra, n. 65, at para. 40, p. 383.

has been considered and the impugned orders were passed is patently illegal. As earlier observed, the first impugned order, after holding the application under Order XLI rule 5 of the Code maintainable, directed the parties to file documents supported by appropriate affidavits to assist the Court in calculating the quantum of deposit. He submits that the application, to be considered maintainable, ought to have been filed with sufficient material and be supported by an affidavit, before being considered. He submits that in the absence of such an affidavit and documents, there was no basis for the Appellate Court to have exercised its jurisdiction in holding the application maintainable or directing the parties to file affidavits and/or documents. He submits that sans the affidavit and documents, the Appellate Court would have had no jurisdiction to have passed the first impugned order.

54. He submits further that even thereafter, prior to passing the second impugned order, no trial was conducted, nor was any evidence permitted to be led by the parties in respect of the value that could have been fetched by the premises. He submits that the documents relied on by the landlord in support of its case – being leases with business houses qua premises located in the same building – were unilateral documents that were prepared after the disputes commenced. He contended that the documents provide no particulars of the facilities provided to the tenants therein and hence the value of the lease ought to not have been regarded as indicative of the reasonable rent the premises may have fetched. He contended that in any case the tenant ought to have been given an opportunity to cross examine the parties to the agreements. Lastly he submits that in any case, the revised user charges ought to have been made payable from the date when the documents and affidavits were brought on record, since this was the day when material was actually available on record to justify exercise of discretion in revising the user charges. These submissions deserve to be rejected as being without merit for the reasons discussed hereinbelow.

55. It cannot be stated that the Appellate Court was without jurisdiction when it passed the first impugned order. The jurisdiction of the Court to impose conditions when granting a stay under Order XLI rule 5 of the Code is equitable in nature.[81] The power is a necessary incident to the equitable power that the Court exercises in staying the

81. Supra, n. 1, at p. 713.

order appealed from. It can be exercised even suo motu, provided there is sufficient material available on record to justify the exercise of the power. It is as a matter of judicial propriety and judicial discipline that the Court does not exercise the power on its own motion – especially considering the fact that more often than not, material may not be available on record to warrant such an exercise until a party actually moves the Court to so exercise its powers. However, this cannot be read to understand that the lack of material on record divests the Court of its power to impose conditions when granting a stay under Order XLI rule 5 of the Code.

56. The Appellate Court, being empowered to consider the application under Order XLI rule 5 of the Code, had passed the first impugned order holding that it was indeed competent to revise the user charges if sufficient cause is shown therefor. It was in view of the fact that documents were filed by the landlord in support of the application under Order XLI rule 5 of the Code without any affidavit supporting the same that the Appellate Court passed the first impugned order directing that an affidavit may be filed to support the application and documents. An order passed in exercise of a power vested in the authority, directing the parties to furnish documents to enable the authority to appropriately exercise the power can hardly be regarded as illegal or contrary to material on record. To the contrary, the Appellate Court adopted the correct course in directing the parties to file documents supported by affidavits to assist it in the inquiry as to the quantum of deposit. In doing so, the Appellate Court was following the mandate of the Supreme Court in **State of Maharashtra & Ors. v. Supermax International Private Limited & Ors.,**[82] where the judgement cautioned the Court affixing the quantum to exercise restraint and not fix any excessive, fanciful or punitive amount.[83]

57. Furthermore, it cannot be accepted that the second impugned order was patently illegal for the reasons canvassed before this Court. The order to be passed on an application under Order XLI rule 5 of the Code granting stay subject to conditions has to be seen as one package; the appellant cannot be heard to contend that it accepts the order insofar as it stays the execution but objects to the conditions.[84] It could hardly

82. Supra,n. 16.

83. Supra, n. 16, at para. 77, p.796.

84. Supra, n. 16, at para. 72, p.795

be said that the Appellate Court ought to decide the question as to whether the stay ought to be granted summarily, based on affidavits and photocopies of documents, but ought to conduct a detailed trial for the purpose of ascertaining the quantum of deposit. It was not – nor could it have been – the contention of the tenant that the procedure adopted by the Appellate Court was unprecedented or not founded in law. Merely because the Appellate Court has proceeded to ascertain the quantum based on the affidavits and documents filed by the parties, the same cannot be considered as an error so gross and patent as to warrant interference under Article 227; this Court is of the view that this is not an error, but the appropriate course to have been followed.

58. It must also be borne in mind that the Appellate Court had given an opportunity to both parties, landlord and tenant alike, to file documents supported by affidavits, to enable the Court to ascertain the quantum to be fixed in the instant matter. The second impugned order specifically notes that while the landlord has furnished the rates of rent, details and particulars of tenancies in the vicinity, including of premises in the same building, the tenant has not even supplied basic particulars such as area of tenancy sought to be relied upon by it. It notes that the tenant has failed to produce any documents in support of its case and has further failed to rebut the case of the landlord as well. It observes that the tenant cannot be heard to contend that the documents indicating rent fetched by premises in the same building ought to not be considered inasmuch as it does not provide particulars of facilities provided to the tenancies. It observes that the Court can presume – albeit a rebuttable presumption – in the absence of proof to the contrary from the tenant, that the tenant is being provided the same facilities as are other tenants in the same premises. It further observes that the tenant, being based out of the same building, ought to have provided particulars as to the facilities made available to the other tenants if it seeks to distinguish its tenancy from the others, instead of raising a technical ground for rejection such as the failure of the landlord to have furnished particulars.

59. As to the objection that the various agreements and leases placed on record have grossly inflated values, the Appellate Court observed that the agreements are with business houses that are going concerns running their respective businesses from the premises. It observed that it is inconceivable that a business concern would execute a duly registered

agreement with inflated rent rates merely at the instance of the landlord. It is in these circumstances that the Appellate Court proceeded to make the second impugned order. Where both parties have been given an equal and sufficient opportunity to make their case as to the quantum to be fixed, and where the Court considers all the material available on record and comes to a conclusion on the basis thereof, the same cannot be regarded as being patently illegal and warranting interference.

60. Mr. Gupta lastly contends that the fixation of the quantum of deposit at Rs. 1,60,000/- (Rupees one lakh sixty thousand only) per mensem towards user charges for the leased premises is wholly onerous. He contends that the sudden increase of the quantum from Rs. 25,000/- (Rupees twenty five thousand only) to Rs. 1,60,000/- (Rupees one lakh sixty thousand only) is wholly unwarranted, especially when the contractual rental rate is Rs. 371.90/- (Rupees three hundred seventy one and ninety paise only). He contends that the Supreme Court has, in its order of 10th December, 2004, even after noting that adjoining premises were let out for Rs. 3,50,000/- (Rupees three lakh fifty thousand only), observed that the amount of Rs. 15,000/- (Rupees fifteen thousand only) per mensem is reasonable user charges for the premises. He contends that in view thereof, the Appellate Court was not right in increasing user charges to the exorbitant amount of Rs. 1,60,000/- (Rupees one lakh sixty thousand only) per mensem.

61. He further contends that even assuming that the premises could indeed have fetched over Rs. 3,20,000/- (Rupees three lakh twenty thousand only) per mensem, the Appellate Court ought to not have granted user charges at fifty percent of the same without applying judicial mind to the facts and circumstances attendant to the case of the parties before it. He contends that the tenant would be gravely prejudiced as a result of the impugned order affixing the quantum of deposit at Rs. 1,60,000/- (Rupees one lakh sixty thousand only), inasmuch as the tenant is likely to be unable to make the deposit and might lose the premises as a result thereof. He submitted that the Appellate Court has not given any reasons for fixing the quantum at the figure it has and has proceeded almost entirely on surmises and conjectures and the second impugned order ought to be set aside.

62. This contention is one that ought to not be canvassed in a petition under Article 227, especially in respect of an interim order. The

contentions, even if accepted, do not disclose an error of jurisdiction to be remedied in exercise of this Court's supervisory power; they are, at best, errors of facts. The supervisory jurisdiction of this Court will not be exercised to correct mere errors of fact or of law unless the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and a grave injustice or gross failure of justice has occasioned thereby.[85]

63. The Appellate Court has considered the material made available by the parties and the fact that similar premises are fetching rent at rates ranging from Rs. 270/- (Rupees two hundred seventy only) to Rs. 420/- (Rupees four hundred twenty only) per square foot per mensem and keeping in mind the possibility of variation on account of facilities made available, came to the conclusion that the leased premises would be capable of earning at least Rs. 270/- (Rupees two hundred seventy only) per square foot per mensem. It observed that as no material was placed on record in support of the contention that the two garages forming a part of the leased premises could fetch Rs. 1,00,000/- (Rupees one lakh only) per mensem, they may be assumed to fetch Rs. 25,000/- (Rupees twenty five thousand only) per mensem considering their location and accessibility.

64. On this basis, and given that the landlord prayed only for fifty percent of the actual value that the premises would be capable of fetching, the Appellate Court had revised the quantum of deposit to Rs. 1,60,000/- (Rupees one lakh sixty thousand only) per mensem. It is thus evident that the Appellate Court has given due consideration to all material available on record and the facts and attendant circumstances relevant to the issue to arrive at its conclusion as found in the second impugned order. The tenant is, in effect, praying that this Court reconsider the material to arrive at its own conclusion; this Court sees no justification to so apply itself.

65. This Court, in exercise of its supervisory jurisdiction, will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character. The view taken by the Appellate Court in affixing the quantum of deposit at the said figure is

85. Surya Rai v. Ram Chander Rai Chander Rai & Ors. supra, n.3 at para 38(5) p. 695.

a reasonably possible view; it cannot be regarded as a patent error warranting interference with.

66. In the above circumstances, the petition is dismissed as being without merit. The parties shall bear their own costs.

ILR (2014) III DELHI 1849
MAC. APP.

NATIONAL INSURANCE CO. LTD. ....APPELLANTS

VERSUS

SUKRITI DEVI & ORS. ....RESPONDENTS

(DEEPA SHARMA, J.)

MAC.APP. NO. : 492/2011 DATE OF DECISION: 08.05.2014

Motor Vehicles Act, 1988—Challenged to award of the Tribunal on the ground that income calculated in the absence of documentary evidence as the documents on record were manipulated and fabricated. Held—After going through he evidence produced before the Tribunal it is apparent that the Appellant's stand has no merit and income correctly calculated. Contention of the Appellant that because the signature of the deceased differs on each and every voucher, the vouchers are not genuine has no force. The insurance company had the opportunity for getting the disputed signatures of deceased on vouchers examined by the handwriting expert. The Court at this stage cannot presume that the vouchers do not bear the signatures of the deceased. Appeal dismissed.

I have given the careful consideration to the findings of the tribunal on this point and has gone through the record. The

Tribunal has elaborately discussed the evidence produced on record in order to arrive to the conclusion that the last drawn salary of the deceased Rs.78,00/- per months. The relevant portion of the findings of the Tribunal is reproduced as under:

> "10. The petitioner in her affidavit Ex.PW3/4 has deposed that the deceased was doing private job and was permanently employed with M/s A.G.Exports, A-110, Phase IV, Udyog Vihar, Gurgaon, Haryana and was earning Rs.7800/- per month. In order to prove the earning capacity of deceased, PW1 Amit Gupta was examined by petitioner who has deposed that he was partner of M/s A.G.Exports engaged in business of fabrics supply. He further deposed that they were having two workers at their concern, one of them was Manoj Singh (deceased) who was working with them for last 6-7 years and was drawing salary of Rs.7800/- per month; after his death in a bus accident his salary for the month of September, 2009 was given to his wife Sukriti. He further clarified that they had never issued any salary certificate to their employees but have been showing the salary paid to their employees in their account books. The salary paid to the employees through voucher and was duly signed by the workers. He has placed on record the cash voucher w.e.f. April, 2009 to September, 2009 Ex.PW1/1 to Ex.PW1/6. It is deposed by him that all these vouchers were duly signed by Manoj Singh at point X except the voucher Ex.PW1/6 which was signed by his wife. In his cross-examination on behalf of insurance company, he has stated that because of small business they had not issued appointment letter to their workers . He has also stated in cross examination that he can produce the cash vouchers even for the previous period if necessary. He has also clarified that amount of Rs. 7800/- in cash voucher was the salary amount and did not include the conveyance and other

allowances . He has deposed in his cross examination that he had been showing the payment to the workers in his Income Tax returns regularly and could submit the proof in that regard . He further deposed that investigator of insurance company inquired from them about the deceased and they had told them that Manoj Singh was working with them and was paid salary. In further cross-examination, he has placed on record a copy of profit and loss account for the year 2008-2009, Ex. PW1/7 along with staff ledger account for the year 2008-09 Ex. PW1/8 . He further clarified that he had filed Income Tax returns regarding these documents Ex. PW1/7 and Ex. PW1/8 and the documents have been audited which means that same has been shown in the income tax returns. In his further cross-examination on 16.11.2010, he has deposed that deceased Manoj Singh was a permanent employee with M/s A.G Exports , a partnership firm and he was working with them for the last 6 years .

11. Ld. counsel for insurance company had argued that the proof of payment of salary and vouchers in that regard has been manipulated and fabricated in order to benefit the LRs of the deceased. Ld. Counsel for petitioner on the other hand has submitted that there is nothing in the cross-examination of PW1 Amit Gupta which may show that the record produced by him was not a record prepared by him in ordinary course of business and was false and fabricated. Accordingly, seeing the testimony of PW1 Amit Gupta, I am satisfied that the deposition made by him was natural, trustworthy and straightforward. There is nothing in his cross-examination so as to conclude that his deposition has been assailed especially with regard to the payment of salary of deceased through voucher Ex. PW1/1 to Ex. PW1/6 . The said payment has been duly authenticated and audited by ledger accounts and profit and loss account placed on record by PW1 Amit Gupta. Nothing was suggested to PW1

Amit Gupta on behalf of insurance company that the said official record was not prepared in ordinary course of business of M/s A.G Exports where deceased was employed as a permanent employee. On the basis of evidence led by petitioner as discussed above , it is established that at the time of death deceased was earning Rs. 7800/- per month from his salary working with M/s A.G Exports and his service with them was permanent service. 12. Deceased Manoj Singh was employee of M/s A.G Exports stands established from the deposition of PW1 as deceased was working with them for last 6 years and nothing was suggested to PW1 Amit Gupta in cross-examination on behalf of insurance company that the said deceased was not a permanent employee with them and was not working for the last 6 years." **(Para 6)**

I have also carefully gone through the evidence produced before the Tribunal and it is apparent that the stand of the appellant has no merit and the tribunal has correctly reached to the conclusion that the last drawn wages of the deceased were Rs.7800/- per month. **(Para 7)**

The contention of the appellant that because the signatures of the deceased differs on each and every voucher, the vouchers are not genuine has no force. The insurance company had the opportunity for getting the disputed signatures of deceased on vouchers examined by the handwriting expert. The court at this stage cannot presume that the vouchers do not bear the signatures of the deceased. Neither the tribunal nor this court has any admitted signatures of the deceased for comparison with his disputed signature on vouchers. The other contention of the appellant that the deceased was not employed with M/s. A.G.Export stands rebutted by the various documents produced on record including documents Ex.PW1/1 to Ex.PW1/6. I find no reason to differ with the findings of learned tribunal on this point. **(Para 8)**

[An Ba]

APPEARANCES:

FOR THE APPELLANTS : Mr. Sonia Sharma, Adv.

FOR THE RESPONDENTS : Mr. Sanjiv Gupta, Adv.

RESULT: Appeal dismissed.

DEEPA SHARMA, J. (ORAL)

1. The appellant has assailed the order the learned Tribunal dated 17th February, 2011 whereby the tribunal has awarded a compensation of Rs. 18,34,800/-.

2. The brief facts are that on 23.09.2009 deceased Manoj Singh was coming on his scooter and when he reached at Punjabi Bagh Flyover, near Railway Line, Punjabi Bagh, one blue line bus bearing registration no. DL 1PB 1685 being driven by its driver respondent no.6 in rash and negligent manner came in a very fast speed and hit against the scooter and as a result the deceased came under the tyre of the offending vehicle and died at the spot. He was 31 years of age with sound health. He was married having two children, wife and parents and was earning Rs.7800/- per month and was the sole bread earner of the family. After considering all the facts and circumstances of the case, the tribunal has awarded the compensation as under:

1. Compensation for loss of dependency	Rs.16,84,800/-
2. Compensation for loss of consortium	Rs. 10,000/-
3. Compensation for loss of estate	Rs. 10,000/-
4. Compensation for funeral expenses	Rs. 5,000/-
5. Compensation for loss of love and affection	Rs. 1,25,000
	Rs.18,34,800/-
Less interim compensation (-)	**Rs. 50,000/-**
	Rs.17,84,800

3. The appellant has not challenged the findings of the tribunal that the accident was the result of the rash and negligent driving of the offending vehicle i.e. the blue line bus. The finding of the learned tribunal to this effect has thus attained the finality.

4. The only challenge in the appeal is that the tribunal has wrongly calculated the income of the deceased at Rs.7800/- per month. It is contended that there was no documentary evidence on record to prove the income. The documents produced on record were manipulated and fabricated. The claimants have produced on record the vouchers of payment of salary allegedly signed by the deceased, however, the signature of the deceased on each of the vouchers is different meaning thereby that these vouchers have been manipulated. It was further argued that the statement of account Ex.PW1/1 to Ex.PW1/6 show that the deceased was getting salary of Rs.5300/- per month till 7th May, 2009 and that all of a sudden the salary was increased to Rs.7800/- and this clearly creates doubt regarding the genuineness of these vouchers. There is no other document on record besides these vouchers. It is contended that in these circumstances the tribunal ought to have taken Rs.5300/- per month as the salary of the deceased while calculating the loss of dependency.

5. It is contended on behalf of the LRs of the deceased that the contention of the insurance company before the tribunal was that the deceased was not in employment of M/s A.G.Exports, a partnership firm. It is further contended that the insurance company did not cross examine the owner of the M/s A.G.Exports who has been examined by the claimant as PW1 on the point that the last drawn of deceased was not Rs.7800/- per month.

6. I have given the careful consideration to the findings of the tribunal on this point and has gone through the record. The Tribunal has elaborately discussed the evidence produced on record in order to arrive to the conclusion that the last drawn salary of the deceased Rs.78,00/- per months. The relevant portion of the findings of the Tribunal is reproduced as under:

> *"10. The petitioner in her affidavit Ex.PW3/4 has deposed that the deceased was doing private job and was permanently employed with M/s A.G.Exports, A-110, Phase IV, Udyog Vihar, Gurgaon, Haryana and was earning Rs.7800/- per month. In order to prove the earning capacity of deceased, PW1 Amit Gupta was examined by petitioner who has deposed that he was partner of M/s A.G.Exports engaged in business of fabrics supply. He further deposed that they were having two workers at their concern, one*

of them was Manoj Singh (deceased) who was working with them for last 6-7 years and was drawing salary of Rs.7800/- per month; after his death in a bus accident his salary for the month of September, 2009 was given to his wife Sukriti. He further clarified that they had never issued any salary certificate to their employees but have been showing the slary paid to their employees in their account books. The salary paid to the employees through voucher and was duly signed by the workers. He has placed on record the cash voucher w.e.f. April, 2009 to September, 2009 Ex.PW1/1 to Ex.PW1/6. It is deposed by him that all these vouchers were duly signed by Manoj Singh at point X except the voucher Ex.PW1/6 which was signed by his wife. In his cross-examination on behalf of insurance company, he has stated that because of small business they had not issued appointment letter to their workers . He has also stated in cross examination that he can produce the cash vouchers even for the previous period if necessary. He has also clarified that amount of Rs. 7800/- in cash voucher was the salary amount and did not include the conveyance and other allowances . He has deposed in his cross examination that he had been showing the payment to the workers in his Income Tax returns regularly and could submit the proof in that regard . He further deposed that investigator of insurance company inquired from them about the deceased and they had told them that Manoj Singh was working with them and was paid salary. In further cross-examination, he has placed on record a copy of profit and loss account for the year 2008-2009, Ex. PW1/7 along with staff ledger account for the year 2008-09 Ex. PW1/8 . He further clarified that he had filed Income Tax returns regarding these documents Ex. PW1/7 and Ex. PW1/8 and the documents have been audited which means that same has been shown in the income tax returns. In his further cross-examination on 16.11.2010, he has deposed that deceased Manoj Singh was a permanent employee with M/s A.G Exports , a partnership firm and he was working with them for the last 6 years .

11. Ld. counsel for insurance company had argued that the proof of payment of salary and vouchers in that regard has been manipulated and fabricated in order to benefit the LRs of the deceased. Ld. Counsel for petitioner on the other hand has

submitted that there is nothing in the cross-examination of PW1 Amit Gupta which may show that the record produced by him was not a record prepared by him in ordinary course of business and was false and fabricated. Accordingly, seeing the testimony of PW1 Amit Gupta , I am satisfied that the deposition made by him was natural , trustworthy and straightforward. There is nothing in his cross-examination so as to conclude that his deposition has been assailed especially with regard to the payment of salary of deceased through voucher Ex. PW1/1 to Ex. PW1/ 6 . The said payment has been duly authenticated and audited by ledger accounts and profit and loss account placed on record by PW1 Amit Gupta. Nothing was suggested to PW1 Amit Gupta on behalf of insurance company that the said official record was not prepared in ordinary course of business of M/s A.G Exports where deceased was employed as a permanent employee. On the basis of evidence led by petitioner as discussed above , it is established that at the time of death deceased was earning Rs. 7800/- per month from his salary working with M/s A.G Exports and his service with them was permanent service. 12. Deceased Manoj Singh was employee of M/s A.G Exports stands established from the deposition of PW1 as deceased was working with them for last 6 years and nothing was suggested to PW1 Amit Gupta in cross-examination on behalf of insurance company that the said deceased was not a permanent employee with them and was not working for the last 6 years."

7. I have also carefully gone through the evidence produced before the Tribunal and it is apparent that the stand of the appellant has no merit and the tribunal has correctly reached to the conclusion that the last drawn wages of the deceased were Rs.7800/- per month.

8. The contention of the appellant that because the signatures of the deceased differs on each and every voucher, the vouchers are not genuine has no force. The insurance company had the opportunity for getting the disputed signatures of deceased on vouchers examined by the handwriting expert. The court at this stage cannot presume that the vouchers do not bear the signatures of the deceased. Neither the tribunal nor this court has any admitted signatures of the deceased for comparison with his disputed signature on vouchers. The other contention of the appellant that the deceased was not employed with M/s. A.G.Export stands rebutted

by the various documents produced on record including documents Ex.PW1/1 to Ex.PW1/6. I find no reason to differ with the findings of learned tribunal on this point.

9. The appellant has also prayed for reduction in the amount of Rs.1,25,000/- granted towards loss of love and affection.

10. It is argued on behalf of the claimants that the deceased has left behind five dependants and the compensation for loss of love and affection has to be given to all the dependants of the deceased and court has actually awarded a sum of Rs.25,000/- for each of the dependants of the deceased and so it is not on a higher side.

11. There is no dispute to the fact that the deceased has left behind five dependants. Grant of Rs.25,000/- to each of the dependant of the deceased towards loss of love and affection cannot be said to be towards higher side. The contention of the appellant, therefore, has no force in it.

12. For the reasons discussed above, the appeal fails and it is dismissed.

ILR (2014) III DELHI 1857
MAC. APP.

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

VERSUS

SANJAY SINGH & ORS. ....RESPONDENT

(DEEPA SHARMA, J.)

MAC APP. NO. : 561/2012 DATE OF DECISION: 08.05.2014

Motor Vehicle Act, 1988—Sections 2 (44), 2 (21), 166 & 140—Award passed by Motor Accident Claims Tribunal on petition filed by respondents fixing liability on

insurance company to pay compensation and rejected its claim for recovery rights—Aggrieved insurance company preferred appeal claiming there was violation of insurance policy as driver was not holding valid and effective driving licence to drive tractor—He was holding driving licence valid for motorcycle and LMV (Non-Transport). Held: Tractor is motor vehicle coming within the definition of section 2 (44) of Motor Vehicle Act and is also a light motor vehicle within the meaning of section 2 (21) of motor Vehicle Act. The tractor not being used for any commercial purpose and is also not a non-transport vehicle.

The witness of the respondent R3W1 has exhibited Form 54 as Ex.RW1/3 issued by Licensing Authority, Badaun, U.P. which shows that the driving license was valid for Motor cycle and LMV (non-transport). The trial court has dealt with the issue whether the tractor falls within the category of LMV (non-transport). The relevant paragraphs of the impugned order are reproduced as under :-

> "………14. Ld. Counsel for insurance company contended that the respondent no.1 was driving the tractor while he was having driving licence of LMV (NT) and a separate endorsement is required for driving the tractor hence there is a breach of policy conditions and insurance company is not liable.
>
> 15. I have gone through the material on record. The report on form 54 issued by Licensing Authority, Badaun, Ex.RW1/3 shows that driving licence of the respondent No. 1 was valid for motorcycle and LMV (non-transport). The tractor is defied in Sec. 2 (44) of MV Act and reads as under:-
>
> (44) *"tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller;*

16 Light Motor Vehicle is defined in Sec. 2 Clause 21 of M.V. Act and reads as under :-

(21) *"light motor vehicle" means a transport vehicle or omni bus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed (7500) kilograms;*

17. The certificate of registration shows unladen and laden weight of vehicle no. UP-24J-8736 to be 1880 kg which is less than 2500kg, therefore, the offending vehicle falls in the category of LMV. The insurance company failed to establish that separate endorsement is required on driving licence for driving the tractor. Therefore the necessary conclusion that follows is that the person having driving licence for driving LMV can drive tractor. Even otherwise in **"National Insurance company Ltd. vs Swaran Singh,** 2004 ACJ 1(SC), wherein the Supreme Court has held that in each case the decision has to be taken whether the factum of the driver possessing licence for one type of vehicle, but, found driving another type of vehicle was the main or contributory cause of the accident." The Insurance company failed to establish any breach of condition of policy." **(Para 9)**

Important Issue Involved: Tractor is a motor vehicle coming within the definition of section 2 (44) of Motor Vehicle Act and is also light motor vehicle within the meaning of section 2 (21) of Motor Vehicle Act. The tractor not being used for any commercial purpose and is also not a non-transport vehicle.

[Sh Ka]]

APPEARANCES:

FOR THE APPELLANT : Mr. Sameer Nandwani, Adv.

FOR THE RESPONDENT : None.

CASE REFERRED TO:

1. *National Insurance company Ltd.* vs. *Swaran Singh,* 2004 ACJ 1(SC).

RESULT: Appeal dismissed.

DEEPA SHARMA, J. (Oral)

1. In this case, a claim petition under Section 140 & 166 of the Motor Vehicle Act has been filed against the order dated 30th March, 2012 of the Tribunal whereby, the Tribunal has granted a compensation of Rs.1,69,300/- and fixed the liability to make the payment upon the appellant.

2. The Tribunal has reached to the conclusion after the inquiry into the matter that, on 11th October, 2009, the claimant was driving a Car No. DL-3CZ-5249 and was going to his residence at Pratap Nagar. When he reached at Hindon Nehar ki patri in front of Mulla Colony, Delhi, a tractor No. UP-24J-8736 came in a very high speed and being driven in a rash and negligent manner from Kondli Pull side and hit his car. As a result, the claimant suffered fractures of both bones of leg. The claimant was removed to the hospital. An FIR No. 430/2009 was registered for the offence punishable under Section 279/338 IPC.

3. The contention of the Insurance Company, before the Tribunal was that there had been a violation of the Insurance Policy as the driver was not holding a valid and effective driving licence and also there was a breach of the terms and conditions of the policy.

4. On the basis of the evidences produced on record, the learned Tribunal fixed the liability to pay the compensation upon the appellant and rejected its claim for recovery rights, holding that there was no violation of terms and conditions of the policy and that the driver was holding a valid driving license.

5. Aggrieved by the said findings, the presesnt appeal has been filed claiming the right to recovery of the compensation from the driver and owner of the offending vehicle.

6. The main contention of the appellant is that the Tractor was being driven on the road and was not being used for agricultural purposes and hence there is a breach of the policy conditions. It is also argued that

the driver of the offending vehicle was not holding a valid driving license for driving the tractor.

7. The tractor was being driven on the road and it has to be driven on the road and simply because the tractor was being driven on the road does not amount to violation of terms and conditions of the policy. The appellant has failed to produce any evidenc on record to prove that the tractor was being used at that time for the purpose other than the agricultural purpose. Evidence shows that the tractor was coming out of the field and this shows that the tractor was used for agricultural purpose. No evidence has been produced on record to show that the tractor has been used for any commercial purpose by the owner of the said tractor at the time of accident.

8. The next contention of the appellant is that the driver of the tractor was not having a valid driving license.

9. The witness of the respondent R3W1 has exhibited Form 54 as Ex.RW1/3 issued by Licensing Authority, Badaun, U.P. which shows that the driving license was valid for Motor cycle and LMV (non-transport). The trial court has dealt with the issue whether the tractor falls within the category of LMV (non-transport). The relevant paragraphs of the impugned order are reproduced as under :-

> ".........14. Ld. Counsel for insurance company contended that the respondent no.1 was driving the tractor while he was having driving licence of LMV (NT) and a separate endorsement is required for driving the tractor hence there is a breach of policy conditions and insurance company is not liable.
>
> 15. I have gone through the material on record. The report on form 54 issued by Licensing Authority, Badaun, Ex.RW1/3 shows that driving licence of the respondent No. 1 was valid for motorcycle and LMV (non-transport). The tractor is defied in Sec. 2 (44) of MV Act and reads as under:-
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> (44) *"tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller;*
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> 16 Light Motor Vehicle is defined in Sec. 2 Clause 21 of M.V. Act and reads as under :-

> (21) *"light motor vehicle" means a transport vehicle or omni bus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed (7500) kilograms;*
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> 17. The certificate of registration shows unladen and laden weight of vehicle no. UP-24J-8736 to be 1880 kg which is less than 2500kg, therefore, the offending vehicle falls in the category of LMV. The insurance company failed to establish that separate endorsement is required on driving licence for driving the tractor. Therefore the necessary conclusion that follows is that the person having driving licence for driving LMV can drive tractor. Even otherwise in **"National Insurance company Ltd. vs Swaran Singh,** 2004 ACJ 1(SC), wherein the Supreme Court has held that in each case the decision has to be taken whether the factum of the driver possessing licence for one type of vehicle, but, found driving another type of vehicle was the main or contributory cause of the accident." The Insurance company failed to establish any breach of condition of policy."

10. No illegality in the order of the learned trial court has been pointed out by the learned counsel for the appellant. Learned Tribunal has dealt with the issue as per the provisions of the law and reached to the conclusion that the tractor is a motor vehicle and also comes within the definition of Section 2 (44) M.V. Act and is also a light motor vehicle within the meaning of Section 2 (21) of Motor Vehicle Act. The tractor was not being used for any commercial purpose. It is also a non-transport vehicle. The appellant has failed to prove that there was violation of terms and conditions of the policy by the insured.

11. The appeal is hereby dismissed being devoid of any merit.

12. The statutory amount deposited by the appellant be refunded.

ILR (2014) III DELHI 1863
MAC.APP

NEW INDIA ASSURANCE COMPANY LTD. ....APPELLANT

VERSUS

ASHWANI KUMAR & ORS. ....RESPONDENT

(DEEPA SHARMA, J.)

MAC.APP. 704/2010 DATE OF DECISION: 08.05.2014

Motor Vehicle Act—1988, Compensation In the proceedings under Motor Vehicles Act, learned Motor Accident Claims Tribunal awarded compensation but at the same time, reached the conclusion that there was a breach in terms of the insurance policy since the driver of the offending vehicle was not holding a valid driving licence, as such the Tribunal granted recovery to the insurance company—Appellant challenged the order of the Tribunal arguing only to the effect that the liability to pay the claimant ought to have been fixed directly on the driver and owner of the offending vehicle instead of the appellant being directed to first pay the claimant and then recover the same from the owner and driver of the offending vehicle—Held, in view of settled legal position that the liability to pay compensation under Motor Vehicles Act is joint and several, coupled with the legal position that liability to pay the third person under the policy is that of the insurance company, the insurance company can only be given a right to recover the awarded compensation from violators of terms and conditions of the insurance policy, so order of the learned Tribunal did not suffer any infirmity.

[Gi Ka]

APPEARANCES:

FOR THE APPELLANT : Neerja Sachdeva, Adv.

FOR THE RESPONDENT : Mr. Amit Kaushik, Adv.

CASES REFERRED TO:

1. *S. Iyyapan* vs. *United India Insurance Co. Ltd.,* reported as 2013 ACJ 1944.
2. *Sohan Lal Passi* vs. *P. Sesh Reddy* reported as II (1996) ACC 617.

RESULT: Appeal dismissed.

DEEPA SHARMA, J. (Oral)

1. There is a short challenge in this case by the Insurance company of the award dated 25th August, 2010. Vide this award dated 25th August, 2010, learned Tribunal had reached to the conclusion that there was a breach of terms of the insurance policy as driver of the TSR was not holding a valid driving license at the time of incident. Consequently, the learned Tribunal had granted the recovery rights to the appellant. It is against this recovery rights given to the appellant, that the appellant has come before this court, arguing that the liability to pay the claimant ought to have been fixed on the driver and the owner of the offending vehicle.

2. In short the facts of the case are that an accident had taken place on 8th November, 2001 at about 9.30 p.m. opposite STD Booth, Hudson line near Nala. At that time the injured/claimant Ashwini Kumar was going on his Motor cycle bearing No. BR-15/A-0102 at a normal speed and a three wheeler (TSR) bearing No. DL-1R-D-9572 which was being driven in a rash and negligent manner hit his motorcycle. The claimant/ injured fell down on the road and received grievous injuries. He filed a claim petition being MACT No. 654/2006 where he had been awarded a compensation of a sum of Rs.1,38,750/- along with interest @ 7.5 % per annum from the date of institution till the date of actual deposit. The Tribunal had opined that accident had taken place due to the rash and negligent driving by the offending vehicle i.e. the TSR.

3. Learned counsel for the claimant has contested the present appeal. Notice of the appeal was also issued to respondents Nos. 2 to 4, the

driver and and owner of the TSR but they have not contested the present appeal.

4. I have heard the arguments and perused the record.

5. The appellant has not challenged the finding of the Tribunal, whereby the TSR was held to be responsible of causing the accident. The finding of the Tribunal to this effect has therefore attained the finality.

6. The law on this point is very clear. It is the settled principle that the liability to pay the compensation is joint and several under the MACT Act. In a case titled as **Sohan Lal Passi v. P. Sesh Reddy** reported as II (1996) ACC 617, the court while referring to Section 96 (2)(b)(ii) of Motor Vehicle Act has held that this Section cannot be interpreted in a technical manner and only enables the Insurance Company to defend the liability to pay the compensation on the grounds mentioned in Sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. The relevant part of the said order is reproduced as under:-

> "12...........According to us, Section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-section (2) including that there has been a contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has not insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression "breach" occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the

> Tribunal or the Court that such violation or infringement on the part of the insured was willful, It the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that it was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under sub-section (1) of Section 96. In the present case far from establishing that it was the appellant who had allowed Rajinder Pal Singh to drive the vehicle when the accident took place, there is not even any allegation that it was the appellant who was guilty of violating the condition that the vehicle shall not be driven by a person not duly licensed. From the facts of the case, it appears that the appellant had done everything within his power inasmuch as he has engaged a licensed driver Gurubachan Singh and had placed the vehicle in his charge. While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had willfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub- section (1) of Section 96 of the Act......."

7. In a recent judgment, titled as **S. Iyyapan v. United India Insurance Co. Ltd.,** reported as 2013 ACJ 1944, the Hon'ble Supreme Court has again reiterated the same principle and has held as under in para 18:-

> "...18. Reading the provisions of Sections 146 and 147 of the Motor vehicles Act, it is evidently clear that in certain circumstances the insurer's light is safeguarded but in any event the insurer has to pay compensation when a valid certificate of insurance is issued notwithstanding the fact that the insurer may proceed against the insured for recovery of the amount. Under Section 149 of the Motor Vehicles Act, the insurer can defend the action inter alia on the grounds, namely, (i) the vehicle was not driven by a named person, (ii) it was being driven by a

person who was not having a duly granted licence, and (iii) person driving the vehicle was disqualified to hold and obtain a driving licence. Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy."

8. It is the established law that the liability to pay the third person under the policy is that of the insurance company and the insurance company can only be given a right to recover the awarded amount from the violators of the terms and conditions of the insurance policy. The award of learned Tribunal does not suffer from any infirmity.

9. The appeal is dismissed being devoid of merits.

10. On 28th October, 2010, this court while dealing with CM No. 18960/2010, directed the appellant to deposit the entire award amount with up to date interest with the Registrar General of court and releasing 50% of the amount in favour of the claimant. The balance amount if any lying with Registrar General of this court be released henceforth to the claimant/injured.

11. The statutory amount deposited by the appellant is also released in his favour.

12. The appeal is disposed of in the above terms.

ILR (2014) III DELHI 1868
MAC.APP

RAJ KUMAR ....APPELLANT

VERSUS

JEET SINGH & ORS. ...RESPONDENTS

(DEEPA SHARMA, J.)

MAC.APP. 378/2013 DATE OF DECISION: 08.05.2014

Motor Vehicles Act, 1988—Appellant met with an accident and thereby suffered Permanent disablement of 80% in respect of lower limbs—The Tribunal assessed the whole body disability at 40% and calculated loss of future earning after taking into account his age as well as three income tax returns—Challenged—Petitioner argued before the High Court that the Tribunal ought not to have taken into consideration the income shown in the assessment year 2009-2010 since during financial year 2008-2009 the petitioner remained indisposed due to his injuries and was not in service, which is the reason for reduction in the earnings of that year otherwise the income tax returns showed that there was yearwise increase in his income—Held, as reflected from record that due to the accident on 21.9.2009, appellant was not able to perform duties with his employer for 5-6 months and therefore, his earnings for the assessment year 2009-2010 are less than the earnings of the previous years, so the Tribunal ought not to have taken into consideration the same—Also held that towards future prospects, keeping in mind age of the appellant as 26 years, the Tribunal ought to have applied 50% of his salary towards future prospects and the Tribunal wrongly applied 30% towards future

prospects—Accordingly, the High Court recomputed the compensation payable to the appellant.

[Ga Ki]

APPEARANCES:

FOR THE APPELLANT : Mr. S.N. Parashar, Adv.

FOR THE RESPONDENTS : Mr. L.K. Tyagi Adv, for R-2.

CASES REFERRED TO:

1. *Neerupam Mohan Mathur* vs. *New India Assurance Co.* 2013 (8) SCALE.
2. *Rajesh* vs. *Rajbir Sigh* (2013) 9 SCC 54. .
3. *Raj Kumar* vs. *Ajay Kumar and others* (2011) 1 SCC 343.
4. *Arvind Kumar Mishra* vs. *New India Assurance Co. Ltd.* [(2010) 10 SCC 254 : (2010) 3 SCC (Cri) 1258 : (2010) 10 Scale 298].
5. *Yadava Kumar v. National Insurance Co. Ltd.* [(2010) 10 SCC 341 : (2010) 3 SCC (Cri) 1285 : (2010) 8 Scale 567].

RESULT: Appeal disposed of.

DEEPA SHARMA (ORAL)

1. The appellant met with an accident on 20.10.2008, while riding on his motorcycle and reached at Pashu Chikitsalaya Bhojpura, when a Tata Truck No.HR 38C-2777 being driven in rash and negligent manner and at very high speed hit his motorcycle. He suffered grievous injuries and was initially treated at Guru Teg Bahadur Hospital and then referred to Trauma Centre, Delhi. He was admitted in Max Balaji Hospital on 21.10.2008 and was discharged from there on 30.10.2008. He suffered with (i) Crushed Mangled left lag – Circumferential loss of skin and crushing of muscles from knee to ankle (ii) Compound fracture BB right leg (MID 1/3) (iii) Lacerated wounds with skin loss right elbow and forearm (iv) Fracture nasal bone and was operated upon. Post operation he developed necrosis of bone and muscles with derangement of coagulation profile and sepsis hence AK amputation was done.

2. The appellant has filed his compensation claim vide MAC no.602/

2010. He suffered permanent disability of 80% in respect of his lower limbs as per the disability certificated issued by GTB hospital. The Tribunal assessed his whole body disability at 40% and calculated the loss of future earning after taking into consideration his age as well three income tax returns of the assessment year 2007-08, 2008-09 and 2009-10 and awarded the compensation as under vide order dated 15.10.2012:

1.	Compensation towards pain and suffering	Rs. 1,00,000/-
2.	Loss of amenities and enjoyment	Rs. 1,50,000/-
3.	Compensation towards disfiguration	Rs. 1,00,000/-
4.	Loss of earning capacity due to injuries	Rs. 9,58,997/-
5.	Loss of earning of petitioner for 5 months @ Rs.8,200/-	Rs. 41,000/-
6.	Expenses towards medical bills	Rs. 3,11,619/-
7.	Compensation towards conveyance and Special diet (without bills)	Rs. 10,000/-
8.	Compensation towards prosthetic leg	Rs. 70,000/-
	Total	Rs.17,41,616/-

3. Aggrieved by the said award, the present appeal has been filed wherein it has been contended that the Tribunal has wrongly calculated the annual income of the appellant. The learned Tribunal ought not to have taken into consideration the income shown in the income tax return of the assessment year 2009-10 because during the financial year 2008-09 the petitioner was indisposed due to his injuries and was not in service and that is why his income for that year has reduced. It is contended that his earlier income tax returns show that there was year wise increase in his income.

4. The respondent had denied that the tribunal has wrongly calculated the income of the appellant.

5. In the present appeal the finding of the tribunal that the accident was the result of the rash and negligent driving of the offending vehicle no. HR 38C 2777 is not disputed. This finding has thus attained finality.

6. I have seen the lower court record. It is apparent from the

record that due to this accident on 21st October, 2009 and due to the grievous injuries received by the appellant he was not able to perform his duties with his employer for 5-6 months. This fact is also clear that the learned Tribunal has compensated him for loss of earning for five months. In view of this fact naturally, his income for assessment year 2009-2010 in his income tax return is less than that of previous years and it was not to be taken into consideration while calculating his average income for the purpose of computing the future loss of income. Thus, calculating the average annual income of the appellant comes to

Income as per Income tax Returns

For the year 2007-2008	**Rs.1,14,321/-**
For the year 2008-2009	**Rs.1,72,680/-**
	Rs.2,87,001/-
Mean of two years income Rs.2,87,001/2 =	**Rs.1,43,500/- (annual income)**

7. It is further argued on behalf of the appellant that 30 % of his annual income has been added towards inflation/future prospects while he was entitled for addition 50% of his income while calculating his loss of future earnings. Reliance has been placed on the judgment of Apex court in **Rajesh vs. Rajbir Sigh** (2013) 9 SCC 54.

8. There is no dispute to the fact that the age of the appellant was 26 year at the time of accident and as per formula laid down in the above mentioned case law, 50% of his salary ought to have been added towards loss of future prospects while calculating his entitlement for loss of earning capacity.

The future loss of income 50% of 143500 = 71,750

Total annual income come to 143500 + 71750 = Rs.215, 250/-

9. It is also argued by appellant that the Tribunal has wrongly assessed the whole body disability as 40 % while it ought to have been 80% and has relied on the findings of case in **Neerupam Mohan Mathur vs. New India Assurance Co.** 2013 (8) SCALE.

10. It is argued on behalf of the respondent that the trial court has correctly assessed the whole body disability at 40% since the disability of 80% suffered by the appellant does not restrict him for performing his vocation. He was only working as an accountant.

11. The question regarding assessment of future loss of earning due to permanent disability was considered by the apex court in the case **Raj Kumar vs. Ajay Kumar and others** (2011) 1 SCC 343 wherein the court has held as follows:

> *"8. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accident injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Disabilities Act", for short). But if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.*
>
> *9. The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the*

extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body cannot obviously exceed 100%.

10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation. (See for example, the decisions of this Court in ***Arvind Kumar Mishra v. New India Assurance Co. Ltd.*** *[(2010) 10 SCC 254 : (2010) 3 SCC (Cri) 1258 : (2010) 10 Scale 298] and* ***Yadava Kumar v. National Insurance Co. Ltd.*** *[(2010) 10 SCC 341 : (2010) 3 SCC (Cri) 1285 : (2010) 8 Scale 567]) 12. Therefore, the*

Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement; (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity."

12. I have gone through the case law of *Neerupam Mohan Mathur* (supra). The facts in that case are clearly different. In that case the appellant was working as a scientist using his hands and since the court find that amputation of his hand had affected his work, his disability was accordingly judged. In the present case, the appellant was working as an accountant and thus was doing a desk job and his disability in relation to lower limb has not left him totally incapable of performing his job. In *Ajay Kumar's* case (supra), the court has clearly held that the assessment of compensation under the head of future earning would depend upon the effect and impact of such permanent disability on the earning capacity. This can be assessed only on appreciation of the evidence. As discussed above, the appellant was an accountant and in the facts and circumstances, the learned tribunal has rightly assessed the percentage of whole body disability of the appellant as 40%.

The total loss of future

earning on account of disability = 215, 250 x 17 (multiplier)x 40/100 (permanent disability) = Rs.14,63,700/-

13. There is no challenge to the compensation awarded by the learned tribunal under other heads.

1.	Loss of earning capacity due to injuries	Rs.14,63,700/-

2.	Compensation towards pain and sufferings	Rs. 1,00,000/-
3.	Loss of amenities and enjoyment	Rs. 1,50,000/-
4.	Compensation towards disfiguration	Rs. 1,00,000/-
5.	Loss of earning of petitioner for 5 months @ Rs.8,200/- p.m.	Rs. 41,000/-
6.	Expenses towards medical bills	Rs. 3,11,619/-
7.	Compensation towards conveyance and special diet (without bills)	Rs. 10,000/-
8.	Compensation towards prosthetic leg	Rs. 70,000/-
		Rs.22,46,319/-

14. The appellant shall be entitled for the interest of @ 7.5% per annum on the awarded amount amount from the date of filing of the petition till its realisation. The amount shall be paid within six weeks. The appellant shall be entitled for the interest @ 12% for the delayed period.

15. The appeal is disposed of in the above terms.

ILR (2014) III DELHI 1875
MAC. APP.

RAJENDER SAH & ORS. ....APPELLANTS

VERSUS

SANTOSH KUMAR & ORS. ....RESPONDENTS

(DEEPA SHARMA, J.)

MAC.APP. NO. : 801/2013 DATE OF DECISION: 09.05.2014

Motor Vehicles Act, 1988—Appeal for enhancement of compensation by LR's of deceased properly. The deceased was a contractor and income ought to have

been Rs. 30,000/- to 40,000/-. Denial of future prospects is against the principles laid down in Sarla Verma's case. Held—Appellant had failed to prove that the deceased was a marble contractor. His income has been assessed on the basis of minimum wage. He thus is taken as a salaried person instead of a self employed person. Held—From the directions in Sarla Verma's case it is apparent that only two categories of persons are not entitled to future prospects, one, where the deceased was self employed and secondly where the deceased was working on a fixed salary (without prospect of annual increment). The government revises the minimum wages twice annually. The deceased who has been assessed as daily wager does not fall into the exempted category in Sarla Verma's case. Since age of the deceased is below 40, he was entitled to 50% of his salary towards future prospect. Appeal disposed of.

The apex court in **Sarla Verma** (supra) has clearly laid down the proposition for grant of the future prospects. It has categorised the categories of persons entitled for the future prospects. The relevant paragraphs are reproduced as under:

> "10. Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects. In Susamma Thomas, this Court held that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand (annual contribution to the dependants); and that where the deceased had a stable job, the court can take note of the prospects of the future and it will be unreasonable to estimate the loss of dependency on the actual income of the deceased at the time of death. In that

case, the salary of the deceased, aged 39 years at the time of death, was Rs.1032/-per month. Having regard to the evidence in regard to future prospects, this Court was of the view that the higher estimate of monthly income could be made at Rs.2000/-as gross income before deducting the personal living expenses. The decision in Susamma Thomas was followed in **Sarla Dixit v. Balwant Yadav** [1996 (3) SCC 179], where the deceased was getting a gross salary of Rs.1543/- per month. Having regard to the future prospects of promotions and increases, this Court assumed that by the time he retired, his earning would have nearly doubled, say Rs.3000/-. This court took the average of the actual income at the time of death and the projected income if he had lived a normal life period, and determined the monthly income as Rs.2200/- per month. In **Abati Bezbaruah v. Dy. Director General, Geological Survey of India** [2003 (3) SCC 148], as against the actual salary income of Rs.42,000/- per annum, (Rs.3500/- per month) at the time of accident, this court assumed the income as Rs.45,000/- per annum, having regard to the future prospects and career advancement of the deceased who was 40 years of age.

11. In Susamma Thomas, this Court increased the income by nearly 100%, in Sarla Dixit, the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words 'actual salary' should be read as 'actual salary less tax']. The addition should be only 30% if the age of the deceased was 40 to 50 years.

There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances. Re : Question (ii) -deduction for personal and living expenses **(Para 14)**

From the directions in **Sarla Verma** Case (supra) , it is apparent that only two categories of persons are not entitled to future prospects, one, where the deceased was self-employed and secondly, where the deceased was working on a fixed salary (without prospect of annual increment etc). **(Para 15)**

In the present case, the claimants have failed to prove that the deceased was a self employed person working as a contractor. The court rather has treated him as a matriculate and working as a daily wager. The government revises the minimum wages twice annually i.e on 1st of Feb and 1st of August. The deceased thus does not fall in the exempted category in **Sarla Verma** Case (Supra). As per **Sarla Verma** Case (supra), since the age of the deceased was below 40 years, he was entitled for addition of 50% of his salary towards future prospect. **(Para 17)**

[An Ba]

APPEARANCES:

FOR THE APPELLANTS : Mr. Peeush Sharma, Advocate.

FOR THE RESPONDENTS : Mr. Pankaj Seth, Advocate for R-3.

RESULT: Appeal disposed of.

CASES REFERRED TO:

1. *Rajesh & Ors. vs. Rajbir Singh & Ors, 2013 (6) Scale 563.*
2. *Sarla Verma v. DTC 2009 ACJ 129.*
3. *Abati Bezbaruah v. Dy. Director General, Geological Survey of India [2003 (3) SCC 148].*
4. *Sarla Dixit v. Balwant Yadav 1996 (3) SCC 179,*

DEEPA SHARMA, J.

ORDER

09.05.2014

1. The present appeal has been filed by the LR's of the deceased Bharat Kumar for enhancement of the compensation amount of Rs. 4,70,170/- granted vide award dated 3rd May, 2013.

2. The deceased namely Bharat Kumar was unmarried at the time of his death and is survived by his parents, brothers and sisters. On 18th November, 2005 at about 10.05 am, deceased Bharat Kumar was going to the construction site at Rama Vihar on his motor vehicle bearing No. DL 4S AU 7471 along with his friend Mr.Ajay kumar, the pillion rider. When he reached at Jain Nagar, one truck bearing No. HR 10 0582 came from the wrong side and hit his motor cycle. As a result of the injuries received by him in this accident, he died on the spot. The ld. Tribunal reached to the conclusion that the accident had taken place due to the rash and negligent driving of truck bearing No. HR 10 0582 by its driver. The ld. Tribunal has also assessed the age of the deceased as 23 years on the basis of secondary school certificate Ex. PW ½. He had rejected the claim that the deceased was working as Contractor and was earning Rs. 30,000/-per month. The ld. Tribunal had concluded that the deceased was a matriculate and assessed the loss of dependency on the basis of minimum wages of a matriculate labour. He took the multiplier as per the age of the mother of the deceased and since he found that only his parents were dependent upon the deceased, did the deduction of ½ from his salary towards personal expenses and assessed the loss of dependency.

3. The contention of the appellant is that the ld. Tribunal has wrongly taken into consideration the minimum wages. The ld. Tribunal ought to

have taken the income of the deceased as Rs. 30,000/- per month. It is further argued that he was a marble contractor and about 30 labourers were working under him and that the document PW 2/R1 which is the attendance register maintained by the deceased in due course and also the oral evidence of PW 2 which has remained unrebutted, duly prove this fact. It is also argued that at the time of the accident, he was carrying Rs. 10,000/- in his pocket to make the payment to his labour. It is further argued that minor siblings were also dependent on the salary of the deceased and thus, the total number of dependents were seven and the ld. Tribunal ought to have deducted 2/3 of the monthly income towards personal expenses. It is also contented that Rs. 5 lacs ought to have been given towards loss of love and affection and the compensation of Rs. 10,000/- towards loss of Estate is also meagre and has claimed Rs. 2 lacs towards loss of Estate. It is also prayed that the compensation of Rs. 10,000/- towards funeral expenses is also too less and Rs. 2 lacs should have been awarded.

4. The appeal is contested only by the Insurance Company. It is argued that ld. Tribunal has correctly assessed the compensation and there exist no ground to disturb the said finding.

5. I have heard the parties and have perused the record and have given thoughtful consideration to the rival contentions.

6. There is no challenge to the factum of accident and that the accident has taken place due to rash and negligent driving of the offending vehicle of which Respondent.No.3/Insurance Company is the insurer. The insurance company has also not disputed its liability to pay the maintenance. These findings of ld. Tribunal has thus attained finality.

7. In this case, the deduction towards personal expenses of deceased was done by using the formula of ½ of his salary. There is no evidence on record to show that the siblings i.e. the brothers and sisters of the deceased were financially dependent on him. He thus is survived by his parents as he was also unmarried at the time of his death. The ld. Tribunal has thus rightly deducted ½ of the income of the deceased towards his personal expenses.

8. The ld. Tribunal has also rightly granted a sum of Rs. 10,000/- towards loss of Estate. In the case **Rajesh & Ors. vs. Rajbir Singh & Ors,** 2013 (6) Scale 563, the Apex court has clearly held that Rs. 1

lac under the head of 'Loss of love and affection' is a just compensation and has also held that atleast a sum of Rs. 25,000/- should be awarded towards funeral expenses.

9. The hon'ble Apex Court in the case **Rajesh & Ors. vs. Rajbir Singh & Ors,** 2013 (6) Scale 563 dealt with the grant of compensation towards loss of consortium, love and affection and funeral charges and has observed as under:

> "20. We may therefore, revisit the practice of awarding compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs. 2,500/- to Rs. 10,000/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In **Sarla Verma's** case (supra), it was held that compensation for loss of consortium should be in the range of Rs. 5,000/- to Rs. 10,000/-. In legal parlance, 'consortium' is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least one lakh for loss of consortium.
>
> 21. We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of compensation under the head 'Funeral Expenses' does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses to award at least amount of Rs. 25,000/-."

No ground has been made out for the claim of Rs. 5 lacs towards loss of Estate and the ld. Tribunal has rightly awarded a sum of Rs. 10,000/- towards loss of Estate.

10. It is argued that the assessment of the monthly income of the deceased has not been done properly. He was working as a contractor and the witnesses have proved on record the attendance register maintained by the deceased in due course as Ex. PW 2/R1. It is further argued that 30 labourers were working under him. He was a marble contractor. Oral testimony of PW 2 proves that the deceased was a marble contractor and that his income ought to have been assessed as Rs. 30,000/- to Rs. 40,000/- per month and that the denial of future prospect despite the fact that he was a young boy of 23 years, is against the principle laid down by the Hon'ble Supreme Court in the case of **Sarla Verma v. DTC** 2009 ACJ 129 A and **Rajesh & Ors. vs. Rajbir Singh & Ors,** 2013 (6) Scale 563. An addition of 50% towards future prospects ought to have been made.

11. It is argued on behalf of the contesting respondents that the ld. Tribunal has rightly assessed the income of the deceased on the basis of minimum wages as there was no concrete evidence showing the income of the deceased.

12. I have given thoughtful consideration to the rival contentions and have also gone through the record. There is no doubt that the appellant have produced on record the documents PW 2/R1 which includes attendance card allegedly issued by the deceased wherein he is shown as the marble contractor and has also produced certain attendant sheets but these sheets are loose sheets and do not seem to be part of any attendance

register. These documents do not reflect the income of the deceased. If the testimony of the witnesses in this case are believed that the deceased was earning Rs. 30,000 to Rs. 40,000/- per month in the year 2005, then he was earning approximately Rs. 4 lacs in a year and under the Income Tax Act, he was liable to file Income Tax Returns. No copy of the Income Tax Return of any year has been placed on record by the appellants. In their statement, PW 1 i.e. the appellant no. 1, Rajender Saha, has deposed that deceased was sending Rs. 25,000/- to Rs. 30,000/- per month to him in village, however, no documentary evidence, in the form of money order or transfer of the money through bank, has been placed on record. In these circumstance, the ld. Tribunal has correctly resorted to assess the annual income of the deceased on the basis of minimum wages of a matriculate. It is not disputed that the deceased was a matriculate.

13. The appellant has also claimed the future prospect in view of the findings in **Sarla Verma** Case (supra). The court has concluded that the appellant has failed to prove that the deceased was the marble contractor. His income has been assessed on the basis of minimum wages. He thus is taken as a salaried person instead of a self employed person.

14. The apex court in **Sarla Verma** (supra) has clearly laid down the proposition for grant of the future prospects. It has categorised the categories of persons entitled for the future prospects. The relevant paragraphs are reproduced as under:

> "10. Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects. In Susamma Thomas, this Court held that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand (annual contribution to the dependants); and that where the deceased had a stable job, the court can take note of the prospects of the future and it will be unreasonable to estimate the loss of dependency on the actual income of the deceased at the time of death. In that case, the salary of the deceased, aged 39 years at the time of death, was Rs.1032/- per month. Having

> regard to the evidence in regard to future prospects, this Court was of the view that the higher estimate of monthly income could be made at Rs.2000/- as gross income before deducting the personal living expenses. The decision in Susamma Thomas was followed in **Sarla Dixit v. Balwant Yadav** 1996 (3) SCC 179, where the deceased was getting a gross salary of Rs.1543/-per month. Having regard to the future prospects of promotions and increases, this Court assumed that by the time he retired, his earning would have nearly doubled, say Rs.3000/-. This court took the average of the actual income at the time of death and the projected income if he had lived a normal life period, and determined the monthly income as Rs.2200/-per month. In **Abati Bezbaruah v. Dy. Director General, Geological Survey of India** [2003 (3) SCC 148], as against the actual salary income of Rs.42,000/- per annum, (Rs.3500/- per month) at the time of accident, this court assumed the income as Rs.45,000/- per annum, having regard to the future prospects and career advancement of the deceased who was 40 years of age.
>
> 11. In Susamma Thomas, this Court increased the income by nearly 100%, in Sarla Dixit, the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words 'actual salary' should be read as 'actual salary less tax']. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances. Re : Question (ii) -deduction

for personal and living expenses

15. From the directions in **Sarla Verma** Case (supra) , it is apparent that only two categories of persons are not entitled to future prospects, one, where the deceased was self-employed and secondly, where the deceased was working on a fixed salary (without prospect of annual increment etc).

16. The Apex court has made a reference of Sushma Thomas Case wherein the future prospects were given to a deceased who had a 'stable job'. In other referred cases also, the deceased were salaried persons. The careful reading of the findings of the Apex court clearly shows that it had intended to exclude only two categories i.e. where the deceased was self-employed or where he was working on a fixed salary with no provision of annual increment etc. By necessary implication, it can be concluded that the Hon'ble Apex court has not intended to exclude the salaried persons who are not employed on a fixed salary. Thus, the Apex court had meant to include all those persons which are in employment but not on a fixed salary.

17. In the present case, the claimants have failed to prove that the deceased was a self employed person working as a contractor. The court rather has treated him as a matriculate and working as a daily wager. The government revises the minimum wages twice annually i.e on 1st of Feb and 1st of August. The deceased thus does not fall in the exempted category in **Sarla Verma** Case (Supra). As per **Sarla Verma** Case (supra), since the age of the deceased was below 40 years, he was entitled for addition of 50% of his salary towards future prospect.

18. There is no dispute to the multiplier used. Multiplier used is 15. Income of the deceased= Rs. 3613 per month (minimum wages) Future prospect= Rs. 3613 + 3613 X 50% = Rs.5419.5/Deductions towards personal expenses= 5419.5-5419x1/2 = Rs. 2710/Loss of dependency= 2710 x 12 x 15 = Rs. 4,87,800/-.

19. The compensation thus awarded is:-

1. Loss of dependency	Rs. 4,87,800/-
2. Funeral charges	Rs. 25,000/-
3. Loss of Estate	Rs. 10,000/-
4. Loss of love, company And affection	Rs. 1,00,000/-
5. Loss of gratuitous services	Rs. 25,000/-
Total	**Rs. 6,47,800/-**

20. I award Rs. 6,47,800/-alongwith interest at the rate of 9% per annum from the date of filing of the petition. The amount shall be paid within eight weeks, in default of which, the appellants are liable to pay interest at the rate of Rs. 12% per annum from the date of default till its realisation. An amount be distributed among the parents of the deceased as per the directions of the order of the ld. tribunal dated 3rd May, 2013.

21. The appeal stands disposed of in the above terms.

ILR (2014) III DELHI 1886
MAT. APP.

MUNAVVAR-UL-ISLAM ....APPELLANT

VERSUS

RISHU ARORA & RUKHSAR ....RESPONDENT

(S. RAVINDRA BHAT & NAJMI WAZIRI, JJ.)

MAT. APP. (FC) NO. : 34/2013 DATE OF DECISION: 09.05.2014
CM APPL.14330/2013

Dissolution of Muslim Marriage Act, 1939—Section 2(ii), 2 (viii) (a), 2 (ix) and 4—Code of Criminal Procedure, 1973—Section 125—Code of Civil Procedure, 1908—Order VIII Rule 5 and Order XII Rule 6—Appellant challenged judgment and order of Family Court whereby his marriage with respondent—Contracted as per Muslim Personal law was decreed to have been dissolved due to latter's subsequent

apostasy—Plea taken, impugned order is invalid and contrary to express provisions of both Muslim personal law as well as Act—Act makes it amply clear that adjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslin personal law—Held—Neither could it be said that apostasy per se does not dissolve a marriage governed by Muslim personal law nor could it be said that Act makes any change to this general law—Plain meaning of Section 4 of Act would be to effect that even if prior to passing of Act apostasy would have operated to dissolve marriage *ipso facto* subsequent to coming into force of Section 4 marriage is not ipso facto dissolved—All that Section 4 had done is to introduce intervening mechanism, but to reach same conclusion, i.e. that apostasy would not be itself dissolve marriage and some further substantive act would be required to be done in this regard; substantive act being filing of a suit seeking declaration as to dissolution under Section 2(ix) of Act—A woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under Section 2(ix) seeking dissolution of marriage—Respondent was initially professing Hinduism and had embraced Islam prior to marriage, and then reconverted to Hinduism—Thus, she falls within exemption under second proviso to Section 4; in a way, she walks out of constraints of Section 4—Thus, in present matter, marriage stands dissolved from date on which respondent apostatized from Islam—Respondent made such public declaration that she had re-embraced Hinduism and produced a certificate from organization which facilitated it—She reiterated this factum in plaint and then deposed so in affidavit in petition—No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy—First substantive defence of appellant that petition was filed contrary to terms of Section 4 of Act is unambiguous admission as

to factum of reconversion—Marriage of respondent who was originally a Hindu is regulated not by rule enunciated in Section 4 of Act by rather pre-existing Muslim personal law which dissolves marriage upon apostasy ipso facto—This Court finds no merit in appeal.

Important Issue Involved: (A) The plain meaning of Section 4 of Dissolution of Muslim Marriage Act, 1939 would be to the effect that even it prior to the passing of the Act, apostasy would have operated to dissolve the marriage ipso facto, subsequent to the coming into force of section 4, the marriage is not ipso facto dissolved. All that section 4 had done is to introduce an intervening mechanism, but to reach the same conclusion, i.e., that apostasy would not by itself dissolve the marriage and some further substantive act would be required to be done in this regard; the substantive act being the filing of a suit seeking declaration as to dissolution under section 2 (ix) of the Act.

(B) A woman married under Muslim personal laws, upon apostatizing , will be entitled to sue under section 2 (ix) seeking dissolution of the marriage.

(C) A clear and direct way of making known one's religion would be by way of a public statement or deposition through an affidavit in a Court.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT	:	Sh. Suman Kapoor, Sh. Osama Suhail and Sh. Samama Suhail, Advocates.
FOR THE RESPONDENT	:	Sh. Sanjay Dewan, Adv.

RESULT: Dismissed.

NAJMI WAZIRI, J.

1. The appellant is aggrieved by the judgement and decree of 26th July, 2013 of the Family Court, Saket, New Delhi ("Trial Court") whereby his marriage with the respondent – contracted as per Muslim personal law – was decreed to have been dissolved due to the latter's subsequent apostasy ("impugned order"). The respondent had sought for divorce under sections 2(ii), 2(viii)(a) and 2(ix) of the Dissolution of Muslim Marriage Act, 1939 ("Act").

2. In the divorce petition ("Petition"), while the respondent-wife had also alleged cruelty and neglect by the appellant, she admitted to having become apostate, having reconverted to her original faith, Hinduism, on 4th March, 2012. She contended that inasmuch as she had apostatized, the marriage stood ipso facto dissolved under Muslim personal law. In his reply to the petition, the appellant gave his own version of the facts and opposed/denied inter alia the factum of the respondent's conversion to Hinduism.

3. Before entering upon a discussion of what the Trial Court concluded on the issues, a few further facts need to be traversed. It is the case of the appellant that pursuant to a college-time romance between the parties, they married each other according to Islamic rites. Prior to contracting the nikah on 15th July, 2010, the respondent had embraced Islam, having renounced Hinduism, admittedly her former religion. She even changed her name from Rishu Arora to Rukhsar.

4. After the marriage, the respondent filed a suit, being CS No. 132 of 2010 before the Senior Civil Judge, New Delhi. She sought a declaration of validity and subsistence of the marriage, allegedly in the apprehension that the appellant / his family may not accept her. The suit was disposed off as the parties appeared before the learned Judge and gave statements as to the validity and subsistence of the marriage. The appellant had relied upon the statement made in these proceedings to contend that the respondent is estopped from denying the existence of the marriage. However, given that there is no estoppel against the law, this contention would be of no relevance in the present matter, as will be discussed further in this Judgment.

5. It was contended that a short while thereafter, differences arose between the parties and they started living separately; the respondent returned to her parents' home. Thereafter, the respondent filed a complaint under the Prevention of Domestic Violence Against Women Act, 2005 as well as a petition seeking maintenance under section 125 of the Code of Criminal Procedure, 1973. However, both the cases were subsequently withdrawn by her. The withdrawals were sought to be explained as being the result of different legal advice given to her upon change of counsel, that since she had apostatized, neither the marriage nor any right to claim maintenance subsisted. It was in these circumstances that the Petition came to be filed.

6. She contended that whereas the issue of dissolution of the marriage on the grounds of cruelty and neglect required detailed trial, the issue of dissolution on the ground of apostasy did not. She argued that for the latter issue, no evidence is required to be led, as her mere statement ipso facto amounts to abjuration of Islam and its tenets. She filed an affidavit admitting to her apostasy. She also filed two *fatwas*[1] from two *muftis*[2] that the abjuration of Islam would ipso facto dissolve the marriage. A decree to this effect was, ergo, sought by an application under Order XII rule 6 of the Code ("Code").

7. The appellant opposed the application under Order XII rule 6. He argued that apostasy would need to be proved through trial in a court of law and refuted the contention that apostasy ipso facto dissolves a marriage contracted under Muslim law. He contended that therefore, at the initial stage of the proceedings, a decree of divorce, as sought in the application under Order XII rule 6 of the Code, could not be granted.

8. The impugned order, which was passed in the aforesaid circumstances, observes that the appellant's admission of the reconversion is, doubtless, not explicit. It however, proceeds to observe that the lack of an explicit admission does not necessarily mean that the implicit admission suffers from ambiguity, requiring a trial to explain the same. It observes that the first substantive defence raised by the appellant in his reply to the Petition was that the Petition was filed contrary to the terms of section 4 of the Act, with especial emphasis on the proviso. It observed that this is an unambiguous admission as to the factum of reconversion.

9. The impugned order then proceeded to consider whether the reconversion would indeed ipso facto dissolve the marriage. It observed that the fat was filed by the respondent indicates that contemporary experts / scholars of Muslim personal law are of the opinion that abjuration of Islam ipso facto dissolves the marital relationship and even a decree of divorce would not be necessary. It referred to a judgement of this Court in **Rajini Murthi v Murshid Abdullah Mohd.**,[3] and of the Lahore High Court in **Mussammat Resham Bibi v Khuda Bakhsh,**[4] and to a translation of Ayat 10 of the Holy Quran, to come to the conclusion that the respondent, who has reconverted to Hinduism from Islam is entitled to a decree of dissolution of the marriage. It thus proceeded to grant a decree of divorce, aggrieved whereby, the appellant has approached this Court.

10. After hearing only the appellant's counsel, this Court reserved the matter for judgement. Learned Counsel for the appellant strenuously contended that the impugned order is invalid and contrary to the express

provisions of both Muslim personal law as well as the Act. He contended that the Act makes it amply clear that the abjuration of Islam or apostasy per se does not result in dissolution of a marriage governed by Muslim personal law.

11. This Court finds itself unable to agree with this contention. Neither could it be said that apostasy per se does not dissolve a marriage governed by Muslim personal law, nor could it be said that the Act makes any change to this general law. There is sufficient authoritative literature in this regard by the various scholars of Muslim personal law to obviate the need to take recourse to the various theological sources.

12. As early as 1870, Mr. Charles Hamilton, in his translation of Hedaya observes:

> *"In a case of apostacy separation takes place without divorce.– If either husband or wife apostatize from the faith, a separation takes place without divorce, according to Haneefa and Aboo Yoosaf. Mohammed alleges that if the apostacy be on the part of the husband, the separation is a divorce... Haneefa makes a distinction between refusal of the faith and apostacy from it ; and his reason for this distinction is that apostacy annuls marriage, because the blood of an apostate no longer remains under the protection of the law...now divorce is used for the purpose of dissolving a marriage which actually exists ; and hence apostacy cannot possibly be considered as divorce : contrary to the case of refusal of the faith, because it is on account of the ends of matrimony being thereby defeated that separation is enjoined, in that instance, as has been already said ; and for this reason it is that the separation is there suspended upon a decree of the magistrate, whereas in apostacy it takes place without any such decree..."*[5] (Emphasis supplied)

13. Shortly thereafter, in 1875, Mr. Neil Baillie observes in his Digest as under:

> *"Apostasy from Islam by one of a married pair is a cancellation of their marriage, which takes effect immediately without requiring the decree of a judge ; and without being a repudiation, whether the occurrence is before or after consummation... If they apostatize together, and then together re-embrace the faith, the marriage remains valid on a favourable construction ; but if only one of them returns to the faith a separation takes place between them. If it is not known which of them was first in apostatizing, the result is the same as if they apostatized together..."*[6] (Emphasis supplied)

> *"If one of two spouses should apostatize from the Mussulman faith before connubial intercourse has taken place, their marriage is cancelled on the instant, and the wife has no right to dower if the apostasy be on her side ; but if it is on the side of the husband she is entitled to half the dower. If the apostasy does not take place till after connubial intercourse, the cancellation of the marriage is suspended till the expiration of the iddut, whether the husband or the wife be the apostate, and no part of the dower abates, because the right to it has been fully established by consummation. There is an exception, however, if the husband were born in the faith, for in that case, the marriage is cancelled immediately, though it should have been followed by connubial intercourse, because a return to the faith is not allowed."*[7]

14. Thereafter, in 1880, Mr. Syed Ameer Ali observed in his book:

> *"Under the Mahommedan law, if a Moslem husband or a Moslem wife apostatise from IslGm, the apostasy has the effect of dissolving the marriage-tie between the parties. The Native Converts' Marriage Act has made a variation in this rule of Mahommedan law. Under the provisions of this Act, if the husband apostatise, he can still demand that his wife should maintain conjugal relations with him, and in case of her refusal he case sue for a divorce from her.*
>
> *If the wife should elect to live with him after his apostasy from IslGm, the rule of the Mussulman law would have no effect, and the marriage would under the Act remain valid, though its legal effects will be regulated by principles other than those of the IslGmic law. Should the wife, however, refuse to cohabit with the apostate husband, the Mahommedan law, as well as the provisions of the Act, would set aside the marriage."*[8] (Emphasis supplied)

15. Relying on Mr. Hamilton's observations, Sir D. F. Mulla, in 1905, observed that apostasy from the Mahomedan religion of either party to a marriage operates as a complete and immediate dissolution of the marriage[9] – an opinion that was echoed by him till 1933, when he last revised the book himself, and indeed, till 1938[10] by Sir George Rankin, who edited the same. Shortly thereafter in 1907, Mr. Abdur Rahman relied on both Mr. Hamilton's work and Mr. Baillie's work to conclude that if either the husband or the wife should apostatize, both of them being Muslims, the marriage is immediately dissolved and separation must take place. In this case there is no need for a judicial decree.[11]

16. Further, prior to the enactment of the Act, the Courts in India have followed this view regularly and without exception.[12] This pre-enactment state of affairs that apostasy ipso facto dissolved a marriage contracted under Muslim personal law is recognised by the jurists in their authoritative legal treatises even in editions subsequent to the Act.[13] The issue as to

whether an act of apostasy prior to the passing of the statute operated to dissolve the marriage ipso facto also arose before the Courts. The Lahore High Court answered the issue in the affirmative in three different matters.[14] In one judgement, DIN MOHAMMED J. of the Lahore High Court does answer the issue in the negative;[15] however, this view was not accepted by BECKETT J.,[16] in his subsequent judgement, who agreed with the other judgements by MONROE J.

17. A Division Bench of the Andhra Pradesh High Court was faced with the issue, where both DIN MOHAMMED J's as well as BECKETT J's judgements were respectively relied upon by either parties. SATYANARAYANA RAJU J. (as he then was), who spoke for the Bench, agreed with the reasoning of BECKETT J. and held that an act of apostasy prior to the passing of the statute indeed operated to dissolve the marriage ipso facto.

18. While doubtless the jurists are divided on whether the factum of apostasy dissolves the marriage or renders it invalid or void or null, there is certainly unanimity amongst both the jurists as well as the judgements of the Courts, that apostasy of either party to a marriage contracted under Muslim personal law shall put an end to the marriage. Thus the question arises as to whether the Act, more specifically, section 4 thereof, alters this state of law.

As to section 4 of the Act

19. It would be useful to set out the provisions of section 4 of the Act:

> *4. The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:*
>
> *Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:*
>
> *Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.*

20. The contention of the appellant before this Court is that even assuming the pre-existing rule of Muslim personal law was that apostasy ipso facto dissolves the marriage, the law has been altered by section 4 of the Act, inasmuch as it provides that a Muslim woman's conversion to another faith does not by itself operate to dissolve her marriage. Hence, he argues, the pre-existing law has been overridden by the Act and cannot be applied in India any longer. The argument, though attractive at first blush,

proceeds on an incorrect construction of section 4. The contention of the appellant, in effect, is that the Act is declaratory in nature or, in any case, amends the pre-existing Muslim law. As a logical sequitur, it is contended, a Muslim marriage could be brought to an end by a woman only under the provisions of the Act and the pre-existing rules of Muslim personal law qua a woman's right to divorce would need to be ignored.

21. That a woman married under Muslim personal laws could seek a divorce only under the Act was confirmed by Kerala High Court.[17] As to the contention that the Act is declaratory or that it ought to be considered sans reference to Muslim personal law there are a few judicial pronouncements,[18] although the Courts are divided on this issue.[19] However, it would be incorrect to regard these pronouncements as supporting the case of the appellant. These judgements were rendered in the context of their own facts and the issues under consideration therein. Since the cases were concerned specifically with various grounds under section 2 of the Act, they cannot be considered as authoritative pronouncements on the scope and ambit of section 4 of the Act. As far as this Court could ascertain, there has been no pronouncement directly dealing with the issue presently before this Court: – whether section 4 has altered the rule of Muslim personal law that apostasy dissolves a marriage.

22. The rule of law as to interpretation of statutes is well established: where the words of the statute are plain and unambiguous, there is no justification for attempting to look at the legislative intent or providing a different meaning than the plain meaning of which the words would admit.[20] However, this is not to say that the Court ought to hold the statute in one hand and a dictionary in the other and merely apply to every word the meaning given in the dictionary. The Court would be required to construe the words used in the statute, ascertain the plain meaning of the statute, and assure itself of the fact that the plain meaning is the only meaning possible, before giving effect to the same.

23. Section 4 of the Act, specifies that the renunciation or conversion of a married Muslim woman does not by itself operate to dissolve the marriage. To this Court's mind, the plain meaning of this provision would be to the effect that even if prior to the passing of the Act, apostasy would have operated to dissolve the marriage ipso facto (as seen from the authorities given hereinabove), subsequent to the coming into force of section 4, the marriage is not ipso facto dissolved. However, to read section 4 as meaning that the renunciation or conversion does not per se operate to dissolve the marriage would be incorrect, inasmuch as it would render the words "by itself" as appearing in the provision otiose.

24. Superfluity cannot be imputed to the words of a statute. They

have to be assigned a meaning. It would be inappropriate for the Court to lightly assume that words used in a statute are mere surplusage to be ignored. In the circumstances, it is apparent from the provisions of section 4 of the Act that the pre-existing rule of Muslim personal law – that apostasy operates to dissolve the marriage – has not been altered by the Act. In the opinion of this Court, all that section 4 has done is to introduce an intervening mechanism, but to reach the same conclusion, i.e., that apostasy would not by itself dissolve the marriage and some further substantive act would be required to be done in this regard; the substantive act being the filing of a suit seeking declaration as to dissolution under section 2 (ix) of the Act.

25. The Court is fortified in coming to this conclusion as to the legislative intent behind section 4 of the Act not merely from the words of section 4 but from the scheme of the Act as well. It must be noticed that clause (ix) of section 2 provides that a woman married under Muslim personal law shall be entitled to obtain a decree for the dissolution of her marriage on any ground recognised as valid for the dissolution of marriages under Muslim personal law in addition to the grounds provided in clauses (i) to (viii) thereof. In the opinion of this Court, this, in itself is substantiation of the fact that the Act has not intended to entirely do away with the rules as to dissolution that existed in Muslim personal law prior to the coming into force of the Act.

26. This is further evident from the long title of the Act,[21] which provides that the Act is to consolidate and clarify the provisions of Muslim law in relation to dissolution of marriage and to remove doubts as to the effect of apostasy. The statute does not indicate that the pre-existing rule of Muslim personal law, that apostasy operates to dissolve a marriage, has been intended to be altered by the legislature in the enactment. Rather, section 4 of the Act was stipulated with the intent of removing the mischief of fraudulent apostasies, as will be discussed at a more appropriate juncture in this judgement.

27. The Court is mindful of the fact that the debates in the Legislative Assembly as well as the Statements of Objects and Reasons appended to a statute hardly give an indication as to what was in the mind of the members of the Assembly who passed it.[22] Indeed, if one were to peruse the debates that took place in the Assembly in respect of section 4 of the Act, a sharp cleavage can be ascertained in the opinion of the members as to the justification for the provision being passed in the manner it was, giving hardly any reliable insight into what weighed in the minds of the members who were present and voting on the Bill. Thus, this Court shall refrain from considering any expressions of opinions found in the debates as aids to ascertaining the intent of the Assembly. However, while not

referring to the debates as aids to construction, the Court would not hesitate to refer to the same to ascertain the mischief prevalent in the society that impelled the enactment of the Act.[23]

28. The provision that is now section 4 was to be found in draft clause 5 of the Bill as originally drafted. The debates, which spanned over a period of a little over a year, indicated that the provision was the subject of controversy even amongst the members. Speaking of the provision in the Statement of Objects and Reasons, the mover of the Bill, Mr. Qazi Muhammad Ahmad Kazmi, sets out the anxiety of the Muslim community at the fact that Courts in British India had been holding that apostasy by a woman dissolves a marriage contracted under Muslim personal laws ipso facto. He observes that Ulemas have issued fat was supporting non-dissolution of the marriage by reason of the wife's apostasy. He observes that a number of articles have appeared in the press demanding legislation to rectify the situation. He further also observes that the Act is in itself being sought to be enacted because of the unspeakable misery to Muslim women in British India for lack of grounds being available to seek a decree of divorce. He draws reference to the monograph entitled Heelat-un-Najiza,[24] by Maulana Ashraf Ali Thanawi; the same provided for grounds of divorce under the Maliki school of jurisprudence being applied to Muslims following Hanafi school – which formed the majority of Muslims in India.[25] This Court recollects its judgement in **Masroor Ahmad v. State (NCT of Delhi) & Anr**.,[26] which acknowledged the introduction by the Act into Muslim personal law, as it is administered in India, of the salutary principle of applying the beneficial principles of one school of Islamic jurisprudence to adherents of the other schools as well.

29. The Bill itself was introduced in the Assembly initially by circulation amongst the members in February, 1938 for eliciting opinions prior to it being considered. Welcoming the introduction of the Bill, a member, Mr. Sardar Sant Singh inter alia observed:

> *"...Here is a provision by which the author of this Bill wants to interfere in the Muslim law of his own community. Sir, I have great sympathy for it, because in the course of my practice at the bar extending over 30 years, I have come across many dishonest conversions, and advantage of the Muslim law is taken to get the marriages dissolved. The High Courts have gone so far as to say that whether the conversion is malafide or bona fide it is immaterial, and the very conversion itself dissolves the marriage. I have always been condemning the actions of those women who have undergone baptism in order to get rid of their husbands; for them an alternative provision has been made in this Bill..."*[27]
> (Emphasis supplied)

30. A similar indication of the position of law that existed prior to the passing of the Act is again hinted at by Mr. Kazmi, the mover of the Bill, at the second reading of the Act, where he states:

> *"...The law as it stands today is that apostasy ipso facto dissolves marriage. The courts have not stopped there but they have even refused to go into the motives of the parties in regard to the conversion and in regard to the apostasy..."*[28]

31. Mr. Kazmi cites further in his speech the opinions of the District and Sessions Judge of Baluchistan and of the District and Sessions Judge of Cuddappah, which opinions, it appears, were also circulated with the members.[29] These two judges have also given an indication that the Courts have expressed an unwillingness to look into the motive of conversions, despite some parties converting ostensibly only to escape their subsisting marriage under Muslim personal law. A similar indication appears to have been given by the Sessions Judge of Multan in his opinion, who appears to have observed that there have been numerous cases in which Muslim women have had recourse to apostasy simply in order to put an end to her marriage.[30]

32. Another member, Mr. Syed Ghulam Bhik Nairang, who claimed responsibility for drafting draft clause 5, provides detailed insight into the anxiety of the community to have pre-existing rule of Muslim law changed. He states:

> *"...For a very long time the courts in British India have held without reservation and qualification that under all circumstances, apostasy automatically and immediately puts and end to the married state without any judicial proceedings, any decree of court, or any other ceremony..." "Now, from the very beginning, when one or two cases were decided by the Courts in that way, the Muslims began to protest and protest vehemently. Agitation has been going on spasmodically in order to get this view corrected, but the Courts, as you know, Sir, are very difficult to persuade to go against an established precedent, when it happens to take the form of a ruling of a High Court..."*

> *"... [I]t is precisely because these rulings are there that we have introduced this Bill and we ask this House to pass [draft] Clause 5. Our position is that those rulings are erroneous..."*[31]

33. A similar insight is given by the Leader of the House, Sir Muhammad Zafrullah Khan:

> *"...British Indian Courts, as I have said, have unduly narrowed the grounds upon which the wife of a Muslim might obtain divorce and this doctrine having, unfortunately, been accepted that if a*

> *Muslim woman adopts any faith other than Islam, one of the consequences of this change of faith shall be that her marriage shall automatically be dissolved, resort has often been had to this device for the purpose of obtaining relief from a marriage tie that has become intolerable. That is how that doctrine has come in. Attempts have been made in British Indian Courts occasionally to argue that even if that is so, the Courts should at least find that the alleged conversion is not a device or a trick for the purpose of bringing the marriage to an end and they have ruled that all that they are concerned with is that the woman says that she is no longer the wife of the person to whom she was married. I am not for the moment saying whether that is right or wrong. I am merely describing the state of the law which made it necessary to have it clearly declared by means of a legal enactment..."*[32] (Emphasis supplied)

34. Thus, it is evident that the pre-existing rule of Muslim law that apostasy ipso facto dissolves the marriage was being taken advantage of in certain matters, resulting in a fraud being played upon the law and Courts. Although there is a catena of judgements in this regard,[33] the unwillingness of the Courts to look into the intent behind the conversion/ apostatizing is best seen from a judgement of a Division Bench of the Lahore High Court, barely three months before the introduction of the Bill, in **Mussammat Resham Bibi v. Khuda Bakhsh.**[34]

35. The matter involved a lady renouncing Islam and thereafter filing a suit for declaration that she is no longer the wife of the respondent. The Trial Court held that the mere declaration of apostasy found in the Plaint is sufficient proof and decreed the suit. This was, however, overturned in appeal by the District Judge, who was unconvinced by her statement and summoned her for inquiry. He was unconvinced even by her statement in Court as to her apostasy and directed pork to be brought to Court and was impressed by her unwillingness to consume the same and held that her words of apostasy are not true and were uttered merely to dissolve the marital tie. In second appeal the learned Single Judge, given the far reaching implications of the question of law in issue, referred the matter to the Division Bench. DIN MOHAMMAD J., speaking for the Bench, reversed the ruling of the learned District Judge and upheld the original decree. After analysing a catena of authorities on the issue of looking into the motive behind the apostasy, he observed:[35]

> *"...I am disposed to think that wherever the Judges applied their mind to this aspect of the case and remarked that the conversion or renunciation was not a colourable transaction, they meant nothing more than that the conversion or renunciation had taken*

place in fact. They neither referred to the sincerity or insincerity of the motive... Renunciation of a religious faith, therefore, requires no other proof than a person's declaration, the only condition being that the declaration is not casual, of which the declarer may repent afterwards, but it should be attended with violation (sic: volition) and should be such to which the declarer adheres and in which he persists. The motive of a declarer is similarly immaterial. A person may renounce his faith for love or for avarice. He may do so to get rid of his present commitments or to truly keep salvation elsewhere. But that would not affect the factum of renunciation and in cases like the present, it is the factum alone that matters and not the latent spring of action which results therein."

(Emphasis supplied)

36. Thus, it is evident that section 4 was enacted in its form to prevent a fraud from being played upon the courts law by women married under Muslim personal law apostatizing solely to escape marital ties. However, on a consideration of the words of the provision, the other provisions in the Act, the long title of the Act, as well as the legislative history and given the mischief sought to be rectified by the provision, this Court is of the view that section 4 only operates to modify the pre-existing rule to the extent of specifying that apostasy does not ipso facto dissolve a marriage contracted under Muslim personal law. It cannot be said – certainly not without doing some violence to the words of the statute – that the plain and simple meaning of the words employed in the provision admits of the construction that apostasy does not per se dissolve a marriage contracted under Muslim personal law.

37. That being the construction of section 4, it necessarily follows that a woman married under Muslim personal laws, upon apostatizing, will be entitled to sue under section 2 (ix) seeking dissolution of the marriage and this Court holds so. All that is required is that she proves before the appropriate Court that she intended to and has indeed apostatized from Islam and accordingly seeks a declaration that the marriage has come to an end.

38. Before concluding on this issue, this Court must observe that the learned Trial Court has, in its decree, specified that the marriage stands dissolved from the date of the respondent apostatizing from Islam. Given that section 4 has sought to modify the pre-existing rule to the extent that apostasy does not ipso facto dissolve a marriage, it could be contended – although it was not contended in the present appeal – that the marriage would stand dissolved only from the date of the decree, since section 4 has fettered such dissolution from taking effect immediately. However, the

Court shall not express an opinion on this issue. Whether section 4 modifies the pre-existing rule to the limited procedural extent of relegating the party to the filing of a suit for a declaration of dissolution from the date of apostasy or whether it alters the same substantively, mandating that the marriage stands dissolved from the date of the decree, is not in issue in the present matter. An opinion in this regard would be appropriate in a case where the same is actually in issue. In the present matter, it is an admitted fact that the respondent was initially professing Hinduism and had embraced Islam prior to the marriage, and then re-converted to Hinduism. Thus, she falls within the exemption under the second proviso to section 4; in a way, she walks out of the constraints of section 4. Thus, in the present matter, the Trial Court was right in specifying that the marriage stands dissolved from the date on which the respondent apostatized from Islam.

39. In the circumstances, the challenge by the appellant to the impugned order on the ground that apostasy is not a ground for dissolution of marriage under the law ought to fail and is rejected.

As to proof of apostasy

40. This leads us to the second part of the appellant's contention, that apostasy is a fact to be proven in trial. Counsel for the appellant has contended that the learned Trial Court erred in relying only upon the statement and self-serving affidavit of the respondent and ought to have afforded the appellant with an opportunity to rebut the same in trial. It was contended that the learned Trial Court ought to have considered whether the apostasy / reconversion was of her own volition or whether she was compelled by her family members to so reconvert.

41. The answer to this issue will be found in the lucid words of DIN MOHAMMAD J. in the abovereferred judgement in **Mussammat Resham Bibi v Khuda Bakhsh.**[36] In virtually identical circumstances, rejecting the contention of the respondent / husband therein that an inquiry was necessary into the truthfulness and bona fides of the conversion / apostasy of the appellant therein, he held:

"...If therefore apostasy takes the form of conversion to another faith, proof of conversion in accordance with the tenets of that faith will be sufficient to indicate apostasy and if it is not accompanied by any such extrinsic manifestation, declaration as stated above [i.e., in the Plaint, as well as in Court] will do. A genuine conversion is one which has actually taken place and if once it is proved as an accomplished fact, further enquiry is barred. In the case before us, as soon as the plaintiff declared not only in the plaint but even in her statement in Court as her own witness that she did not believe in God, the Quran and the Prophet

of Islam, she at once went out of the pale of Islam. As remarked by Plowden J. in Mussammat Khan Bibi v Pir Shah, it is impossible to be of the Muhammadan religion without the belief that the Prophet of Islam was and is the Prophet of God or as remarked by Stodgon and Beachcroft JJ. in Mussammat Nani Jan v Husain Bakhsh "the essentiality of apostasy is said to consist in the uttering of words against the Muhammadan religion, after embracing the Muhammadan faith, which is the belief in the Prophet of Islam with respect to all that came down to him from Almighty God." "[37] (Emphasis supplied)

42. This Court finds itself in respectful agreement with the above pronouncement. Being of a religious persuasion or belief in a particular religion and continuance thereof is an existential choice. Manifestations of religious practices of a particular religion could lead to the inference of the person's adherence to that religion. However, faith itself cannot be seen unless the person chooses to make it obvious. A clear and direct way of making known one's religion would be by way of a public statement or deposition through an affidavit in a Court. In the instant case the respondent made such public declaration – that she had re-embraced Hinduism and produced a certificate from the organisation which facilitated it. She reiterated this factum in the Plaint and then deposed so in an affidavit in the Petition. No further proof could be required, nor indeed could be led in evidence, to prove or disprove her apostasy. It is inconceivable how any trial could even be conducted in this regard. The best that the appellant would be able to achieve would be that upon the respondent deposing as to her apostasy in the witness box, the appellant would suggest vehemently to the respondent that she had not apostatized and the respondent would deny the same with vehemence. Faith cannot be determined simply by the vehemence of the suggestion or its denial in a trial in Court.

43. Essentially, belief in One God and in Prophet Muhammad being His last apostle constitutes Islam and those who accept this are Muslims. Any doubt about this fundamental tenet of the Muslim faith casts one outside the Muslim fold. Such a doubt would remain hidden inside the individual and be never known to the world until it is so expressed. But in the present case the respondent went far beyond mere doubts about her belief in Islam or adherence to Islamic tenets. She expressed her apostasy – her reconversion to Hinduism by overt public acts. The 18th century renowned Urdu poet Meer Taqi Meer describes it, some may say sardonically, as:

"Meer ke deen-o-mazhab ko poochhtey kya ho ab, Un-ney toh kashqa khaincha, dair mein baitha, kab ka tark Islam kiya."

(It's been a while since he applied a tilak, ensconced himself in an

idol-house, abandoned Islam, You ask about Meer's religion now)[38]

44. In the circumstances, this Court has no hesitation in upholding the finding of the learned Trial Court – based on the declaration of apostasy made in the Petition and the affidavit filed in Court – that the respondent has indeed apostatized. Thus, the appellant's challenge to the impugned order on this ground too fails.

As to the order being made under Order XII rule 6

45. The appellant has also challenged the propriety of the procedure adopted by the learned Trial Court in passing the impugned order under Order XII rule 6 of the Code. It was contended that the Trial Court has proceeded to decree the Suit solely on the basis of the Petition and the documents filed therewith. It was contended that for a decree to be passed under Order XII rule 6 of the Code, there ought to be a clear and unambiguous admission in the reply to the Petition; that the factum of apostasy was denied by the appellant in the Petition and hence the learned Trial Court ought to not have passed the impugned order under Order XII rule 6 of the Code.

46. This Court finds itself unable, once again, to agree with this contention. The learned Trial Court observed that the first substantive defence of the appellant was that the Petition was filed contrary to the terms of section 4 of the Act, with especial emphasis on the proviso. The Trial Court observed that this is an unambiguous admission as to the factum of reconversion. This Court finds no error in this finding of the Trial Court. The finding of the Trial Court, in effect, is that the appellant has taken a plea of demurrer as to the issue of apostasy / reconversion.

47. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further.[39] This Court has perused the copy of the reply to the Petition filed with the appeal and is reassured that the Trial Court has indeed come to a correct conclusion. Not only has the appellant raised any plea other than a bald denial as to the factum of reconversion in his reply, he has reiterated the demurrer in the same by stating that the Petition is filed contrary to the mandate of section 4 of the Act. It has been contended that Muslim personal law does not recognise apostasy as a ground for divorce.

48. However, conspicuous by its absence is any actual basis for the denial of the factum of reconversion. It has not been the contention of the appellant that the respondent's words of disbelief are not with an intent to apostatize, but were uttered without any belief or conviction in the words.

Nor has it been contended that the respondent is likely to repent her act of apostasy and re-embrace Islam. In short, it has never been the case of the appellant that the acts said to constitute apostasy do not amount to apostasy with intent to leave the faith of Islam.

49. All that is found – apart from the contention that Muslim personal law does not recognise apostasy as a ground for divorce – is a bald and mechanical denial of the factum of apostasy. It is inconceivable how these mechanical and bald denials could be even considered as valid denials as required under Order VIII rule 5 of the Code. In the circumstances, given that the appellant had only raised a plea of demurrer in respect of the factum of reconversion, this Court finds no fault in the procedure adopted by the learned Trial Court in decreeing the Petition under Order XII rule 6 of the Code.

As to the husband's right to divorce by pronouncing talaq being abridged

50. The learned Counsel for the appellant then raised a curious contention; he contended that if a woman married under Muslim personal law were to be held entitled to dissolve the marriage by her mere act of apostasy, it would abridge the right of the husband to divorce her by pronouncing talaq thrice. He thus sought to contend that the right of a woman married under Muslim personal law to dissolve the marriage by the mere act of apostasy ought to not be recognised.

51. It must be noted that this contention was not raised before the Trial Court, nor is there any specific ground in the appeal to support this contention. In any case, on its own merit, the contention deserves to be rejected as proceeding from an incorrect understanding of Muslim personal law, and of law in general. A woman married under Muslim personal law is not empowered, nor is she conferred with a right to divorce her husband by apostatizing. All that the law states is that were a woman married under Muslim personal law to apostatize, the marriage stands dissolved. In such circumstances, the woman is entitled to seek a decree of declaration that the marriage stands dissolved from the date of her apostatizing. Secondly, while it is doubtless that the husband's right in such a case to divorce his wife by pronouncing talaq is affected, the same is not due to operation of law or of a judicial pronouncement; the right stands affected by the simple fact that the marriage has already dissolved. Inasmuch as it is not the contention of the appellant that any of his vested right is taken away by the Act retrospectively, the contention is not one to be taken up in support of this appeal.

52. This Court bears in mind that the legislation enacted 75 years ago was to empower Muslim women to seek redress from a miserable marriage,

which otherwise was wholly dependent upon the husband's prerogative to give her a talaq (divorce; un-tethering from the bonds of marriage). It must be noted that even khula, which was a procedure for dissolution initiated at the instance of the wife, required the consent of the husband. However, with the enactment of the Act, the husband's right to talaq has to be seen in the context of the wife's competing rights. An equitable scheme as per Islamic tenets has been recognised in the Act and attitudes of parties would need a subtle adjustment to align with the basic tenets. Accordingly, the contention that the impugned judgement, if upheld, would adversely affect the appellant's prerogative of talaq, is rejected.

As to the authorities relied on, and not relied on

53. Lastly, the learned Counsel for the appellant contended that the learned Trial Court has failed to consider pronouncements of the Supreme Court that were binding on it, and has relied on authorities that ought to not have been relied upon. The second of these contentions, is that the learned Trial Court has placed reliance on selective verses of the Quran and on fatwas stated to have been issued by religious clerics, which is not correct in law. However, given that this Court agrees with the conclusion that the learned Trial Court has arrived at, it does not deem it necessary to pronounce upon this issue, and reserves its opinion on the propriety or otherwise of reliance upon such authorities for a matter where the same is actually at issue.

54. The learned Counsel for the petitioner further contended that the learned Trial Court has failed to consider the binding precedents of **Sarla Mudgal & Ors. v Union of India & Ors.,**[40] and **Lily Thomas & Ors. v Union of India & Ors.**[41] This Court is of the view that neither judgement is binding, being irrelevant in the present context, since the issues involved were different. In the former, the issue was as to whether a man married under Hindu law would be entitled to solemnise a second marriage by / after embracing Islam, without the first marriage being validly dissolved. The Supreme Court had answered the same in the negative. It held that a marriage solemnised under a statute and according to one personal law cannot be dissolved according to another personal law on conversion of one of the parties to that religion. In the latter case, the issue was as to: whether, a married man professing a religion which stipulates monogamy, when he renounces such religion and converts to Islam and solemnises a second marriage without divorcing his first wife, would be guilty of bigamy under section 494 of the Indian Penal Code, 1860. The Supreme Court answered the same in the affirmative. Thus, this contention of the petitioner also ought to fail.

55. In light of the above discussion, and the admitted fact that the

Respondent was originally a Hindu, who reconverted to her original faith from Islam, this Court holds that she falls within the second proviso to Section 4 of the Act, which is properly described as an exception to that section. Her marriage is accordingly regulated not by the rule enunciated in Section 4 of the Act, but rather the pre-existing Muslim personal law which dissolves marriage upon apostasy ipso facto.

56. In the circumstances, this Court finds no merit in the Appeal. Accordingly, it is dismissed.

ILR (2014) III DELHI 1905
RFA (OS)

PANKAJ BAJAJ ....APPELLANT

VERSUS

MEENAKSHI SHARMA & ORS. ....RESPONDENTS

(S. RAVINDRA BHAT & NAJMI WAZIRI, J.)

RFA (OS) NO. : 72/2013 & CMS NO. : 10341-43/2013 DATE OF DECISION: 09.05.2014

Land Acquisition Act, 1894—Section 4, 6, 9 & 10—Code of Civil Procedure, 1908—O VII rule 11—Appellant had filed suit seeking perpetual injunction against dispossession from suit property and declaration that restoration allotment of same by Lt. Governor was illegal—Learned Single Judge dismissed suit on ground that plaintiff (Appellant herein) had no title to suit property—Order challenged in appeal before DB—Plea taken, application u/O VII rule 11 ought to be decided based on averments in plaint alone—Learned Single Judge had incorrectly proceeded upon assumption that possession of suit premises were taken pursuant to acquisition without giving

opportunity to appellant to prove his case—Per contra plea taken, it is ex facie evident from documents filed with plaint that suit property was given to Society pursuant to acquisition and under lease agreements—It is a logical sequitur therefrom that Society would be bound by terms thereof including prohibition from selling—In circumstances, no title could have flown from Society to appellant—Where plaint itself discloses no cause of action suit ought to be dismissed and there is no infirmity in action of learned Single Judge in doing so—Held—Case of appellant is that possession of suit property was never taken pursuant to agreement and Society had acquired title, possession and/or interest therein from the original owners pursuant to settlement and not acquisition—It is this that appellant seeks to set his title up—This cannot be set to be a case of clever or artful drafting to create illusory cause of action that ought to be nipped in bud under O VII rule 11—Duty of Court under O VII rule 11 is to consider whether averments in plaint taken as a whole, along with documents filed therewith, if taken to be true, would warrant a decree in favour of plaintiff—This Court is of view that in instant case, averments and documents would so do—De hors a patent contradiction, i.e., one ascertainable ex facie from record, without involving any lengthy or complicated argument or a long drawn out process of reasoning, between averments and documents, Court considering application under O VII rule 11 ought to not lightly ignore averment in plaint—Conclusion of learned Single Judge that Society acquired title/interest in suit property under lease agreements is unwarranted at stage of considering application under O VII rule 11—Plaint does disclose a cause of action which ought to be considered in trial—Impugned order is set aside.

Important Issue Involved: De hors a patent contradiction, i.e., one ascertainable ex facie from the record, without involving any lengthy or complicated argument or a long drawn out process of reasoning, between the averments and the documents, the Court considering an application under O VII rule 11 ought to not lightly ignore an averment in the plaint.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Sh. Manav Gupta, Adv.

FOR THE RESPONDENTS : Mr. S.K. Pathak with Mr. Amit Sinha and Mr. Rohit Aggarwal, Advocates for R-1. Mr. Subrat Deb, Advocate for DDA/R-3

RESULT: Allowed.

NAJMI WAZIRI, J.

1. This Appeal challenges the order of the learned Single Judge dated 1st July, 2013 ("impugned order"), whereby the learned Single Judge had dismissed the appellant's suit, i.e. CS (OS)/1114/2009 ("Suit") seeking (a) perpetual injunction against dispossession from suit property, i.e., A-20, New Friends Colony, New Delhi and (b) declaration that restoration allotment of the same by the Lieutenant Governor, on 2nd May, 2009 was illegal. However, the Suit was itself dismissed on the ground that the plaintiff (appellant herein) had no title to the suit property. The impugned order observed inter alia that since the appellant had set up his case on the basis of a document, which could not have vested any title in him, the Suit was without any locus or cause of action.

2. The circumstances in which the Suit came to be filed can be traced to 13th November, 1959 when a notification under section 4 of the Land Acquisition Act, 1894 ("Act") was issued in respect of lands (including the suit property), comprised in Khasra 60/3, measuring 1 Bigha 17 Biswas in the Revenue Estate of Village Khizrabad, Delhi. A Notification under section 6 was issued on 9th January, 1969 and notices under sections 9 and 10 were served on the land-owners on 20th June,

1971. This acquisition was to enure to the benefit of the respondent no. 5 ("Society"); the lands under acquisition were leased to the Society under agreements dated 13th February, 1963 and 15th December, 1964 (hereafter collectively referred to as the "Lease agreements"), for developing the lands as per the sanctioned layout plan and thereafter sub-leasing it to its members. The owners of Khasra No. 60/3 challenged the acquisition before this court in W.P. (C). 764/1971 ("Writ Petition"). An interim order on 12th July, 1971 protected the landowners from dispossession. This order was confirmed on 9th August, 1971.

3. Meanwhile, the land under Khasra No. 60/3 was divided into four plots, bearing numbers A-13, A-14, A-19 and A-20; the suit property is the land comprised in plot A-20. It was the appellant's case that the land comprised in the said four plots remained in the possession of the original landowners / writ petitioners. The Society allotted the said four plots to different parties who subsequently became parties to the Writ Petition. The allottees of plots A-13, A-14 and A-19 settled the differences with the original landowners and the challenge in respect of the said plots stood withdrawn in 1987 and 1994. It is the case of the appellant that the challenge in respect of the said plots was withdrawn as the allottees, under the settlement, compensated the owners of the plots – not the respondent no. 3 (DDA).

4. However, the challenge to the acquisition remained, to the limited extent of the original landowners' interest in the suit property. This challenge too extinguished in 2005, when a compromise application was filed and the Writ Petition was withdrawn. The order of 19th April, 2005 disposing off the Writ Petition recorded inter alia that the possession of the suit property has already been handed over to the Society and there was no dispute as to the validity of the acquisition proceeding. The appellant contends that the settlement came about only as a result of the Society making payment to the original landowner using the monies given by the appellant – not from any amounts given the respondent no. 1; which fact stands admitted by the latter.

5. It is not disputed that in 1982, by a sub-lease, the Society allotted plot A-20 to Mr. R. D. Sharma, through whom the respondent No. 1 seeks to claim, the allotment to Mr. R. D. Sharma was cancelled / withdrawn in 2001 due to non-compliance with the terms of the sub-lease, and subject to payment of certain charges, the allotment was

restored in 2009. Neither the allotment nor the restoration in favour of Mr. R. D. Sharma is disputed, except that the petitioner questions the powers of the Lt. Governor / DDA to so do. The appellant has had other proceedings with the respondent no. 1 in respect of the suit property, which are not relevant to the present dispute; he claims title to the suit property on the basis of the settlement with the original landowner and a sale deed executed by the Society in 2007. He has been enjoying the property since 2009 on the basis of an interim order passed in the Suit.

6. He contended that when the possession of the suit property was admittedly not taken till 2005 the acquisition could not be deemed as complete nor that the Society has received the possession under the acquisition; that the latter's possession and title to the property is derived not from the acquisition or the Lease Agreements but from the settlement of the disputes in 2005, which, in turn, was on the basis of the monies paid by the appellant; that he derives his title from the 2007 agreement executed by the Society in his favour.

7. The appellant submits that the respondent no. 1, in collusion and connivance with the respondents no. 3 and 4 were seeking to illegally and adversely affect his ownership and possession of the suit property through the restoration of the allotment in 2009; he emphasised that the restoration was much after the sale in 2007. He thus sought (a) perpetual injunction against respondents no. 1 and 3 from dispossessing the appellant; (b) respondent no. 3 being enjoined from entering upon the suit property; (c) respondent no. 4 being enjoined from assisting respondent no. 1 in taking possession of suit property; (d) declaration that the restoration by respondent no. 2 is illegal and unlawful; (e) declaration that the sub-lease by respondent no. 1 is illegal, unlawful and inoperative; and (f) such further and other orders, with costs.

8. An application was filed by the respondent no. 1 in the Suit under Order VII rule 11 of the First Schedule to the Code of Civil Procedure, 1908 ("Code"), pursuant to which the impugned order came to be passed. The application sought to contend that the plaint ought to be rejected as it does not disclose any cause of action.

9. Before the learned Single Judge, the case of the respondent nos. 1 and 3 was that the suit was not maintainable because the appellant had no locus standi; that since the Society was not competent to execute the sale deed of 2007, the appellant would have no right, title or interest in

the property. To demonstrate this, they relied on the provisions of the Lease Agreements of the Society with the President of India, whereunder the former was given the right to only sub-lease the suit property, and not to alienate it. It was emphasised that the Society was prohibited from selling the suit property. They had further relied upon the order dated 19th April, 2005 disposing off the Writ Petition to demonstrate that it was an admitted position of the original landowners that there was no challenge to the validity of the acquisition proceedings and the possession of the suit property was already handed over to the Society.

10. The appellant asserted the Society's right to execute the sale deed of 2007; that the possession of the suit property was transferred pursuant to the settlement with the original landowners and withdrawal of the writ petition on 19th April, 2005; that pursuant to the settlement, it was the Society and not the DDA that acquired the interest and possession of the land; that DDA never acquired title to or interest in the suit property as possession was never taken over pursuant to the acquisition; that thus Society was entitled to execute the sale deed of 2007 in favour of the Appellant. To reinforce this contention, the appellant relied on a response by DDA to a query under the Right to Information Act, 2005 which stated that till 2005, the possession was not taken either pursuant to the acquisition or otherwise. It was further argued that in any case, a triable issue arose as to whether the Society acquired possession of the suit property pursuant to the acquisition or (as is sought to be pleaded by the appellant) pursuant to the settlement culminating in the order of 19th April, 2005. It was lastly argued that since the appellant was in possession of the suit property, the same ought to not be disturbed.

11. The learned Single Judge agreed with the contentions of the respondents, since it was, in the opinion of the learned Single Judge, ex facie evident from the plaint and documents filed therewith that the appellant has no locus standi nor is any cause of action found in the plaint. He accordingly dismissed the Suit. He reasoned:

11.1. The interest in and possession of all the lands under acquisition were transferred to the Society pursuant to the Lease agreements.

11.2. It is inconceivable how the interest and possession only for the suit property would transfer to the Society pursuant to the order of 19th April, 2005.

11.3. In any case, even the compromise application filed for withdrawing the Writ Petition had acknowledged that the interest in the suit property passed to the Society under the Lease agreements. The sale deed sought to be relied upon by the appellant finds the Society admitting to the same.

11.4. Once it is held that the Society derives its interest to the land only pursuant to the Lease agreements, any further acts of the Society qua the land would be governed by and subject to the terms of the Lease agreements.

11.5. The Lease agreements expressly prohibit any sale of the land by the Society and only permit a transfer by way of sub-lease, which admittedly was not done in the instant case.

11.6. Thus, it is ex facie evident from the documents filed with the plaint that the appellant has neither locus standi nor any cause of action to file the suit, as the appellant could not have received any title to the suit property from the Society.

11.7. When it is already admitted by the appellant's predecessor-in-interest, i.e., the Society – in both the order dated 19th April, 2005 as well as the sale deed the appellant relies on – that the possession was received under the Lease agreements, no triable issue arises as to when the possession was actually transferred. The parties need not be relegated to a trial for the same.

11.8. The case of appellant that he is in possession of the property and hence is entitled to an order protecting the same from any disturbance is not founded on the pleadings. A party cannot be allowed to set up a case not specifically pleaded. The appellant has set up a case in the Suit based on the sale deed of 2007 and cannot now seek relief on the basis of possession.

12. Mr. Tiku, learned Senior Advocate for the appellant contended that the impugned order failed to take into account that the possession of the suit property passed on to the Society only pursuant to, or in any case, subsequent to the order of 19th April, 2005. He laid especial reliance on the reply of the DDA to his RTI application. He further contended that the property could not have been allotted to respondent no. 1's predecessor-in-interest when the possession of the property was never taken over and the acquisition process has per se not been completed. He further emphasised that the respondent no. 1 could not have acquired or gained any interest in the suit property from the Society, since the latter would have had no interest prior to 19th April, 2005. He submitted that in any case, the DDA could have acquired no right, title or interest in the suit property, since the possession of the property was never taken pursuant to the acquisition.

13. It was further submitted that the Society transferred the suit property to the appellant only in view of the fact that the appellant settled the disputes with the predecessor-in-interest / original landowners (which settlement culminated in the order dated 19th April, 2005). This, he reasoned, was in keeping with the outcome of resolution of identical disputes qua the other plots of land (A-13, A-14 and A-19) by the allottees with the original landowners.

14. He contended that in an application under Order VII rule 11 ought to be decided based on the averments in the plaint alone. He contended that the learned Single Judge has incorrectly proceeded upon an assumption that the possession of the suit premises were taken pursuant to the acquisition without giving an opportunity to the appellant to prove his case. It was contended that the only mandate of order VII rule 11 was to reject a plaint if, on a reading of the plaint, it is apparent that no cause of action is disclosed. He further contended that once it is seen from the plaint that a reasonable case has been made out, the appellant ought to have been given an opportunity to prove his case in trial. He contended that the impugned order has caused great prejudice to the appellant, who is now remediless.

15. Per contra, Senior Counsel Mr. Neeraj Kishan Kaul appearing for the respondent no. 1 contended that the impugned order suffers from no infirmity. He contended that it is ex facie evident from the documents filed with the plaint that the suit property was given to the Society pursuant to the acquisition and under the Lease Agreements. He contended that once it is seen that the Society acquires interest in the suit property under the Lease Agreements, it is a logical sequitur therefrom that the Society would be bound by the terms thereof – including the prohibition from selling. In the circumstances, he submitted, no title could have flown from the Society to the appellant. He submitted that where the plaint itself discloses no cause of action, the Suit ought to be dismissed

and there was no infirmity in the action of the learned Single Judge in doing so.

16. The judge considering a matter under Order VII rule 11 of the Code ought to bear in mind that the issue to be considered is not of whether the plaintiff has cause of action to file the suit, but as to whether the plaint has disclosed a cause of action.[1] The public policy behind the provision of Order VII rule 11 could be found in the judgement of the Supreme Court in **T. Arivanandam v T.V. Satyapal & Anr.,**[2] where it held that if on a meaningful – not formal – reading of the plaint, it is manifestly vexatious and meritless, and does not disclose a cause of action, the power under Order VII rule 11 ought to be exercised.

17. The Supreme Court, in **Liverpool & London S. P. & I Association Ltd. v M. V. Sea Success I & Anr.,**[3] observed:

> *"139. Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed. *** 152. So long as the claim discloses some cause of action or raises some questions fit to be decided by a judge, the mere fact that the case is weak and not likely to succeed is no ground for striking it out. The purported failure of the pleadings to disclose a cause of action is distinct from the absence of full particulars. (See Mohan Rawale [(1994) 2 SCC 392] .)"*

18. The Suit also ought to be considered in the light of the above pronouncements. The case of the appellant in the Suit is that the possession of the suit property was never taken over pursuant to the acquisition. In the plaint, it has been inter alia averred:

18.1. The proceedings in the acquisition remained stayed since 1971 and till 2005.

18.2. The disputes qua the lands comprised in plots A-13, A-14 and A-19 were settled between the original owners thereof and the allottees of the plots.

18.3. The original owners of the lands comprised in plots A-13, A-14 and A-19 withdrew the dispute qua the acquisition in view of the settlement with the allottees.

18.4. The writ petition before this Court was thus only in respect of the suit property.

18.5. Even the challenge to that limited extent was settled between the original owners and the Society and the writ petition was withdrawn in 2005.

18.6. The possession of the suit property was given to the Society pursuant to the settlement and the withdrawal on the basis of the consent order.

18.7. The Society then sold the property to the appellant and put him in possession thereof, which is now sought to be disturbed by the respondent no. 1 in collusion and connivance with the other respondents.

19. The plaint contends that in the past the respondents have been involved in various proceedings inter se in respect of the allotment made to the predecessor-in-interest of the respondent no. 1 (which was admittedly cancelled in 2001 and reinstated in 2009); it sought to make out a case that the respondent no. 1 has neither right, nor title, nor interest in the suit property at the time of the sale by the Society to the appellant; that the respondents have colluded to oust the appellant from the suit property and to gain possession thereof illegally. Alongwith the plaint, various documents were filed purporting to be in support of the appellant's case.

20. It has been the case of the appellant before the learned Single Judge as well as before this Court that the possession was never taken by the respondent no. 3 pursuant to the acquisition proceedings. The appellant has sought to set up a case based on the above averments that the possession was transferred by the original owners to the Society directly. Even this transfer of possession, it is contended, is pursuant to the settlement between the original owners and Society.

21. It has further been contended that even the settlement qua the suit property was effected by the Society using the monies furthered by the appellant and thus the Society transferred the suit property to the appellant. Although the respondent no. 1 is said to have made extensive

submissions before the learned Single Judge qua her title to / interest in the suit property, the same are not relevant for deciding the application under Order VII rule 11 of the Code. As earlier observed, the only relevant material for considering an application under Order VII rule 11 is the averments in the plaint – read as a whole – and the documents filed therewith.

22. This Court is of the view that the averments in the plaint and the documents filed therewith do disclose a cause of action. The case of the appellant is that the possession of the suit property was never taken pursuant to the agreement and that the Society has acquired title, possession and / or interest therein from the original owners pursuant to the settlement and not the acquisition. It is thus that the appellant seeks to set his title up. This cannot be said to be a case of clever or artful drafting to create an illusory cause of action that ought to be nipped in the bud under Order VII rule 11. The duty of the Court under Order VII rule 11 is to consider whether the averments in the plaint taken as a whole, alongwith the documents filed therewith, if taken to be true, would warrant a decree in favour of the plaintiff. This Court is of the view that in the instant case, the averments and the documents would so do.

23. The learned Single Judge, in the opinion of this Court, erred in placing undue reliance upon the recitals in the 2007 agreement and on the content of the compromise application filed in the writ petition. It is incontrovertible that if the Society had acquired title / interest in the suit property pursuant to the acquisition and under the Lease Agreements, it would not be competent to execute the sale deed. However, that is not the case set up by the appellant in the Suit. The case of the appellant has been that the possession was handed over to the Society pursuant to a settlement with the original owners. Therefore, the appellant ought to be provided an opportunity to prove his case in trial.

24. However, the learned Single Judge held that the appellant is estopped from contending so and cannot seek a trial in respect of the said issues. This, he held, by relying on (a) the acknowledgement (to the effect that the Society derives title to the suit property under the acquisition and the Lease Agreements) in the compromise application, (b) the recitals of the 2007 agreement (which state that the Society derives title to the suit property under the Lease Agreements), (c) the law laid down by this Court in **Nagin Chand Godha v. Union of India,**[4] and **Rajbir Solanki, Dr. v Union of India**[5] to the effect that the Collector need not prove actual physical possession being taken over, so long as the record indicates that possession is taken over.

25. In the opinion of this Court, the aforementioned course of action as adopted by the learned Single Judge would not be warranted on an application under Order VII rule 11. As the Supreme Court observed in **Liverpool & London S. P. & I Association Ltd. v M. V. Sea Success I & Anr.,**[6] *[i]n ascertaining whether the plaint shows a cause of action, the court is not required to make an elaborate enquiry into doubtful or complicated questions of law or fact. By the statute the jurisdiction of the court is restricted to ascertaining whether on the allegations a cause of action is shown.* Although the said documents may contain certain material that may not be in keeping with the case of the appellant, it would not warrant dismissal of the plaint under Order VII rule 11. De hors a patent contradiction, i.e., one ascertainable ex facie from the record, without involving any lengthy or complicated argument or a long drawn out process of reasoning, between the averments and the documents, the Court considering an application under Order VII rule 11 ought to not lightly ignore an averment in the plaint.

26. The judgements of this Court referred to hereinabove were made in a different context. In **Nagin Chand Godha v. Union of India,**[7] the Court was faced with a situation where symbolic possession was taken by execution of a panchnama and thereafter the erstwhile owner claimed that since he was still in possession thereof, the land ought to be denotified. In the said circumstances, the Court observed that land vests in the Union once symbolic possession is taken and shown from record. Similar was the conclusion of the Court in **Rajbir Solanki, Dr. v Union of India,**[8] where symbolic possession was taken – admittedly so – over seven years ago, but denotification was sought on the basis that the petitioner therein remained in actual possession.

27. In the present case, the only records that the learned Single Judge appears to have relied upon to arrive at the conclusion that possession was taken were (a) the aforestated acknowledgement in the compromise application filed in the writ petition and (b) the recitals in the 2007 agreement. There is admittedly no panchnama filed with the plaint to indicate that symbolic possession was taken over. Nor is there any material to indicate that an overt act has been done by the Collector to

indicate that possession had been taken over, as was the case in the aforestated two decisions of this Court.

28. In the circumstances, this Court is of the view that the conclusion of the learned Single Judge that the Society acquired title / interest in the suit property under the Lease Agreements is unwarranted at the stage of considering an application under Order VII rule 11. The plaint does disclose a cause of action which ought to be considered in trial. Thus, the impugned order is set aside; the parties are directed to present themselves before the concerned Single Judge as per roster allocation, on 20th May, 2014 for directions towards further proceedings in the Suit. Status quo to be maintained.

29. The appeal is allowed in the above terms, without any order as to costs.

ILR (2014) III DELHI 1917
CS (OS)

JAFAR IMAM ....PLAINTIFF

VERSUS

DEVENDER CHAUHAN & OTHERS ....DEFENDANTS

(SANJEEV SACHDEVA, J.)

CS(OS) NO. : 1843/2013 DATE OF DECISION: 15.05.2014

Code of Civil Procedure, 1908—Order VII Rule 11—Court Fees Act, 1870—Section 7(x)—Specific Relief Act, 1963—Section 19 (1)(b)—Suit for specific performance of Agreement to Sell along with cancellation of five sale deeds which have been executed after the agreement to sell. Application seeking rejection of plaint on the ground that the plaintiff has not correctly valued the suit for the

purposes of Court fee and jurisdiction. As per the applicant the Plaintiff had sought cancellation of sale deeds which are registered at different values and since Plaintiff is not in possession of the property., the suit should have been valued on the consideration mentioned in the respective sale deeds. Plaintiff states that Plaintiff had to value the suit for substantive relief of specific performance and the consequential reliefs of cancellation are covered in the main relief. Held—The relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of subsequent transferees is only an ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant in favour of the Plaintiff. Consequently there will be no question of payment of ad valorem Court fees in respect of said relief. The said relief claimed would be superficial and unnecessary. Application dismissed.

To settle the controversy, it is necessary to determine the nature of the suit filed by the Plaintiff and the nature of reliefs claimed. The Plaintiff has sought specific performance of an agreement to sell and further cancellation of the sale deed of the purchasers subsequent to the agreement to sell in favour of the Plaintiff. If the two reliefs were independent of each other then the Plaintiff would necessarily have to value the suit based on the two independent reliefs and pay the appropriate court fees thereon. **(Para 7)**

In terms of section 7 (x) of the Court Fees Act, 1870, the Plaintiff has valued the relief of specific performance on the basis of the sale consideration mentioned in the agreement to sell. The issue relates to the court fees paid on the relief seeking cancellation of the sale deeds executed in favour of the purchasers post the date of the agreement to sell. **(Para 8)**

The relief of cancellation of the sale deeds is a relief completely dependent on the relief of specific performance. The relief of cancellation of sale deeds cannot be granted independent of the relief of specific performance. If the relief of specific performance is refused then the relief of cancellation would automatically be rejected. It is only when the relief of specific performance is granted in favour of the Plaintiff that the Plaintiff would be entitled to claim the relief of cancellation. **(Para 9)**

Further it is held that if in a suit the Plaintiff seeks the substantive relief of specific performance of contract, the declaration of the invalidity of the sale deed in favour of the subsequent transferees would be an ancillary relief. If the Plaintiff is able to establish his case of the specific performance against the seller then it would be enough, if the subsequent transferees are joined as parties, to the suit because the only decree to be passed in the suit for specific performance against the subsequent transferees would be to ask them to join in conveyance with seller/owner. In that sense, it was not necessary at all for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It would have been enough for the Plaintiff to have joined them as co-Defendants so as to contend that the subsequent sale deeds were not binding on him. The argument that the relief of declaration prayed for against the subsequent transferees was required to be valued in terms of money was rejected. **(Para 11)**

Clause (b) of Sub-section (1) of Section 19 of the Specific Relief Act lays down as under:-

> "19(1). Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;" **(Para 14)**

The Section speaks of the enforcement only. It does not speak in terms of a decree being claimed against such persons. For enforcing the decree of specific performance, all that is necessary is to implead the subsequent transferee as a party and the decree is required to direct the subsequent transferee to be a party to conveyance to be executed by the original vendor in favour of the vendee. **(Para 15)**

In the present case the Plaintiff has sought for specific performance of the agreement to sell dated 15.09.2003. Along with the relief of specific performance the Plaintiff has claimed cancellation of five sale deeds dated 20.04.2004, 05.07.2004 and 11.06.2004. The sale deeds the cancellation of which has been sought by the Plaintiffs have been executed after the agreement to sell in favour of the Plaintiff. The relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of the subsequent transferees is only an ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant No. 1 in favour of the Plaintiff. **(Para 21)**

There would be no necessity of claiming any declaratory relief as against the subsequent transferee. Consequently, there will be no question of payment of ad valorem court-fees in respect of said relief. The said relief claimed would be superficial and unnecessary in the facts and circumstances of the case. **(Para 22)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Mr. Kamal Mehta with Mr. Sudeep Singh, Advocates.

FOR THE DEFENDANTS : Mr. Nikil Mehra, Advocate for the Defendant No.1 Mr. Ravi Gupta, Sr. Advocate with Mr. Ankit Jain,

Advocate for the Defendant No.2. Mr. Darpan Wadhwa with Mr. Arjun Syal, Advocates for Defendant No.5.

CASES REFERRED TO:

1. *Jasmeet vs. Surender Singh;* (2009) 159 DLT 517.
2. *Dilip Basti Mal Jain vs. Babban* AIR 2002 BOMBAY 279.
3. *Dwarka Prasad Singh & others vs. Harikant Prasad Singh & Others* AIR 1973 SC 655.
4. *Lala Durga Prasad & Another vs. Lala Deep Chand & Others* AIR 1954 SC 75, 1954 SCR 360.
5. *Kafiladdin* vs. *Samiraddin* A. I. R. 1931 Cal. 67.
6. *Kali Charan* vs. *Janak Deo* A.I.R. 1932 All. 694.
7. *Potter* vs. *Sanders* 67 E. R. 1057.

RESULT: Application dismissed.

SANJEEV SACHDEVA, J.

IA No. 20314/2013 in CS(OS) 1843/2013 (By Defendant No. 2 under Order 7 rule 11 CPC)

1. The Defendant No. 2 has filed the present application under order 7 rule 11 of the Code of Civil Procedure (Hereinafter referred to as the CPC) seeking rejection of the plaint on the ground that the Plaintiff has not correctly valued the suit for the purposes of Court fees and jurisdiction and has not paid the requisite court fees on the same.

2. The Plaintiff has filed the present suit for specific performance of agreement to sell dated 15.09.2003. Along with the relief of specific performance the Plaintiff has claimed cancellation of five sale deeds dated 20.04.2004, 05.07.2004 and 11.06.2004. The sale deeds the cancellation of which has been sought by the Plaintiffs have been executed after the agreement to sell in favour of the Plaintiff.

3. As per the applicant/Defendant No. 2, the Plaintiff has sought cancellation of five sale deeds which are registered at different values and the Plaintiff has valued the relief for cancellation of the sale deeds at Rs.200/- each and not at the values mentioned in the respective sale

deeds and has not paid the requisite Court fees on the same. As per the applicant, since the Plaintiff is not in possession of the property, the suit should have been valued on the basis of the consideration mentioned in the respective sale deeds and ad valorem court fees should have been paid there on.

4. The Plaintiff has opposed the application and has contended that the Plaintiff has to value the suit for substantive relief of specific performance and the consequential/ancillary reliefs of cancellation of sale deed are all covered in the main relief of specific performance and do not require separate ad valorem court fees.

5. Learned counsel for the Plaintiff has relied on the judgment of the Bombay High Court in the case of **DILIP BASTI MAL JAIN V. BABBAN** AIR 2002 BOMBAY 279 to contend that in a suit for specific performance substantive relief is the relief of specific performance of contract and the declaration of invalidity of the sale deeds in favour of the subsequent transferees is nothing but an ancillary relief and it is not necessary for the Plaintiff to ask for any declaration for cancellation of the sale deeds and as such there was no question of payment of Court fees in respect of the said relief and the relief of cancellation of sale deeds would be superficial and unnecessary.

6. Learned counsel for the Defendant has relied upon the judgment in case of **JASMEET VERSUS S. SURENDER SINGH;** (2009) 159 DLT 517 to contend that in a suit for cancellation and declaration of sale deeds as null and void, the Plaintiff is bound to pay court fees on value of jurisdiction and pay ad valorem court fees.

7. To settle the controversy, it is necessary to determine the nature of the suit filed by the Plaintiff and the nature of reliefs claimed. The Plaintiff has sought specific performance of an agreement to sell and further cancellation of the sale deed of the purchasers subsequent to the agreement to sell in favour of the Plaintiff. If the two reliefs were independent of each other then the Plaintiff would necessarily have to value the suit based on the two independent reliefs and pay the appropriate court fees thereon.

8. In terms of section 7 (x) of the Court Fees Act, 1870, the Plaintiff has valued the relief of specific performance on the basis of the sale consideration mentioned in the agreement to sell. The issue relates

to the court fees paid on the relief seeking cancellation of the sale deeds executed in favour of the purchasers post the date of the agreement to sell.

9. The relief of cancellation of the sale deeds is a relief completely dependent on the relief of specific performance. The relief of cancellation of sale deeds cannot be granted independent of the relief of specific performance. If the relief of specific performance is refused then the relief of cancellation would automatically be rejected. It is only when the relief of specific performance is granted in favour of the Plaintiff that the Plaintiff would be entitled to claim the relief of cancellation.

10. The Bombay High Court in the case of **DILIP BASTI MAL JAIN** (SUPRA) relying upon the decision of the Supreme Court of India in **DWARKA PRASAD SINGH & OTHERS VS HARIKANT PRASAD SINGH & OTHERS** AIR 1973 SC 655 laid down that in order to decide the question relating to the pecuniary jurisdiction of the court, what is required to be seen is the allegations made, and relief claimed in the plaint.

11. Further it is held that if in a suit the Plaintiff seeks the substantive relief of specific performance of contract, the declaration of the invalidity of the sale deed in favour of the subsequent transferees would be an ancillary relief. If the Plaintiff is able to establish his case of the specific performance against the seller then it would be enough, if the subsequent transferees are joined as parties, to the suit because the only decree to be passed in the suit for specific performance against the subsequent transferees would be to ask them to join in conveyance with seller/ owner. In that sense, it was not necessary at all for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It would have been enough for the Plaintiff to have joined them as co-Defendants so as to contend that the subsequent sale deeds were not binding on him. The argument that the relief of declaration prayed for against the subsequent transferees was required to be valued in terms of money was rejected.

12. The Bombay High Court in **DILIP BASTI MAL JAIN** (SUPRA) further relied upon the Judgments in the case of Vimala Ammal v. C. Suseela, Dwarka Prasad Singh v. Harikant Prasad Singh, and Durga Prasad v. Deep Chand wherein it has been laid down that when an action is brought for specific performance, the subsequent transferee would be

a necessary party to the suit as the only decree that is required to be passed in such a suit (for specific performance) is against the original vendor. The subsequent transferees are required to be directed to join in the sale which is directed by a decree for specific performance of contract. It has been held that the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him, to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor, all that he does is to pass on his title to the prior transferee.

13. The Bombay High Court in **DILIP BASTI MAL JAIN** (SUPRA) has laid down that the law as laid down by the Supreme Court dispenses with the necessity of obtaining any specific declaration against the subsequent transferee. It would not, therefore, be necessary at all to claim a declaration as such. Thus it was not at all necessary for Plaintiff to claim declaration of invalidity of transfer of property made in favour of the subsequent transferees.

14. Clause (b) of Sub-section (1) of Section 19 of the Specific Relief Act lays down as under:-

> "19(1). Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against- (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;"

15. The Section speaks of the enforcement only. It does not speak in terms of a decree being claimed against such persons. For enforcing the decree of specific performance, all that is necessary is to implead the subsequent transferee as a party and the decree is required to direct the subsequent transferee to be a party to conveyance to be executed by the original vendor in favour of the vendee.

16. Section 7 of the Court Fees Act 1880 lays down as under:

> "7. Computation of fees payable in certain suits.-The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :-

for specific performance.-(x) In suits for specific performance- (a) of a contract of sale-according to the amount of the consideration;"

17. In respect of suits falling under Sub-section (x) (a), a departure has been made and liberty has been given to the Plaintiff to value his suit claim for the purposes of court-fees according to the amount of the consideration. The substantive relief claimed in the suit is not a relief of declaration or the alternate relief relating to the damages, but is of specific performance of contract based on agreement of sale as such the suit claim was is to be valued under Section 7 (x) (a) of the Court Fees Act according to the amount of consideration.

18. In **DWARKA PRASAD SINGH & OTHERS** (SUPRA), the supreme Court of India following the decision in the case of **LALA DURGA PRASAD & ANOTHER V. LALA DEEP CHAND & OTHERS** AIR 1954 SC 75, 1954 SCR 360 held that in a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale the proper form of the decree is to direct specific performance of the contract between the vendor and the Plaintiff and further direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the Plaintiff. The conveyance has to be executed by the vendor in favour of' the Plaintiff who seeks specific performance of the contract in his favour and the subsequent transferee has to join in the conveyance only to pass his title which resides in him. It has been made quite clear that he does not join in any special covenants made between the Plaintiff and his vendor. All that he does is to pass on his title to the Plaintiff. Further the Supreme Court laid down that if there are any special covenants and conditions agreed upon in the contract for sale between the original purchaser and the vendor those have to be incorporated in the sale deed although it is only the vendor who will enter into them and the subsequent purchaser will not join in those special covenants. The whole idea and the purpose underlying a decree for specific performance is that if a decree for, such a relief is granted the person who has agreed to purchase the property should be put in the same position which would have obtained in case the contracting parties, i.e., vendor and the purchaser had, pursuant to the agreement, executed a deed of sale and completed it in every way.

19. The Supreme Court of India in the case of **LALA DURGA PRASAD AND ANOTHER** (SUPRA) noticed that 3 different practises were being followed by the courts in India:

> 37. The practice of the courts in India has not been uniform and three distinct lines of thought emerge. (We are of course confining our attention to a Purchaser's suit for specific performance). According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the Plaintiff and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser.
>
> 38. The only statutory provisions which bear on this point are section 91 of the Indian Trusts Act, 1882, section 3 of the Specific Relief Act, 1877, illustration (g), and section 27 of that Act, and section 40 of the Transfer of Property Act.
>
> 39. Section 91 of the Trusts Act, does not make the subsequent purchaser with notice a trustee properly so called but saddles him with an obligation in the nature of a trust (because of section 80) and directs that he must hold the property for the benefit of the prior "contractor", if we may so describe the Plaintiff,
>
> > "to the extent necessary to give effect to the contract." Section 3 illustration (g) of the Specific Relief Act makes him a trustee for the Plaintiff but only for 'the purposes of that Act. Section 40 of the Transfer of Property Act enacts that this obligation can be enforced against a subsequent transferee with notice but not against one who holds for consideration and without notice. Section 27 of the Specific Relief Act does not carry the matter any further. All it savs is that specific performance may be enforced against
> >
> > (a) either party thereto;
> >
> > (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

None of this helps because none of these provisions directly relate to the form of the decree. It will there- fore be necessary to analyse each form in the light of other provisions of law.

40. First, we reach the position that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him is not void but only voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a conveyancing point of view to compel him to convey to the Plaintiff unless steps are taken to re-vest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance. to the vendor was ordered but Sulaiman C. adopted the other course in **Kali Charan v. Janak Deo** A.I.R. 1932 All. 694. He directed cancellation of the subsequent sale and conveyance to the Plaintiff by the vendor in accordance with the. contract of sale of which the Plaintiff sought. :specific performance. But though this sounds logical the objection to it is that it might bring in its train complications between the vendor and the subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.

41. We are not enamoured of the next alternative either, namely, conveyance by the subsequent purchaser alone to the Plaintiff. It is true that would have the effect of vesting the title to the property in the Plaintiff but it might be inequitable to compel the subsequent transferee to enter into terms and covenants in the vendor's agreement with the Plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varied by altering or omitting such terms the court will be remaking the contract, a thing it has no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the Plaintiff and direct the subsequent transferee to join in the conveyance so

as to pass on the title which resides in him to the Plaintiff. He does not join in any special covenants made between the Plaintiff and his vendor; all he does is to pass on his title to the Plaintiff. This was the course followed by the Calcutta High Court in **Kafiladdin v. Samiraddin** A. I. R. 1931 Cal. 67, and appears to be the English practice. See Fry on Specific Performance, 6th edition, page 90, Paragraph 207; also **Potter v. Sanders** 67 E. R. 1057. We direct accordingly.

20. The legal position thus emerges is that:-

(i) If in a suit the Plaintiff seeks the substantive relief of specific performance of contract, the declaration of the invalidity of the sale deed in favour of the subsequent transferees would be an ancillary relief.

(ii) It is not necessary at all for the Plaintiff to ask for any such declaration for cancellation of Sale Deed.

(iii) It would be enough for the Plaintiff to have joined subsequent transferees as co-Defendants so as to contend that the subsequent sale deeds were not binding on him.

(iv) The proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him, to the prior transferee.

(v) Subsequent transferee does not join in any special covenants made between the prior transferee and his vendor, all that he does is to pass on his title to the prior transferee.

(vi) If the court reaches the conclusion that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him would not be void but only voidable at the option of the earlier "contractor".

(vii) If there are any special covenants and conditions agreed upon in the contract for sale between the original purchaser and the vendor those have to be incorporated in the sale deed although it is only the vendor who will enter into

them and the subsequent purchaser will not join in those special covenants.

(viii) The whole idea and the purpose underlying a decree for specific performance is that if a decree for, such a relief is granted the person who has agreed to purchase the property should be put in the same position which would have obtained in case the contracting parties, i.e., vendor and the purchaser had, pursuant to the agreement, executed a deed of sale and completed it in every way.

(ix) The relief of declaration prayed for against the subsequent transferees is not required to be valued in terms of money.

(x) There would be no necessity of claiming any declaratory relief as against the subsequent transferee. Consequently, there will be no question of payment of court-fees in respect of said relief. The said relief claimed would be superficial and unnecessary in the facts and circumstances of the case.

21. In the present case the Plaintiff has sought for specific performance of the agreement to sell dated 15.09.2003. Along with the relief of specific performance the Plaintiff has claimed cancellation of five sale deeds dated 20.04.2004, 05.07.2004 and 11.06.2004. The sale deeds the cancellation of which has been sought by the Plaintiffs have been executed after the agreement to sell in favour of the Plaintiff. The relief of specific performance of agreement to sell is the substantive relief and the declaration of the invalidity of the sale deed in favour of the subsequent transferees is only an ancillary relief. It is not necessary for the Plaintiff to ask for any such declaration for cancellation of Sale Deed. It is sufficient for the Plaintiff to ask for the subsequent transferees to join in the execution of the sale deed by the Defendant No. 1 in favour of the Plaintiff.

22. There would be no necessity of claiming any declaratory relief as against the subsequent transferee. Consequently, there will be no question of payment of ad valorem court-fees in respect of said relief. The said relief claimed would be superficial and unnecessary in the facts and circumstances of the case.

23. The Judgment in the case of **JASWANT SINGH** (SUPRA)

relied upon by the Counsel for the Defendant is not applicable in the facts of the present case as in the said case the court was not dealing with a suit for specific performance and the Plaintiff therein had sought cancellation of sale deed on the ground that the Defendant had fraudulently made the Plaintiff execute the sale deed without payment of consideration. It was in those facts the court held that since the relief of declaration and the consequential relief of cancellation was sought, court fees was payable.

24. In view of the above, the application of the Defendant No. 2 is without any merit and is thus dismissed, with no orders as to costs.

IA No. 20554/2013 (by Plaintiff under Order 6 Rule 17 read with Order 1 Rule 10 CPC)

1. The Plaintiff by the present application has sought impleadment of Defendants No. 6 to 8. The Plaintiff has contended that Defendant No.2 in the written statement has disclosed that the suit property has been further sold to Defendants No. 6, 7 and 8 vide sale deed dated 2.11.2010 and 9.11.2010. The Plaintiff has contended that the sale deed executed by Defendant No.2 in favour of the said Defendants is collusive and a fraudulent exercise in order to frustrate the rights of the Plaintiff in the prior agreements to sell. The Plaintiff has sought impleadment of the subsequent purchasers, i.e., Defendants No. 6 to 8 and the consequential amendments to the plaint.

2. No reply has been filed by the existing Defendants to the said application. Notice to the proposed Defendants was directed to be served by order dated 17.12.2013. They have not been served.

3. Issue fresh notice to the proposed Defendants 6 to 8 by ordinary process and speed post returnable on 05th August, 2014 before the Roster Bench. Reply be filed by the Defendants 1 to 5 within four weeks, rejoinder if any by the Plaintiff within four thereafter.

ILR (2014) III DELHI 1931
W.P.(C)

KHEM CHAND .....PETITIONER

VERSUS

GOVT. OF NCT OF DELHI & ANR. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, J.)

W.P.(C) 2958/2014 & CM NO. 6149/2014 DATE OF DECISION: 20.05.2014

Service Law—Respondents notified vacancies of 14 posts of Instructor/Mathematics in the Department of respondent No.1, out of which 12 posts were in the category of unreserved and 2 were in the category of schedule caste Petitioner submitted an application as scheduled caste candidate and successfully cleared the written examination and was provisionally selected as one of the two scheduled caste candidates for the post—Respondent No.2 forwarded dosier of the petitioner alongwith the other selected candidates to respondent for issuing after of appointment after due verification—Respondents found on verification that the letter of experience submitted by the petitioner was not genuine, so his candidature was rejected—Tribunal also held that the experience certificate submitted by petitioner was not genuine, so respondents rightly denied appointment to the petitioner—Challenged in writ petition—Held, the confusion occurred since the company issuing the experience certificate had been using spelling of its name as Tondon Diesels and had also been spelling its name as Tondon Diesel as well as Tandon Diesel—Held, the doubt as regards genuineness of the experience certificate was without any basis, so order of Tribunal set aside and directions issued to the respondents to proceed in the matter of appointment of petitioner.

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Raman Duggal, Mr. Sudhir Kumar and Mr. Anish Shresta, Advs.

FOR THE RESPONDENTS : Ms. Ruchi Sindhwani, ASC with Ms. Bandana Shukla, Adv. with R.P. Sharma, GI/STA and Mr. Ram Narain, GI STA.

RESULT: Writ petition allowed.

GITA MITTAL, J. (Oral)

1. The petitioner assails the order dated 19th December, 2013 passed by the Central Administrative Tribunal rejecting his application being O.A.No.2068/2012.

2. The facts giving rise to the instant petition are largely undisputed and to the extent necessary are noticed hereafter.

3. We have called for the original record of the respondents and carefully perused the same.

4. A requisition was made by the Government of NCT of Delhi . respondent no.1 herein to the Delhi Subordinate Services Selection Board (DSSSB for brevity) - respondent no.2 herein resulting in publication of an advertisement no.03/07 by the respondent no.2 in the Employment News. The respondents thereby notified vacancies of 14 posts (12 in the category of unreserved and 2 in the category Scheduled Caste) of Instructor/Mathematics in the Department of Training and Technical Education of the respondent no.1. As per the advertisement, the respondents had notified the following eligibility conditions: -

5. The advertisement also informed all candidates of the following:-

7.	Educational and other qualifications required for direct recruits::	1. 2. 3.	Matriculation or equivalent From a recognized University/Board. Diploma in Mechanical Engineering from a recognized Institute. One year's practical experience in an Engineering Workshop of repute. OR One year training at the Central Training Institute.

"The selection of the above 14 candidates (UR 12, SC . 02) shall further be subject to the fulfilment of all eligibility conditions as prescribed by the statutory RRs and the terms and conditions of the advertisement indicated in the advertisement inviting applications and also subject to thorough verification of their identity with reference to their photographs, signatures, handwriting and thumb impression etc., on the application forms, admit card, etc. The candidature of candidate is liable to be cancelled by the user Department also, in case the candidate is found not fulfilling the eligibility conditions or for any other genuine reasons. The competent authority of the user Department shall arrange to verify the correctness of information/documents as furnished in the application form after verification of the same from the original documents. Mere inclusion of name in the result notice does not confer any right upon the candidate over the post."

6. It is an admitted position that petitioner submitted an application as Scheduled Caste candidate; successfully appeared in the written examination and by the notice No.22 dated 6th April, 2011 was provisionally selected as one of the two scheduled caste category candidates for the post of Instructor/Mathematics apart from 12 candidates in the unreserved candidates.

As a result, the respondent no.2 forwarded the dossier of the petitioner along with the other selected candidates to the respondent no.1 for issuing the offer of appointment to the selected candidates after due verification.

7. The respondent no.1 had found the educational certificate and the caste certificate of the petitioner as genuine. We, however, are concerned with the verification effected of the experience certificate submitted by the petitioner. To support his plea that he possessed the requisite one year experience in an engineering workshop of repute, the petitioner had submitted a certificate dated 8th June, 2006 issued to him by **"TANDAN** Diesel Service. As per the letter head, the firm was located at 3778 Mori Gate, Delhi . 110006. The certificate dated 8th June, 2006 was in the following terms:

"Certificate

To Whomsoever It May Concern

This is to certify that Mr. Khem Chand has been working in Tandan Diesel Service since 02nd May 2003 to 13th May, 2006 as a Assistant/helper (Mech.)

His performance in this period was good. He bears a good moral character. We hope for his prosperous future."

8. When the respondents attempted to verify the certificate at the address on the letter head, no response was received from the firm. As per the record, at this stage, the petitioner submitted a letter dated 24th October, 2011 to the respondent no.1 informing that the firm which had issued the experience certificate had changed his address since the issuance of the certificate and that it was at the following address:

TANDON Diesel Service,
Shop No.3794/3, (3rd in the Gali),
Mori Gate, (in front of Bholla Ram Market),
Delhi . 110006.

The petitioner informed the respondents that in case they wanted to exchange correspondence with the firm, they should communicate with the firm on this address.

9. Consequently, the respondent no.1 sent a letter dated 4th November, 2011 to the proprietor of the firm at the address disclosed by the petitioner, enclosing the copy of the experience certificate of the firm submitted by the respondent to the petitioner requesting verification thereof.

10. The original record produced before us discloses that in response to its letter dated 4th November, 2011, the proprietor of the firm responded by a communicated dated 28th November, 2011 which reads as follows:

"Ref. No. TDS Dated : 28/11/11 2/2011

TO,

DEPARTMENT OF TRAINING &
TECHNICAL EDUCATION
MUNI MAYA RAM MAR,
PITAMPURA, DELHI - 110088

REF: - LETTER NO.F.21(12)/96/TRG. ADMN./1239/6939 DATED 04.11.2011

TO WHOM IT MAY CONCERN

Certified that Sh. Khem Chand S/o Sh. Padam Singh has worked in this workshop as Assistant/Helper Mechanical from 02nd May 2003 to 13 May 2006.

He bears a good moral character.

We wish him all the best for his future career.

11. It is important to note that the letter head on which the certificate dated 28-11-11 was typed describes the name and address of the firm as TONDON Diesel Service, 3793/3, Kucha Ravi Das, Opp. Bhola Ram Market, Mori Gate, Delhi 110006.

12. This communication was also sent to the respondents by registered speed post. The original envelope is also available in the records wherein the address of the sender is scribed in hand writing and reads as follows:-

TONDON Diesel Service
3793/3, Kucha Ravi Dass,
Opp. Bhola Ram Market,
Mori Gate, Delhi 110006.

13. The name and address of the firm as scripted on the envelope in hand writing corroborates the certificate dated 8th June, 2006 which had been filed by the petitioner along with his application, certifying that he had worked in the workshop as Assistant/Helper Mechanical from 2nd May, 2003 to 13th May, 2006.

14. In fact, the issue of the petitioner's experience stood conclusively settled and no doubt ought to have remained hereafter so far as the experience of the petitioner is concerned. However, the matter did not end here. We find that inexplicably, yet another communication dated 15th December, 2011 was issued by the respondents, again addressed to the proprietor of **'Tandan** Diesel Service, Shop No.3794/3, 3rd in the Street, Mori Gate, Opp. Bhola Ram Market, Delhi . 11006, referring to the verification dated 18th November, 2011 of the experience certificate issued by the firm. By this letter, verification was sought by the respondents from proprietor of the firm as to the name of the company for the reason that name on the letter heads was reflected as **"TANDON** DIESEL SERVICE" while the rubber stamp affixed was mentioning the

firm's name as **"TANDON** DIESEL SERVICE" while on the original certificate, the firm was referred to as "TANDAN DIESEL SERVICE".

14. It is undisputed that this communication was sent by the respondents by speed registered post. The firm responded promptly by a certification sent by registered speed post to the respondent no.1 on 16th December, 2011, again on a letter head wherein the address of the firm was reflected as 3793/3, Kucha Ravi Das, Opp. Bhola Ram Market, Mori Gate, Delhi 110006. Reference was made to the letter of respondent no.1 dated 13th December, 2011, and it was once again certified that Shri Khem Chand, the present petitioner had worked in the workshop as assistant/helper mechanical for the aforenoticed period. The firm certified the good moral character of the petitioner as well.

We may note that this letter is erroneously dated 16th November, 2011. It refers to the letter of the respondent no.1 dated 13th December, 2011. The original envelope available in the shows that it has been posted on 16th December, 2011. There is thus an error in mentioning 'November' in the date which is actually 'December'.

15. It may also be noted that the address on the envelope in which the certificate was sent on 16th December, 2011, the following name and address of the firm stands scribed in hand:

"Tandon Diesel Service
Sh. No.3794/3, 3rd In the street,
Mori Gate, Opp. B. Ram Market,
Delhi 110006"

16. It is noteworthy that all letter heads of the firm on record contain the following two telephone numbers:-

2925217
2947828 PP

17. It would appear that the spelling of the surname. Tandon, has been varied on the letter head as is borne out from the endorsement of the name of the firm on the various envelopes and letter heads. There can be no dispute at all with regard to the identity of the firm. The respondent no.1 had sent its letters seeking verification by posts. The firm responded to the same under registered covers by speed post. Therefore, irrespective of the communication being sent to "TONDON Diesel Service" or "TANDON DIESEL SERVICE" or to "TANDAN Diesel Service", it was

duly received and identical responses received. It is evident that spelt in any manner as noted above, the reference is to one and the same person and firm which has responded to the query made.

18. The original record also contains an official noting which has been numbered as 291 dated 27th February, 2012 which records that the firm's response stood received by post and that the experience certificate with regard to the petitioner was found .okay.. The noting notes that on a physical verification report was not found genuine. It is because of this stand of the respondents that it becomes necessary to also refer to the physical verification which the respondent no.1 claims to have effected. This verification reflects an extremely sordid state of affairs.

19. Mr. Tandon, the proprietor of the TANDON DIESEL SERVICE sent a letter dated 19th March, 2012 to the Secretary of the Department of Training and Technical Education, Government of NCT of Delhi Muni Maya Ram Marg, Pitam Pura, Delhi . 110088 referring and enclosing the letters dated 4th November, 2011 and 13th December, 2011 sent by the respondents. He adverts in detail as to what transpired when the inspector of the respondent visited the firm to effect physical verification of the certificate issued by the firm in respect of Khem Chand.

20. The letter dated 19th March 2013 also reiterates that Khem Chand had worked in this workshop as Assistant/Helper Mechanical from 2nd May, 2003 to 13th May, 2006. It confirmed that the aforenoticed letters dated 28th June, 2006; 28th November, 2011 and 16th December, 2011 had been sent by the firm to the respondents.

The original record of the respondents again shows that the letter dated 19th March, 2012 was sent by registered speed post by TANDON Diesel Service and was received in the office of the respondent no.1 on 23rd March, 2012.

21. Grave anxiety has been expressed by the proprietor in this letter when he narrates the manner in which the firm was pressurized by the Inspector under the pretext of the physical verification. In the letter dated 19th March, 2012, the proprietor of the firm has stated thus:

> *"It is further stated that after some time, one person, Mr.Malik came in person and enquired about the experience certificate of Sh. Khem Chand. He also shown the copy of the experience*

> *certificate issued by my Supervisor on 28.06.2006 to Shri Khem Chand. Further, he told me to show his attendance register relating to the period during his tenure of service in my workshop and also demanded Sale Tax Number etc. It is submitted that the records of this period cannot available with me. Then he asked me to give in writing that the signature on the experience certificate is not mine. It admitted that the signature is not mine and the experience certificate was signed by my supervisor, who was authorized to issue such type of certificates. Actually, Mr. Malik cheated me and took my signature to use this certificate at their own, to prove as fake. The fact is that Shri. Khem Chand has worked in my workshop as Assistant/Helper Mechanical from 2nd May 2003 to 13th May, 2006. It is also a fact that earlier my workshop was situated at 3778, Mori Gate, Delhi . 110006, which I have shifted to new address at 3793/3, Kucha Ravi Das, Opp. Bhola Ram Market, New Delhi . 110006."*

22. It is therefore, apparent that in the guise of physical verification, the Inspector who was sent to verify the same has in fact harassed the firm's proprietor for extraneous reasons, which are not disclosed. The grievance of the sole proprietor reflected as above shows how the inspector sent by respondents, pressurized the firm to disown its pervious certificate.

23. It is noteworthy that even the physical verification by Mr.Malik establishes the existence of TANDON DIESEL SERVICE at the given address. This puts the issue of identity of the firm beyond the pale of suspicion.

24. Our attention is drawn to the endorsement made on a photocopy of the certificate dated 28th November, 2011 which is to the effect that TANDON Diesel Service exists at the above mentioned address since 1986. *"I never changed my address during this period"* Interestingly, even in this certificate there is no denial to the fact that Khem Chand had worked with the firm as Assistant/Helper Mechanical.

25. So far as change of address is concerned, the same has been informed by the firm in its communication. No effort has been made by the respondents to verify the address of the firm for the year 2006 when the original certificate was issued.

26. Ms. Ruchi Sindhwani, learned counsel for respondent no.1 relies on the endorsement made on the certificate dated 8th June, 2006 to the effect that "this experience certificate was not issued by me and signature not signed by me"

Here again the respondent no.1 has gravely erred in construing the certificate. The proprietor of the firm has clearly explained the circumstances in which he was compelled to sign the letter by the inspector. The proprietor has also explained that the certificate dated 28th June, 2006 was signed by his supervisor who was authorised to issue such type of certificate and not signed by him.

27. Placing reliance on the above statement on the certificate dated 8th June, 2006 a report has been submitted by one Shri Anil Malik dated 13th January, 2012.

28. As per the communication dated 19th March, 2012, the statement that the certificate of 2006 was not signed by him was correct. However, the proprietor of the firm had clearly explained that the experience certificate was signed by his supervisor who was authorized and who had issued the certificate under various authority.

29. We are further informed that so far as the verification which the inspector claims to have procured is not in the hand writing of the sole proprietor. The circumstances in which his signature was obtained have been explained in the letter dated 19th March, 2012 by the proprietor of the firm.

30. The proprietor of the firm has denied the correctness of the endorsement dated 28th November, 2011, while reiterating the contents of the earlier certificate on which it was endorsed. Yet the respondent no.1 relied upon the endorsement to discredit the certificate so as to deny the consideration for the appointment to the petitioner.

31. There was therefore, no reasons to doubt the correctness of the authenticity of the certificate dated 8th June, 2006 (wrongly referred as 28th June, 2006 in some places of the record).

32. We are informed by Ms. Ruchi Sindhwani, learned counsel that the petitioner's dossier was returned to the respondent no.2 on the 22nd March, 2012. The letter dated 19th March, 2012 is stated to have been received by the respondent No.1 on the 23rd March, 2012 as per the

diarization on the original in the record. The same has been completely ignored by the respondents. Even if the letter dated 19th March, 2012 had not been received, the above narration would show that there is no reason to doubt the letter dated 28th November, 2011 and 16th December, 2011 (wrongly mentioned as 16th November, 2011) received by respondent No.1 in response to its letters of 4th November, 2011 and 15th December, 2011.

33. A facade of suspicion has been created based on the differential spelling of 'Tandon' in the name of the firm. In fact the firm itself has used different spellings for the surname .Tandon. as appears in the various communications. The doubt thus was completely without any basis, factually or legally.

34. It is not disputed before us that the educational qualifications of the petitioner as well as his caste certificate as his belonging to the scheduled caste stand duly verified. The petitioner had successfully participated in the selection process and he was denied in the favourable consideration and appointment by the respondents on an erroneous and misconceived notion that he had submitted false experience certificate.

35. Even though the dossier of the petitioner had been sent by the respondents to the respondent No.2 on the 22nd March, 2012, nothing prevented the respondent no.1 from recalling the same and proceeding in the matter in the light of the statements made in the letter of 19th March, 2012. The petitioner belongs to the Scheduled Caste category and deserved the special treatment which law has mandated qua him. There is no dispute also that the vacancy for the post for which the petitioner had applied, still exists and there is no legal prohibition to the appointment of the petitioner.

36. In view of the above discussion, the finding of the Tribunal to the effect that the experience certificate issued to the petitioner by Tandon/ Tondon submitted by the respondents was not genuine is also contrary to the record as well as established facts. Respondent no.1 was not justified in returning the dossier of the applicant to respondent no.2 or denying appointment to the petitioner for this reason.

It is accordingly directed as follows:-

(i) The order dated 19th December, 2013 is hereby set aside

and quashed.

(ii) A direction is issued to respondent no.1 to proceed in the matter of appointment of the petitioner for the post of mathematician/instructor pursuant to the selection process initiated by the notice advertised No.03/2007 published by the DSSSB.

(iii) The respondent shall pass appropriate orders in regard thereto within a period of four weeks and communicate the same to the petitioner forthwith. Given the fact that the petitioner was wrongly denied consideration by the respondents, the petitioner shall be entitled to consequential benefits of protection of seniority, notional pay, etc.

(iv) It is made clear that petitioner shall be placed in the seniority list as per his merit in the selection process in question.

(v) The petitioner shall not be entitled to arrears of salary.

The writ petition and pending applications are allowed in the above terms.

Dasti.

ILR (2014) III DELHI 1942
CRL. A.

RIZWAN @ BHURA ....APPELLANT

VERSUS

STATE OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 362/2012 DATE OF DECISION: 23.05.2014

Indian Penal Code, 1860—Arms Act, 1959—S. 25—Appeal against conviction—Accused apprehended at a short distance from the spot and found in possession of country made pistol with live cartridges—FIR lodges promptly—No animosity between complaint and accused—Accused not even a resident of Delhi Minor contradictions and small improvement in the testimony of the witnesses do not effect the basic structure of the prosecution case—Since the accused apprehended after the incident at a short distance there was no requirement of TIP. Acquittal of co-accused—Does not necessitate acquittal of appellant where there are specific and cogent evidence of his involvement—It is always open to Court to differentiate the accused who is convicted from those who are acquitted. S. 397 IPC—Describes minimum sentence for improvement and does not prescribe fine, therefore, imposition of fine U/s. 397 IPC is not permissible.

[Di Vi]

APPEARANCES:

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

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP. SI Raj Kumar, PS Kalyan Puri.

RESULT: Appeal partially allowed.

S.P. GARG, J.

1. Challenge in this appeal is to a judgment dated 25.02.2012 of learned Additional Sessions Judge-02 in Sessions Case No.28/08 arising out of FIR No.296/06 registered at police station Krishna Nagar by which the appellant was convicted under Section 392/397 IPC and 25 Arms Act. By an order dated 29.02.2012, he was awarded various prison terms with fine.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 03.11.2006 at about 11:45 AM, in front of Himgiri Automobile, Kanti Nagar, Road No.57, Delhi, the appellant and his associates Asif and Dhillu Phurkan (since acquitted) robbed complainant-Sanjay Mahajan of '30,000/-at pistol point. On raising alarm by the complainant, the appellant was apprehended at a short distance and the robbed articles were recovered from his possession. He was also found in possession of a country-made pistol with live cartridges. Statements of witnesses conversant with the facts were recorded. During investigation, Asif and Dhillu Phurkan were arrested and put to Test Identification Proceedings. After completion of investigation, a charge-sheet was submitted against the appellant and his associates; they were duly charged and brought to trial. The prosecution examined 11 witnesses to prove their guilt. In 313 statement, the accused persons denied their complicity in the crime and pleaded false implication. The trial resulted in the appellant's conviction as aforesaid. Asif and Dhillu Phurkan were acquitted of the charges. It is relevant to note that State did not challenge their acquittal.

3. Learned Sr.Counsel for the appellant urged that the trial court did not appreciate the evidence in its true and proper perspective and ignored the vital discrepancies and improvements in the statements of the prosecution witnesses without valid reasons. The appellant and the complainant were not medically examined. The prosecution witnesses gave inconsistent version about the exact place of recovery of katta from appellant's possession. On the same set of evidence, co-accused Asif and Dhillu Phurkan were acquitted. Learned Additional Public Prosecutor urged that the conviction is based upon fair appraisal of evidence and no sound reasons exist to disbelieve the complainant.

4. The incident in which the complainant-Sanjay Mahajan was robbed of Rs. 30,000/-took place at around 11:45 AM on 03.11.2006. The complainant had come to Delhi in connection with his business and was also robbed of a blank cheque bearing signatures of his wife-Rajni Mahajan. The appellant-Rizwan @ Bhura was apprehended soon on the complainant's raising alarm when the TSR in which the assailants had fled after the crime was chased. The Investigating Officer lodged First Information Report in promptitude after recording complainant-Sanjay Mahajan's statement (Ex.PW-2/1) by sending rukka at 02:45 pm. In the complaint Sanjay Mahajan gave detailed account of the incident as to how and under what circumstances the three assailants in the TSR robbed him of Rs.30,000/- and cheque of State Bank of India at pistol point. He further disclosed about the apprehension of the appellant and recovery of the country-made pistol used to put him in fear. Since the FIR was lodged in promptitude without any delay, there was least possibility of the complainant to falsely implicate the appellant with whom he had no prior animosity. The appellant was not even resident of Delhi and had travelled from Himachal Pradesh in connection with his business. In his Court statement, he supported the prosecution in its entirety and proved the version given to the police at the earliest available opportunity without any major deviation. He identified Rizwan @ Bhura to be the assailant who was armed with a pistol and used it to rob him of '30,000/- and a cheque. In the cross-examination, the complainant was confronted with the statement (Ex.PW-2/1) where some of the facts mentioned in the examination-in-chief were omitted to be recorded. He further disclosed that after the incident, he had called the police at 100 and the PCR had arrived after 30/45 minutes. Rizwan @ Bhura was given beatings by the public. He, HC Sompal and 5/7 public persons had given chase to the TSR. Scanning the complainant's testimony as a whole, it reveals that despite in-depth cross-examination, no material discrepancies or contradictions could be extracted to shatter it. Of course, the complainant made some improvements in his deposition before the court and the facts stated by him did not find mention in the statement (Ex.PW-2/1) However, these improvements are minor in nature and do not affect the basic structure of the prosecution case. So far as the identity of the appellant and the role attributed to him in the crime is concerned, he was certain that the appellant was the author of the crime. No ulterior motive was assigned to the complainant to falsely recognize and identify the appellant. The complainant had travelled on the day of his examination from Himachal

and had produced a ticket (Ex.2/D1) in that regard. He was not going to be benefited by making false statement to implicate the appellant. Since the appellant was apprehended at a short distance after the incident, there was no necessity to put him to Test Identification Proceedings as the complainant identified him at the spot. The police also recovered TSR No. DL1RJ 1594 in which the assailants were travelling. This TSR (Ex.P-5) was released to PW-7 (Sunil Kumar Tyagi) on superdari. The appellant failed to explain as to how and under what circumstances, the TSR which was in their possession came to be seized by the police. PW-7 thus corroborates the version given by the complainant. Minor contradictions and discrepancies highlighted by the appellant's counsel do not affect the core of the prosecution case to discredit the cogent and unimpeachable testimony of the complainant. Acquittal of co-accused Asif and Dhillu Phurkan for reasons detailed in the judgment does not result the appellant's acquittal when there are specific and cogent evidence to establish his involvement in the crime. It is always open to a court to differentiate the accused who had been acquitted from those who was/were convicted. Simply because the complainant and the appellant were not medically examined, it won't affect the prosecution case.

5. All the relevant submissions of the appellant have been dealt cogently by the prosecution in the impugned judgment and no deviation is called for. Minimum sentence prescribed under Section 397 IPC is seven years, which cannot be reduced or modified. The appellant has been sentenced to pay Rs.5,000/- under Section 392 IPC; Rs.10,000/- under Section 397 IPC and Rs.1,000/- under Section 25 Arms Act. Section 397 IPC does not regulate imposition of fine. It only prescribes minimum sentence of imprisonment which cannot be less than seven years. Hence fine sentence imposed under Section 397 IPC is not permissible and is set aside. Default sentence for non-payment of fine under Sections 392 IPC and 25 Arms Act is reduced to SI for fifteen days and ten days respectively. Other terms of the sentence order are left undisturbed.

6. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith along with the copy of this order.

ILR (2014) III DELHI 1946
MAC APP.

ROYAL SUNDRAM ALLIANCE INSURANCE CO. LTD. ....APPELLANT

VERSUS

VIMLA DEVI & ORS. ....RESPONDENTS

(DEEPA SHARMA, J.)

MAC APP. NO. : 1192/2012 DATE OF DECISION: 28.05.2014

(A) Motor Vehicle Act, 1988—Section 166 & 140—Award passed by Motor Accident Claims Tribunal challenged by insurance company on ground of incorrect multiplier as per age of deceased applied to calculate compensation in death case of a bachelor aged 21 years. Held:- Multiplier has to be taken as per the age of bachelor deceased or the survivor, whichever is higher.

The contention of the appellant has force. It is a settled law that the multiplier has to be taken as per the age of the deceased or the survivor whichever is higher. In this case, the age of the survivor is higher and, therefore, multiplier has to be taken as per the age of the parents. The age of the parents was 55 years approximately. Therefore, in view of case of Sarla Verma v. DTC 2009 ACJ 129 the multiplier of 9 ought to have used while calculating the loss of dependency. **(Para 7)**

(B) Motor Vehicle Act, 1988—Section 166 & 140—Award passed by Motor Accident Claims Tribunal challenged by insurance company on ground that legal heirs of deceased not entitled to future prospects. Held:- Only two categories i.e. where the deceased was self employed or where he was working on a fixed salary

with no provision of annual increment etc. are excluded while calculating the future prospects.

The Apex court has made a reference of Sushma Thomas Case wherein the future prospects were given to a deceased who had a 'stable job'. In other referred cases also, the deceased were salaried persons. The careful reading of the findings of the Apex court clearly shows that it had intended to exclude only two categories i.e. where the deceased was self-employed or where he was working on a fixed salary with no provision of annual increment etc. By necessary implication, it can be concluded that the Hon'ble Apex court has not intended to exclude the salaried persons who are not employed on a fixed salary. Thus, the Apex court had meant to include all those persons which are in employment but not on a fixed salary. **(Para 11)**

Important Issue Involved: (A) Multiplier has to be taken as per the age of bechelor deceased or the survivor whichever is higher.

(B) Only two categories i.e where the deceased was self employed or where he was working on a fixed salary with no provision of annual increment etc. are excluded while calculating the future prospects.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Ms. Suman Bagga, Adv.

FOR THE RESPONDENTS : Mr. G.K. Sachdeva, proxy counsel for Mr. M.C. Premi, Adv.

CASES REFERRED TO:

1. *Rajesh and Others* vs. *Rajbir Singh and Others* 2013 (9) SCC 54.

2. *Sarla Verma* vs. *DTC* 2009 ACJ 129.

RESULT: Appeal and counter claim disposed of.

DEEPA SHARMA, J.

1. In this case the insurance company has challenged the award dated 18th August, 2012 awarding compensation of Rs.6,74,904/- and 22nd September, 2012 awarding compensation of Rs.10,25,256/- vide this appeal.

2. An FIR no.100/2010 under Section 279/337/304-A IPC was registered against the driver of truck bearing no.DL 1M 2691. On 20th June, 2010, one Anil Kumar along with deceased Hans Raj was strolling on pavement on leftside foot path of Delhi Cantt Fly over and thereafter they came down on the road due to a tree standing in the middle of the pavement when suddenly a truck bearing no. DL-1M-2691 being driven by its driver in a very high speed in a rash and negligent manner without blowing any horn, hit both of them from behind. Both of them were removed to Base Hospital, Delhi Cantt and from there they were transferred to DDU Hospital. Anil was discharged after treatment whereas Hans Raj was taken to Balaji Action Hospital, Paschim Vihar. He was declared as brought dead. The deceased was 21 years of age and was pursuing his graduation in Delhi University. The case of the legal heirs of the deceased is that he was working as a Helper in a school bus.

3. Counter claim has also been filed by the legal heirs of the deceased whereby they have claimed Rs.50,000/- on account of funeral expenses. Rs.10,000/- awarded towards treatment and claim enhancement in the compensation.

4. The learned Tribunal reached to the conclusion that accident was the result of rash and negligent driving by the driver of the offending vehicle and that the deceased was 21 years of age and pursuing his graduation but since there was no evidence that he was working as a Helper on a school bus, his income was taken as per schedule of minimum wages of a unskilled worker and the loss of dependency was calculated. Subsequently, an application under Section 114 read with Order 47 of the Code of Civil Procedure was moved wherein it was pointed out that since the deceased was matriculate, the minimum wages ought to have been taken of a matriculate. His matriculation certificate Ex.PW1/E and diploma certificate Ex.PW1/C was proved on record. In view of these documents, the learned Tribunal reached to the conclusion that minimum

wages ought to have been taken of a matriculate and accordingly, recalculated the loss of dependency and awarded a sum of Rs.10,25,256/-. Vide its earlier order dated 18th August, 2012, the tribunal had awarded a sum of Rs.6,74,904/-. The Tribunal has also fixed the liability to pay the compensation upon the insurance company.

5. The appellant has assailed this award on various grounds. The first ground is that the tribunal has erred in modifying the earlier order dated 18th August, 2012 and there was an order dated 22nd September, 2012 is liable to be quashed. This contention of the appellant has no merit in it for the simple reason that the Tribunal is empowered to review its order if a Tribunal feels that there was an error apparent on the record which needed to be corrected. In its earlier order dated 18th August, 2012, the learned Tribunal had reached to the conclusion that the deceased was pursuing his graduation. This very fact shows that the deceased was a matriculate, yet while calculating loss of dependency, the minimum wages of matriculate was not used. Subsequently, when in the application of review, documents showing passing of matriculate and other relevant document were produced before the Tribunal, it was the duty of the Tribunal to correct the wrong. I find no reason to quash the impugned award dated 22nd September, 2012.

6. The next contention of the appellant is that the Tribunal has wrongly taken the multiplier as per the age of the deceased. Since the deceased was a bachelor of 21 years of age and he is survived by his parents, the multiplier ought to have been taken as per average age of parents.

7. The contention of the appellant has force. It is a settled law that the multiplier has to be taken as per the age of the deceased or the survivor whichever is higher. In this case, the age of the survivor is higher and, therefore, multiplier has to be taken as per the age of the parents. The age of the parents was 55 years approximately. Therefore, in view of case of **Sarla Verma v. DTC** 2009 ACJ 129 the multiplier of 9 ought to have used while calculating the loss of dependency.

8. It is also argued on behalf of the appellant that the Tribunal has wrongly awarded future prospects while he was not entitled to any future prospects in view of **Sarla Verma's** case (Supra). It is argued on behalf of the LRs of the deceased that the Tribunal has rightly awarded the future prospects, however, in view of the **Sarla Verma's** case

(supra) it ought to have been 50% since the age of the deceased was below 40 years instead of 30% which the Tribunal has used.

9. I have given careful consideration to the findings of the apex court. The apex court in **Sarla Verma** (supra) has clearly laid down the proposition for grant of the future prospects. It has categorised the categories of persons entitled for the future prospects. The relevant paragraphs are reproduced as under:

> "10. Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects. In Susamma Thomas, this Court held that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand (annual contribution to the dependants); and that where the deceased had a stable job, the court can take note of the prospects of the future and it will be unreasonable to estimate the loss of dependency on the actual income of the deceased at the time of death. In that case, the salary of the deceased, aged 39 years at the time of death, was Rs.1032/- per month. Having regard to the evidence in regard to future prospects, this Court was of the view that the higher estimate of monthly income could be made at Rs.2000/- as gross income before deducting the personal living expenses. The decision in Susamma Thomas was followed in **Sarla Dixit v. Balwant Yadav [1996 (3) SCC 179],** where the deceased was getting a gross salary of Rs.1543/-per month. Having regard to the future prospects of promotions and increases, this Court assumed that by the time he retired, his earning would have nearly doubled, say Rs.3000/-. This court took the average of the actual income at the time of death and the projected income if he had lived a normal life period, and determined the monthly income as Rs.2200/- per month. In **Abati Bezbaruah v. Dy. Director General, Geological Survey of India [2003 (3) SCC 148]**, as against the actual salary income of Rs.42,000/-per annum, (Rs.3500/-per month) at the time of accident, this court assumed the income as Rs.45,000/- per annum, having regard to the future prospects and career

advancement of the deceased who was 40 years of age.

"11. In Susamma Thomas, this Court increased the income by nearly 100%, in Sarla Dixit, the income was increased only by 50% and in Abati Bezbaruah the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. [Where the annual income is in the taxable range, the words 'actual salary' should be read as 'actual salary less tax']. The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.

Re : Question (ii) -deduction for personal and living expenses."

10. From the directions in **Sarla Verma** Case (supra) , it is apparent that only two categories of persons are not entitled to future prospects, one, where the deceased was self-employed and secondly, where the deceased was working on a fixed salary (without prospect of annual increment etc).

11. The Apex court has made a reference of Sushma Thomas Case wherein the future prospects were given to a deceased who had a 'stable job'. In other referred cases also, the deceased were salaried persons. The careful reading of the findings of the Apex court clearly shows that it had intended to exclude only two categories i.e. where the deceased was self-employed or where he was working on a fixed salary with no provision of annual increment etc. By necessary implication, it can be concluded that the Hon'ble Apex court has not intended to exclude the salaried persons who are not employed on a fixed salary. Thus, the Apex court had meant to include all those persons which are in employment

but not on a fixed salary.

12. In the present case, the deceased was treated as a daily wager. The government revises the minimum wages twice annually i.e on 1st of Feb and 1st of August. The deceased thus does not fall in the exempted category in **Sarla Verma** Case (Supra). As per **Sarla Verma** Case (supra), since the age of the deceased was below 40 years, he was entitled for addition of 50% of his salary towards future prospect.

a) Minimum wages of matriculate	Rs.6448
+ 50% future	Rs.6448 + 3224
	= Rs.9672
b) 1/2 deductions on personal living expenses	Rs.9672 -4191
	= Rs.5481/-
c) Loss of dependency	5481x12x9
	= Rs.591954/-

13. In the counter claim, the legal heirs of the deceased as contended that The Tribunal has awarded only a meagre sum of Rs.10,000/- towards funeral expenses. They had spent Rs.50,000/- towards funeral expenses and they ought to have been awarded the same. Learned counsel for the appellant has stated that the Tribunal has correctly awarded the funeral expenses.

14. The apex court in the case of 2013 (9) SCC 54 titled **Rajesh and Others vs. Rajbir Singh and Others** has explained what is a just for compensation. The relevant paragraph is reproduced as under:

"7. The expression 'just compensation' has been explained in **Sarla Verma'** case (supra), holding that the compensation awarded by a Tribunal does not become just become just compensation merely because the Tribunal considered it to be just. 'Just Compensation' is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. After surveying almost all the previous decisions, the Court almost standardized the norms for the assessment of damages in Motor Accident Claims."

The court has also held as under:

21. We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of compensation under the head 'Funeral Expenses'. The 'Price Index', it is a fact has gone up in that regard also. The head 'Funeral Expenses' does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses, to award at least amount of Rs. 25,000/-."

15. In view of this, I award a sum of Rs.25,000/-towards funeral expenses. I award the following compensation.

1.	Loss of dependency	Rs.5,91,948/-
2.	Loss of affection	Rs.1,00,000/-
3.	For funeral expenses	Rs. 25,000/-
4.	Loss of Estate	Rs. 10,000/-
	Total	**Rs.7,26,948/-**

16. I award a sum of Rs.7,26,948/- with interest at the rate of 9% per annum from the date of filing the petition till its realization.

17. The compensation shall be distributed as per the directions of award of learned Tribunal dated 22nd September, 2012.

18. In view of the above, the appeal and the counter claim stand disposed of.

ILR (2014) III DELHI 1954
CS (OS)

SHRI DINESH CHADHA ....PLAINTIFF

VERSUS

HOTEL QUEEN ROAD PVT. LTD. ....DEFENDANT

(JAYANT NATH, J.)

CS (OS) NO. : 225/2009 DATE OF DECISION 29.05.2014

Code of Civil Procedure, 1908—Specific Relief Act, 1963—Section 14, Indian Contract Act, 1872—Section 24, 73—Suit for declaration and damages that termination of his services is illegal, arbitrary and in violation of the terms of employment and principles of natural justice. Plaintiff joined at the post of General Manager and continued to work till 02.01.2009. On 02.01.2009 when Plaintiff joined after a leave the was orally asked to resign without assigning any reason and was asked to leave the office abruptly/Plaintiff could not even take his original papers lying in the office containing important documents. The Plaintiff returned the laptop and the company car provided to the plaintiff was also taken away forcibly. Plaintiff contends that part of salary not paid and cash incentive not paid in full, medical bills and medical insurance not paid, statutory benefits of provident fund have also not been deducted. Defendant states that Plaintiff was not discharging his duties well and was having a highly unprofessional attitude. Oral notice of termination of three months was given to the Plaintiff. Held—No evidence on record to show that oral notice of termination was given to the plaintiff. Termination of the Plaintiff is illegal as no notice of three months was given. Salary for three months granted to Plaintiff. However, relief of reinstatement cannot be granted in

view of Section 14 of the SRA as the present contract provides for a termination clause. Claim of Plaintiff for cash incentive is rejected being hit by s. 24 of the contract act. Claim of maintenance of company car, driver's salary, Petrol expenses, provident fund, medical reimbursement and medical insurance allowed. Damages of Rs. 25 lacs rejected as no cogent evidence has been places on record on the basis of which claim can be adjudicated. Compensation of any remote or any indirect loss or damage sustained by the party complaining of a breach cannot be granted. Suit decreed.

In my view, the said relief as sought for by the plaintiff cannot be granted in view of Section 14 of the Specific Relief Act which provides that where a contract in its nature is determinable or a contract the performance of which involves the performance of a continuous duty which the court cannot supervise, such a contract cannot be specifically enforced. The present contract provides a termination clause meaning that it is determinable. Hence, on this ground itself the present contract cannot be specifically enforced. Reference in the above context may also be had to the judgment of the Supreme Court in the case of **State Bank of India vs. S.N. Goyal,** AIR 2008 SC 2594 wherein para 11 the Court held as follows:-

> "11. Where the relationship of master and servant is purely contractual, it is well settled that a contract of personal service is not specifically enforceable, having regard to the bar contained in Section 14 of the Specific Relief Act, 1963. Even if the termination of the contract of employment (by dismissal or otherwise) is found to be illegal or in breach, the remedy of the employee is only to seek damages and not specific performance. Courts will neither declare such termination to be a nullity nor declare that the contract of employment subsists nor grant the consequential relief of reinstatement. ...."

Accordingly it is held that the plaintiff is not entitled to any relief of reinstatement with full back wages as claimed. **(Para 24)**

In my view a perusal of the terms of the employment as contained in letter dated 10.10.2007 would show that the remuneration and perks receivable by the plaintiff have been comprehensively spelt out. There is no mention of any incentive other than the salaried package which is stipulated. Based on the bald averments of the plaintiff, it is not possible to accept that the terms of the written contract were varied by any oral communication. That apart, as rightly argued by the learned counsel for the defendants, the contract being an attempt to evade income tax, any such agreement if it was ever entered into would possibly be hit by Section 24 of the Contract Act. Such claim of the plaintiff for cash incentive is accordingly rejected. **(Para 28)**

The next component as per Schedule-I pertains to the maintenance of the company car, petrol expenses, unpaid driver's salary, provident fund, medical reimbursement and medical insurance. The total amount claimed on this account is Rs.3,10,678/-. **(Para 29)**

Accordingly I allow the above claim of the plaintiff for a sum of Rs.3,10,678/-. **(Para 37)**

I have already recorded a finding above about termination of the services of the plaintiff being illegal as no termination notice as provided in letter dated 10.10.2007 of three months' was given to the plaintiff. Accordingly, the plaintiff on account of the said illegality perpetuated by the defendants would be entitled to claim salary for the said period of three months. This damage arose as a direct and inevitable consequence of the breach of the employment contract by the defendant. The said salary would come to Rs.6 lacs i.e. Rs. 2 lacs per month. Accordingly, the plaintiff would be entitled to the said sum of Rs.6 lacs. **(Para 38)**

Regarding the claim of damages of Rs.25 lacs, no cogent

evidence has been placed on record on the basis of which this claim can be adjudicated upon. Even otherwise in terms of Section 73 of the Indian Contract Act, compensation for any remote or any indirect loss or damage sustained by the party complaining a breach cannot be granted. Accordingly the claim for Rs.25 lacs is rejected. **(Para 40)**

[An Ba]

APPEARANCES:

FOR THE PLAINTIFF : Ms. Nandini Sahni, Advocate.

FOR THE DEFENDANT : Mr. Mohit Choudhary, Mr.Imraan and Ms.Damini Chawla, Advocates for D1 & D-3 Mr.Nitesh Jain and Mr.Sugam Seth, Advocates for D-2.

CASES REFERRED TO:

1. *Grand Vasant Residents Welfare Association* vs. *DDA & Ors.* in LPA no. 775/2003 decided on 05.03.2014.
2. *A. Shanmugam* vs. *Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam* 2012 (6) SCC 430.
3. *P.K. Gupta* vs. *Ess Aar Universal (P) Ltd.* RFA (OS) 78/ 2011.
4. *State Bank of India* vs. *S.N.Goyal,* AIR 2008 SC 2594.

RESULT: Suit decreed.

JAYANT NATH, J.

1. The present suit is filed by the plaintiff seeking relief of declaration and damages. As per the plaint the plaintiff was employed by defendant No.1 in its hotel, namely, Hotel Ramada Plaza at the post of General Manager vide contract letter dated 10.10.2007. Defendant No.2 is said to be a director of defendant No.1. Defendant No.3 is the younger brother of defendant No.2 who is said to have taken over the control of defendant No.1 with effect from 14.01.2009.

2. It is averred that the plaintiff officially joined the Hotel on 15.11.2007 at the post of General Manager and continued to work till 02.01.2009.

3. As per the plaint the plaintiff was entitled to receive salary of Rs.18 lacs per annum for the first six months and thereafter at the rate of Rs. 24 lacs per annum. Further it is averred that the plaintiff was to be paid a monthly sum of Rs.1.50 lacs in cash as incentive for the first six months and a sum of Rs.2 lacs per month in cash as incentive thereafter.

4. It is further averred that the plaintiff went on leave from 26.12.2008 till 01.01.2009. On 02.01.2009 when the plaintiff joined back his duties, the plaintiff was called by defendant No.2 and was orally asked to resign from the job as General Manager. It is averred that no reasons were assigned and the plaintiff was asked to leave the office abruptly. The plaintiff could not even take his original papers lying in the office containing important documents, bills, etc. The plaintiff returned the laptop and the company car provided to the plaintiff was also taken away forcibly.

5. It is the contention of the plaintiff that various dues have not been paid. A part of the salary was stated to be not paid. The cash incentive was said to have been paid very infrequently and at the whims and fancy of defendant No.2 and has not been paid in full. It is further averred that though the plaintiff was provided a car as agreed, he was not provided a driver and even the fuel was provided subject to a ceiling limit of 200 litres in a month whereas the plaintiff had to incur expenses of above 200 litres of petrol in a month. It is further averred that the plaintiff was entitled to medical bills and medical insurance which has not been paid. Statutory benefits of provident fund have also not been deducted. The statement of alleged dues of the plaintiff is attached as Schedule-I to the plaint (Ex.PW1/ 9). The same reads as follows:-

SCHEDULE-I

STATEMENT OF PENDING DUES OF SHRI DINESH CHADHA, GENERAL MANAGER, HOTEL RAMADA PLAZA.

Salary Arrears from 15th May 2008 to 30th Nov.2008	3,27,419/-

Cash Incentive Arrears till Nov.2008	6,89,919/-	
Salary for Dec.2008	2,00,000/-	
Cash Incentive for Dec. 2008	2,00,000/-	
Salary from 1st Jaun.2009 to 2nd Jan. 2009	12,903/-	
Cash Incentive from 1st Jan.2009 to 2nd Jan. 2009	12,903/-	
Sub Total		14,43,144/-
Company Car DL 4C AE 9035 Maintenance Expenses	5,654	
Petrol Expenses	60,000/-	
Unpaid driver's Salary @ Rs.5500/- p.m. w.e.f. 1.1.2008 to 31.12.2008	66,000/-	
Sub total		1,31,654/-
Provident Fund	1,47,392/-	
Approx. Interest on PF	13,454/-	
Sub total		1,60,846/-
Medical Reimbursement	11,220/-	
Medical Insurance	20,412/-	
Sub total		31,632/-
Ununtilised earned Leave (Privileged Leave) of 24 days		1,60,000/-
Notice Period Salary (3 months)		6,00,000/-
Total amount due to plaintiff by defendants		25,27,276/-

6. On the basis of the above averment, the plaintiff seeks a decree of declaration declaring that the termination of his services is illegal, arbitrary and in violation of the terms of the employment and principles of natural justice, a decree of declaration declaring that the plaintiff shall be deemed to be in service of the defendants and for consequential orders of reinstatement with full back wages and other dues and a decree of damages for a sum of Rs.25 lacs to be paid jointly or severally by the defendants.

7. Defendants No.1 and 3 filed their written statement claiming that the senior staff working with defendant No.1 at the relevant point of time, on inquiry informed that the plaintiff was not discharging his duties well and was having a highly unprofessional attitude. It is further averred

that an oral notice of termination of three months on 01.10.2008 was given to the plaintiff. It is averred that due to improper, unprofessional and negligent conduct of the plaintiff whereby the hotel company suffered a lot, the salary of the plaintiff for the month of December 2008 has been forfeited. The claim of the plaintiff for cash incentive has been denied stating that defendants No.1 and 3 were not a party to any such alleged understanding inasmuch as earlier the hotel was under the control of defendant No.2. It is further averred that even if any such understanding was arrived at, the same is illegal and against public policy and cannot be enforced in a court of law. The other claims of the plaintiff for unpaid dues have been denied.

8. Defendant No.2 has filed a separate written statement which substantially takes the same stand as defendant No.1 and 3. Defendant No.2 has further added that the plaintiff was misusing the hotel services for his personal and family use inasmuch as he is said to be getting his personal clothes dry cleaned, invited his family and friends at the coffee shop without paying the bills, etc.

9. On 29.05.2009 in IA No.6260/2009 this court passed an order holding that the forfeiture of the salary of the plaintiff for the month of December 2008 cannot be sustained and a direction for release of the salary of Rs.2 lacs being the salary for the month of December 2008 was issued. The appeal filed by the defendants against the said order was dismissed by the Division Bench. The said payment was made by defendants No.1 and 2 in court as recorded in order dated 03.08.2009. Similarly on 24.09.2009 in IA No.9918/2009 this court noted that salaries have been paid to the plaintiff at the rate of Rs.1.50 per month after 30.04.2008. Accordingly this court directed that arrears of salary in the sum of Rs.3,27,419/-for the period 15.05.2008 to 30.11.2008 as well as salary of Rs.12,903/- for one day i.e. from 01.01.2009 to 02.01.2009 be paid to the plaintiff. The other claims of three months' salary in lieu of notice period, provident fund, etc. were directed to await the conclusion of trial.

10. Issues were framed on 08.09.2009 which read as follows:-

"(i) Whether the suit is not maintainable as claimed by the Defendants? OPD

(ii) Whether the termination of the Plaintiff's services by the

Defendants was invalid and if so, to what effect? OPD

(iii) Whether the Plaintiff is entitled to damages and if so, to what amount? OPP

(iv) Whether the Plaintiff is entitled for a declaration as prayed for and consequential relief of reinstatement with full back wages as claimed? OPP

(v) Relief."

11. Plaintiff led evidence of three witnesses, namely, the plaintiff himself as PW1, Mr.K.K. Mittal, Assistant Local Authority, Department of Prevention of Food Adulteration as PW2 and Mr.Sunil Kumar Chadha, the brother of plaintiff as PW3. The plaintiff has exhibited 21 documents i.e. PW1/2 to PW1/22 (PW1/1 being the plaint). Seven of these documents have also been marked exhibits twice over, presumably in the course of admission/denial of documents, as Ex.P-1 to Ex.P-5 and Ex.P-7 to Ex.P-8.

12. The defendants filed the evidence of three witnesses i.e. Mr.Mandeep Gambhir as DW1, Mr.Dinesh Gupta as DW2 and Mr. Ashok Mittal as DW3. However, due to non-payment of cost, the right to lead further evidence on behalf of defendants No.1 and 3 was closed vide order dated 16.01.2012. The witnesses of the said defendants were never cross-examined. Similarly, as per order dated 24.04.2012 the right to lead evidence by defendant No.2 was also closed.

13. Learned counsel appearing for the plaintiff has strongly argued that the services of the plaintiff have been wrongfully terminated without giving the three months' notice as prescribed in the letter of appointment. Termination being illegal and wrongful, it is urged, it is void and hence the plaintiff is entitled to be reinstated with full back wages.

14. It is argued that as far as the cash incentive, as claimed by the plaintiff is concerned, the plaintiff has successfully proved the same. In the evidence by way of affidavit of PW1 the said witness has proved that he was entitled to cash incentives. It is urged that there is no cross-examination of the said witness on the same. It is further urged that PW3 has also proved that his brother, namely, plaintiff used to receive cash incentives. On damages it is urged that on account of wrongful termination, the plaintiff suffered damages.

15. Learned counsel appearing for defendants No. 1 & 3 and 2 respectively have reiterated the contentions raised in their separate written statements. They have reiterated that the claim of the plaintiff for cash incentive, even if any such agreement took place is void as being against the public policy and hit by Section 24 of the Indian contract Act. It is further urged that there can be no damages for termination of the contract as alleged.

16. Learned counsel for defendants No. 1 and 3 has also urged that the employment to plaintiff was given by defendant No.2 and the liability if any to pay the plaintiff is of defendant No.2.

17. I will first deal with issue No.1 which reads as follows:-

"(i) Whether the suit is not maintainable as claimed by the Defendants? OPD"

18. The only ground urged in this regard is that on account of the fact that the plaintiff is claiming a cash component, which term is hit by Section 24 of the Indian Contract Act, hence the entire contract is void. Apart from the above no other argument has been made as to why the suit is not maintainable. There is no merit in the said contention of the defendants and the same is rejected. The claim for cash incentive is not based on the terms of the written contract as contained in letter dated 10.10.2007. The said contract is not in any way effected by the claim of the plaintiff for cash incentive. Accordingly I hold that the suit is maintainable.

19. I will now deal with issues No.2 and 4 together, which read as follows:-

"(ii) Whether the termination of the Plaintiff's services by the Defendants was invalid and if so, to what effect? OPD

(iv) Whether the Plaintiff is entitled for a declaration as prayed for and consequential relief of reinstatement with full back wages as claimed? OPP"

20. The facts that emerge as above are that as per the terms of the letter of appointment dated 10.10.2007 issued to the plaintiff, his services were terminable on giving a three months' notice from either side. Relevant clause of the Appointment letter reads as follows:-

"Notice Period : Three (3) months notice from either side."

21. According to the plaintiff, he was orally asked to leave the services on 02.01.2009. He was abruptly deprived of the use of the car and laptop on the same date. The defendants in their written statements have claimed that an oral notice of termination of three months on 01.10.2008 was given to the plaintiff. There is no evidence on record to show that any oral notice of termination was given to the plaintiff. The defendants have not been able to lead any evidence in as much as the right of defendant to lead evidence was closed before the witness of defendant Nos. 1 and 3 were cross-examined. Further had any such oral notice been given, the conduct of the parties after the oral notice would have shown so. In the absence of this evidence on record, the said contention of the defendants cannot be believed.

22. Accordingly, the version of the plaintiff is accepted, namely, that he was abruptly asked to leave the services on 02.01.2009 on an oral communication. No notice of three months, as required under the terms of the appointment letter was given. Accordingly, the termination of the services of the plaintiff is illegal inasmuch as it is contrary to the terms of his employment contract.

23. The issue would be what would be the effect of the said action of the defendants. The plaintiff seeks consequential relief of reinstatement with full back wages.

24. In my view, the said relief as sought for by the plaintiff cannot be granted in view of Section 14 of the Specific Relief Act which provides that where a contract in its nature is determinable or a contract the performance of which involves the performance of a continuous duty which the court cannot supervise, such a contract cannot be specifically enforced. The present contract provides a termination clause meaning that it is determinable. Hence, on this ground itself the present contract cannot be specifically enforced. Reference in the above context may also be had to the judgment of the Supreme Court in the case of **State Bank of India vs. S.N.Goyal,** AIR 2008 SC 2594 wherein para 11 the Court held as follows:-

"11. Where the relationship of master and servant is purely contractual, it is well settled that a contract of personal service is not specifically enforceable, having regard to the bar contained in Section 14 of the Specific Relief Act, 1963. Even if the termination of the contract of employment (by dismissal or otherwise) is found to be illegal or in breach, the remedy of the employee is only to seek damages and not specific performance. Courts will neither declare such termination to be a nullity nor declare that the contract of employment subsists nor grant the consequential relief of reinstatement. ...."

Accordingly it is held that the plaintiff is not entitled to any relief of reinstatement with full back wages as claimed.

25. The issue now comes as to whether the plaintiff is entitled to damages which issue is covered by issue No.3 which reads as follows:-

"(iii) Whether the Plaintiff is entitled to damages and if so, to what amount? OPP"

26. The claim for damages has not been fully spelt out. There are two components of monetary compensation that has been sought by the plaintiff, one is the pending dues as per Schedule-I of the employment contract and the second is a sum of Rs.25 lacs claimed as damages from the defendants. Unfortunately the issue is not very properly phrased in as much it does not specifically mention about unpaid dues. However, money that was payable to the plaintiff in terms of the employment contract, if wrongly withheld, can be claimed as a component of damages. The defendants have not argued to the contrary.

27. I will first deal with the claim as stipulated under Schedule-I. Certain amount is claimed on account of unpaid salary arrears. In view of the earlier orders passed by this Court, the salary arrears as per the terms of the employment contract have already been directed to be paid to the plaintiff. One component that remains to be settled is the claim of cash incentives which as per the plaintiff had been agreed to be paid by the defendants orally. The plaintiff is claiming cash incentives of Rs.1.50 lacs per month for the first six months and Rs.2 lacs per month thereafter. According to the plaintiff as said by him in his cross-examination on 08.03.2010, he claims to have received a sum Rs. 10.75 lacs as cash incentive. He confirms that this incentive was not shown by him in his income tax returns.

28. In my view a perusal of the terms of the employment as

contained in letter dated 10.10.2007 would show that the remuneration and perks receivable by the plaintiff have been comprehensively spelt out. There is no mention of any incentive other than the salaried package which is stipulated. Based on the bald averments of the plaintiff, it is not possible to accept that the terms of the written contract were varied by any oral communication. That apart, as rightly argued by the learned counsel for the defendants, the contract being an attempt to evade income tax, any such agreement if it was ever entered into would possibly be hit by Section 24 of the Contract Act. Such claim of the plaintiff for cash incentive is accordingly rejected.

29. The next component as per Schedule-I pertains to the maintenance of the company car, petrol expenses, unpaid driver's salary, provident fund, medical reimbursement and medical insurance. The total amount claimed on this account is Rs.3,10,678/-.

30. A perusal of the employment letter dated 10.10.2007 would show that the said letter provides for company maintained car and fuel with driver. There is no cap on the fuel consumption of the plaintiff. The letter also provides for reimbursement of medical expenses/insurance for the plaintiff and his family. Provident fund and gratuity have also to be provided by defendant No.1. Hence, the claim of the plaintiff pertaining to maintenance of company car, petrol expenses, unpaid driver's salary, provident fund, medical reimbursement and medical insurance is covered by the terms of the employment letter dated 10.10.2007.

31. We may now look at the pleadings of the parties. In the plaint, on the above issue the plaintiff has averred as follows:-

> "5. That apart from other terms and conditions, the plaintiff was also provided for a Toyota Car No.DL 4C AE 9035 and however as agreed the plaintiff was not provided the Driver by defendants and even the fuel was provided for with a ceiling limit of 200 liters per month. Whereas the plaintiff had to incur from his own pocket the expenses for extra 100 to 200 liters of Petrol as well as Salary for his Driver from his pocket to the tune of Rs.5500/-per month.
>
> 6. That apart from this, the plaintiff was also entitled to for Medical bills and Medical insurance to be reimbursed by the hotel. Even the said bills were never cleared by defendant no.1 hotel though tendered to hotel by plaintiff from time to time.
>
> 7. That the plaintiff is also insured with United India Insurance and is paying premium of Rs.1512/-per month. Even the said amount of Insurance was not paid to the plaintiff by defendant No.1 hotel even though it forms the part of terms and conditions as agreed to vide letter dated 10.10.2007 by defendants.
>
> 8. That even the Statutory benefits of the Provident Fund was not deducted and paid by defendant No.1 hotel as their contribution and there is total confusion about the status of Provident Fund as the plaintiff was never informed as to whether defendant no.1 hotel is actually deducting the Provident Fund and are also contributing from their side towards the same or not. Thus the plaintiff has not been paid even his statutory benefits by defendants till date."

32. Defendants No.1 and 3 in their written statement on the above paras of the plaintiff reply as follows:-

> "6. That the contents of para 5 of the suit plaint is wrong and is vehemently denied. That the plaintiff should be put to the strict proof of the same. It is submitted that the plaintiff was provided for a Toyota Car No. DL 4C AE 9035 and that the expenses towards the driver and fuel were claimed by him and the same were reimbursed to him in routine.
>
> 7. That the contents of para 6 and 7 of the suit plaint is wrong and vehemently denied due to want of knowledge. That the plaintiff should be put to the strict proof of the same.
>
> 8. That the contents of para 8 is a matter of record and need no reply."

33. The written statement of defendant No.2 on the above paras reads as follows:-

> "6. That the contents of para 5 of the suit plaint is wrong and is vehemently denied and the plaintiff should be put to the strict proof of the same. It is submitted that the plaintiff was provided for a Toyota Car No.DL 4C AE 9035 and that the expenses towards the driver and fuel were being claimed by him and the

same were being reimbursed to him in routine.

7. That the contents of para 6 and 7 of the suit plaint is wrong and vehemently denied due to want of knowledge. That the plaintiff should be put to the strict proof of the same.

8. That the contents of para 8 is a matter of record and need no reply."

34. In my view the pleadings of the defendants justify the above claim of the plaintiff. On the issue of pleadings a Division Bench of this Court in the case of **Grand Vasant Residents Welfare Association vs. DDA & Ors.** in LPA no. 775/2003 decided on 05.03.2014 in paras 30 and 32 held as follows:-

"31. On November 21, 2011 this Court while deciding RFA (OS) 78/2011 **P.K. Gupta vs Ess Aar Universal (P) Ltd.** held as under:

11. We need to highlight that the fundamental principles, essential to the purpose of a pleading is to place before a Court the case of a party with a warranty of truth to bind the party and inform the other party of the case it has to meet. It means that the necessary facts to support a particular cause of action or a defence should be clearly delineated with a clear articulation of the relief sought. It is the duty of a party presenting a pleading to place all material facts and make reference to the material documents, relevant for purposes of fair adjudication, to enable the Court to conveniently adjudicate the matter. The duty of candour approximates uberrima fides when a pleading, duly verified, is presented to a Court. In this context it may be highlighted that deception may arise equally from silence as to a material fact, akin to a direct lies. Placing all relevant facts in a civil litigation cannot be reduced to a game of hide and seek. In the decision reported as 2011 (6) SCALE 677 **Rameshwari Devi vs. Nirmala Devi** the Supreme Court highlighted that pleadings are the foundation of a claim of the parties and where the civil litigation is largely based on documents, it is the bounden duty and obligation of the Trial Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties.

xxx

32. In the decision reported as 2012 (6) SCC 430 **A. Shanmugam vs Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam** it was held as under:"

27. The pleadings must set-forth sufficient factual details to the extent that it reduces the ability to put forward a false or exaggerated claim or defence. The pleadings must inspire confidence and credibility. If false averments, evasive denials or false denials are introduced, then the Court must carefully look into it while deciding a case and insist that those who approach the Court must approach it with clean hands."

35. The above denial of the defendants being utterly vague, the claim of the plaintiff can be allowed on this basis itself.

36. That apart, the plaintiff in his evidence (PW1) duly reiterated the submissions made in the plaint. There is no cross-examination on the same by the defendants.

37. Accordingly I allow the above claim of the plaintiff for a sum of Rs.3,10,678/-.

38. I have already recorded a finding above about termination of the services of the plaintiff being illegal as no termination notice as provided in letter dated 10.10.2007 of three months' was given to the plaintiff. Accordingly, the plaintiff on account of the said illegality perpetuated by the defendants would be entitled to claim salary for the said period of three months. This damage arose as a direct and inevitable consequence of the breach of the employment contract by the defendant. The said salary would come to Rs.6 lacs i.e. Rs. 2 lacs per month. Accordingly, the plaintiff would be entitled to the said sum of Rs.6 lacs.

39. Apart from the above, the plaintiff has also claimed interest on provident fund and unutilized earned leave. There is nothing on record to show as to how the plaintiff is entitled to the same. The claims on this count are accordingly rejected.

40. Regarding the claim of damages of Rs.25 lacs, no cogent evidence has been placed on record on the basis of which this claim can be adjudicated upon. Even otherwise in terms of Section 73 of the Indian

Contract Act, compensation for any remote or any indirect loss or damage sustained by the party complaining a breach cannot be granted. Accordingly the claim for Rs.25 lacs is rejected.

41. Accordingly the plaintiff would be entitled to recover a sum of Rs.9,10,678/-.

42. The plaintiff has claimed a decree against the defendants. It appears that defendants No. 2 and 3 have been impleaded as defendants being directors or promoters of defendant No.1. There is no clear averment in the plaint or otherwise to show as to how defendants No. 2 and 3 would be personally liable for the dues of defendant No.1 which is a private limited company. The employment contract of the plaintiff is with defendant No.1. It is settled legal position that a company is limited by its liability as per Memorandum & Article of Association of the company. Other than where directors have made themselves personally liable by way of guarantee, indemnity, etc., a liability of a director or officer of a company under common law is only confined to cases of malfeasance and misfeasance. In the present case there is no such allegation of malfeasance and misfeasance. Accordingly the claim of the plaintiff can only succeed against defendant No.1.

43. Accordingly the suit is decreed in favour of the plaintiff and against defendant No.1 for a sum of Rs.9,10,678/-. The plaintiff is also entitled to pendente lite simple interest @ 9% per annum from the date of filing of the suit till recovery. The plaintiff shall also be entitled to costs.

ILR (2014) III DELHI 1970
CRL. A.

KANCHAN SINGH ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 65/2000 DATE OF DECISION: 30.05.2014

Indian Penal Code, 1860—S.308/326/324/34—Prompt lodging of FIR—Since of FIR was lodges without any delay, there was least possibility of the complainant to fabricate or concoct a false story in such a short interval. Contradictions in evidence—Held, such minor contradictions are bound where a group of persons had attacked three persons. In such a situation, it would not be reasonable to expect that every witness should describe with mathematical accuracy about each and every injury sustained by all the injured persons giving minor details. The totality of the evidence of a witness has to be taken into consideration for fixing the probative value. The totality of the evidence of a witness has to be taken into consideration for fixing the probative value. Plea of alibi—Held, when a plea of alibi is raised by an accused, it is for him to establish the said plea by positive evidence. The burden is on the accused to show that he was somewhere else other than the place of occurrence at the time of incident. The burden on the accused is undoubtedly heavy. This flows from Section 103 of Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. Plea of 'alibi' must be proved with absolute certainty so as to

completely exclude the possibility of accused's presence at the time and place where the incident took place.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Sanjeev Sharma, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP for the State.

CASE REFERRED TO:

1. *Jail Prakash Singh* vs. *State of Bihar & Anr.* 2012 CRI.L.J.2101.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Challenge in this appeal is to a judgment dated 25.11.1999 of learned Additional Sessions Judge in Sessions Case No.206/97 arising out of FIR No.264/95 registered at police station Tilak Nagar by which the appellant was convicted under Section 308/326/324/34 IPC. By an order dated 04.12.99, he was awarded RI for seven years with fine Rs. 25,000/-under Section 308/34 IPC; RI for ten years with fine Rs.25,000/ under Section 326/34 IPC and RI for three years with fine Rs.5,000/- under section 324/34 IPC. The sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 14.04.1995 at about 5.30 pm in the street opposite House No.3B/103, Vishnu Garden, the appellant sharing common intention with his sons Sukhvinder Singh and Harvinder Singh inflicted injuries to Raj Rani, Deputy Singh and Bhaktawar Singh. The police machinery swung into action when information about the incident was conveyed and DD No.12 (Ex.PW-15/A) was recorded at 06.20 pm at police post Khyala. SI Jagdish Chander (PW-14) to whom the investigation was entrusted lodged First Information Report after recording complainant-Raj Rani's statement (Ex.PW-1/A) from the hospital by sending rukka (Ex.PW-14/A). Statements of witnesses conversant with the facts were recorded. The appellant and his sons Sukhvinder Singh and Harvinder Singh were arrested and crime weapons were recovered pursuant to

disclosure statements. After completion of investigation, a charge-sheet was filed against the appellant and his sons, they were duly charged and brought to trial. The prosecution examined 16 witnesses in all. In their 313 statements, the accused persons denied their complicity in the crime and pleaded false implication. They raised the plea of 'alibi' and claimed that on the relevant date, they were present in village Biggar, Fatheabad (Hissar) at Gurudwara Teg Bahadur to perform 'kirtan'. DW-1 (Dalbir Singh) and DW-2 (Ajit Singh) appeared in defence. The trial resulted in their conviction. Being aggrieved and dissatisfied, the appellant has preferred the appeal. It is pertinent to note that Sukhvinder Singh expired in Tihar Jail on 31.05.2000. Co-convict Harvinder Singh also expired during the pendency of Crl.A.No.64/2000.

3. Learned Sr.counsel for the appellant urged that the trial court did not appreciate the evidence in its true and proper perspective and fell in grave error in relying upon the testimonies of interested witnesses without independent corroboration. The trial court ignored the vital inconsistencies, discrepancies and improvements emerging in their statements. PWs deviated from their earlier statements recorded under Section 161 Cr.P.C. and were duly confronted with the material omissions. It is unclear which crime weapon was used by which of the assailants. Originally, the story in the FIR was that the appellant was holding a 'danda' throughout the incident but during deposition in the court, the 'danda' was changed into 'Khanda' by the prosecution witnesses. They gave conflicting statements about the exact place of the occurrence. Ocular testimony is at variance with the medical evidence. The trial court without any valid reasons declined to accept the appellant's valid defence whereby they had categorically asserted their presence in a Gurudwara at village Biggar, Fatheabad. Learned Senior counsel adopted alternative plea to modify the sentence order as the appellant has lost his two sons and there is nobody else to take care of him in old age. After seeking instructions from the appellant, he voluntarily offered to pay ' 2.5 lacs as compensation to the victims without prejudice. Learned Additional Public Prosecutor urged that the prosecution witnesses who sustained grievous injuries on their bodies corroborated each other on material aspects and there are no sound reasons to disbelieve them.

4. The occurrence took place at around 05.30 pm on 14.04.1995. DD No.12 (Ex.PW-15/A) was recorded in promptitude at around 06.20 pm on getting information regarding use of swords at B/83 Vishnu Garden.

SI Jagdish Chander (PW-14), along with Ct.Satbir went to the spot and came to know that the injured had already been taken to Deen Dayal Upadhyay hospital (in short DDU hospital). Leaving Ct.Ghasi Ram to safeguard the spot, he went to DDU hospital and found Deputy Singh, Bhaktawar Singh and Raj Rani admitted there for treatment. Deputy Singh and Bhaktawar Singh were 'unfit' to make statements. The Investigating Officer lodged First Information Report after recording complainant-Raj Rani's statement (Ex.PW-1/A) vide rukka (Ex.PW-14/A) at around 08.15 pm. MLC (Ex.PW-12/B) (of Raj Rani) records her arrival time at DDU hospital at 06.20 pm with the alleged history of 'assault'. In her statement (Ex.PW-1/A) given to the police at the earliest available opportunity, Raj Rani gave detailed account of the incident and implicated the appellant and his sons for inflicting injuries to her and her sons Deputy Singh and Bakhtawar Singh. She attributed specific and definite role to each of them and also assigned ill-motive for causing injuries. Since the FIR was lodged without any delay, there was least possibility of the complainant to fabricate or concoct a false story in such a short interval. In the case of **Jail Prakash Singh v.State of Bihar & Anr.** 2012 CRI.L.J.2101 the Supreme Court held:-

> *"The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity; danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."*

5. On 14.04.1995 Raj Rani (MLC-E-23650) was referred to PW-8 (Dr.Abhitabh Bhasin) for radiological examination. After scanning X-ray films (Ex.PW-8/A and Ex.PW-8/B), he found a fracture on her left occipital bone as per report (Ex.PW-8/C). He also examined X-ray films

(Ex.PW-8/D and Ex.PW-8/E) (of Deputy Singh) and found fracture scaphoid bone and 3rd metacarpal i.e. a bone connecting the hand with the forearm and of 3rd finger vide report (Ex.PW-8/F). He also proved reports (Ex.PW-11/A, Ex.PW-11/B and Ex.PW-11/C). PW-12 (J.C.Vashisht), Record Clerk, DDU hospital, identified signatures of Dr.Jyoti Mehta, Dr.Sanjay Rohtagi and Dr.M.N.Mansoor on MLCs Ex.PW-12/A, Ex.PW12/ B and Ex.PW-12/C. There are no sound reasons to disbelieve the testimony of expert witness whereby the victims were found to have suffered injuries on vital parts of the body. Injuries suffered by the victims, in fact, are not under challenge. Appellant's only plea is that he and his sons were not the author of the injuries and they all were away at a far long distance at the relevant time completely excluding their presence at the spot 6. To infer the appellant's involvement, testimony of star witness PW-1 (Raj Rani) is relevant and crucial. She proved the version given to the police at the first instance without major variation. She testified that at about 05.30 pm, when she and her sons were going to purchase vegetables, Kanchan Singh, standing on the roof of his house, raised an alarm about fall of her son Deputy Singh from the scooter. When her son was about to pick the scooter, Kanchan Singh came there with a 'khanda' (double-edged sword) and dealt a blow aiming at his neck. Her son avoided the assault by moving his neck other side and the 'khanda' hit on his left cheek. Kanchan Singh then called his sons Sukhvinder Singh and Harvinder Singh. Meanwhile, her son Bakhtawar Singh came at the spot. When he (Bakhtawar Singh) was in the process to lift Deputy Singh, Sukhvinder Singh gave a sword blow to him as a result of which his three fingers were severed. Another blow was given on the left arm resulting in its hanging. Harvinder Singh caught hold Deputy Singh to prevent his escape from the spot. Ignoring her request with folded hands not to hit her son, Kanchan Singh gave a 'Khanda' blow on her head and back. Kanchan Singh threatened the public, who pleaded to spare them not to come forward or else they would be treated in the same manner. They were taken to DDU hospital. She identified Khanda (Ex.P-1), Sword/ Kirpan (Ex.P-2) used as crime weapons. In the cross-examination, she was confronted with statement (Ex.PW-1/DA) where certain facts deposed in examination-in-chief did not find mention. She elaborated that the incident had taken place in the street. She claimed that they and not Kanchan Singh had lodged previous complaints. She denied the suggestion that accused persons had gone to

a Gurudwara in village Biggar, Fatheabad and were not present at the spot.

PW-2 (Deputy Singh), other injured, corroborated her mother's testimony and clarified that on 14.04.995 at about 05.30 pm, he and his mother had started from the house to purchase some goods from the market. Since the road was rough, her mother left the house on foot to board the motor-cycle at a distance. The house of the accused persons was situated in the same gali after 2/3 houses from their house. He further deposed that when he reached in front of Kanchan Singh's house, while standing on the roof, he exhorted 'Thahar ja' after abusing him. He applied breaks as a result of which a stone came under the wheels and the imbalance caused its fall. He saw Kanchan Singh coming towards him and attacked him with a khanda in his hand on his neck. He succeeded to avoid it twice but at the third attempt, Kanchan succeeded to hit him on left side of his face. Defying her mother's request not to kill him, he called his sons Sukhvinder Singh and Harvinder Singh who arrived at the spot armed with a talwar (sword) and axe respectively. Bakhtawar Singh reached the spot on hearing his cries. Kanchan Singh again hit him on his head with the 'Khanda'. He saved it with his left hand but his thumb and first two fingers were severed and he started bleeding from his hand and face and became unconscious. Later on, he came to know that Bakhtawar's two fingers were cut off by the accused. He identified Khanda (Ex.P-1) and kirpan (Ex.P-2) used in the crime and their bloodstained clothes Ex.P-3 (1 to 5); Ex.P-4 (1 to 2) and Ex.P-5 (1 to 2). In the cross-examination, statement (Ex.PW-2/DA) was put and he was confronted with the facts which did not find mention therein. He further disclosed that the quarrel which originated at 05.30 p.m. continued for about 30 minutes. He came to know about the severance of three fingers of Bakhtawar in the hospital. He denied that no quarrel took place with the accused persons and they were falsely implicated in the incident.

PW-3 (Bakhtawar Singh) another victim implicated Kanchan Singh and his sons for causing injuries to him, his brother Deputy Singh and mother Raj Rani. He deposed that when he tried to intervene to save his brother, Harvinder Singh grappled with him and Sukhvinder Singh who was armed with a sword gave a blow which he received on his left hand as a result of which his three fingers were completely cut off. Sukhvinder Singh gave another blow of sword which cut off half of the elbow resulting its hanging with the arm. He further deposed that after causing

sword injuries, both Harvinder and Sukhvinder inflicted the injuries on his leg. Kanchan Singh gave a 'Khanda' blow on Raj Rani's head and back. In the cross-examination, the witness stated that he became unconscious after sustaining injuries and did not know who took him to the hospital. He was also confronted with the statement (Ex.PW3/ DA) where certain facts deposed for the first time before the court were found omitted therein.

7. In the cross-examination of these injured witnesses, many questions have been put but the defence could not brought on record that the appellant and his sons were not present at the crime spot or they had not participated in the commission of the crime in question. Only there are certain minor contradictions in the evidence of these witnesses regarding specific evidence about the nature of assault given by the particular accused to a particular victim. Such minor contradictions are bound to occur where a group of persons had attacked three persons. In such a situation, it would not be reasonable to expect that every witness should describe with mathematical accuracy about each and every injury sustained by all the injured persons giving minor details. The totality of the evidence of a witness has to be taken into consideration for fixing the probative value. In the instant case, the unarmed victims who were brutally assaulted with sharp weapons, were taken by surprise having no inkling about the impending danger. The altercation ensued all of a sudden. Multiple wounds were inflicted to all of them in quick succession. In such a scenario it was not expected from the victims who were under great mental shock and horror to tell the exact sequence of the injuries and the weapon used. All the victims were consistent about the presence of the assailants and injuries caused by them to all of them with sharp weapons. They have given cogent, credible and trustworthy version about the participation of all of them sharing common intention. Despite cross-examination, their testimony about the role attributed to the appellant and his sons could not be shattered. Improvements and inconsistencies in the evidence of eye-witness regarding the part played by each of the accused would not be a ground to disbelieve them when having regard to the number of injuries on them, it would have been impossible to give a detailed account of the incident. There cannot be mathematic accuracy as to how many blows were given by whom. The prosecution case would fail only when inconsistencies are major and go to the root of the matter. The trial court observed and noted the injuries

suffered by the victims as demonstrated during their examination in the court. PW-1 (Raj Rani) had mark of injuries on her head; PW-2 (Deputy Singh) had mark of injury on the face from temporal region to chin and his left hand had only two fingers; PW-3 (Bakhtawar Singh) had only a thumb and a finger in the left hand and injury on elbow, left leg. Ocular testimony of these witnesses is in consonance with medical evidence referred above. The Court has no valid reasons to disbelieve the testimonies of all these witnesses who would be least disposed to falsely implicate the appellant and his sons or substitute them in place of real offenders. Involvement of the appellant and his associates had emerged soon after the incident and they were specifically named in the FIR.

8. Plea of 'alibi' set up by the appellant and his sons, for valid reasons, was out-rightly rejected by the trial court. When a plea of alibi is raised by an accused, it is for him to establish the said plea by positive evidence. The burden is on the accused to show that he was somewhere else other than the place of occurrence at the time of incident. The burden on the accused is undoubtedly heavy. This flows from Section 103 of Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. Plea of 'alibi' must be proved with absolute certainty so as to completely exclude the possibility of his presence at the time and place where the incident took place. In the present case, the appellant examined DW-2 (Ajit Singh) who claimed that the appellant and his sons were sent to perform 'kirtan' in a gurudwara at village Biggar, Fatheabad (Hissar) on 13/14.04.1995 vide certificate (Ex.DW-2/A) and they reported back on 16.04.1995. In the cross-examination, he admitted that document (Ex.DW-2/B) was a photocopy of the carbon copy. Carbon copy (Ex.DW2/ B) was not on the letter head of Delhi Sikh Gurudwara Management Committee. It was a loose sheet and did not form part of any register and did not bear the number of any consecutive series. He also admitted that the letter did not bear the signatures of any of the accused. Ex.DW-2/B, is a photocopy of a carbon copy original of which has not been brought on record. Contents of this document reveal that the appellant's group was assigned a duty to report at village Biggar Distt. Fatehbad, on 14.04.95 to perform kirtan. They were directed to reach there by the evening of 13.04.95 and to contact Gurbaksh Singh Mukhtar. The appellant did not produce any evidence to prove that pursuant to this letter, he and his sons had performed any journey or

reported their arrival at a particular time to perform kirtan in the Gurudwara on 13.04.95 or 14.04.95. It is not revealed as to by which mode they had gone to the said village and when the return journey was undertaken. They did not examine any witness from the said Gurudwara/village to prove their physical presence at the relevant time at the said place to perform the kirtan. There is nothing on record if any remuneration was given to them. The authenticity of document (Ex.DW-2/B) is highly suspect and cannot be believed. The appellant and his son Sukhvinder Singh were arrested in Delhi on 14.04.1995 itself and personal search memos Ex.DW-14/D & 14C were prepared. Harvinder Singh could be arrested on 09.05.95 vide personal search memo Ex.DW14/F. Kanchan Singh was in custody on 16.04.95 and it belies DW2's statement that appellant and his sons had reported their arrival in the Gurudwara at Delhi on 16.04.95. Once the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence of PW-1, 2 and 3, it was incumbent upon the appellant to prove plea of 'alibi' with absolute certainty which he utterly failed. The plea of 'alibi' seems to have been set up to avoid conviction. False explanation given by the appellant in 313 statement about his presence in village Biggar is an additional incriminating circumstance to connect him with the crime.

Admittedly, there was long standing bitter animosity between the parties. The appellant and his sons nurtured a grievance due to election of Raj Rani's husband as President in the Gurudwara where the appellant and his sons used to sing songs (Ragies) in praise of God. They were distantly related to each other and lived in the same vicinity. The victims had no ulterior motive to falsely implicate them for the grievous injuries sustained by them.

9. In the light of the above discussion, I have no hesitation to uphold the findings of the trial court on conviction. Turning to the plea to take lenient view, it is true that the appellant has lost his two young sons during the pendency of the appeal; he has suffered ordeal of trial/ appeal for about 19 years; offer has been made voluntarily to pay Rs.2.5 lacs to the victims as compensation and he has also remained in custody for six months and three days besides remission for three months and three days. All these mitigating circumstances, however, do not dilute the gravity of the offence whereby the appellant and his sons inflicted brutal injuries without any provocation to the unarmed victims including a lady

with sharp weapons including 'khanda' kept as religious insignia. The injuries were caused on the auspicious day of 'Baisakhi'. Long pendency of a matter by itself would not justify lesser sentence. Offer of compensation after 19 years would not heal the wounds which physically crippled three innocent victims for no fault of theirs. Considering the mitigating and aggravated circumstances, the sentence order is modified to the extent that the appellant shall undergo RI for five years with fine Rs.5,000 and failing to pay the fine to undergo SI for one month under Sections 308/326 IPC each; and RI for two years with fine Rs.2,000/- and in default of payment of fine to undergo SI for 15 days under Section 324/34 IPC. All the sentences shall operate concurrently. Needless to state, he will avail benefit under Section 428 IPC. The appellant shall pay compensation of Rs.1 lac to the victims; deposit it within fifteen days before the Trial Court and it shall be released to the victims as a token of compensation after due notice in equal proportions.

10. The appeal stands disposed of in the above terms. The appellant shall surrender before the Trial Court on 06.06.2014 to serve the remaining period of sentence. The Registry shall transmit the Trial Court records forthwith along with the copy of this order.

ILR (2014) III DELHI 1979
CRL. A.

PRABHU DAYAL SHARMA ....APPELLANT

VERSUS

THE STATE OF NCT OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 680/2012 & 689, 857, 676, 675, 1036/2012 DATE OF DECISION: 30.05.2014

Indian Penal Code, 1860—Injured witness—Held, testimony of injured witness is accorded a special

status in law. Injury to a witness is an inbuilt guarantee of his presence at the scene of crime. Injured witness will not want to let the actual assailant go unpunished merely to falsely involve a third party.

Plea of alibi—Plea of alibi must be proved by an accused by cogent and satisfactory evidence completely excluding the possibility of accused persons at the scene of occurrence at the relevant time, where presence of accused at the scene of occurrence has been established satisfactorily by the prosecution.

Necessary ingredients of S. 308 IPC—No injuries inflicted on vital organs of the victim—Fractures on right femur, right Tibia and metacarpal bones—Though injuries were 'grievous' in nature, they were not sufficient in ordinary course of nature to cause death—Prosecution could not establish any evidence to infer that the injuries were caused with the object and knowledge to cause victim's death—Incident took place suddenly without pre-plan—Accused not armed with any weapon—No past history of animosity—From these circumstances, it cannot be inferred that accused had intention or knowledge attracting S. 308 IPC—Conviction U/s.325/34 affirmed.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Dayan Krishnan, Sr. Advocate with Mr. Sudarshan Rajan, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

CASES REFERRED TO:

1. *State of Uttar Pradesh* vs. *Naresh and Ors.,* (2011) 4 SCC 324.

2. *Abdul Sayed* vs. *State of Madhya Pradesh,* (2010) 10 SCC 259.

RESULT: Appeal partially allowed.

S.P.GARG, J.

1. In Criminal Appeals No. 680/2012, 689/2012, 676/2012 and 675/2012, Prabhu Dayal Sharma (A-1), Jasveer (A-2), Mahabir (A-3) and Rajesh Kumar @ Raju (A-4) challenge the legality and correctness of a judgment dated 23.05.2012 of learned Addl. Sessions Judge in Sessions Case No. 8/11 arising out of FIR No. 70/06 PS Paharganj, by which they were convicted under Sections 325/34 IPC. By an order dated 24.05.2012, they were sentenced to undergo RI for one and half year with fine Rs.15,000/-, each.

2. Jasbir Singh (A-2) has filed Crl.A.No.857/2012 under Section 372 Cr.P.C. to impugn a judgment dated 23.05.2012 in Sessions Case No. 9/11 arising out of FIR No. 69/06 PS Paharganj, by which Ramesh Kirar (respondent No.2) was acquitted of the charge. Complainant – Ramesh Kirar has preferred Crl.A.No.1036/2012 under Section 372 Cr.P.C. to challenge A-1 to A-4's acquittal under Sections 308/34 IPC and for enhancement of sentence awarded to them in FIR No.70/06 PS Paharganj.

Since all these appeals were intrinsically connected, with the consent of the parties, these were heard together to be disposed of by a common judgment.

3. Shorn of details, the prosecution case as reflected in the charge-sheet in FIR No. 70/06 PS Paharganj was that on 17.02.2006 at about 08.00 a.m. at shop No.5, near Uday Singh Ashram Chowk, Aram Bagh, Paharganj, A-1 to A-4 sharing common intention caused injures to Ramesh Kirar with iron rods and dandas in an attempt to commit culpable homicide. The police machinery swung into action after receiving information about the incident and Daily Diary (DD) No.8A (Ex.PW-8/A) came to be recorded at 08.32 a.m. at PS Paharganj to the effect that an individual had sustained injuries on head in a quarrel at Uday Singh Ashram, Aram Bagh. The investigation was entrusted to ASI Dharambir Singh who with Const.Manoj Kumar went to the spot. They came to know that the victim had already been shifted to Dr.Ram Manohar Lohia Hospital. ASI Dharambir Singh collected MLC of Ramesh Kirar. Since he was unfit to make statement, the Investigating Officer lodged First Information Report,

after making endorsement (Ex.PW-8/B) on DD No.8A (Ex.PW-8/A). During investigation, statements of the witnesses conversant with the facts were recorded. The investigation was taken over by SI S.P.Singh. On 22.02.2006, statement of the victim Ramesh Kirar was recorded. A-1 to A-4 were arrested. After completion of the investigation, a charge-sheet was submitted against them for committing offence under Sections 308/34 IPC; they were duly charged and brought to trial. The prosecution examined fourteen witnesses to establish their guilt. In 313 statements, the accused persons pleaded false implication and denied their involvement in the crime; A-3 and A-4 raised plea of 'alibi'. DW-1 to DW-6 were examined in defence. The trial resulted in conviction of A-1 to A-4 under Sections 325/34 IPC as aforesaid. Being aggrieved and dissatisfied, they have preferred the appeals.

4. In case FIR No.69/06 PS Paharganj, the prosecution case as disclosed in the charge-sheet was that on 17.02.2006 at about 08.00 A.M. at shop No.5, near Uday Singh Ashram Chowk, Aram Bagh, Paharganj, Ramesh Kirar voluntarily caused simple hurt with sharp object to Jasveer (A-2). When PW-8 (ASI Dharambir Singh) went to Dr.Ram Manohar Lohia Hospital, after assignment of investigation pursuant to DD No.8A (Ex.PW-8/A), he found Jasveer (A-2) admitted there for treatment. He collected his MLC and lodged First Information Report after recording his statement (Ex.PW-2/A) by sending rukka (Ex.PW-6/A). After the investigation was over, a charge-sheet against Ramesh Kirar was furnished; he was duly charged and brought to trial. The prosecution examined six witnesses. In 313 statement, Ramesh Kirar claimed himself to be innocent and examined DW-1 (HC Arvind) and DW-2 (Dr.Ajay Gandotra) in defence. The trial resulted in his acquittal. Being aggrieved and dissatisfied, the victim has challenged the acquittal. It is relevant to note that State did not prefer to file any appeal against the impugned judgment dated 23.05.2012.

5. In Crl.A.No.1036/2012, challenging A-1 to A-4's acquittal under Sections 308/34 IPC, the victim-Ramesh Kirar claimed enhanced sentence.

6. I have heard the learned counsel for the parties and have examined the Trial Court records. The occurrence took place on 17.02.2006 at around 08.00 a.m., near Uday Singh Ashram Chowk, Aram Bagh, Paharganj. DD No.8A (Ex.PW-8/A) was recorded in promptitude about the incident at 08.32 a.m. at PS Paharganj. PCR form (Ex.PW-11/A) was

filled up at 08.28 a.m. on getting information about a quarrel in which an individual had sustained injuries on his head. It further records that the assailants had fled the spot after giving beatings to Ramesh Kirar and he had been taken to hospital. PW-1 (Om Parkash), after getting information from his cousin about the occurrence went to the spot and found Ramesh Kirar lying injured opposite shop No.5, Aram Bagh. He shifted Ramesh Kirar to Dr.Ram Manohar Lohia Hospital. MLC (Ex.PW-13/A) records the arrival time of the patient (Ramesh Kirar) at 08.40 a.m. in the hospital. Om Parkash's name finds in the MLC in the column 'brought by'. As per endorsement on the MLC, Ramesh Kirar was 'unfit' to make statement on 17.02.2006. PW-6 (Dr.Kalyani) medically examined the victim who was brought in the hospital with the alleged history of 'assault' by MLC (Ex.PW-6/A). On local examination, he was found having abrasion on left leg, right ankle joint, right knee joint, right leg with profuse bleed side; right knee joint, ankle joint, left radius ulna with restrictions and right dorsum of hands with swelling. PW-7 (Dr.Anil Taneja) after examining seven x-ray plates (Ex.PX1 to Ex.PX7) found three fractures of right femur, right Tibia and metacarpal bones. The report submitted by him is Ex.PW-7/A. In the opinion of PW-13 (Dr.Pankaj Bansal) the injuries were 'grievous' in nature. Apparently, Ramesh Kirar sustained three fractures on various parts of the body in the occurrence which were 'grievous' in nature' Nothing has come on record to show that these injuries were self inflicted or accidental. A-2, who lodged cross-case vide FIR No.69/06, in 313 statement, did not deny the injuries sustained by Ramesh Kirar. He, however, pleaded that Ramesh Kirar was assaulted by his associates to whom he had sold the property in question and had taken advance payment but not in a position to hand over its possession. In the complaint (Ex.PW-2/A) lodged in case FIR No.69/06, A-2 took up the plea that injuries to Ramesh Kirar were inflicted by him by a lathi in the exercise of his right of private defence when he was stabbed by a knife by him.

7. The crucial aspect to be determined is as to who was the perpetrator of crime to cause injuries to Ramesh Kirar. Star witness is Ramesh Kirar who on oath deposed that when on 17.02.2006, he had gone to a barber (PW-2 Yamin) for shave and also to collect monthly rent, A-2 called him out on the pretext to meet A-1 standing outside the shop. He recalled that after coming out, he saw A-1 standing in the company of A-3 and A-4. On the exhortation of A-1 "maro sale ko aaj

bachke na jane paye", A-2 caught hold of him by shoulders, and A-2 and A-3 started beating him with rod and dandas, causing injuries on his head, hands, legs and other parts of the body. He was taken to the hospital by someone where his statement was taken on 22.02.2007. Ramesh Kirar was cross-examined indepth on various dates on facts not relevant to the fact-in issue. He was mainly questioned regarding dispute over ownership / possession of the property in question which belonged to the Akhara. Since the matter was subjudice and civil proceedings were already pending regarding the property in question, these questions were not very material and relevant to the incident in question. The complainant disclosed that he remained unconscious from 17.02.2006 to 22.02.2006. After discharge from Dr.Ram Manohar Lohia Hospital on 02.03.2006, he got regular treatment from Khetarpal Hospital. He denied the suggestion that he was beaten by the 'party' from whom he had received earnest money and was unable to deliver the possession of Akhara to them. He also denied that A-3 and A-4 had gone to Jaipur on the date of incident for purchase of the clothes for the statue of 'Gurumuni'. Apparently, no material contradictions or discrepancies could be brought out in the cross-examination to discredit the version narrated by the injured witness. Names of the alleged assailants from whom the complainant had obtained any advance to hand over the possession of Akhara were not suggested. The victim who sustained multiple fractures on the body was not expected to let the real offenders go scot free and to falsely implicate innocent ones. Explaining the delay in recording statement on 22.02.2006, PW-14 (SI S.P.Singh, Investigating Officer) disclosed that from 17.02.2006 to 20.02.2006, he remained unconscious to make any statement. On 21.02.2006, though he was physically fit to make statement, being 'unwell', he recorded it on 22.02.2006. On 22.02.2006, the complainant was specific and certain as to who were the assailants and what role was played by each of them. The delay in recording the statement has been explained and can be accepted. The testimony of a stamped witness has its own relevance and efficacy. The testimony of the injured witness is accorded a special status in law. This is a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of crime and because the witness will not want to let the actual assailant to go unpunished merely to falsely involve a third party for the commission of the offence. In the case of **'State of Uttar Pradesh vs.Naresh and Ors.',** (2011) 4 SCC 324, the Supreme Court held:

"The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein."

8. In the case of **'Abdul Sayed Vs.State of Madhya Pradesh',** (2010) 10 SCC 259, the Supreme Court held :

"The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness".

As discussed above, A-2 in complaint (Ex.PW-2/A) (FIR No. 69/06) admitted his presence at shop No.5 where Ramesh Kirar, the victim had met him. He further admitted that on his asking, Ramesh Kirar declined to settle the accounts and started abusing him. On that, an altercation took place. Ramesh Kirar took out a knife from the back pocket and stabbed him on his back. He claimed that in private defence, he picked up a 'lathi' lying at the spot and dealt a blow on his leg. Apparently, the theory propounded by A-2 that Ramesh Kirar's associates caused beating to him on his inability to hand over the possession despite receiving advance payment fell flat. PW-2 (Yamin) also spoke of a quarrel between Ramesh Kirar and Jasveer (A-2). He supported both of them

and disclosed that Ramesh Kirar and Jasveer sustained injuries in the said scuffle. He was, however, conspicuously silent as to who gave injuries to whom. It appears that Yamin did not present true facts to avoid annoyance to any party, being a tenant in the shop as, ownership / possession of it was being claimed by both of them. As per his statement, he was paying rent to Akhara authorities through Ramesh Kirar and Jasveer (A-2).

9. Complainant – Ramesh Kirar assigned a specific and positive role to each of the assailants in the crime. He was fair enough to disclose that only A-3 and A-4 were armed with iron rod and dandas. A-1 had exhorted to them "maro sale ko aaj bachke na jane paye". The role assigned to A-2 was that he caught hold of him at that time. The victim had no extraneous consideration to falsely rope in A-3 and A-4 with whom he had no prior animosity. In fact, it were A-3 and A-4 who played active role in causing multiple fractures to the victim. The findings of the Trial Court that A-1 to A-4 sharing common intention voluntarily caused injuries to the victim cannot be faulted.

10. A-3 and A-4 took the plea of 'alibi' and claimed that on the day of incident they had gone to Jaipur for purchase of clothes for the statue. They examined DW-5 (Rajeev Sabikhi) to prove that on 16.02.2006, they had stayed in his Hotel Residency Inn in room No.109 as reflected in Ex.DW-5/A. They further examined DW-2 (Ghanshyam Sharma) from Jaipur to prove purchase of certain articles from his shop vide documents (Mark-A and Mark-B) on 16.02.2006. DW-6 (Mr.Vivek Gupta) proved the photocopy of the bill No.53 dated 16.02.2006 (Mark DW-6/A) to prove purchase of certain articles. The Trial Court elaborately dealt with the defence evidence and for valid reasons rejected the plea outrightly. A-3 and A-4 did not examine any witness from Akhara in question to prove if they were deputed to go to Jaipur to purchase jewellery / clothes for the statue or were entrusted with any specific amount for that purpose. They also did not examine relevant witness to show if any such articles were purchased and brought back by them. No documentary evidence from the Akhara showing the purchase of any such article and its payment to A-3 and A-4 was brought on record. Nothing was revealed as to by which mode of transport, A-3 and A-4 had performed their to and fro journey to Jaipur. It was also not disclosed as to on which date and at what time, they had departed for Jaipur and reached Delhi after performing their journey. No tickets / reservation tickets for the journey undertaken

have been placed on record. The testimonies of DWs-2, 5 and 6 are not cogent and reliable. A-3 and A-4 had no sound reasons to get two different bills in two different names from DW-3 for purchase of articles when these were meant for the statue and not for individual requirement. It is unbelievable that DW-2 (Ghanshyam Sharma) would be able to identify the routine / casual customers visiting his shop for the purchase of routine articles only on one occasion during his examination after about five years of the incident in the Court. Document (Mark DW-5/A) is a loose sheet and does not contain the parentage or the address of the visitors to the hotel. It does not bear the signatures of A-3 or A-4. Admittedly, DW-5 (Rajeev Sabikhi) was known to A-3 and A-4 since long. The possibility of manipulated/fabricated document to create the plea of alibi cannot be ruled out. The authenticity of the document is highly suspect and cannot be believed. Once the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through the reliable evidence of the complainant, it was incumbent upon them to prove the plea of 'alibi' with absolute certainty. Plea of alibi must be proved by cogent and satisfactory evidence completely excluding the possibility of accused persons at the scene of occurrence at the relevant time. The plea of 'alibi' set up by A-3 and A-4 seems to be an afterthought and un-believable.

11. A-2 lodged complaint (Ex.PW-2/A) which formed the basis of registration of FIR No.69/06. In the complaint, A-2 disclosed that when he visited PW-2 (Yamin)'s shop, A-2 stabbed him by a knife on his asking to settle the account. The Trial Court for sound reasons did not believe the theory propounded by the complainant and exonerated Ramesh Kirar of the charge. A-2 admitted that in private defence, he inflicted lathi blow on Ramesh Kirar's leg but he did not explain as to how and under what ircumstances, he got multiple fractures on his various body parts. He did not report the incident to the police soon from the spot. Daily Diary (DD) No.8A (Ex.PW-8/A) was recorded at 08.32 a.m. at PS Paharganj which pertained to the injuries sustained by an individual lying at the spot. In PCR form (Ex.PW-11/A), the name of the injured was ascertained as Ramesh Kirar. Neither PCR form (Ex.PW-11/A) nor Daily Diary (DD) No.8A (Ex.PW-8/A) records if anyone else suffered injuries in the occurrence. A-2 did not inform any of his relative about the occurrence and conveniently went alone to Dr.Ram Manohar Lohia Hospital in a TSR and admitted himself there. MLC (Ex.PW-5/A) records

the arrival time of the patient A-2 (Jasveer) at 09.05 a.m.; he was declared fit for statement at 10.15 a.m. Contrary to that, MLC of Ramesh Kirar, who was taken by Om Parkash (PW-1), records the arrival time of the patient at 08.40 a.m. A-2 did not explain the delay in reaching Dr.Ram Manohar Lohia Hospital. PW-8 (ASI Dharambir Singh) to whom the investigation was assigned after recording A-2.s statement, lodged the First Information Report. In the cross-examination, he admitted that he reached shop No.5, near Uday Singh Ashram Chowk, Aram Bagh, Paharganj, at about 08.30 a.m. Dr.Ram Manohar Lohia Hospital was at a distance of two or three kilometres from the spot. No eye witness came forward to disclose that injuries were caused to A-2 by Ramesh Kirar. In his Court statement (in case FIR No. 69/06 PS Paharganj), A-2 gave inconsistent version that after sustaining stab blow on back and neck, he fell down and was taken to the hospital by 'someone'. This assertion is in contradiction to the statement (Ex.PW-2/A) in which he claimed that he went to the hospital on his own in a TSR. No knife was recovered at the spot. Victim – Ramesh Kirar lying in injured condition at the spot was not found in possession of any such knife. It belies A-2's statement that he was caused injuries by a knife by the victim Ramesh Kirar. The prosecution failed to establish beyond reasonable doubt that the victim Ramesh Kirar was the author of the injuries to A-2. Acquittal of Ramesh Kirar for sound reasons in the impugned judgment dated 23.05.2012 in Sessions Case No. 9/11 arising out of FIR No. 69/06 PS Paharganj is based upon fair appraisal of the evidence and needs no intervention.

12. Appellant's counsel in Crl.A.No.1036/2012 emphasized that on A-1's exhortation "maro sale ko aaj bachke na jane paye", multiple injuries were inflicted to the victim and it attracted ingredients of Section 308 IPC. The submissions are devoid of merits. No injuries were inflicted on the vital organs of the victim. As per medical evidence, the victim sustained three fractures on right femur, right Tibia and metacarpal bones. The injuries were 'grievous' in nature and were not sufficient in the ordinary course of nature to cause death. The prosecution could not established / produced any evidence on record to infer that the injuries were caused with the avowed object and knowledge to cause victim's death. The incident of altercation had taken place at the shop being run by PW-2 (Yamin) where the victim had gone for shave in routine without any inkling of his arrival to the assailants to pre-plan the attack. A-1 and A-

2 were not armed with any weapon. Dispute arose when A-1 asked Ramesh Kirar to settle the accounts for the rent received by him. In the said scuffle, injuries were voluntarily caused to the victim. Both the parties were acquainted with each other and had visiting terms before the incident. There was no past history of animosity or long standing enmity. The relations became strained when both of them claimed ownership over the Akhara property and instituted civil proceedings. From these circumstances, it cannot be inferred that the convicts had requisite intention or knowledge to attract Section 308 IPC.

13. The convicts were awarded RI for one and half year with fine Rs. 15,000/-, each under Sections 325/34 IPC which cannot be termed inadequate. A-1 was aged around 72 years. None of them was a habitual offender or involved in any criminal activities. The occurrence had taken place at the spur of the moment over settlement of accounts pertaining to the property of the Akhara. Considering the facts and circumstances in which the altercation arose, I find no merit in the appeal for enhancement of the sentence awarded by the Trial Court.

14. In the light of above discussion, the findings of the Trial Court convicting A-1 to A-4 under Sections 325/34 IPC are affirmed. Turning to the plea to modify the sentence order, A-2 to A-4 deserve no leniency as the unarmed complainant suffered three fractures on various body parts and remained admitted for number of days in the hospital. So far as A-1 is concerned, he is aged about 75 years; is not a previous convict; has clean antecedents; and has suffered agony of trial / appeal for eight years. The only role attributed to him that of exhortation; he was not armed with any weapon and did not facilitate co-convicts in causing injuries to the victim. The initial confrontation had taken place with A-2. Keeping in view the genesis and origin of the incident and looking to his age, conduct, antecedents, and attendant circumstances, interest of justice would be met if instead of sentencing him at once to any punishment, he is directed to be released on probation of good conduct. Accordingly, A-1 shall be released on his entering into a bond in the sum of ‘ 30,000/- with one surety in the like amount to the satisfaction of the Trial Court to appear and receive sentence when called upon during two years and in the meantime, to maintain good conduct and not to indulge into such crime. The necessary bonds would be furnished within seven days. A-1 shall deposit Rs. 1 lac to be paid as compensation to the victim in the Trial Court within fifteen days. The compensation will be released

to the victim – Ramesh Kirar after due notice.

15. While maintaining conviction qua A-1 to A-4 under Sections 325/34 IPC, sentence order is modified to the extent that A-1 would be released on probation and shall pay a sum of Rs. 1 lac as compensation to the victim. Crl.A.No.680/2012 stands disposed of in the said terms. Crl.A.No.689/2012, Crl.A.No.676/2012 and Crl.A.No.675/2012 stand dismissed.

16. Crl.A.No.857/2012 filed by A-2 against acquittal is dismissed.

17. Crl.A.No. 1036/2012 filed by the complainant for enhancement of sentence stands dismissed.

18. Trial Court records be sent back forthwith with the copy of the order. A-2, A-3 and A-4 shall surrender before the Trial Court on 6th June, 2014 to serve the remaining period of their sentence.

ILR (2014) III DELHI 1990
CRL. A.

RAVI KUMAR & ORS. ....APPELLANT

VERSUS

STATE ....RESPONDENT

(KAILASH GAMBHIR & SUNITA GUPTA, J.)

CRL.A. NO. : 819/2011 DATE OF DECISION: 30.05.2014

Indian Penal Code, 1860—S.302/34—Related witnesses—Held, relationship itself is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal culprit and make allegations against an innocent person. Evidence of related witnesses can be relied upon if it has a ring of truth to it and is cogent, credible and trustworthy. Such evidence however needs to be carefully

scrutinised and appreciated before any conclusion is made to rest upon it. Evidence cannot be disbelieved merely on the ground that the witnesses are related. Once it is established that their depositions are cogent, inspires confidence, do not suffer from any material contradictions, the Court would be justified in relying upon such valuable piece of evidence.

Discrepancies in Evidence—Held, minor discrepancies are bound to occur due to normal errors of perception and observation, errors of memory due to lapse of time, mental disposition due to shock and horror at the time of occurrence. In fact such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their version. If, on the other hand, these witnesses give evidence with mechanical accuracy, it could be cogitated that they were giving tutored versions. The question is whether embellishments in statement of witnesses can destroy the core of the prosecution story. Minor contradictions appearing in the testimony of the witnesses does not materially affect the core of the prosecution case nor render the testimony of the witnesses liable to be discredited.

Indian Evidence Act, 1872—S. 134—Held, our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses.

Hostile witness—It is settled law that mere fact that witnesses has not supported the case of prosecution if not in itself sufficient to reject his evidence in *toto*. The evidence of hostile witness can be relied upon at least up to the extent it supports the case of prosecution.

CFSL report—Blood report—Merely because the CFSL report did not give the group of blood/semen, it

cannot be said that CFSL report was negative, and all that can be said is that the CFSL report is inconclusive but not negative which would not provide the accused with any material benefit.

Motive—Held, when the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more of less academic. Sometimes motive is clear and can be proved. However, sometimes motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of eye witnesses is credit worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is motive or not becomes wholly irrelevant.

Non-examination of independent witnesses—Held, it is common experience that public persons are generally reluctant to join police proceedings. There is general apathy and indifference on the part of public to join such proceedings.

Delay in the lodging FIR—Held, delay is not by itself fatal to the case of the prosecution nor can delay itself create any suspicion about the truthfulness of the version given by the informant just as a prompt lodging of the report may be no guarantee about its being wholly truthful. So long as there is cogent and acceptable explanation offered for the delay it looses its significance. Whether or not the explanation is acceptable will depend upon the facts of each case. There is no cut and dried formula for determining whether the explanation is or is not acceptable.

Plea of alibi—Held, the burden is on the accused to lend credence to the defence of alibi put up by him.

Plea of self-defence—Held, even if no plea of self-defence was taken by the appellant before the Trial

Court, it is to be seen whether the appellant has been able to establish such a plea on the basis of material available on record.

Plea of sudden and grave provocation—Held, the plea of sudden and grave provocation can be taken only when a person is so deeply provoked that he loses his self-control and causes the death of a person while still being in that state of mind—Nothing occurred on the date of the occurrence to have provoked the accused to lose his self control or to cause his death while still in that state of mind. Hence, the defence of sudden and grave provocation is not available to Appellant No. 1—Accused persons were armed with weapons when they came out of the gali in front of house no. B-1, Sewak Park—Accused persons inflicted as many as 7 incised wound injuries on vital parts of the body of the deceased, like the lungs and the heart which were sufficient to cause death in the ordinary course of nature.

Section 34 of IPC—Common intention—Is the result of the concerted action of more than one person if the said result was reached in furtherance of the common intention and each person must be held liable for the ultimate result as if he had done it himself—A perusal of Section 34 of IPC would clearly indicate that there must be two ingredients for convicting a person with the aid of Section 34 of IPC. Firstly, there must be a common intention and Secondly, there must be participation by the accused persons in furtherance of the common intention. If the common intention is proved, it may not be necessary that the acts of the several persons charges with commission of an offence jointly must be the same or identically similar—The acts may be different in character, but must be arising out of the same common intention in order to attract the provision—It is a state of mind of an accused which can be inferred objectively from his

conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances—Therefore, in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence before a person can be vicariously convicted for the act of the other—Deceased was surrounded by all the accused persons. Accused R addressed his co-accused to finish deceased—Pursuance thereof while K and RK caught hold of deceased and pinned him down, accused S who was carrying a danda in his hand tried to keep away the brothers of deceased, from coming near deceased to provide any assistance to him and thereafter, accused R inflicted indiscriminate knife blows on the deceased resulting in as many as seven injuries due to which deceased succumbed to injuries. The deceased was unarmed and there was absolutely no physical threat from his side to the appellants. The mere fact that the role ascribed to K and RK was only of catching hold does not lessen their liability, inasmuch as, had they not pinned him down act could not have been committed—The criminal act was done with the common intention of all the accused to commit murder.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Sh. Ajay Verma, Advocate for appellant No.1-Ravi Kumar Mr. K. Singhal, Advocate for appellant No.2-Karamvir Mr. Vivek Sood, Advocate for appellant No.3-Raj Kumar Mr. Jitender Sethi, Advocate for appellant No.4-Sanjay.

FOR THE RESPONDENT : Mr. Sunil Sharma, Additional Public Prosecutor for State.

CASES REFERRED TO:

1. *Bastiram* vs. *State of Rajasthan,* 2014 III AD (SC) 348.
2. *State of Rajasthan* vs. *Manoj Kumar,* 2014 V AD (S.C.) 243.
3. *State of Rajasthan* vs. *Shobha Ram,* (2013) 14 SCC 732.
4. *Gangabhavani* vs. *Rajapati Venkat Reddy,* AIR 2013 SC 3681.
5. *Rohtash Kumar* vs. *State of Haryana,* (2013) 14 SCC 434.
6. *Rishi Pal* vs. *State of Uttarakhand,* 2013 II AD (SC) 103.
7. *Shanmugam and Anr.* vs. *State Rep. by Inspector of Police, T. Nadu,* (2013) 12 SCC 765.
8. *Gangabhavani* vs. *Rayapati Venkat Reddy and Ors.,* AIR 2013 SC 3681.
9. *Kanhaiya Lal and Ors.* vs. *State of Rajasthan,* 2013 (6) SCALE 242.
10. *Bakhshish Singh* vs. *State of Punjab and Anr.,* (2013) 12 SCC 187.
11. *Satbir @ Lakha* vs. *State of Haryana,* 2013 (1) SCC (Cri) 129.
12. *Raj Paul Singh & Another* vs. *State,* (2013) 1 SCC (Cri) 7.
13. *Lal Bahadur* vs. *State (NCT of Delhi),* (2013) 4 SCC 557.
14. *Pudhu Raja and Anr.* vs. *State, Rep. by Inspector of Police,* JT 2012 (9) SC 252.
15. *Sukhlal Sarkar* vs. *Union of India (UOI) Ors.,* (2012) 5 SCC 703.
16. *Gajoo* vs. *State of Uttarakhand,* (2012) 9 SCC 532.
17. *Sathya Narayanan* vs. *State rep. by Inspector of Police,* (2012) 12 SCC 627.
18. *Ramnaresh & Ors.* vs. *State of Chattisgarh,* (2012) 4 SCC 257.
19. *Sampath Kumar* vs. *Inspector of Police* (2012) 4 SCC 124.

20. *Dayal Singh* vs. *State of Uttaranchal,* (2012) 8 SCC 263.
21. *Mrinal Das & Others.* vs. *State of Tripura,* (2011) 9 SCC 479.
22. *State of U.P.* vs. *Naresh,* (2011) 4 SCC 324.
23. *Kilakkatha Parambath Sasi and Ors.* vs. *State of Kerala,* AIR 2011 SC 1064.
24. *Sk. Sattar* vs. *State of Maharashtra,* (2010) 8 SCC 430.
25. *Vijay @ Chinee* vs. *State of M.P.,* (2010) 8 SCC 191.
26. *Abdul Sayeed* vs. *State of M.P.,* (2010) 10 SCC 259.
27. *State rep. by Inspector of Police* vs. *Saravanan & Anr.,* AIR 2009 SC 152.
28. *Kapildeo Mandal* vs. *State of Bihar,* (2008) 16 SCC 99.
29. *Vineet Kumar Chauhan* vs. *State of U.P.,* (2007) 14 SCC 660.
30. *Ramdas and Ors.* vs. *State of Maharashtra,* (2007) 2 SCC 170.
31. *Namdeo* vs. *State of Maharashtra, (2007) 14 SCC 150.*
32. State of A.P. *vs.* S. Rayappa and Ors. *(2006) 4 SCC 512.*
33. *Hari Ram* vs. *State of U.P.,* (2004) 8 SCC 146.
34. *Saravanan and Anr.* vs. *State of Pondicherry,* (2004) 13 SCC 238.
35. *Krishna Mochi* vs. *State of Bihar,* 2002 6 SCC 81.
36. *Suresh and Anr.* vs. *State of U.P.,* (2001) 3 SCC 673.
37. *State of H.P.* vs. *Gian Chand, (2001) 6 SCC 71.*
38. Narayan Chetanram Chaudhary vs. State of Maharashtra (2000) 8 SCC 457.
39. *State of Haryana* vs. *Bhagirath,* (1999) 5 SCC 96.
40. *State of Hayana* vs. *Bhagirath,* (1999) 5 SCC 96.
41. *Binay Kumar Singh* vs. *State of Bihar,* (1997) 1 SCC 283.
42. *Nadodi Jayaraman and Ors.* vs. *State of Tamil Nadu,* (1992) 3 SCC 161.
43. *Appabhai & Anr.* vs. *State of Gujarat,* AIR 1988 SC 696.
44. *State of U.P.* vs. *M.K. Anthony,* AIR 1985 SC 48.

45. *Solanki Chimanbhai Ukabhai* vs. *State of Gujarat,* (1983) 2 SCC 174.
46. *Dudh Nath Pandey* vs. *State of U.P.,* (1981) 2 SCC 166.
47. *Molu* vs. *State of Haryana,* AIR 1976 SC 2499.
48. *State of A.P.* vs. *Rayavarapu Punnayya,* (1976) 4 SCC 382.
49. *Ramaswami Ayyangar and Ors.* vs. *State of Tamil Nadu,* (1976) 3 SCC 779.
50. *K.M. Nanavati* vs. *State of Maharashtra,* 1962 Supp (1) SCR 567.
51. *Tahsildar Singh and Anr.* vs. *State of U.P,.* AIR 1959 SC 1012.
52. *Dalip Singh* vs. *State of Punjab* AIR 1953 SC 354.

RESULT: Appeal Dismissed.

SUNITA GUPTA, J.

1. Kuldeep along with his mother, brother and sister was residing in House No. 73, Gram Sabha, Sewak Park, Uttam Nagar, Delhi. Sapna along with her father accused Ravi and other family members was residing at House No.71, Gram Sabha, Sewak Park, Uttam Nagar Delhi. Kuldeep developed a love affair with Sapna which became eye sore to the family of Ravi and his brothers. The relations between the two families became strained and the hatred developed to such an extent that not only the father of Sapna but her uncles also planned to commit murder of Kuldeep. With this pre-concerted plan, on 14th October 2006 at about 8:45 PM when PW2 Sunny along with his brother Kuldeep and his cousin PW3 Rupesh were returning from Balmiki Mandir located in their Colony and reached near the house of Shyam Khanna, all the four accused persons namely Ravi Kumar, Karamvir, Raj Kumar and Sanjay came out of the gali behind them and accused Ravi Kumar addressed to co-accused persons that Kuldeep has caused damage to their reputation because of an affair with his daughter Sapna and therefore, he should be killed. Thereafter, accused Raj Kumar caught hold of Kuldeep's hands while Karamvir caught hold of his feet. When PW2 Sunny and PW3 Rupesh tried to come forward to save Kuldeep, accused Sanjay wielded a danda at them and threatened them not to come forward to save Kuldeep. Meanwhile, accused Ravi Kumar who was carrying a large knife(Chhura) stabbed Kuldeep on his abdomen and chest several times. After having caused

injuries to Kuldeep, all the four accused persons ran away from the spot towards their house.

2. On 14th October, 2006 at about 9:15 PM, on receipt of an information, regarding murder having been taken place at Sewak Park opposite the house of Ashok Bagri, Head Constable Nempal Sharma recorded DD No.40A and informed Inspector Suresh Chand who along with Inspector R.S. Chahal reached the spot, i.e., opposite to House No. B-1, Sewak Park, Uttam Nagar where they met other police officials and came to know that Kuldeep has been murdered by accused Ravi Kumar, Karamvir, Raj Kumar and Sanjay with the help of a chhura. Blood was lying in the gali and the chabootra. One danda and a pair of blood stained hawai chappal belonging to the deceased was also found lying at the spot. Inquiry revealed that Kuldeep had been taken to Panchsheel Hospital. Inspector Suresh Chand went to Panchsheel Hospital where he came to know that the deceased had been taken to DDU Hospital by his brother Sunny. Thereupon Inspector Suresh Chand went to DDU hospital where he came to know that Kuldeep had been declared brought dead. PW2 Sunny met inspector Suresh Chand at the hospital. His statement Ex.PW2/A was recorded by Inspector Suresh Chand on the basis of which rukka was prepared and the same was sent to police station which resulted in registration of FIR 979/2006 u/s 302/34 IPC.

3. It is further the case of prosecution that there was strong resentment in the area and large crowd has gathered who were screaming maaro maaro. The accused persons were hiding inside their house. They were arrested from their house and pursuant to the disclosure statement made by the accused Ravi Kumar, a chhura was recovered from below the water tank at the place of worship at the back side of his house. After completing investigation, charge sheet was submitted against all the accused persons for offence under Section 302/34 IPC.

4. In order to substantiate its case, prosecution in all examined 28 witnesses. All the incriminating evidence was put to the accused persons while recording their statement under Section 313 Cr.P.C. wherein they denied the case of the prosecution, and alleged false implication in the case. It was further pleaded that on the day of incident which was a Saturday, they were busy in the Chowki of Kali Mata. At that time, police came to their house and took them and implicated them in this false case. However, they did not prefer to lead any evidence in their defence.

5. After meticulously examining the evidence led by the prosecution

and the other materials on record, vide impugned judgment dated 21st May, 2011 and order on sentence dated 6th June, 2011, learned Additional Sessions Judge, Rohini, Delhi convicted all the appellants for offence under Section 302/34 IPC and sentenced them to undergo Rigorous Imprisonment for life. In addition, accused Ravi Kumar was directed to pay fine for a sum of Rs.50,000/-, in default of payment of fine, to undergo Simple Imprisonment for six months while accused Karamvir, Raj Kumar and Sanjay were directed to pay fine for a sum of Rs.2,000/- each, in default of payment of fine, to undergo Simple Imprisonment for a period of two weeks. The convicts were granted benefit of Section 428 of the Code of Criminal Procedure, 1973.

6. Feeling aggrieved by the impugned judgment and the order on sentence, present appeal has been preferred by the appellants.

7. We have heard Sh. Ajay Verma, learned counsel for appellant No.1-Ravi Kumar, Mr. K. Singhal, learned counsel for appellant No.2-Karamvir, Mr. Vivek Sood, learned counsel for appellant No.3- Raj Kumar, Mr. Jitender Sethi, learned counsel for appellant No.4 and Mr. Sunil Sharma, learned Additional Public Prosecutor appearing for the State and have perused the record.

8. It was submitted by learned counsel for the appellants that:

- Out of 28 witnesses examined by the prosecution, the alleged eye-witnesses are PW2 Sunny, PW3 Rupesh, PW5 Shyam Khanna and PW6 Krishan Kumar. The moot question is whether the so called eye witnesses PW2 and PW3 are reliable and truthful? Whether PW6 is an eye-witness or a post incident witness or is a planted witness and what is the reliability of the version given by PW5?
- PW 2 Sunny is the real brother of deceased Kuldeep while PW3 Rupesh is the cousin brother, therefore, both are close relatives of the deceased.
- Presence of PW2 and PW3 at the spot is highly doubtful as no effort was made by them to save Kuldeep when he was being allegedly assaulted by the accused persons.
- PW3 did not render any help to PW2 in taking the injured to Hospital nor accompanied him to Panchsheel Heart and Medical Centre.

- According to PW2, he took the injured to Panchsheel Heart and Medical Centre where after checking by the doctor, Kuldeep was advised to be taken to DDU Hospital. While he was waiting for some vehicle, a red colour van reached at the spot along with Head Constable Roop Singh and then the deceased was shifted to DDU Hospital and he came back to the spot. Quite surprisingly, assuming this to be correct even this witness had not met the Investigating Officer PW23 or PW28 at the spot nor at the Panchsheel Hospital but as per PW23, PW2 Sunny had only reached in the emergency after he reached the DDU Hospital.
- PW9 Dr. R.K. Sharma has deposed that one of the attendant was brother of the deceased, but this fact does not find mention in the letter of examination Ex.PW9/A nor in his statement under Section 161 Cr.P.C. Hence, this is material improvement and is of no evidentiary value.
- PW23 Inspector Suresh Chand has admitted that he reached the spot at 9:45 p.m. and then went to Panchsheel Hospital at 11:00 p.m. but surprisingly he could not meet any eye witness. As per the MLC of the deceased Kuldeep, he was brought to the hospital at 11:50 p.m. by Constable Roop Kumar. It was most unnatural on the part of PW2 not to have accompanied the injured brother for further treatment and instead he gave a false explanation of going back to the house to inform his family members about the death of Kuldeep.
- According to PW2, he was accompanied by Arun Kumar to Panchsheel Hospital but Arun Kumar was not examined as a witness.
- According to PW3, PW2 asked him to go back to the house and take care of his mother as such there was no occasion for PW2 to have come back to the spot hence his non-availability at Panchsheel Hospital or his not accompanying injured brother to DDU Hospital creates a doubt about the presence of the witness at the time of occurrence. Both these witnesses are close relatives of deceased and, therefore, claimed themselves to be the eye witnesses of the incident.

- Rukka was sent at about 1:30 p.m. i.e. after five hours of the occurrence. As such, there is enormous delay in lodging the FIR.
- Despite the fact that a huge crowd had gathered at the spot, but no public person had been joined in the investigation. This shows that the investigation is lopsided, biased and tainted.
- No reliance can be placed on the testimony of PW5 Shyam Khanna and PW6 Krishan Kumar, both of whom have not supported the case of prosecution.
- As per the information given to the PCR, a quarrel had taken place at Sewak Park metro station Uttam Nagar, Delhi. As per the subsequent information given to PCR there was a quarrel with Kuldeep in which he sustained knife blows and was removed to Panchsheel Hospital where he was declared brought dead. As per the statement of Dr. R.K. Sharma, Kuldeep was brought by some person from Sewak Park and was declared dead.
- No incident took place in front of the house of Shyam Khanna. In fact, deceased Kuldeep sustained knife injuries in some quarrel at Sewak Park and thereafter he was removed to hospital by some person and was declared dead. Had he been taken to Panchsheel Heart and Medical Centre by PW2 Sunny the same would have found mention in the letter of examination given by Dr. Sharma.
- Since the relations between the appellant-Ravi and the family members of the deceased had become strained therefore due to animosity not only accused Ravi but his brothers, who are the appellants in this case, were also falsely implicated in the present case.
- The role assigned to Raj Kumar was catching hold of hands of Kuldeep whereas the role assigned to accused Karamvir was catching hold of his feet and role ascribed to appellant-Sanjay was that he had given several danda blows on the person of the deceased and had also threatened PWs Sunny and Rupesh not to come forward to save their brother.
- Ocular version given by these witnesses is contrary to

medical evidence as in the post mortem report Ex.PW27/A, no injury on the person of the deceased was found to be caused by blunt object and the injuries were caused with sharp edged weapon only.

- Danda was alleged to be found at the spot which although gave positive result for Human Blood but blood group was not opined, therefore, it is not established that blood on danda was that of deceased.
- Finger prints of accused Sanjay were not taken to match with finger prints on danda to show that it was used by accused Sanjay.
- Reference was made to Modi's Medical Jurisprudence and Toxicology for submitting that blunt object like danda, lathi could result in causing abrasion, bruises or contusion which is missing in the post mortem report. As such, presence of accused Sanjay at the time of the incident is highly doubtful.
- If Raj Kumar had caught hold of the hands of the deceased, then his clothes would have been smeared with blood but no blood was found on his clothes. Moreover, according to the mother of the deceased Kuldeep, she was informed that Ravi stabbed him.
- Karamvir was falsely roped in the present case being the brother of the accused Ravi.
- All the accused persons were present in their house as it was a Saturday and accused Sanjay is visited by mata ki chowki.
- Accused Karamvir, Raj Kumar and Sanjay did not share common intention with co-accused Ravi.
- The incident had taken place due to grave and sudden provocation as Kuldeep used to tease daughter of appellant Ravi, he had circulated her photographs in the locality. The appellant had even sent his daughter to her maternal uncle's house but Kuldeep did not stop his activities. On the date of incident a quarrel took place and in heat of passion, the incident took place.
- The case of the appellant is covered by Exception IV of

Section 300 of Indian Penal Code, as the crime was committed under grave and sudden provocation and therefore the offence is liable to be converted from Section 302 IPC to Section 304(1) IPC.

9. Refuting the submissions of learned counsel for the appellants it was submitted by learned Additional Public Prosecutor appearing on behalf of the State that:

- This is a case of honour killing as deposed by the witnesses that according to accused Ravi his honour was being lowered down in the society due to the acts of Kuldeep. Therefore, the motive to commit the crime is writ large.
- The appellant Ravi cannot be allowed to take the plea of grave and sudden provocation for the first time at the appellate stage as no such plea was taken before the Trial Court. Rather before the Trial Court, his case was one of denial simplicitor.
- In case the appellant wants to bring his case within the exceptions, it is incumbent upon him to prove that the case is covered by Exception-IV. However, the circumstances do not show that there was any provocation on the date of incident. Moreover, to bring the case within the meaning of Exception-IV provocation has to be grave and sudden. As per the case of appellant Ravi, the deceased was having affair with his daughter Sapna and the appellant had been distributing photos/pamphlets much prior to the incident. On the fateful day, no quarrel had taken place. Rather all the four accused in furtherance of their common intention with premeditation armed with weapon came and acted in a most cruel manner and inflicted as many as seven injuries on the chest and abdomen of Kuldeep.
- The suggestion was given to all the prosecution witnesses that murder was committed by some unknown 'persons' meaning thereby that it was admitted that it was not the act of a single person. Moreover, the deceased was a young boy whereas accused Ravi was a middle aged man. If Ravi alone would have caught Kuldeep then the same would have been resisted by Kuldeep and in that process possibility of Ravi sustaining injuries cannot be

ruled out, but no injury was sustained by appellant Ravi. This lends assurance to the testimony of the prosecution witnesses that all the four accused persons came together. Accused Karamvir caught hold of the deceased by his feet, Raj Kumar by his hands and thereafter when Sunny and Rupesh tried to rescue their brother they were prevented from doing so by accused Sanjay and thereafter Ravi inflicted knife blows on the person of the deceased on vital part of his body i.e. chest and abdomen. Danda blows were also given by accused Sanjay, which was reflected in the MLC.
- The *danda* was recovered from the spot and human blood was detected on it.
- At the instance of the accused Ravi, the weapon of offence, i.e., knife was recovered. His blood stained clothes were also recovered. Same were sent to FSL and as per report of FSL, human blood of 'B' Group was detected on the same which was the blood group of deceased.
- The place of incident stands proved from the testimonies of PW2, PW3, PW5 and PW6. Besides that the crime team report and the photographs also proves the place of crime.
- The appellant cannot get any benefit from the information sent to PCR, inasmuch as, it has come on record that after the incident there was great tension in the area and crowd had collected at the spot. Extra force had to be called to control the situation. The accused were inside their house. One of the accused, namely, Raj Kumar who was a Constable in Delhi Police sent a misleading information to the police regarding quarrel at Sewak Park near metro station at Kakrola, but on reaching the place of incident things became clear that the same had taken place in front of House No. B-1 Sewak Park, Uttam Nagar.
- The impugned judgment does not suffer from any infirmity which calls for interference. As such, the appeal is liable to be dismissed.

10. We have given our considerable thoughts to the respective submissions of the learned counsel for the parties and have perused the

Trial Court record.

Eye Witnesses:

11. PW2 Sunny is one of the star witness of the prosecution, who is also the real brother of the deceased Kuldeep Kumar. This witness has unfolded that his brother Kuldeep had an affair with one Sapna, daughter of Ravi Kumar, who lived in their neighbourhood. On account of this affair, family of Ravi Kumar had enmity with Kuldeep. About one month prior to the incident, Ravi gave beatings to his daughter Sapna for being in love with Kuldeep and sent her away to her maternal uncle's house. On the fateful day, i.e., 14th October, 2006, at about 8:45 pm, he along with Kuldeep and cousin Rupesh(PW3) were returning from Balmiki Mandir, which was located in their Colony. Kuldeep was walking about 15-20 steps ahead of them. They were following him. When Kuldeep reached near the house of Shyam Khanna, all the four accused persons, namely, Ravi Kumar, Karamvir, Raj Kumar and Sanjay came out of the gali which was behind them. Accused Ravi Kumar addressed to his co-accused saying that Kuldeep had caused damage to their reputation because of his affair with his daughter Sapna and therefore, he should be killed. Thereafter, accused Raj Kumar caught hold of Kuldeep's hands while Karamvir caught hold of his feet. When PW2 Sunny and PW3 Rupesh tried to come forward to save Kuldeep, accused Sanjay wielded a danda at them and threatened them not to come forward to save Kuldeep. Meanwhile, accused Ravi Kumar who was carrying a large knife (Chhura), stabbed Kuldeep on his abdomen and chest several times. Sanjay hit Kuldeep with danda couple of times. After having caused injuries to Kuldeep, all the four accused persons ran away from the spot towards their house saying that he had been killed.

12. On alarm having been raised by them, their family members reached the spot. His mother tried to shake up deceased Kuldeep and when he did not respond, he took him to nearby Panchsheel Heart and Medical Centre, where after checking, doctor advised to take him to DDU Hospital. He waited for a TSR for quite some time, but none came to that side. A red colour van along with police official HC Roop Singh came there and he shifted Kuldeep to DDU Hospital where doctor declared him dead. When the police official took away his brother Kuldeep to DDU Hospital, he rushed back to his house to inform his family members and then he also went to DDU Hospital where his statement Ex.PW2/A was recorded which bears his signatures at point A. Thereafter, he

returned to the spot along with the police officials and pointed out the place of occurrence. On his pointing out, site plan of the place of occurrence was prepared. The police team collected blood samples, blood stained earth, earth control, a pair of hawai chappals belonging to his brother, a blood stained danda left at the spot by the accused Sanjay. Thereafter, the accused persons were arrested from their house. Their disclosure statements Ex. PW2/K to PW2/N were recorded. Accused Ravi Kumar got recovered a knife from below the water tank at the place of worship at the back side of his house. Sketch of the knife Ex.PW 2/O was prepared which was seized. The blood stained clothes of the accused persons were seized by the police. After few days, scaled site plan was prepared in his presence. His clothes were also seized by the police. He further deposed that the accused persons had fled away to their house and were not permitted to come out of their house by the family member, in fact, a large crowd had gathered at the spot.

13. PW3 Rupesh is the cousin brother of the deceased and has corroborated the version of PW2 Sunny by deposing that on 14th October, 2006, he had gone to his masi's house at about 8:30 PM. He along with his cousin brothers Kuldeep and Sunny went to Balmiki Mandir. When they were returning from the Mandir, Kuldeep was walking about 20 steps ahead of them. When they reached near the house of Shyam Khanna, all the four accused namely Raj Kumar, Ravi Kumar, Karamvir and Sanjay came out of the gali which was behind them. Accused Ravi declared that Kuldeep had brought defame to them on account of involvement with his daughter and therefore, he should be killed. Accused Raj Kumar caught hold of his hands, Karamvir caught hold of his feet and accused Sanjay hit him with a danda on his chest. Accused Ravi Kumar stabbed Kuldeep on his abdomen and chest. When they raised alarm, Sanjay threatened them by wielding his danda saying that they will also be attacked in the same fashion. On alarm being raised by them, all the accused persons ran away, leaving behind the danda and Ravi ran away along with his knife. In the meantime, his Masi(aunt) namely Premlata also reached there and on seeing Kuldeep she fainted. Sunny took Kuldeep to Panchsheel Hospital by lifting him. He picked up his massi and took her to her house. Thereafter, he also went to Panchsheel Hospital where he was told by Sunny that doctor had advised that Kuldeep be taken home as he had not survived. However, Sunny was not satisfied with the medical advice and wanted to take him to DDU Hospital. He waited for some vehicle to take the injured to DDU Hospital. In the

meantime, police officials reached there and they stopped a van and took Kuldeep to DDU Hospital. Sunny advised him to take care of his mother as he was going to DDU Hospital. Then he reached his massi's house. Crowd had gathered and police had also reached the spot. At about 2:00 AM, Sunny returned home along with police officials. He pointed out the place of occurrence to the police and the site plan was prepared at his instance. Police officials seized blood, blood stained earth, earth control, a pair of hawai chappal of deceased Kuldeep and a danda vide seizure memos which bears his signature. Thereafter, police officials went to the house of accused persons and after interrogation, accused Ravi got recovered the Chhura/knife from a worship place under a water tank which was on the rear side of the house of the accused Ravi Kumar. I.O. also got removed clothes of all the accused persons which were sealed and separately kept in a cloth pulanda.

14. Learned counsel for the appellants challenged the testimony of PW2 Sunny and PW3 Rupesh basically on two grounds:-

a. They are closely related to the deceased and so are interested witnesses;

b. They are not truthful and reliable witnesses.

15. As regards the first limb of the argument, it is not in dispute that PW2 Sunny was the real brother and PW3 Rupesh was the cousin brother of deceased Kuldeep. However, relationship itself is not a factor to affect the credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. It is a well settled legal proposition that the evidence of related witnesses can be relied upon if it has a ring of truth to it and is cogent, credible and trustworthy. Such evidence however needs to be carefully scrutinised and appreciated before any conclusion is made to rest upon it. But the evidence cannot be disbelieved merely on the ground that the witnesses are related to the deceased.

16. In **Shanmugam and Anr. v. State Rep. by Inspector of Police, T. Nadu,** (2013) 12 SCC 765 Hon'ble Supreme Court while dealing with the aspect of creditworthiness of the evidence of relatives of the victim held:

"12. .... far more important than categorisation of witnesses is the question of appreciation of their evidence. The essence of any such appreciation is to determine whether the deposition of the witness to the incident is truthful hence acceptable. While doing so, the Court can assume that a related witness would not ordinarily shield the real offender to falsely implicate an innocent person. In cases where the witness was inimically disposed towards the accused, the Courts have no doubt at times noticed a tendency to implicate an innocent person also, but before the Court can reject the deposition of such a witness the accused must lay a foundation for the argument that his false implication springs from such enmity. The mere fact that the witness was related to the accused does not provide that foundation. It may on the contrary be a circumstance for the Court to believe that the version of the witness is truthful on the simple logic that such a witness would not screen the real culprit to falsely implicate an innocent. Suffice it to say that the process of evaluation of evidence of witnesses whether they are partisan or interested (assuming there is a difference between the two) is to be undertaken in the facts of each case having regard to ordinary human conduct prejudices and predilections.

*13. The approach which the Court ought to adopt in such matters has been examined by this Court in several cases, reference to which is unnecessary except a few that should suffice. In **Dalip Singh v. State of Punjab** AIR 1953 SC 354, this Court observed:*

26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

17. In **Namdeo v. State of Maharashtra,** (2007) 14 SCC 150, Hon'ble Supreme Court held that a close relative cannot be characterised as an "interested" witness. The only rule of caution in this regard is that the evidence of such witness must be scrutinised carefully. If on such scrutiny, his evidence is found to be reliable, inherently probable and wholly trustworthy, conviction can be based even on the 'sole' testimony of such witness.

18. In **Gangabhavani v. Rayapati Venkat Reddy and Ors.,** AIR 2013 SC 3681, Supreme Court discussed the legal proposition dealt by the court in their earlier judgments with respect to the evidence of related witnesses and held:

> *"14. In view of the above, it can safely be held that natural witnesses may not be labelled as interested witnesses. Interested witnesses are those who want to derive some benefit out of the litigation/case. In case the circumstances reveal that a witness was present on the scene of occurrence and had witnessed the crime, his deposition cannot be discarded merely on the ground of being closely related to the victim/deceased."*

19. In **Gajoo v. State of Uttarakhand,** (2012) 9 SCC 532, it was observed:

> *"13. Similar view was taken by this Court in the case of **State of A.P. v. S. Rayappa and Ors.** (2006) 4 SCC 512. The court observed that it is now almost a fashion that public is reluctant to appear and depose before the court, especially in criminal cases and the cases for that reason itself are dragged for years and years. The Court also stated the principle that, "by now, it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or for some other reasons."*

20. Testing on the anvil of the above legal principles, it will be suffice to say that merely because PW2 Sunny and PW3 Rupesh are close relatives of the deceased, it is not sufficient to doubt their credibility.

In fact, they being the close relatives would not allow the real culprit to go scot free and make allegations against the accused persons to falsely implicate them in such a heinous crime. The only rule of caution is that the testimony of such related witnesses must be reliable, trustworthy and duly corroborated by other evidences. Once it is established that their depositions are cogent, inspires confidence, do not suffer from any material contradictions and is in consonance with the above legal principles, the Court would be justified in relying upon such valuable piece of evidence.

21. Coming to the second limb of argument that the testimony of PW-2 and PW-3 is not reliable and trustworthy as they were not the eye witnesses to the incident, both these witnesses were subjected to lengthy cross-examination, however, nothing material could be elicited to discredit their testimony except certain minor contradictions.

22. Minor discrepancies are bound to occur due to normal errors of perception and observation, errors of memory due to lapse of time, due to mental disposition due to shock and horror at the time of occurrence. In fact such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their version. If, on the other hand, these witnesses give evidence with mechanical accuracy, it could be cogitated that they were giving tutored versions. The question is whether embellishments in statement of witnesses can destroy the core of the prosecution story.

23. Hon'ble Supreme Court in **Bakhshish Singh v. State of Punjab and Anr.,** (2013) 12 SCC 187 dealt with the applicability of contradictions and embellishments:

> *"31. This Court in several cases observed that minor inconsistent versions/discrepancies do not necessarily demolish the entire prosecution story, if it is otherwise found to be creditworthy. In **Sampath Kumar v. Inspector of Police** (2012) 4 SCC 124, this Court after scrutinizing several earlier judgments relied upon the observations in **Narayan Chetanram Chaudhary v. State of Maharashtra** (2000) 8 SCC 457 to the following effect:*
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>> *"21..........42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the*

testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person."

24. In **Rohtash Kumar v. State of Haryana,** (2013) 14 SCC 434, Hon'ble Supreme Court considered the issue of discrepancies in the depositions:

"24. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the court to reject the evidence in its entirety. Therefore, irrelevant details which do not in any way corrode the credibility of a witness should beignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, so as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness."

25. In **State of U.P. v. Naresh,** (2011) 4 SCC 324, the Supreme Court after considering a large number of its earlier judgments held:

"30. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon.

However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.

Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited."

26. A similar view has been reiterated in **Tahsildar Singh and Anr. v. State of U.P.**. AIR 1959 SC 1012; **Pudhu Raja and Anr. v. State, Rep. by Inspector of Police,** JT 2012 (9) SC 252; **Lal Bahadur v. State (NCT of Delhi),** (2013) 4 SCC 557; **State of U.P. v. M.K. Anthony,** AIR 1985 SC 48; **State rep. by Inspector of Police v. Saravanan & Anr.,** AIR 2009 SC 152; and **Vijay @ Chinee v. State of M.P.,** (2010) 8 SCC 191.

27. In view of the legal proposition enunciated above, the minor contradictions appearing in the testimony of the witnesses does not materially affect the core of the prosecution case nor render the testimony of the witnesses liable to be discredited.

28. Further the presence of PW2 and PW3 on the spot at the time of incident is established not only from their ocular testimony but also from the circumstantial evidence which has come on record. According to PW-2, after Kuldeep fell down on being stabbed by accused Ravi Kumar, he and Rupesh tried to revive him while all the accused ran away from the spot. Rupesh ran away from the spot to fetch a TSR for carrying Kuldeep to hospital but since no vehicle was available, PW-2 without wasting further time physically lifted Kuldeep to Panchsheel Hospital which was about 100 mtrs. away from the spot of incident. The

fact that Kuldeep was brought to Panchsheel Hospital by Sunny finds corroboration from the testimony of Dr. R.K.Sharma (PW-9) who has deposed that brother of the deceased Kuldeep had brought him to the hospital and despite the fact that he declared Kuldeep dead, his brother insisted that Kuldeep should be thoroughly examined due to which reason he advised him to take Kuldeep to DDU hospital.

29. Learned counsel for the appellant submitted that the factum of Kuldeep being brought to hospital by his brother does not find mention in the certificate PW-9/A given by the Doctor nor in his statement u/s 161 Cr.P.C recorded by the police, as such it was a material improvement in the testimony of the witness. Although it is true that in certificate Ex.PW 9/A, it is not specifically mentioned that Kuldeep was brought to hospital by his brother but it is pertinent to note that testimony of Dr. R.K.Sharma in this regard has not been challenged by the accused in cross examination. His attention was neither drawn to the certificate Ex.PW 9/A nor to his statement recorded u/s 161 Cr.P.C. In fact, none of the accused have preferred to cross examine this witness at all. Under the circumstances there is no reason to disbelieve the testimony of this witness, keeping in view the fact that he is a totally independent witness who is neither related to the complainant party nor is on any inimical terms with the accused.

30. Testimony of Dr. R.K.Sharma and Sunny also find corroboration from the testimony of Const. Roop Singh (PW-15), who on receipt of information from PCR had gone to the place of incident but came to know that the injured was taken to Panchsheel Hospital. When he reached Panchsheel Hospital he met Sunny who wanted Kuldeep to be taken to DDU hospital. Since no vehicle was found, they tried to stop number of vehicles. Finally he managed to stop a private van which carried the deceased to DDU hospital but Sunny did not accompany him at that time.

31. The Investigating Officer Insp. Suresh Chand (PW23) also corroborates the testimony of Dr. R.K.Sharma to the extent that he was informed by Dr.R.K.Sharma that brother of deceased Sunny had brought him to the hospital. Moreover, according to PW2, in the process of removing his injured brother to hospital, his clothes were smeared with blood. This part of his testimony find corroboration from FSL result which gave positive result of human blood of 'B. group on the clothes of this witness which is the blood group of deceased.

32. Learned counsel for the appellant submitted that it has come in the statement of the witness that when Sunny had removed his brother to hospital, at that time one Arun had helped him to take the injured to Panchsheel Hospital, however, the said Arun was neither cited as a witness nor examined by prosecution. Mere non-examination of Arun is of no consequence inasmuch as it would be unsound to lay down a rule that every witness should be examined even though their evidence may not be material. In **Namdeo**(supra), it has been laid down that Indian legal system does not insist on plurality of witnesses. Neither the legislature under Section 134 of the Evidence Act, 1872 nor the judiciary mandates that there must be particular number of witnesses to record an order of conviction against the accused. Our legal system has always laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses.

33. It is further the submission of learned counsel for the appellant that the testimony of Sunny reveals that while the deceased Kuldeep was being taken to DDU hospital he had gone back to his house to inform his family members, which is an unnatural conduct in the given circumstances and as such his plea is only an after thought in order to justify his absence at DDU hospital when the deceased was taken to DDU hospital by the police. This submission again is bereft of merit inasmuch as place of incident is just 100 mtrs away from Panchsheel Hospital and house of the deceased is situated about 150 mts from Panchsheel Hospital meaning thereby that the house of deceased from hospital was at a walking distance. After Dr.R.K.Sharma had declared Kuldeep dead and while his body was being taken to DDU hospital, Sunny had decided to go back to inform his family members. It has come on record that when Sunny had left the spot with his brother, his mother who had already reached the spot had become unconscious on seeing the condition of her son Kuldeep, on which Sunny had asked his cousin Rupesh to take his mother home. In this background, after Dr. R.K.Sharma declared Kuldeep dead and when the body of Kuldeep was being taken to DDU hospital in order to confirm the same, if Sunny went to his house to inform his family members about the death of Kuldeep, there is nothing unusual about it. Thereafter he reached DDU hospital and met Insp. Suresh Chand who recorded his statement wherein he gave a detailed version of the entire incident and the role played by each and every accused. In this scenario, there is no reason to doubt the presence of Sunny at the spot at the time of incident and witnessing the incident

which formed the basis of registration of FIR. 34. Testimony of Rupesh has been challenged on the ground that he did not accompany the deceased to Panchsheel Hospital nor to DDU hospital. Here again a valid explanation is forthcoming. The house of the deceased was adjacent to the place of incident and both the accused and deceased were next door neighbours. On hearing alarm, mother and sister of the deceased came to the spot. Mother of deceased Kuldeep fainted on seeing the body of her son. Since no vehicle was available, Sunny took Kuldeep to Panchsheel Hospital and instructed Rupesh to take his mother home and to take care of her as she had become unconscious. As such the mere fact that Rupesh did not accompany Sunny to Panchsheel Hospital does not cast any doubt regarding his presence at the spot or witnessing the incident. The testimony of PW2 Sunny and PW3 Rupesh are therefore cogent, consistent and truthful. The facts unfolded by them are found to be consistent. No inherent infirmity attacking the substratum of the case is noted in their testimony. They projected the sequence of events in a cohesive manner. True account of events have been projected by the witnesses. They are reliable witnesses and accountability of the accused can be adjudged on their testimones.

35. As far as the testimony of PW 5 and 6 are concerned, PW-5 Shyam Khanna has deposed that on 14th October, 2006, he was present at his house. On hearing commotion from the gali at about 8:30 PM and on hearing the cries of maar gaye-maar gaye, he went outside his house in the street, where he saw a crowd of 10-15 persons. Kuldeep was lying on the ground. Blood was oozing from his body. His sister and mother were sitting near him. He remained on the spot for some time. He has not seen such a terrifying scene. He went back to his house and closed the door. After some time, police arrived at the spot after the deceased had been taken away by Sunny, younger brother of Kuldeep to hospital. Some blood had fallen on the platform built outside his house. When the police came, they collected blood from that platform and also from the gali. He was called by the police to join the proceedings. The witness did not support the case of prosecution in all material particulars and, as such, he was cross-examined by learned Additional Public Prosecutor for the State and in cross-examination, he admitted that all the four accused are residents of house No. 71, Gram Sabha, Sewak Park, Uttam Nagar, Delhi. According to him, he had seen Sunny when he picked up Kuldeep and took him to hospital. However, he did not see Rupesh at that time.

36. PW6, Krishan Kumar is the cousin of the deceased Kuldeep. He

has stated that on 14th October, 2006 at about 8:45 PM he was present at his house. On hearing the noise of bachao bachao, he came out of his house and saw that crowd had gathered. Kuldeep was lying on the ground in front of his house and also the house of Shyam Khanna. He saw all the four accused running towards their house. Accused Ravi was carrying a long knife in his hand and they left behind a danda on the spot. He further stated that he had seen accused Ravi stabbing Kuldeep, while accused Raj Kumar and Karambir had pinned him down. Accused Sanjay was carrying a danda in his hand and was standing at the spot. The mother, sister and brother of Kuldeep were raising alarm. Sunny shifted Kuldeep to Panchsheel Hospital. Police arrived at the spot and took all the four accused persons and their family members to the police station. This witness also did not support the case of prosecution, as such, he was cross-examined by learned Public Prosecutor for the State and in cross-examination, he admitted that Sanjay left behind his bamboo stick near Kuldeep when he escaped from the spot. In cross-examination by learned counsel for the accused, he stated that when he reached the spot, mother, sister and brother of Kuldeep were present with him. He was the fourth person to reach at the spot. He further deposed that his statement was recorded on 10th November, 2006 at his house by the police officials. Earlier on the day of occurrence, the police officials made inquiries from him but he refused to make the statement to the police because accused persons are his immediate neighbours.

37. Testimony of both these witnesses have been challenged by the learned counsel for the accused, inasmuch as, they have not supported the case of prosecution. It is settled law that mere fact that witness has not supported the case of prosecution is not in itself sufficient to reject his evidence in toto. The evidence of hostile witness can be relied upon at least up to the extent it supports the case of prosecution.

38. In **Sathya Narayanan v. State rep. by Inspector of Police,** (2012) 12 SCC 627, Hon'ble Supreme Court referred to its earlier decision rendered in **Mrinal Das & Others. v. State of Tripura,** (2011) 9 SCC 479 where while reiterating that corroborated part of evidence of hostile witness regarding commission of offence is admissible, it was held as under:-

> *"67. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of*

the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."

39. Therefore, the testimony of PW5 Shyam Khanna, even if declared hostile, can be read to the extent of its corroboration. PW5 Shyam Khanna has proved the place of incident which was in front of his house from where blood lying at the spot was lifted by the police in his presence. He has also established the presence of the brother, sister and mother of the deceased. He has also corroborated the version of PW2 Sunny to the extent of place of incident and the fact that it was Sunny who removed the deceased to the hospital. This witness has tried to show that he was also an eye witness to the incident but this claim of his witnessing the incident seems to be doubtful inasmuch as it has come in his testimony that he came out of his house when he heard the noise of weeping of a woman who was crying 'maar gaye, maar gaye'. This shows that when he came out of his house, the incident had already taken place and mother and sister of the deceased had reached the spot. This being the background, the testimony of Krishan Kumar can only be read to the limited extent of place of incident; presence of brother, sister and mother of the deceased at the spot and the factum of PW2 Sunny carrying the victim to the hospital.

Recovery of Knife

40. The ocular testimony of PW2 and PW3 that appellant Ravi inflicted several knife blows on the abdomen and chest of Kuldeep, find

corroboration from the recovery of knife at the instance of appellant Ravi. It has come on record that immediately after the incident, the family members of the deceased had reached the spot. The accused were hiding inside their house. There was resentment in the area and a large number of persons had collected in the gali and were raising slogans of maro-maro on which Inspector Suresh Chand gave instructions to SI R.S. Meena, ASI Jai Prakash and other staff to preserve the scene of crime and take care of the accused persons and he also called other staff from the police station to control the crowd and take care of accused. SI Balihar Singh (PW-28), Additional SHO R.S. Chahal got opened the door of the house of the accused persons and took them out from the back side. When the accused were taken out from the room, somebody from the public pelted stone which hit on the head of the accused Karamvir due to which he sustained injuries. Thereafter, all the accused were arrested and their personal search was conducted. Accused Ravi Kumar made a disclosure statement Ex.PW2/K and pursuant to the same, he took the police party on the back side of his house at a place of worship where there was cemented water tank and took out a chhura which was lying below the water tank which was blood stained and blade of chhura was found slightly bent from the tip. Sketch of the chhura Ex. PW2/O was prepared and it was seized vide memo Ex.PW2/X. The recovery of this chhura was effected in the presence of PW2 Sunny and PW3 Rupesh who have identified the same weapon with which injuries were inflicted on the person of Kuldeep by accused Ravi.

41. The testimony of Inspector Suresh Chand regarding making of disclosure statement by accused Ravi Kumar and subsequent recovery in pursuance to the disclosure statement find corroboration from SI R.S. Meena, PW2 Sunny and PW3 Rupesh Kumar. The knife/dagger Ex. P3 has been duly identified by PW2 and PW3 to be the same knife with which injuries were inflicted on the person of Kuldeep by accused Ravi Kumar. Furthermore, the knife was produced before Dr. Anil Shandilya (PW27) in order to obtain his subsequent opinion. The dagger Ex.P3 was examined by the doctor and thereafter, he gave his subsequent opinion that the injuries mentioned in the post mortem report could be caused by the weapon examined by him or similar like weapon. The dagger was also sent to CFSL and as per the report Ex.PW23/J, the dagger Ex.P3 got recovered by accused Ravi Kumar soon after the incident showed positive result for human blood of group B which was also the blood of deceased Kuldeep.

Recovery of danda

42. While assaulting Kuldeep, accused Sanjay gave danda blow on the person of deceased and when PW2 and PW3 tried to rescue their brother, they were threatened by weilding this danda by accused Sanjay. After causing injuries to Kuldeep, all the accused persons ran away from the spot. The danda was left behind while Ravi took away the knife with him.

43. The ocular testimony of both these witnesses that accused Sanjay was carrying a danda with him with which he frightened Sunny and Rupesh not to come forward to save Kuldeep and the fact that he also hit Kuldeep with danda a couple of times find corroboration from the circumstantial evidence.

44. On receipt of information, SI Lalit Kumar (PW-12) along with members of the crime team including photographer HC Vijay Kumar (PW-1) reached the spot and both these witnesses have deposed that besides blood, one danda was also lying at the spot. The photographs Ex.P-2(7 to 12) also shows the presence of danda lying at the spot. Insp. Suresh Chand has corroborated their testimony regarding lying of danda at the spot which was seized vide seizure memo Ex. PW 2/B. During the course of investigation, danda was sent to CFSL which gave positive report for human blood. Although the blood group could not be opined on the same but non-detection of blood group is not fatal. In **Ramnaresh & Ors. v. State of Chattisgarh,** (2012) 4 SCC 257 which was a case u/s 302/499/376(2)(g) read with Section 34 IPC, the plea taken was that the CFSL report does not connect the accused with the commission of crime as the CFSL report did not give the group of the blood/semen. Repelling the contention, it was held by Hon'ble Supreme Court that CFSL report was inconclusive but not negative which would not provide the accused with any material benefit. Although it is true that fingerprints of the accused Sanjay were not taken in order to compare the same with the fingerprints on the danda, but that again is not such a factor which may provide any benefit to the accused, keeping in view the testimony of PW 2 and PW3, coupled with the fact that the danda was found lying at the spot which was stained with blood moreover no finger prints could be detected on the danda.

Medical Evidence

45. Dr. R.K.Sharma (PW-9) has proved that Kuldeep was brought

to Panchsheel Hospital by his relatives and his brother was accompanying him. He declared him 'brought dead' and advised him to take the deceased to DDU hospital.

46. PW16 Dr. Bhawna was posted as Casualty Medical Officer at DDU Hospital. She has deposed that on 14th October, 2006 at 11:50 PM, a patient, namely, Kuldeep was brought by Constable Roop Singh with alleged history of assault. On medical examination, she prepared his MLC Ex.PW16/A and found following injuries:-

1. Incised stabbed wound over sternum, gaping, viscera visible.
2. Incised wound- stab just below umbilicus, depth full finger could be inserted.
3. Incised wound over left side of chest lateral to mid calvicular line. 4. Incised wound over left lumbar region, tailing downward.
5. Incised wound left forearm flexor aspect below elbow.
6. Incised wound left forearm flexor aspect middle 1/3rd.
7. Incised wound left forearm extensor aspect, soft tissues exposed.
8. Clots in nostrils and bleed from oral cavity seen.
9. Subcutaneous emphysema (present of air) felt over left side chest wall.

47. PW27 Dr. Anil Shandilya conducted post mortem on the dead body of Kuldeep and prepared the post mortem report Ex.PW 27/A. On examination he found the following injuries:-

External injuries:

1. Incised stab wound over sternum front of chest of size 2.8cm x 2cm x chest cavity deep 2.4cm lateral to midline right side with clean cut well defined regular margins with dried up blood clots.
2. Incised stab wound over left nipple longitudinally placed left side chest of size 4.8cm x 2.9cm x chest cavity deep with clean cut well defined regular margins with dried up blood clots.
3. Incised wound right side from umbilical over abdomen of

size 3cm x 2cm into muscle deep with clean deep with well defined regular margins with dried up blood clots.

4. Incised wound over left lumber region 2.5cm x 1.9cm x S.C. to muscle deep with well defined regular margins with dried up blood clots.

5. Incised wound flexor aspect left forearm 3cm below elbow or size 7cm x 3cm x muscle deep with well defined regular margins with dried up blood clots.

6. Incised wound left arm flexor aspect middle 1/3 of size 2.5cm x 2cm x muscle deep with well defined regular margins with dried up blood clots.

7. Incised wound over left forearm distal 1/3 of size 4cm x 2cm x subcutaneous to muscle deep with well defined regular margins with dried up blood clots.

Internal injuries:

1. Head: Pale (Brain matter)
2. Neck: NAD
3. Chest: Wound No.1 - penetrating right side chest wall underlying structures and entering the chest cavity piercing right lung through and through correspondingly with sharp cut. Wound No. 2 - Penetrating left side chest wall underlying structure and left ventricle of heart through and through correspondingly with sharp cut. Chest cavity full of liquid blood and clots about 2.6 ltrs.
4. Abdomen: All visceras pale, stomach containing semi digested unidentifiable food.

48. It was opined that cause of death was due to haemorrhage and shock resulting from injury to lungs and heart, consequent upon stab injury which was sufficient to cause death in ordinary course of nature. All injuries were ante mortem in nature caused by sharp edged weapon.

49. He further deposed that on 15.11.2006 he received an application along with one sealed parcel containing weapon of offence. The weapon i.e. knife/churra shown to him was having reddish brown stains on both surfaces of blade and wooden handle with bend pointed tip. The inner edge was sharp in whole length and the upper edge blunt about ¾ in length and the rest tapering edge of upper border sharp with bent pointed

tip. He gave his subsequent opinion along with the sketch of dagger Ex.PW27/B opining that the injuries mentioned in the post mortem report could be caused by the examined weapon of offence i.e. dagger Ex.P3 or similar like weapon.

50. It was submitted that the medical evidence is at variance with the ocular testimony, inasmuch as, according to the post mortem report and the evidence given by the doctor, no blunt injury was found on the body of the deceased Kuldeep and injuries were caused by sharp edged weapon. However, the ocular testimony is to the effect that couple of danda blows were given on the person of deceased Kuldeep and injuries were caused by sharp edged weapon.

51. The question before us, therefore, is whether the "medical evidence" should be believed or whether the testimony of the eye witnesses should be preferred. There is no doubt that ocular evidence should be accepted unless it is completely negated by the medical evidence. **Abdul Sayeed v. State of M.P.,** (2010) 10 SCC 259 following **State of Hayana v. Bhagirath,** (1999) 5 SCC 96 and **Solanki Chimanbhai Ukabhai v. State of Gujarat,** (1983) 2 SCC 174 This principle has more recently been accepted in **Gangabhavani v. Rajapati Venkat Reddy,** AIR 2013 SC 3681.

52. Substantially similar question arose in **Bastiram v. State of Rajasthan,** 2014 III AD (SC) 348 and a plea was taken that the Trial Court and the High Court erroneously gave primacy to the ocular evidence disregarding the medical evidence. It will be advantageous to reproduce the relevant observations which are as under:-

> "38. The expression "medical evidence" compendiously refers to the facts stated by the doctor either in the injury report or in the post mortem report or during his oral testimony plus the opinion expressed by the doctor on the basis of the facts stated. For example, an injury on the skull or the leg is a fact recorded by the doctor. Whether the injury caused the death of the person is the opinion of the doctor. As noted in **State of Haryana v. Bhagirath,** (1999) 5 SCC 96 on the same set of facts, two doctors may have a different opinion. Therefore, the opinion of a particular doctor is not final or sacrosanct.
>
> 39. What about the facts recorded by a doctor-are they sacrosanct? In **Kapildeo Mandal v. State of Bihar,** (2008) 16 SCC 99 the facts found by the doctor were preferred over the eye witness

testimony. The ocular evidence was to the effect that the deceased suffered firearm injuries. However, the doctor conducting the post mortem examination stated that he did not find any indication of any firearm injury on the person of the deceased. No pellets, bullets or any cartridge were found in any of the wounds. Accepting the "medical evidence" on facts, it was observed that:

> "[T]he medical evidence is to the effect that there were no firearm injuries on the body of the deceased, whereas the eyewitnesses' version is that the Appellant-accused were carrying firearms and the injuries were caused by the firearms. In such a situation and circumstance, the medical evidence will assume importance while appreciating the evidence led by the prosecution by the court and will have priority over the ocular version and can be used to repel the testimony of the eyewitnesses as it goes to the root of the matter having an effect to repel conclusively the eyewitnesses' version to be true.

40. Similarly, a fact stated by a doctor in a post mortem report could be rejected by a Court relying on eye witness testimony, though this would be quite infrequent. In **Dayal Singh v. State of Uttaranchal,** (2012) 8 SCC 263 the post mortem report and the oral testimony of the doctor who conducted that examination was that no internal or external injuries were found on the body of the deceased. This Court rejected the "medical evidence" and upheld the view of the Trial Court (and the High Court) that the testimony of the eye witnesses supported by other evidence would prevail over the post mortem report and testimony of the doctor. It was held:

> "[T]he trial court has rightly ignored the deliberate lapses of the investigating officer as well as the postmortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3

> [doctor] and PW 6 [investigating officer] are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court."

41. An opinion given by a doctor, based on the facts recorded on an examination of a victim of a crime, could be rejected by relying on cogent and trustworthy eye witness testimony."

53. Reverting to the case in hand, according to Dr. Anil Shandilya, injuries were by sharp edged weapon. No question was put by either of the sides as to whether any injury could have been caused by blunt object. However, a specific question was put to Dr. Bhawna in her cross examination as to whether in the MLC of Kuldeep, she found any injury caused by a blunt weapon and she replied:

Injury No.9 – subcutaneous emphysema over the chest could have been caused by both- a blunt instrument or a sharp instrument. This injury was one in which there was air under the skin and this could have been possible either on account of the knife given on the chest or because of breaking of ribs or otherwise. This breaking of ribs could have taken place either by way of a blunt force impact or fall.

54. Under the circumstances, the possibility of Injury no.9 caused by blunt object could not be ruled out by Dr. Bhawna. Therefore, it cannot be said that no injury was caused by danda by accused Sanjay. The danda was also blood stained and on scientific examination, human blood was detected on the same. Even assuming for the sake of argument that the danda was not used for causing any injury on the person of Kuldeep, at least it stands proved that the same was used by him to prevent Sunny and Rupesh to come forward to save their brother Kuldeep and they were threatened by wielding this danda. Scientific evidence

55. The scientific evidence also conclusively proves the case of prosecution. During the course of investigation, following articles were seized:-

(i) From the spot, blood sample, blood stained earth, sample earth, pair of blood stained hawai chappal make Rexona

Ex.P-1 belonging to deceased Kuldeep and a blood stained danda Ex.P2 were seized vide seizure memo Ex.PW 2/B;

(ii) A dagger/churra Ex.P3 was recovered at the instance of accused Ravi which was seized vide seizure memo Ex.PW2/X;

(iii) After the arrest of accused persons, their clothes were seized vide seizure memos Ex.PW2/Q, Ex.PW2/R, Ex.PW2/S and Ex.PW2/P.

(iv) The clothes of complainant Sunny were seized vide seizure memo Ex.PW2/T;

(v) After post mortem examination, doctor handed over clothes of the deceased and his blood sample which were seized vide seizure memo Ex.PW 23/H.

56. All these exhibits were sent to CFSL, Kokatta and as per the CFSL report Ex.PW23/J, pair of Hawai Chappal, danda/bamboo stick, dagger, pant, banian of accused Ravi Kumar; shirt, pant and banian of accused Karamvir; T-Shirt, half pant and shirt of PW-2 Sunny; shirt, vest, jeans and vest of deceased Kuldeep gave positive result for "human blood". However, no blood could be detected on the clothes of accused Sanjay and Raj Kumar. On the dagger, clothes of accused Ravi Kumar, clothes of PW-2 Sunny, human blood of Group B was detected which was the blood group of the deceased. The effect of the same is that the human blood of B group which was of the deceased was found on the dagger Ex.P-3 which was got recovered from accused Ravi Kumar and proves that it was the same dagger which was used as a weapon in committing the offence. The bamboo stick/danda Ex.P-2 used by accused Sanjay which he left at the spot while running away also showed positive result of human blood establishing that it was used on the victim. The clothes of Sunny Ex.P-14 to P-17 gave positive result of human blood of Group B which establishes presence of Sunny at the spot and that he had taken the deceased to the hospital and, therefore, while removing the deceased to hospital, his blood came on his clothes. The clothes of accused Ravi Kumar, Ex. P-5 and P-6 also showed positive result for human blood of Group B as that of deceased Kuldeep establishing his presence at the spot of incident and that the blood of the deceased Kuldeep came on his clothes while he attacked Kuldeep. Clothes of accused Karamvir Ex.P-7 to P-9 also gave positive result for human blood. The allegations against accused Karamvir was of catching hold of

the deceased from his legs and the presence of human blood on his clothes establishes his presence at the spot. Moreover, no explanation has been given either by accused Ravi Kumar or Karamvir as to how blood came on their clothes.

57. Much emphasis was laid by learned counsel for the appellants Raj Kumar and Sanjay that no blood was detected on their clothes. The allegations against accused Raj Kumar are of catching hold of hands of deceased Kuldeep and therefore, blood may not have come on his clothes. As regards Sanjay is concerned, the allegations against him are of wielding danda at Sunny and Rupesh to prevent them from helping the deceased and of giving danda blows to the deceased. The mere non-detection of blood on his clothes does not ipso facto prove his absence at the spot or non-participation in the commission of offence.

58. The result of the aforesaid discussion is that testimony of PW-2 and PW-3 are of sterling quality and both the witnesses stood the test of cross examination. Moreover their ocular version of the incident find substantial corroboration from the recovery of weapon of offence, medical evidence and the scientific evidence.

Motive

59. Motive to commit crime in the instant case is writ large inasmuch as it is evident from the testimony of prosecution witnesses that deceased Kuldeep was having a love affair with Sapna, daughter of accused Ravi Kumar, due to which differences had arisen between the families. According to PW-2 Sunny and PW-4 Prem Lata, accused Ravi Kumar had even given beatings to his daughter Sapna and two to three months prior to the incident had sent her to her maternal uncle's house. He had also threatened Kuldeep and asked him to desist from his activities. Not only that accused Ravi Kumar and Sanjay had visited the house of Prem Lata and asked her to advise Kuldeep to refrain from his activities. Even the Investigating Officer Suresh Chand has deposed that there was previous dispute between the parties since the deceased had distributed the objectionable photographs of the daughter of the accused Ravi. On this account Ravi had sent his daughter to Rajasthan at her maternal uncle's house despite which he continued with this objectionable behaviour. The photograph of deceased Kuldeep with Sapna, Ex.PW 2/V and PW 2/W proves the same. It was in this background that on the fateful day when deceased Kuldeep along with his brother Sunny and cousin Rupesh were returning from Balmiki Mandir, all the four accused in order to take

revenge since reputation of their family was at stake, committed the gruesome murder.

60. In **Molu v. State of Haryana,** AIR 1976 SC 2499, it was observed that when the direct evidence regarding the assault is worthy of credence and can be believed, the question of motive becomes more or less academic. Sometimes motive is clear and can be proved. However, sometimes the motive is shrouded in mystery and it is very difficult to locate the same. If, however, the evidence of the eye witnesses is credit worthy and is believed by the Court which has placed implicit reliance on them, the question whether there is motive or not becomes wholly irrelevant. To the same effect is the law laid down in **Rishi Pal v. State of Uttarakhand,** 2013 II AD (SC) 103.

61. Keeping in view the testimony of PW2 and PW4, the eye witness account of the incident narrated by PW Sunny and Rupesh and the other circumstances available on record, the motive to commit the crime is established beyond reasonable doubt.

Non examination of independent witnesses

62. It was submitted by learned counsel for the appellants that despite the fact that number of persons had gathered at the spot but no independent witness was joined in the proceedings. It is common experience that public persons are generally reluctant to join police proceedings. There is general apathy and indifference on the part of public to join such proceedings. In **Appabhai & Anr. v. State of Gujarat,** AIR 1988 SC 696, it was held by Hon'ble Supreme Court that:

> *"11. ......It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused."*

63. Hon'ble Supreme Court in **Krishna Mochi v. State of Bihar,** 2002 6 SCC 81 in this regard held as under:

> *"31. It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross-examination which may sometimes be because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other all urence or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent."*

64. The apathy and indifferent attitude of the public at large is manifest from the material available on record, inasmuch as,

i) PW6 Krishan Kumar is the first cousin of the deceased. It has come in his cross-examination that police officials met him on the day of occurrence and made inquiries from him but he refused to make the statement to the police because the accused persons were his immediate neighbours. It was only on 10th November, 2006 that his statement could be recorded by the police. If being close relative of the deceased, he was hesitant in making statement to the police since the accused

persons and the complainant party were resident of the same locality, therefore, he did not want to depose against accused persons due to neighbourhood, then, possibility of any other independent person of the locality coming forward to join the investigation is quite remote. Moreover, when he appeared in Court, he chose not to support the prosecution version.

ii) PW5 Shyam Khanna was the resident of the same locality and the gruesome murder has taken place in front of his house. Even this witness has deposed that on hearing commotion in the gali, he came outside his house and saw Kuldeep lying on the ground and blood was oozing from his body. Large number of people had gathered there. After sometime, he went back to his house and closed the door. Since blood had fallen on the platform built outside his house, therefore, when police came and collected the blood from that platform and also from gali, then he was called by the police to join the proceedings. Even then when he appeared in the witness box, he chose not to support the case of prosecution.

(iii) It has come in the statement of PW15 Constable Roop Singh that on receipt of information regarding commission of murder, he went to the spot and came to know that injured had been removed to Panchsheel Hospital. Therefore, he went to Panchsheel Hospital where he met Sunny who was standing outside the hospital and wanted to shift his brother to DDU Hospital but was unable to arrange any vehicle. As such, he requested one private van for taking the injured to DDU hospital. On his asking, the van driver took the injured in his van, however, at Uttam Nagar Bus Terminal, the driver of the van stopped the vehicle and refused to go further saying that Kuldeep has already expired and he did not want to be involved in any court case. It was only after his persistent asking, after quite some time, that he agreed and took the injured to DDU hospital but he did not disclose his name and address. All this reflects that although on humanitarian grounds, the private van driver initially agreed to take the injured to DDU Hospital but later on refused to go further as he did not want to be involved in any court case. The first cousin of the deceased Krishan Kumar (PW5) initially refused to give any statement, the accused being his neighbour. PW5 Shyam Khanna despite deposing that he had never seen such a terrifying scene chose to close the door of his house instead of rendering any help to Sunny and Rupesh to remove injured to hospital. In that scenario, if any other independent person of the locality did not agree to join, no adverse inference can be drawn. Moreover, there is no reason to disbelieve the testimony of PW2 and PW3 which find corroboration to some extent from PW5 Shyam Khanna and PW6 Krishan Kumar and all the other circumstantial evidence as discussed above.

Place of incident:-

65. The case of the prosecution is that the murder of deceased had taken place opposite the house of Shyam Khanna and Krishan Kumar whereas the case of defence is that the murder of Kuldeep had been committed by some unknown person near the metro station and accused persons were falsely implicated on the basis of suspicion. For raising this submission, reliance was placed on Ex. PW23/DA vide which a call was given to PCR at 2055 regarding a quarrel at Sewak Park Metro Station, near Kakrola. At 2056, another call was made that a boy, namely, Kuldeep, s/o Jasbir, r/o House No. 73, Gram Sabha, Sewak Park, Uttam Nagar had a quarrel in which he received knife blows. He has been removed to Panchsheel Heart and Medical Centre where he was declared 'brought dead' by the doctor. Relying upon this information given to PCR, it was submitted that Kuldeep sustained knife injuries in a quarrel at Sewak Park Metro Station near Kakrola and was removed by some people from Sewak Park to Panchsheel Heart and Medical Centre where he was declared 'brought dead'. However, on the basis of suspicion, the accused persons were falsely implicated in this case.

66. The accused persons cannot get any benefit from the PCR call. According to Inspector Suresh Chand on verification, it was found that this PCR call Ex. PW23/DA was made by accused Raj Kumar. As per record, accused Raj Kumar was working as Constable in Delhi Police. As such, possibility of making this call for the purpose of creating a defence cannot be ruled out. Moreover, seeing the gruesome murder of Kuldeep, there was agitation amongst the residents of the area and in order to bring the situation under control, extra police force had to be called by Inspector Suresh Chand at the spot. Large crowd gathered outside the house of accused persons and were raising slogan 'maro maro' and being apprehensive of danger to their lives this call of quarrel may have been made by the accused Raj Kumar. All the accused were hiding inside their houses. The relatives of the deceased and the persons of the locality were in aggressive mood and wanted to take revenge. Situation was very tensed. Even when the accused persons were taken out from their house, somebody from the public threw a stone which hit on the head of Karamvir due to which he sustained injuries.

67. Moreover, vide DD No.46 Ex. PW15/C at 9:35 PM information was given that a murder had taken place at Dwarka Mor, Sewak Park near the house of Ashok Bagri. Prior thereto DD No.40A Ex.PW23/A was also recorded on receipt of information from W60 operator at 9:15 PM regarding a murder near the house of Ashok Bagri at Dwarka Mor, Sewak Park. As per this DD, ASI Jai Prakash was being sent to the spot. Information was also given to additional SHO, Inspector Suresh Chand and in-charge PP R.S. Meena. Inspector Suresh Chand, PW23 has deposed that on receipt of DD No.40A Ex.23/A, he along with Additional SHO Inspector R.S. Chahal reached at the spot, i.e., opposite house No. B-1, Sewak Park, Uttam Nagar where he met SI R.S. Meena, ASI Jai Prakash, Costable Nasib Singh and other staff and found blood lying in the gali opposite house No. B-1, Sewak Park and on the wall of chabootra. Besides that, one danda and one pair of blood stained hawai chappal of the deceased was also lying at the spot. The Crime Team comprising of SI Lalit Kumar(PW12) and Head Constable Vijay Kumar(PW1) also reached the place, i.e., House No. B-1, Sewak Park, Uttam Nagar and prepared the Crime Team report Ex.PW12/A and photographs Ex.P2 (7 to 12) were taken.

68. PW2 and PW3 have also deposed regarding commission of murder of Kuldeep near the house of Shyam Khanna. PW5 Shyam Khanna is resident of B-2A, Sewak Park, Uttam Nagar. This witness has also deposed that on hearing the commotion in the gali and hearing the cries of 'maar gaye-maar gaye', he came outside his house in the gali and saw deceased lying on the ground, blood was oozing from his body. Some blood had fallen on the platform built outside his house. House of PW6 Krishan Kumar is opposite the house of PW5 Shyam Khanna and this witness has also deposed that Kuldeep was lying on the ground in front of his house and that of the house of Shyam Khanna. Under the circumstances, there is no doubt about the place of incident which stand established from the oral testimony of the witness coupled with the crime team management report.

Delay in lodging FIR

69. It is urged by the learned counsel for the appellants that there is delay in lodging FIR and in the absence of explanation, the case of prosecution should be thrown overboard. Delay in the lodging of the FIR is not by itself fatal to the case of the prosecution nor can delay itself create any suspicion about the truthfulness of the version given by the informant just as a prompt lodging of the report may be no guarantee about its being wholly truthful. So long as there is cogent and acceptable explanation offered for the delay it looses its significance. Whether or not the explanation is acceptable will depend upon the facts of each case. There is no cut and dried formula for determining whether the explanation is or is not acceptable.

70. In this context, we may refer with profit to the judgment rendered in **State of H.P. v. Gian Chand,** (2001) 6 SCC 71 wherein a three-Judge Bench has opined that the delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay. If the explanation offered is satisfactory and there is no possibility of embellishment, the delay should not be treated as fatal to the case of the prosecution.

71. In **Ramdas and Ors. v. State of Maharashtra,** (2007) 2 SCC 170, it has been ruled that when an FIR is lodged belatedly, it is a relevant fact of which the court must take notice of, but the said fact has to be considered in the light of other facts and circumstances of the case. It is obligatory on the part of the court to consider whether the delay in lodging the report adversely affects the case of the prosecution and it would depend upon the matter of appreciation of evidence in totality.

72. In **Kilakkatha Parambath Sasi and Ors. v. State of Kerala,** AIR 2011 SC 1064, it has been laid down that when an FIR has been lodged in a belated manner, inference can rightly follow that the prosecution story may not be true but equally on the other side, if it is found that there is no delay in the recording of the FIR, it does not mean that the prosecution story stands immeasurably strengthened. Similar view has also been expressed in **Kanhaiya Lal and Ors. v. State of Rajasthan,** 2013 (6) SCALE 242.

73. In **Shanmugam** (supra) there was a delay of few hours in lodging the FIR. In that case also, the brother of the deceased returned to the place of occurrence after the accused persons had left only to find his brother dead with his face and head severely injured. He travelled to Harur to inform his brother who accompanied him to the place of occurrence in a car and then to the police station where the first information report was lodged. It was observed that some time was obviously wasted in this process of travel to and from the place of occurrence and to the police station for lodging the report. The report gave a detailed account of the incident. The version given by author of the FIR remained consistent

with the version given in the first information report and as such, it was observed that there was no reason to disbelieve the prosecution case only because the first information report was delayed by a few hours especially when the delay was satisfactorily explained.

74. Scrutinized on the anvil of the aforesaid enunciation of law, we are disposed to think that the case at hand does not reveal that the absence of spontaneity in the lodgement of the FIR has created a coloured version.

75. It is a matter of record that the incident has taken place at about 8:30 pm. Immediately thereafter, the injured was removed to Panchsheel Heart and Medical Centre by PW2 Sunny where, after examination Dr.R.K. Sharma declared Kuldeep dead. However, Sunny insisted that Kuldeep be thoroughly examined. Therefore, Dr. R.K. Sharma advised him to take Kuldeep to DDU Hospital in case he was not satisfied. Since no ambulance was available, Sunny tried to stop number of vehicles but in vain. When Constable Roop Singh reached Panchsheel Hospital and was informed by Sunny that he wanted to take his brother to DDU Hospital then he managed to stop a private van and carried the deceased to DDU Hospital. Sunny, however returned to the spot in order to inform his family members and thereafter he went to DDU Hospital where he met Inspector Suresh Chand who recorded his statement Ex. PW2/A, where after FIR was got registered. The report Ex. PW2/A gave a detailed account of the incident. The version given by the author of the FIR remained consistent with the version given in the First Information Report, as such, there is no reason to disbelieve the prosecution case only because the First Information Report was delayed by a few hours specially when the delay was satisfactorily explained.

Plea of alibi

76. The appellants in their statement recorded under Section 313 Cr. P.C. have tried to take a plea of alibi by stating that the alleged incident took place on a Saturday and they were busy in the chowki of Kali Mata. Police came to their house and took them and falsely implicated in this case.

77. When an alibi is set up, the burden is on the accused to lend credence to the defence put up by him.

78. Explaining the essence of a plea of alibi, it was observed in **Dudh Nath Pandey v. State of U.P.,** (1981) 2 SCC 166 that:

"The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed."

79. This was more elaborately explained in **Binay Kumar Singh v. State of Bihar,** (1997) 1 SCC 283 in the following words:

"22. We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant."

"23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such

circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi."

80. In **Sk. Sattar v. State of Maharashtra,** (2010) 8 SCC 430, it was held that plea of alibi has to be proved with absolute certainty so as to completely exclude the possibility of the presence of the accused at the place of incident at the relevant time.

81. Reverting to the case in hand, PW4 Smt. Premlata, mother of the deceased has admitted in cross-examination that accused Sanjay is a tantric and on every Saturday, he used to perform puja inside his house and people used to visit him to seek solutions for their problems. However, according to her, Sanjay performs pooja between 5:00 to 8:00 pm and she denied the suggestion that Sanjay performs pooja till 10:00 pm or that on the date of incident large number of persons were present in the gali till late hours, who visited the accused Sanjay for pooja and chowki. PW6 Krishan Kumar although did not support the case of prosecution, but in regard to this aspect, he supported the prosecution version by deposing that accused Sanjay performs pooja, however, he could not say if accused Sanjay sat on mata ki chowki on that day. He denied the suggestion that none of the accused were present at the place of occurrence or that he neither saw the accused persons stabbing Kuldeep nor running away from the spot. The incident in question had taken place around 8:30 pm. Even if it is believed that accused Sanjay performs pooja and is visited by mata ki chowki, the onus of proving the fact that at the relevant time, he or any of the other accused were not present at the spot, was upon the accused persons and absolutely no evidence has been led by them to prove their presence in the house for performing mata ki chowki. As such, the plea of alibi taken up by the accused persons is not proved.

82. The foregoing discussion, goes to show that prosecution has been able to establish that before Ravi Kumar stabbed Kuldeep, both Sunny and Rupesh were kept away by the accused Sanjay who was carrying a danda and threatened them and it was accused Ravi, who exhorted his brothers that Kuldeep had defamed his family on account of an affair with his daughter and they should kill him on which Raj Kumar caught hold of the hands of Kuldeep whereas Karamvir caught hold of Kuldeep.s feet and pinned down Kuldeep while accused Ravi Kumar inflicted knife blows on the abdomen and chest of Kuldeep.

83. In fact, all the submissions made by the learned counsel for the appellants challenging the incident in question looses significance, as during the course of argument, it was admitted by learned counsel for the appellant Ravi that such an incident had taken place but it was submitted that the circumstances in which the incident had taken place deserves to be noticed. According to him, since the deceased was defaming his daughter and was bringing disrepute to his family, as such, due to sudden and grave provocation, the offence had been committed, as such, the case falls under the exception clause and his conviction under Section 302 IPC is liable to be converted under Section 304 IPC.

84. Learned Additional Public Prosecutor for the State countered the submission by submitting that no such plea was taken by the appellant before the Trial Court, rather during the trial, the case of the appellant was one of denial simplicitor and of false implication. Now, at this stage, the appellant cannot be permitted to take the plea of grave and sudden provocation which is otherwise not proved in the facts and circumstances of the case.

85. In **State of Rajasthan v. Manoj Kumar,** 2014 V AD (S.C.) 243, a similar question arose where the accused persons took the plea of right of private defence in appeal and the same was opposed by the learned counsel for the State on the ground that such a plea was never taken by the accused in their statement under Section 313 Cr.P.C., hence High Court cannot advert to the same. Repelling the contention of learned counsel for the State, Hon'ble Supreme Court observed as under:-

*"11. .....we may refer with profit to the pronouncement in **Munshi Ram and Ors. v. Delhi Administration** (1968) 2 SCR 455 wherein it has been laid that even if an accused does not take the plea of private defence, it is open to the court to consider such a plea if the same arises from the material on record and burden to establish such a plea is on the accused and that burden can be discharged by showing preponderance of probabilities in favour of that plea on the basis of material on record. In **Salim Zia v. State of Uttar Pradesh** (1979) 2 SCC 648 the observation made by this Court to the effect that it is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of*

probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence. Similarly, in Mohd. Ramzani v. State of Delhi 1980 Supp SCC 215, it has been held that it is trite that the onus which rests on an accused person Under Section 105, Evidence Act, to establish his plea of private defence is not as onerous as the un shifting burden which lies on the prosecution to establish every ingredient of the offence with which the accused is charged, beyond reasonable doubt."

86. In view of this legal proposition even if no such plea was taken by the appellant before the Trial Court, it is to be seen whether the appellant has been able to establish such a plea on the basis of material available on record. Before doing so, let us now discuss the principles governing Sections 300 and 302 of the Indian Penal Code.

87. Sections 299 and 300 of the Code deal with the definition of 'culpable homicide' and 'murder', respectively. In terms of Section 299, 'culpable homicide' is described as an act of causing death (i) with the intention of causing death or (ii) with the intention of causing such bodily injury as is likely to cause death, or (iii) with the knowledge that such an act is likely to cause death. As is clear from a reading of this provision, the former part of it, emphasises on the expression 'intention' while the latter upon 'knowledge'. Both these are positive mental attitudes, however, of different degrees. The mental element in 'culpable homicide', that is, the mental attitude towards the consequences of conduct is one of intention and knowledge. Once an offence is caused in any of the three stated manners noted-above, it would be 'culpable homicide'. Section 300, however, deals with 'murder' although there is no clear definition of 'murder' in Section 300 of the Code. As has been repeatedly held by Supreme Court, 'culpable homicide' is the genus and 'murder' is its species and all 'murders' are 'culpable homicides' but all 'culpable homicides' are not 'murders'.

88. Supreme Court in the case of **Vineet Kumar Chauhan v. State of U.P.,** (2007) 14 SCC 660 noticed the academic distinction between 'murder' and 'culpable homicide not amounting to murder' vividly brought out in **State of A.P. v. Rayavarapu Punnayya,** (1976) 4 SCC 382, where it was observed as under:

"... that the safest way of approach to the interpretation and application of Section 299 and 300 of the Code is to keep in

focus the key words used in various clauses of the said sections. Minutely comparing each of the clauses of Section 299 and 300 of the Code and the drawing support from the decisions of the court in Virsa Singh v. State of Punjab and Rajwant Singh v. State of Kerala, speaking for the court, Justice RS Sarkaria, neatly brought out the points of distinction between the two offences, which have been time and again reiterated. Having done so, the court said that wherever the Court is confronted with the question whether the offence is murder or culpable homicide not amounting to murder, on the facts of a case, it would be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be that the accused has done an act by doing which he has caused the death of another. Two, if such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to culpable homicide as defined in Section 299. If the answer to this question is in the negative, the offence would be culpable homicide not amounting to murder, punishable under the First or Second part of Section 304, depending respectively, on whether this second or the third clause of Section 299 is applicable. If this question is found in the positive, but the cases come within any of the exceptions enumerated in Section 300, the offence would still be culpable homicide not amounting to murder, punishable under the first part of Section 304 of the Code. It was, however, clarified that these were only broad guidelines to facilitate the task of the court and not cast-iron imperative."

89. Having understood the legal principles governing Sections 302 and 304 IPC, let us now examine whether appellant no.1's case, as he claims, falls under Exception 1 of 300 which offence would be punishable under the first part of Section 304 of the Code or whether the conviction of the appellant by the trial court is liable to be confirmed.

90. In order to examine whether the case of the appellant comes under Exception 1 of Section 300 IPC, let us extract the provision which is as follows:

"Exception 1.-When culpable homicide is not murder.-Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes

the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:-

First.-That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person

Secondly.-That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.-That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.-Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact."

91. We may now refer to the celebrated case of **K.M. Nanavati v. State of Maharashtra,** 1962 Supp (1) SCR 567, wherein the Supreme Court extensively dealt with the aspect of grave and sudden provocation and observed as under:

"135. Homicide is the killing of a human being by another. Under this exception, culpable homicide is not murder if the following conditions are complied with: (1) The deceased must have given provocation to the accused. (2) The provocation must be grave. (3) The provocation must be sudden. (4) The offender, by reason of the said provocation, shall have been deprived of his power of self-control. (5) He should have killed the deceased during the continuance of the deprivation of the power of self-control. (6) The offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

152. Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation ? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and emotional background of the society to which an accused belongs. In our vast country there are social groups ranging from the lowest to the highest state of civilization. It is

neither possible nor desirable to lay down any standard with precision : it is for the court to decide in each case, having regard to the relevant circumstances. It is not necessary in this case to ascertain whether a reasonable man placed in the position of the accused would have lost his self-control momentarily or even temporarily when his wife confessed to him of her illicit intimacy with another, for we are satisfied on the evidence that the accused regained his self-control and killed Ahuja deliberately.

153. The Indian law, relevant to the present enquiry, may be stated thus: (1) The test of "grave and sudden" provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control. (2) In India, words and gestures may also, under certain circumstances, cause grave and sudden provocation to an accused so as to bring his act within the first Exception to s. 300 of the Indian Penal Code. (3) The mental background created by the previous act of the victim may be taken into consideration in ascertaining whether the subsequent act caused grave and sudden provocation for committing the offence. (4) The fatal blow should be clearly traced to the influence of passion arising from that provocation and not after the passion had cooled down by lapse of time, or otherwise giving room and scope for premeditation and calculation."

92. In **Sukhlal Sarkar v. Union of India (UOI) Ors.,** (2012) 5 SCC 703, Supreme Court held as under:

"10. The meaning of the expressions "grave" and "sudden" provocation has come up for consideration before this Court in several cases and it is unnecessary to refer to the judgments in those cases. The expression "grave" indicate that provocation be of such a nature so as to give cause for alarm to the Appellant. "Sudden" means an action which must be quick and unexpected so far as to provoke the Appellant. The question whether provocation was grave and sudden is a question of fact and not one of law. Each case is to be considered according to its own facts. 11. Under Exception 1 of Section 300, provocation must be grave and sudden and must have by gravity and suddenness deprived the Appellant of the power of self-control, and not merely to set up provocation as a defence. It is not enough to

show that the Appellant was provoked into losing his control, must be shown that the provocation was such as would in the circumstances have caused the reasonable man to lose his self-control. A person could claim the benefit of provocation has to show that the provocation was grave and sudden that he was deprived of power of self-control and that he caused the death of a person while he was still in that state of mind."

93. Applying these legal principles to the facts of the case, it can be said that the defence of accused that his case is covered under Exception 1 of Section 300 does not hold any ground. The plea of sudden and grave provocation can be taken only when a person is so deeply provoked that he loses his self-control and causes the death of a person while still being in that state of mind. PW2 Sunny in his testimony had stated that on account of the affair between the deceased Kuldeep and Sapna, the family of accused Ravi Kumar had enmity with Kuldeep. He further stated that about a month prior to this incident, Ravi Kumar had caused beatings to his daughter Sapna for being in love with Kuldeep and had sent her away to her maternal uncle's house. This part of the testimony also finds corroboration from the testimony of PW4 Premlata, mother of deceased Kuldeep, who stated that about 2-3 months prior to this occurrence, accused Ravi gave beatings to his daughter Sapna and sent her to her mama's house. PW4 also stated that about 2-3 months prior to this occurrence, accused Ravi and Sanjay came to her house complaining that accused Kuldeep used to tease Sapna and that she should advise him to refrain from doing the same. It is therefore clear that Appellant Ravi had learnt about the affair between Kuldeep and his daughter Sapna much prior to the date of incident. Nothing occurred on the date of the occurrence to have provoked the accused to lose his self control or to cause his death while still in that state of mind. Hence, the defence of sudden and grave provocation is not available to Appellant no.1. Another relevant point that discards his theory of sudden and grave provocation is that it is proved from the evidence on record that the accused persons were armed with weapons when they came out of the gali in front of house No.B-1, Sewak Park. While accused Sanjay was carrying a danda, Accused Ravi Kumar was carrying a large knife (Churra). According to the post-mortem report, accused persons inflicted as many as 7 incised wound injuries on vital parts of the body of the deceased, like the lungs and the heart, which according to PW27 Dr Anil Shandilya, Senior Resident, DDU Hospital, were sufficient to cause death in the ordinary course of nature.

94. Learned counsel for the accused Raj Kumar, Karamvir and Sanjay submitted that the only role ascribed to accused Raj Kumar and Karamvir is that of catching hold of the hands and feet of the deceased whereas, the role qua accused Sanjay, as proved on record, is only regarding wielding of danda to prevent PW2 & PW3 coming to rescue of Kuldeep. None of these accused, according to the learned counsels, shared any common intention to commit the murder of deceased.

95. The nuances of Section 34 of the Indian Penal Code has been explained by Hon'ble Supreme Court in several decisions, but we will only refer to the decision in the case of **Nadodi Jayaraman and Ors. v. State of Tamil Nadu,** (1992) 3 SCC 161 and **Saravanan and Anr. v. State of Pondicherry,** (2004) 13 SCC 238. In the case of Nadodi Jayaraman and Ors. (Supra), the Court has observed:

"9. Section 34 of Indian Penal Code enacts that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons, is liable for that act in the same manner as if it were done by him alone. The section thus lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is found in the existence of "common intention" animating the accused leading to the doing of a criminal act in furtherance of such intention. The section is intended to meet a case in which it is difficult to distinguish between the act of individual members of a party and to prove exactly what part was played by each of them. It, therefore, enacts that once it is found that a criminal act has been committed by several persons in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. It is thus an exception to the general rule of criminal jurisprudence that it is the primary responsibility of the person who actually commits a crime and only that person can be held guilty and punished in accordance with law for his individual act."

96. It is thus clear that the criminal act referred to in Section 34 Indian Penal Code is the result of the concerted action of more than one person if the said result was reached in furtherance of the common intention and each person must be held liable for the ultimate result as if he had done it himself.

97. A perusal of Section 34 of the Indian Penal Code would clearly

indicate that there must be two ingredients for convicting a person with the aid of Section 34 of the Indian Penal Code. Firstly, there must be a common intention and Secondly, there must be participation by the accused persons in furtherance of the common intention. If the common intention is proved, it may not be necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must be arising out of the same common intention in order to attract the provision. The said principle is reiterated in a three-judge bench decision in **Suresh and Anr. v. State of U.P.,** (2001) 3 SCC 673 and **Ramaswami Ayyangar and Ors. v. State of Tamil Nadu,** (1976) 3 SCC 779, wherein the court has stated that the acts committed by different confederates in the criminal action may be different, but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the commission of crime. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, the person who instigates or aids the commission of the crime must be physically present and such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act.'

98. Insofar as common intention is concerned, it is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. As observed in **Hari Ram v. State of U.P.,** (2004) 8 SCC 146, the existence of direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and, the proved circumstances. Therefore, in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence before a person can be vicariously convicted for the act of the other.

99. Following this judgment in **State of Rajasthan v. Shobha Ram,** (2013) 14 SCC 732, Hon'ble Supreme Court reversed the order of acquittal passed by the High Court in view of the fact that the factual situation appearing in that case revealed that A-1 and A-2 were brothers having an old enmity with the deceased. On the date of incident A-1

assaulted the deceased with stones and A-2 was sitting on the chest of the deceased. It was observed that A-1 and A-2 had a common intention to assault and kill the deceased persons with A-2 as a participant in the crime with the intention of lending weight to the commission of an offence pursuant to a pre-concerted plan.

100. In, **Satbir @ Lakha v. State of Haryana,** 2013 (1) SCC (Cri) 129, a quarrel ensued. Appellant and other accused A-3 and A-4 caught hold of PWs while A-1 inflicted knife injuries on them. It was held that but for the overt act of appellant and other accused in having held the victims, there would have been no scope for A-1 to have inflicted injuries. Conviction u/s 34 read with Sections 307 and 324 IPC was affirmed by High Court and Apex Court dismissed the appeal.

101. In **Raj Paul Singh & Another v. State,** (2013) 1 SCC (Cri) 7, A-1 in fully drunken condition started abusing complainant in filthy language. Complainant's husband warned appellant not to abuse complainant. A-1 did not pay heed and asked his wife to get a knife. A-1's wife A-2 brought knife and gave it to A-1 who then stabbed the complainant. As a result whereof he fell down with bleeding injury and was taken to hospital where he died subsequently. A1 was arrested and at his instance knife was recovered. It was held that deceased was unarmed and there was absolutely no physical threat from deceased to the appellants, and A1 after being provided with knife by A2 stabbed deceased on left side of chest on instigation of A2, resulting in the death of the deceased. This was, thus a case where the appellants took undue advantage and acted in a cruel or unusual manner. Appellants were rightly held guilty of committing murder under Section 302 read with S.34 IPC.

102. Applying the settled principles of law to the facts of the present case, it is evident that the common intention entertained by the accused persons is apparent from their acts and conduct. All the accused, namely, Ravi Kumar, Sanjay, Karamvir and Raj Kumar are real brothers who were aggrieved by the conduct of Kuldeep as he was having love affair with the daughter of Ravi Kumar which affected their family reputation. In pursuance to their common intention, when Kuldeep was returning from Balmiki Mandir along with his brother Sunny and cousin Rupesh, he was surrounded by all the accused persons. Accused Ravi addressed his co-accused to finish Kuldeep on that day as he was lowering down their reputation. In pursuance thereof while Karamvir and Raj Kumar caught hold of Kuldeep and pinned him down, accused

Sanjay who was carrying a danda in his hand tried to keep away the brothers of Kuldeep, namely, Sunny and Rupesh from coming near Kuldeep to provide any assistance to him and thereafter, accused Ravi inflicted indiscriminate knife blows on the deceased resulting in as many as seven injuries due to which Kuldeep succumbed to injuries. The deceased was unarmed and there was absolutely no physical threat from his side to the appellants. The mere fact that the role ascribed to Karamvir and Raj Kumar was only of catching hold does not lessen their liability, inasmuch as, had they not pinned him down, it was not possible for accused Ravi alone who was a middle aged person to inflict several knife blows on Kuldeep who was a young man aged about 24 years. Role of Sanjay is no less than that of remaining co-accused. Under the circumstances, the criminal act was done with the common intention of all the accused to commit murder of Kuldeep.

103. The irresistible conclusion of the aforesaid discussion is that the entire material available on record was minutely considered by the learned Trial Court and the impugned judgment and the order on sentence do not suffer from any infirmity or perversity which calls for interference. While finding no merit in the appeal, we dismiss the same.

104. Before parting with this judgment we express our deep anguish and pain for the brutal and shocking murder of a young boy of 24 years at the hands of the father of the girl with whom he was in love and relationship and his three brothers. Both the boy and girl were major in age and residing in the same locality. It is often said that when two individual gets attracted towards each other and enter into a relationship due to bonding of love then their relationship is above the barriers of caste, creed, religion and status. Indian Society is based on the deep rooted value system and traditional value system still plays a key role in social operation, be it solemnization of marriages and other customary functions. Despite radical societal changes caused due to multiple factors, the parental dominance over the lives of their children, which includes their education and career decision still exists and more importantly in a marriage decision. There are families where still the children give due respect to the wishes of their parents and relatives in the selection of their brides/bride grooms, but in the last two decades and may be more than that one can see revolutionary changes in the behaviour patterns of young children. The economic and social dynamics of the society are changing very fast. This can be witnessed by the increasing number of live-in relationships which are justified by the young generation on the

ground that the institution of marriage is too burdensome as proven by the increasing divorce cases. Moreover, with the changing times these live-in relationships have acquired a legal mandate and are slowly becoming socially accepted. There are many platforms besides the schools and colleges where teenagers come across and get attracted towards each other. The growing acceptance of this reality in the society is reverberated by the media and more and more such relationships are now seeing the light of the day.

105. Therefore, the need of the hour is that the boys and more importantly girls have to be very careful and cautious before taking such an important decision concerning their lives before entering into the most sanctimonious relationship of marriage or even to have live in relationship. One of the major reasons contributing increase in the rape cases is a failure of live in relationship or any immature decision on the part of such young adults which more often end up in a broken relationship but sometimes after indulging into physical relationship. However, this places an implied onus on the shoulders of the persons involved in such relationships to act responsibly and maturely. On the other hand when the question comes to the acceptance of these relationships the parents are also expected to behave with more sensitivity and maturity as such issues need to be resolved with patience, understanding and tolerance and instead of indifference or with a bent of mind of alienating the two. It is often noticed that any impetuous act to smother such relationships often has a backlash in the form of resentful feelings or even rebellious actions. Therefore, it is with great sensitivity that the parents need to acknowledge the growing independence of their children and rationally and dispassionately deal with these emotive issues giving due respect to their feelings.

106. The precious life of deceased Kuldeep perhaps would not have met such a tragic end and these accused persons perhaps would not have suffered severity of punishment of life imprisonment had they acted in a sensible and mature manner with due patience, tolerance and understanding to resolve the things instead of taking the law in their own hands.

Appellants be informed through the concerned Superintendent, Jail. Copy of the order along with Trial Court record be sent back.