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F. No..(B)/Com./DHC/1319
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CIRCULAR

Vide Notice No. 909/Comp./DHC Dated. 23.10.2013, lawyers and litigants were informed that this court will start e-filing in Company and Tax Jurisdictions from 25th October, 2013 but it has been noticed that lawyers/litigants are not availing this facility. It is now brought to the notice of the litigants/Advocates that w.e.f. 11th November, 2013 e-filing in Company and Tax mattes will be mandatory and Registry will not accept filing through any other mode.

For the purposes of e-filing in the said jurisdictions, a lawyer or a litigant in person, as the case may be, will neet to purchase a digital signature. The list of vendors (Licensed Certifying Authorities) who offer digital signatures for sale is available on the website http://cca.gov.in.

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DELHI EXCISE ACT, 2009—Section 33—Appellant was facing departmental inquiry initiated by respondent and concerned Officers of respondent had also lodged FIR U/s 33 of Act against respondent—Respondent filed writ petition seeking stay of departmental inquiry pending criminal proceedings—Vide order dated 04/04/13, ad interim stay of departmental inquiry was vacated—Aggrieved appellant challenged said order and alleged disciplinary proceedings as well as FIR stem from same incident, so participation of appellant in departmental proceedings would seriously prejudice him in criminal trial. Held: There is no bar against an employer initiating disciplinary proceedings against an employee for misconduct in relation to an offence which may also be a subject matter of criminal proceedings. However, in certain cases it may be advisable to stay the disciplinary proceedings, if the same are likely to cause prejudice to the employee in the criminal proceedings.

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long term or short term capital gains has long been a contentious issue—no substantial question of law raised in the present appeal.

Commissioner of Income-Tax Delhi-XV, New Delhi v. *Neenu Dutta* *4155*

INDIAN PENAL CODE, 1860—Section 302 read with Section 34 of the IPC—A boy had been stabbed near the Taj Colony Red Light Traffic Booth, who was in a serious condition.—The injured was reported to have been removed to GTB Hospital.—SI Satender Mohan (PW13) Left Constable Sanjeev Kumar at the spot and he alongwith Constable Rajvir reached GTB Hospital from where he collected the MLC of the injured Saleem @ Tikla as per which he was brought dead to the hospital.—He met Jeeshan @ Pappu, Brother-in-law (sister's husband) of the deceased and recorded his statement.—Nawab and After caught hold of Saleem and exhorted Shabab by saying "Aaj iska kaam Khatam kar de" whereupon Shabab assaulted Saleem with a double edged dagger on his chest, right hand and left hand. On hearing the noise, Waseem, his wife reached the spot and both of them raised hue and cry by shouting "Bachao Bachao". All three assailants fled the spot and sine his since his brother-in-law Saleem was fast losing blood he and his wife took him in a TSR to GTB Hospital where he was declared brought dead.—Initially, accused Nawab Anwar Khan and Shabab khan were sent to face trial for the charge under Section 302/34 IPC.—A separate charge for the offence under Section 27 of the Arms Act was framed against accused Shabab Khan were sent to face trial for the charge under Sections 302/34 IPC.—A separate charge for the offence under section 27 of the Arms Act was also framed against accused Sabab Khan. Accused persons pleaded not guilty for the aforesaid charges and claimed trial.—Learned counsel next contended that two alleged eye-Witnesses (PW1 and PW2) are the relative of the deceased and are interested witnesses and as such their testimony deserves to be

rejected.—In support of his contention, he placed reliance on the case of M.C. Ali & Anr. vs. State of interested witnesses cannot be believed in the absence of independent corroboration.—It was further contended that there are major contradictions and discrepancies the testimonies of theses two eye-witnesses which renders their evidence altogether unreliable and the Appellants deserve to be acquitted on this ground along.—Heavy reliance was placed in this regard upon the judgments of the Supreme Court in Anil and Anr. vs. State of Maharashtra, 2013 (1) C.C. Cases (SC) 259; Eknath Ganpat Aher and Ors. vs. State of Maharashtra AIR 2010 SC 2657 and Govind Raju @ Govind vs. State by Srirampuram and Anr., AIR 2012 SC 1292. It was also submitted that PW2 Jeeshan @ Pappu was a stock witness of the police in several cases and also a mukhbir of the police.—Learned counsel for the accused next that the genesis of the prosecution is based on the call made to the PCR by PW10, namely, Ishrat Khan, who called the PCR on 100 number and gave the information that some person had been stabbed near the traffic booth Seelampur, Delhi.—Motive is a necessary ingredient of any crime and the prosecution having failed to prove any motive on the part of the accused persons to eliminate the deceased, the prosecution story cannot be believed.—Most importantly, there was a grave contradiction in the ocular testimony and the medical evidence.—It has come in the evidence of PW1 and PW2, who falsely claimed themselves to be the eye-witnesses, that the weapon of offence was a double-edged knife but the medical report shows that the injury caused to the deceased was by a single-edged knife. The doctor examined by the prosecution, namely, PW4 Dr. contradicted the statements given by PWs 1 and 2 with regard to the weapon used for the commission of the offence in that he deposed that the injury on the which caused the death was inflicted by a single sharp edged weapon.—The court therefore, in agreement with the learned trial judge who found the testimony of the eye-witnesses to be credible and

trustworthy. The fact that both the eye-witnesses are close relatives of the deceased, in our opinion., does not in any manner impair their testimony or discredit the same as the testimony of “interested witnesses”. Being close relatives of the deceased, it does not stand to reason that they would want to screen the real culprit and falsely implicate innocent persons. The contention of the counsel for the parties is also not borne out from the record. DW2 has proved on record that a suit was filed buy by PW2 Jeeshan @ Pappu against Khursheed Ahmed.—The court do not find such discrepancies in Their testimonies as would throw doubt on the prosecution case. The contradiction, if any, are in our opinion too inconsequential to be dwelt upon. When two persons unfold the same story there is bound to be slight variation in the manner in which they narrate the incident. This does not mean that are being untruthful with regard to the occurrence of the incident and so long as the broad outlines of their narration are same the details would be irrelevant in the present case upon being cross-examined with regard to the details of the incident PW1 Waseem Begum stated that accused Nawab was holding an iron chain with which he had first pressed the neck of Saleem (deceased) and then the chain was thrown down and Saleem was stabbed.—With regard to the absence of light at the spot, it is clear from the evidence on record that though the area of Taj Colony was not receiving electricity, electricity was being drawn by the inhabitants of the colony from unauthorized sources. PW1 Waseem Begum in the course of the cross-examination has admitted has admitted it to be so.—PW1 and PW2 perceived it to be a double-edged knife, the opinion of the doctor was that it was that it was a single edged knife. The knife has not been recovered during investigation and as such the opinion of the doctor could not be sought as to whether the stab injuries found on the deceased could have been inflicted with the recovered weapon of offence. In such circumstance to discard the otherwise clear, cogent and credible testimonies of the eye-witnesses would not, in our

opinion, militate against all settled canons of appreciation of evidence.—It is a well settled proposition of law that motive is of paramount importance when the case is based entirely on circumstantial evidence. Motive to a great extent loses relevance when there is ocular evidence which is cogent and convincing. Thus, we are not inclined to throw out the case of the prosecution merely on the ground that the prosecution has failed to establish the motive for the commission of the offence assuming this to be true.—The court , therefore, uphold that the conviction of the Appellants under Section 302 IPC with the aid of Section 34 IPC.—All the three appeals are dismissed.

Shabab Khan v. *State* *4067*

— Section 395, 34 and Section 397—The prosecution case is based on the statement of PW2 Darshana—As the door was opened 4/5 other persons entered the drawing room. One of the persons, who came on the motorcycle, removed her two gold bangles, one mangalsutra, one gold ring, one pair of ear tops, one gold chain from her person and the other person was holding a country made pistol in his hand when jewellery was being removed. The other persons who came later stated searching the house for other things.—They left by locking them in the bathroom and closing the gate from outside. She identified the Appellant Joginder as the person who was carrying pistol and Appellant joginder as the person who removed the jewellery from her person. She further stated that she had gone to the jail and had identified joginder present in Court.—The evidence of this witness is supported by PW2 Pinki. She identified joginder as the person who had removed the jewellery and Joginder as the person who was having gun with him. She also stated that she went to the jail and identified Joginder in the TIP.—Though PW3 Sushil nephew of PW1 was also examined as a prosecution witness, however he only stated that he found 3-4 Persons present in the drawing room and those persons took all of them to the bathroom and bolted

the bathroom from outside. He had seen the two Appellants but there were other person who were statement near him PW4 Shri S.S. Rathi the learned Metropolitan Magistrate the TIP proceedings.—.Learned counsel for the Appellant assails the TIP on the ground PW1 in her cross-examination admitted that the height and figure of the inmates joined in the TIP was different from the Appellant.—The complainant could not have disclosed the names of the assailants in the FIR as she was not aware of their names. They total strangers to her testimony of complainant or PW2 cannot be discarded on ground. Further as per the prosecution case PW3 reached home only later on, and thus he had not witnesses the entire incident. Thus non-identification on the Appellants by PW3 is immaterial as he entered the house when around six to seven persons were there searching the house. Merely because PW3 has stated in his cross-examination that no one was present outside would not discredit the testimony of PW1 and PW2., as it is not necessary that in each case robbers are supposed to post someone outside for guarding the place.—Further even if in the present case only two accused have been convicted conviction under Section 395 and 397 IPC can still be based as PW1 and PW2 have clearly that besides the Appellant 4 or 5 more persons were Involved and the non trial or conviction of the other 4 or 5 persons would not vitiate the conviction of the Appellants for offences under Section 395 and 397 IPC. In Raj Kumar @ Raju Vs. State of Uttaranchal (2008) 11 SCC 709 it was held:- “21. It is thus clear that recording conviction of an offence of robbery, the must be five or more persons. In absence of such finding an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not able to convict them and order their acquittal observing that their identity is not established. In such case,

conviction of less than five persons—Or even one—Can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity.—The court find no infirmity in the impugned judgment of conviction and order on sentence.—Dismissed.

Joginder @ Joga v. *State N.C.T. of Delhi* *4089*

— Sections 7 and 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988—Learned counsel for the Appellant contends that though the complaint stated about demand at Radhu Place, however the raid was conducted at Preet Vihar Office. Though PW3 prepared the memo Ex.PW3/A, however there is no corresponding entry in the register No. 19. As per PW8 the money was demanded by Mr. R.B. Singh and not the Appellant because Mr. R.B. Singh was the person competent to sanction the loop connection sought by the complainant. The Appellant is only a Telephone Operator and had on role to play in the sanction of the loop connection. The complainant has not been able to prove the initial demand—Learned APP for the State on the other hand contends that PW1 and PW2 have proved that the Appellant was working at preet vihar Office. Though bottles were not deposited with Moharar malkhana PW3, however PW11 S.K. Sharma clearly stated that he handed over Ex. LH1 and P1 along with samples seals to ACP A.K. Singh who kept the same in his almirah in lock and key. Further PW4 A.K. Singh stated that S.K. Sharma the investigating officer deposited the wash with him which he kept in safe custody—The case of the prosecution based on the complaint of PW7 Mohan Chand is that he was posted as a constable in Delhi Police and applied for the a loop connection in Delhi Vidyut Board near Radhu Place Cinema. On 9th April, 1992 he went to DESU office at Preet Vihar for meeting Inspector R.B. Singh in connection with his meter but he did not find him present in the office. In his office Appellant was present who told him that Inspector R.B. Singh had not yet come and there was no difference

between the Appellant and Inspector R.B. Singh—On reaching the DESU Office, the Appellant met them at the office. The complainant talked to the Appellant and enquired about Inspector R.B. Singh. The Appellant again stated that was no difference between him and Inspector R.B. Singh and asked the complainant to give money to him and the work would be done—On the demand of the Appellant the complainant took out Rs. 300/- from his pocket and gave the same to the same to the Appellant. The Appellant received the money from his left hand and kept the money in his left side pocket of his shirt. Thereafter panch witness Gurinder Singh PW8 gave the Signal to the raiding party and the Appellant was apprehended. From the search of the Appellant three notes of Rs. 100/- denomination were recovered from his left side poket of the shirt. The numbers were tallied and thereafter washes of his left hand and the poket were taken. The same were recovered by recovery memo Ex. PW7/C which bear the signatures of the complainant.—PW8 deposed about the acceptance of Rs. 300/- by the Appellant, However tried to exonerate him by stating that demand and acceptance was for acceptance was for Inspector R.B. Singh.—The version of complainant PW7 is further supported by PW9 Inspector Abhey Ram the Laying who has proved preraid proceedings and the statement of the complainant recorded by him vide Ex.PW7/A. This witness has also proved the recovery from the Appellant and he stated that on receiving the signal he went towards the Appellant and recovered the money from the Appellant. The contention of learned counsel for the Appellant that the prosecution has failed to preserve the hand-wash and pocket-wash solution and have not proved the link evidence is also liable to be rejected.—Learned counsel for the Appellant contends that PW7 the complainant in his testimony has admitted that the solution when produced in the Court was white. Thus the hand wash and poket wash have not been proved. This contention is also fallacious. PW7 the

complainant has no doubt admitted that when the solution was produced in the Court, it was white but he also stated that the powder was visible in the bottles.—It is thus proved beyond reasonable doubt that the hand-wash solution and the shirt poket-wash solution had turned pink and gave positive test for phenolphthalein. In the present case the raid was conducted in 1992 and when the solution was shown to the witness when it was found to be white was on 7th December., 2004 i.e. nearly after more than 12 years. In such a situation the pink colour evaporating by the trap laying officer and scientific evidence besides the investigating officer. Merely because the panch witness PW8 has supported the case of the complainant with regard to demand and acceptance and has given another story, the case of the prosecution cannot be said to be proved beyond reasonable doubt.—Further, this Court in Hari Kishan Vs. State 2011 X AD (Delhi) 553 also held that even if the panch witness has turned hostile, his part testimony can be looked into seek corroboration to the testimony of the complainant and the trap laying officer. In the present case also PW8 the panch witness has corroborated the version of PW7 on material aspects like joining the investigation, treating three notes of Rs. 100/- denomination and the recovery from the Appellant after a raid was conducted at Preet Vihar office of DESU.—The explanation of the Appellant in his statement under Section 313 Cr.P.C. was that he never demanded money or accepted the same as he was not competent to do the work of the complainant and stated that on the day of the raid he came to him and enquired about Inspector R.B. Singh, he showed his ignorance on which the complainant took out the money and tried to hand-over the same to him to be given to Shri R.B. Singh which he pushed his by his hand and refused to accept. However, this explanation of the Appellant is not borne out from the record as the recovery was not from the ground but from left side pocket of his shirt and the wash of the shirt was also taken—

In view of the evidence, the prosecution has proved its case beyond reasonable doubt against the Appellant and hence no illegality in the impugned judgment convicting the Appellant for the aforesaid and the order on sentence—dismissed.

Ram Naresh Pandey v. *State* *4096*

— Section 302, 308, 452, 323, 34—The appellant Khem Chand was convicted under Sections 304-I/34 of Indian Penal Code, 1860 while co-accused Harish, Dharam Pal and Surender were convicted under Sections 323/34 IPC and order of sentence dated 25th November, 2010 vide which the appellant Khem Chand was sentenced to undergo rigorous imprisonment for five years and also to pay fine of Rs. 10,000/-. The convicts were granted benefit of Section 428 Cr.P.C.—It was submitted by Sh. R.N. Sharma, learned counsel for the appellant that the convicted of the appellant has been based on wrong appreciation of evidence. None of the prosecution witnesses supported the case of the prosecution. There are material contradictions in their testimony. Even the blood lifted from the spot was not sent to FSL. Blood stained clothes were also not taken into possession. Under the circumstances, prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. As such, the appellant is entitled to be acquitted—Rebutting the submissions, learned Additional Public Prosecutor for the State that there is no infirmity in the impugned order. The prosecution case stand establish from the testimony of witnesses which found due corroboration from the medical evidence. The fact that blood stained clothes were not seized or blood lifted from spot was not sent to FSL, can at best be said to be a lapse on the part of investigating officer of the case but that itself is no ground to throw the case of prosecution. That being so, the appeal being devoid of merits, is liable to be dismissed—The material witnesses regarding the incident and the genesis of the case are PW1 Veermati, PW2 Ram Singh, PW3 Vijay Singh, PW5 Anup Singh, PW6 Mittar Pal and PW8 Vajinder Singh—In order to

substantiate the aforesaid case of prosecution, the most material witness is PW1 Smt. Veermati—Testimony of Veermati has been assailed on grounds: (i) The witness was in advance stage of pregnancy and therefore it was not possible for her to reach the spot and witness the incident. (ii) She was not believed by the prosecution as she was declared hostile and cross-examined by Additional Public Prosecutor for the State. (iii) Her testimony suffers from discrepancy and improvements. (iv) There was no electricity in the premises in question, therefore, it was not possible for her to identify the accused. As regards the submission that the witness was in advance stage of pregnancy and delivered a child after 10-15 days of the incident, as deposed by PW3 Vijay Singh, therefore, it was not possible for her to come to the spot while running, the contention is without any substance, because the best person to depose about this fact was Veermati herself. She has deposed that at the time of incident she was six months pregnant and she gave birth to a child after 3-4 months. As regards the submission that the witness did not support the case of the prosecution in all material particulars, a perusal of her testimony reveals that she was cross-examined by learned Additional Public Prosecutor only regarding apprehension of accused and identification of documents on which she put thumb impression. Moreover, it is a settled law that the mere fact that a witness has been declared hostile by the prosecution is not a ground to discard his/her testimony in toto and that portion of the testimony which supports the prosecution can be considered and form the basis of convicted. There is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness in no far as it supports the case of the prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the

extent to which it supports the prosecution version of the incident. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness, who has been called and cross-examined by the party with the leave of the Court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. When a witness is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence. Under the circumstances, mere fact that witness was declared hostile in regard to apprehension of accused and her thumb impression on document is not sufficient to discard her testimony in regard to actual incident which was narrated by her in cohesive manner. In view of this legal position the minor discrepancies not touching the basic substratum of the case is not sufficient to render her testimony liable to rejection. It has come in her cross-examination that there was no enmity between accused or her family or between accused Khem Chand and deceased Raj Kumar. At no point of time, any quarrel had taken place between accused Khem Chand and his son Mahesh with any of her workers including the deceased. In the absence of any animosity, ill will or grudge against the accused, there is no rhyme or reason as to why she will falsely implicate the appellant in such serious crime.—Under the circumstances, the entire incident including the role played by accused Khem Chand stands proved from the testimony of this witness. Moreover, her testimony finds corroborating from other witness.—Furthermore, the ocular

testimony of prosecution witness find corroboration from the medical evidence, inasmuch as, inasmuch as, Raj Kumar was removed to GTB Hospital by PCR van.—As regards other limb of argument that the blood stained earth, etc.. which were seized from the were not sent to FSL and the blood stained clothes were not seized, this, at best, can be termed to be a defect in the investigation. There are catena of decisions to the effect that defects in investigation by itself cannot be a ground for acquittal.—As regards the authorities relied upon by learned counsel for the appellant, the court have carefully gone through the same. However, all the authorities are authorities are on the facts and circumstances of each case and have no application to the case in hand.—In the instant case, it stands proved from the testimony of Veermati which also, to some extent, finds corroboration from other prosecution witness that when the quarrel started initially between Harish, Surender Singh and Dharam Pal with Anup, Mittar Pal, Raj Kumar and Vijay accused Khem Chand initially said "In Saalon Ne Humari Neeind/Sona Haram Kar dia Hai" and thereafter he came to the place of incident, caught hold of Raj Kumar, who asked khem Chand not to intervene and pushed him (I.E. Khem Chand) as a result of which Khem Chand received injuries on his forehead.—The ocular testimony of the prosecution witnesses, as seen above find substantial corroboration from the medical evidence. Under the circumstances, the learned additional Sessions Judge rightly convicted the appellant for offence under Section 304 IPC.—The question then is whether the case falls under Section 304 Part II of the IPC, inasmuch as, learned Additional Sessions Judge has convicted appellant under Section 304 Part I without assigning any reason.—The nature of injury inflicted by the co-accused, Part of body on which it was inflicted, the weapon used to the same, there was no premeditation in the commission of crime, there is not even a suggestion that appellant or co-accused had any enmity or motive to commit any offence against the deceased, deceased was not given a

second blow once he had collapsed to the ground on account of stab injury on thigh, the appellant and his companion took to their heels, do not suggest that there was intention to kill the deceased. All that can be said is that co-accused had the knowledge that the injury inflicted by him was likely to cause the death of deceased. The case would, therefore, more appropriately fall under Section 304 art II of the IPC. Appellant having exhorted his son Mahesh and then catching hold of deceased from behind is also liable with the Section 34 IPC. Conviction is, accordingly, altered to Section 304 Part II/34 IPC.—As regards quantum of sentence, punishment as prescribed under Section 304 IPC is 10 years imprisonment and fine. Learned Additional Sessions Judge has already taken a liberal view by awarding five years rigorous imprisonment. That being so, no further leniency is called for.—Dismissed.

— Section 394/397—Appellant convicted of offences punishable u/s 394 and 397 IPC and sentenced to rigorous imprisonment for a period of six years and imposed a fine of Rs.5000/- for the offence punishable u/s 394 IPC and sentenced to seven years for the offence punishable u/s 397 IPC—Impugned judgment/order challenged mainly on the ground that no public witnesses were associated and since nothing was robbed from the complainant and the injury caused to him was only simple, imprisonment imposed is disproportionately higher. Held: It has been proved beyond reasonable doubt by the depositions of PW1 the complainant and his friend PW2 that appellant attempted to commit robbery by voluntarily causing hurt to PW1 and therefore no error in the conviction of the appellant for the offence punishable u/s 394 IPC. However since only an attempt to robbery was made, the act of the appellant causing an injury to the complainant would be an offence punishable u/s 398 IPC and not section 397 IPC. Section 398 IPC being a minor offence of section 397 IPC, no prejudice

caused to the appellant and conviction altered from section 397 IPC to 398 IPC. Sentence of imprisonment cannot be reduced as the minimum sentence prescribed under section 398 IPC is seven years. Fine imposed for the offence committed u/s 394 IPC also cannot be waived for imposition of fine is mandatory under the said section. However the simple imprisonment imposed for six months for non payment of fine being on the higher side is hereby reduced to three months.

Avid Ali v. *State (Govt. of NCT) of Delhi* *4160*

— Section 392, 394 & 397—Appellant challenged his conviction and Sentence U/s 392/394/397 of Code and urged in absence of conducting of TIP proceedings, identification of appellant for first time in the court was highly doubtful. Held:—When immediately after the incident, before there was any extraneous intervention, the incident was narrated and name of culprit along with his parentage and address given, there was no need for conducting Test Identification Parade of the accused.

Wasim Pahari v. *State* *4269*

— Section 392,394 & 397—Appellant challenged his conviction and sentence U/s 392/394/397 of Code and urged nature of injuries on person of injured were opined to be simple, therefore, offence U/s 397 of Code not made out. Held:—When robbery committed by offender armed with deadly weapon which was within vision so as to create terror in his mind, then it is not mandatory that grievous hurt is to be caused to any person to bring case within four corners of Section 397 of IPC.

Wasim Pahari v. *State* *4269*

— Section 394/395/397—Appellant challenged judgment and conviction U/s 394/395/ read with section 397 of Code and urged trial court did not appreciate evidence in its true and

proper prospective. Held:—Minor contradictions and improvements do not discredit otherwise natural and reliable testimony of public injured witnesses. Corroboration of evidence with mathematical precision cannot be expected in criminal cases.

Rajkumar @ Babloo v. *State* *4282*

— Sections 392/394/397/452/506 (ii)/342/34—Arms Act, 1959—25/27—Appellants aggrieved by judgment and their conviction challenged the same by way of appeal and alleged wrong appreciation of evidence by trial Court—Also, some of prosecution witness interested witness and no independent witness joined in investigation. Held: Evidence of related or interested witness should be meticulously and carefully examined. In a case where the related witness may have an enmity with the assailant, the bar would need to be raised and the evidence of witness would have to be examined by applying the standard of discerning scrutiny. However, this is only a rule of prudence and not one of law.

Rajesh Gupta v. *State (NCT) of Delhi* *4304*

— Sections 392/394/397/452/506 (ii)/342/34—Arms Act, 1959—25/27—Appellants aggrieved by judgment and their conviction challenged the same by way of appeal and urged Constable who took accused persons to hospital was not examined which is fatal to prosecution case. Held: It is not the number of witnesses but it is the quality of evidence which is required to be taken note of for ascertaining the truth of the allegations made against the accused.

Rajesh Gupta v. *State (NCT) of Delhi* *4304*

— Section 397—Appellant challenged his conviction and sentence U/s 397 of Code—Appellant urged, evidence adduced on record not appreciated in its true and proper prospective—Appellant did not join TIP as his photo was shown to complainant and his identification after gap of about 7 months

in court was highly doubtful. Held:—Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. The practice is not born out of procedure but cut of prudence. Substantive evidence is evidence of identification in court.

Sheikh Munna @ Munna Sheikh v. *State* *4319*

— Section 307/427/34 IPC—Conviction of the appellants u/s 307/427/34 IPC challenged inter alia on the ground of false implication and the fact that the victim had criminal antecedents and was involved in a number of criminal case . Held: material contradiction/discrepancy emerged regarding the version narrated by complainant/injured. It was not suggested that the injuries were self inflicted or accidental in nature or the appellants were not its author. The appellants did not deny their presence at the spot of the incident. No ulterior motive was proved to prompt the complainant to falsely implicate the appellants for the injuries sustained by him and to let the culprits go scot free. The contention with respect to the criminal antecedents of the victim has no merit as these are not enough to discard the testimony of the complainant. Conviction u/s 307/34 IPC however altered to section 324/34 IPC for the injuries suffered by the victim were ascertained 'simple' in nature and were not found sufficient in the ordinary course of nature to cause death. The weapons used could not be recovered to ascertain if these were 'deadly' ones. At no stage prior to the occurrence any threat was extended by the appellants to eliminate the victim. No attempt to cause physical assault or harm was made earlier. From the facts and circumstances of the cases, it is not prudent to hold that an attempt to murder the victim was made.

Kamal Jaiswal & Ors. v. *State of NCT of Delhi* *4340*

— Section 367/341/394/34—Appellant preferred appeals to challenge their conviction and sentence U/s 3767/341/392/394/34 of Code—They urged, improper investigation, thus, convicted on flimsy evidence is bad. Held:—The prosecution is bound to prove the guilt beyond reasonable doubt. Mere suspicion is not enough and no substitute for proof. Court's verdict must rest not upon suspicion but legal grounds established by legal testimony to base conviction.

Gaurav @ Vicky v. *State* *4348*

— Section 306, 107 & 498A—Appellant challenged his conviction and sentence U/s 306 of Code—As per appellant, utterance even if admitted “Mar Ke Dikha” by appellant could not be said enough to instigate deceased to commit suicide—Prosecution failed to prove, due to conduct of appellant deceased was left with no other option but to commit suicide. Held:—Under Section 306/107 IPC, establishment and attribution of mens rea, on the part of the deceased which caused him to incite the deceased to commit suicide is of great importance. A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation.

Preet Pal Singh v. *State of Delhi* *4354*

— Section 313, Section 302—Code of Criminal Procedure, 1973—Appellant challenged his conviction and sentence U/s 302 of Code and urged prosecution adduced broken chain of circumstantial evidence, alleged dying declaration was not put to him in his statement U/s 313 of Code. Held:—Examination of accused U/s 313 Cr.P.C not to be treated as empty formality. Accused must be granted an opportunity of explaining any circumstance which may be incriminate him with a view to grant him an opportunity of explaining the said circumstance. However, where no examination U/s 313 Cr.P.C conducted by trial court, it is open to examine accused U/s 313 Cr.P.c even at appellate stage.

N. Dev Dass Singha v. *State* *4361*

— Section 308/34 IPC—Appellants convicted u/s 308/34 IPC and sentenced to undergo RI for years each—Appellants pleaded that the victims had sustained injuries at some other place and falsely implicated them due to previous enmity. Held: The injuries on the victims not self inflicted or accidental and no evidence has come on record to substantiate the plea of the appellants. Appellants to be held the author of the injuries inflicted upon the victim however prosecution failed to establish commission of offence of offence u/s 308/34 IPC. Appellants and the victims had no previous enmity. Evidence on record rules out pre-plan or meditation. No weapon of offence recovered from the possession of the appellants. Appellants also did not inflict repeated fatal blows on the vital organs of the victims and the injuries received by the victims only 'simple' in nature caused by blunt object. In order to succeed in a prosecution u/s 308 IPC, the prosecution has to prove that the injuries to the victims were caused by the appellants with such intention or knowledge and under such circumstances that if these had caused death, the act of the appellants would have amounted to culpable homicide not amounting to murder and since the intention and knowledge are lacking in the present case, the conviction stands altered to 325/34 IPC. Further since the occurrence was an outcome of a sudden flare, appellants deserve to be released on probation.

Ashok Kumar @ Pintu & Ors. v. *State of Delhi* *4393*

— Section 304/325/345 IPC—Chargesheet was filed against the appellants for having beaten one Ramesh and thereby causing his death—Trial Court however convicted the appellants only for the offence punishable u/s 325 /34 IPC—Conviction challenged inter alia on the ground that the appellants were not the author of the injuries to the victim and the appellants had been falsely implicated—Held: No delay in lodging the FIR and in the Statement given to the police, the complainant/ eye witness gave a graphic account as to how and kicks,

assigning specific roles to each of the appellants and proved the said version in the also without any major variation. The findings of the Trial Court that the appellants were the authors of the injuries no interference however conviction altered to section 323/34 IPC in view of the postmortem examination report which did not record any injury/violence marks on the body of the victim and opined the cause of death as heart failure consequent to assault.

Harish Arora @ Sunny v. *State* *4399*

— Section 326 IPC—Conviction of the appellant u/s 326 IPC challenged inter alia on the ground that the trial court fell into grave error in relying upon the testimony of the complainant against whom a cross case u/s 305 IPc for causing injuries to the appellant, prior in time on the same day was registered vide FIR No. 358/95 PS Kalkaji and further that there was no material before the trial court to ascertain nature of injuries as 'grievous' in nature in the absence of examination of concerned doctors. Held: No delay in lodging the FIR and in the statement given to the police, the victim gave graphic detail of the incident, assigning specific role to the appellant and proved the said version in the trial also without any major variation. Since the FIR was recorded promptly, there was lest possibility of fabricating a false story in such short interval. Medical evidence is in consonance with ocular testimony. MLCs proved by competent doctors who were familiar with the handwriting and signatures of the doctors who had medically examined the victim and therefore it cannot be inferred that there was no material before the trial court to ascertain the nature of injuries. The injuries were not self—Inflicted or accidental in nature. The complainant who sustained 'grievous' injuries on his vital organ is not expected to let the real assailant go scot free and rope in the innocent one. The accused persons could not establish that they were victims at the hands of the complainant or had sustained

'grievous' injuries on their bodies. The proceedings in FIR No. 358/95 PS Kalkaji are not on record and its outcome is unclear. The appellant did not examined any doctor in defence to show that the sustained injuries prior to the said occurrence or was admitted in the hospital. Conviction upheld.

Prem Chand @ Raju v. *The State (Govt. of N.C.T. of Delhi)* *4409*

— Section 120B/489B/489C IPC—Appellant A-1 convicted for having committed offence punishable u/s 120B/489B/489C IPC and appellant A-2 held guilty only u/s 120B IPC—During the course of arguments, A-1 opted not to challenge his conviction u/s 489B/489C IPC and appellant A-2 challenged his conviction inter alia on the ground that the prosecution could not produce any cogent evidence to establish his complicity with A-1. Held: Admittedly no fake currency was recovered from A-2's possession. He was not present at the time of use of fake notes by A-1 at the shop of the complainant. No overt act was attributed to him in the incident to infer he was also beneficiary. Mere presence of A-2 with A-1 at his residence is inconsequential and mere evidence of association is not sufficient to lead to an inference of conspiracy. Prosecution failed to establish that there was meeting of minds between A-1 and A-2. Hence A-2 acquitted of the charges.

Mohinder Pratap v. *The State of NCT of Delhi* *4417*

— Section 302/201/34 IPC—Appellants convicted for having caused the murder of one Ram Mohan by strangulating him with a leather belt and tying his feet with an electric wire and throwing away his body near a railway track—Prosecution relied upon the testimony of an eye witness to the beatings given to the deceased by the appellants, the recovery of shirt belonging to the deceased, recovery of a red and black PVC electric wire similar to the one with which the feet of the dead body were tied and recovery of a leather belt with which the deceased was stragulated in pursuance of the disclosure

statements given by one of the appellants—Conviction challenged inter alia on the ground that none of the recoveries were made in pursuance of the disclosure statement. Held: Though the prosecution has proved beyond reasonable doubt that the appellants had given beatings to the deceased with fists, legs and belt, there is not shred of evidence to show that the appellants had strangulated the deceased or had disposed off the dead body or that they had the knowledge of the dead body being present near the railway track. Recoveries relied upon by the prosecution cannot be stated to have been made in pursuance of the disclosure statements of the appellants and hence are inadmissible in evidence. Conviction altered to section 323/34 IPC.

Devender Singh v. *State* *4476*

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985—Respondents alleged to have entered into a criminal conspiracy on or before 27.01.2003—To illegally acquire, possess and deal with controlled substance—Which was exported form India to Manila, Philippines—Both the respondents were arrested and their statements were recorded under Section 67 of the NDPS Act—After recording the statements of the witnesses, the respondents were charge—Sheeted under Sections 29 & 25A of NDPS Act—To establish the charges, prosecution examined thirteen witnesses—The respondents impleaded false implication—Trial Court acquitted the respondents of the charges—Hence the present Criminal Leave Petition by Narcotics and Control Bureau. Held—No corroborating material in support of the statements allegedly recorded under Section 67 of the Ndps Act—The prosecution did not investigate as to from where the contraband was procured by the respondents—The relevant documents showing the export were not collected and proved—Burden to prove the case beyond reasonable doubt was upon the prosecution—The provision of the NDPS Act and the punishment prescribed therein being indisputably stringent, the

extent to prove the foundational facts on the prosecution i.e. 'proof beyond all reasonable doubt' would be more onerous—It is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof—No illegality or material irregularity in the impugned judgment which is based upon fair appraisal of the evidence and needs no interference—The leave petition is numerated and is dismissed.

Narcotics Control Bureau v. *Gurnam Singh & Anr.* *4382*

PREVENTION OF CORRUPTION ACT, 1988—Section 7/13(1)(d)—As per the allegations of complainant he was constructing a house on a plot in Laxmi Nagar and the appellant being the SHO of PS Shakkarpur demanded a bribe without which he would not permit the construction on the plot—Complainant approached PS Anti Corruption Branch and a raiding team apprehended the appellant while accepting the bribe—During trial complainant though admitted giving a complaint to the Anti Corruption Branch, failed to support the case of the prosecution with regard to demand, acceptance and recovery of money at the spot—Appellant convicted however on the basis of the deposition of the trap laying officer and on the recovery of treated notes from the drawer in the room of the appellant. Held: It is well settled law that prosecution is duty bound to prove the demand and acceptance of money either by direct or circumstantial evidence and in the present case there is no such evidence. The Ld. Trial Court failed to consider that the complainant was involved in five cases and that the appellant was also able to prove that the plot on which the complainant was assertedly constructing, belonged to somebody else who was residing in a fully constructed house thereon with his family. Appeal allowed.

Hem Chander v. *State of Delhi* *4166*

— Learned counsel for the Appellant contends that though the

complaint stated about demand at Radhu Place, however the raid was conducted at Preet Vihar Office. Though PW3 prepared the memo Ex.PW3/A, however there is no corresponding entry in the register No. 19. As per PW8 the money was demanded by Mr. R.B. Singh and not the Appellant because Mr. R.B. Singh was the person competent to sanction the loop connection sought by the complainant. The Appellant is only a Telephone Operator and had on role to play in the sanction of the loop connection. The complainant has not been able to prove the initial demand.—Learned APP for the State on the other hand contends that PW1 and PW2 have proved that the Appellant was working at preet vihar Office. Though bottles were not deposited with Moharar malkhana PW3, however PW11 S.K. Sharma clearly stated that he handed over Ex. LH1 and P1 along with samples seals to ACP A.K. Singh who kept the same in his almirah in lock and key. Further PW4 A.K. Singh stated that S.K. Sharma the investigating officer deposited the wash with him which he kept in safe custody—The case of the prosecution based on the complaint of PW7 Mohan Chand is that he was posted as a constable in Delhi Police and applied for the a loop connection in Delhi Vidyut Board near Radhu Place Cinema. On 9th April, 1992 he went to DESU office at Preet Vihar for meeting Inspector R.B. Singh in connection with his meter but he did not find him present in the office. In his office Appellant was present who told him that Inspector R.B. Singh had not yet come and there was no difference between the Appellant and Inspector R.B. Singh.—On reaching the DESU Office, the Appellant met them at the office. The complainant talked to the Appellant and enquired about Inspector R.B. Singh. The Appellant again stated that was no difference between him and Inspector R.B. Singh and asked the complainant to give money to him and the work would be done.—On the demand of the Appellant the complainant took out Rs. 300/- from his pocket and gave the same to the same to the Appellant. The Appellant received

the money from his left hand and kept the money in his left side pocket of his shirt. Thereafter panch witness Gurinder Singh PW8 gave the Signal to the raiding party and the Appellant was apprehended. From the search of the Appellant three notes of Rs. 100/- denomination were recovered from his left side poket of the shirt. The numbers were tallied and thereafter washes of his left hand and the poket were taken. The same were recovered by recovery memo Ex. PW7/C which bear the signatures of the complainant.—PW8 deposed about the acceptance of Rs. 300/- by the Appellant, However tried to exonerate him by stating that demand and acceptance was for acceptance was for Inspector R.B. Singh.—The version of complainant PW7 is further supported by PW9 Inspector Abhey Ram the Laying who has proved preraid proceedings and the statement of the complainant recorded by him vide Ex.PW7/A. This witness has also proved the recovery from the Appellant and he stated that on receiving the signal he went towards the Appellant and recovered the money from the Appellant. The contention of learned counsel for the Appellant that the prosecution has failed to preserve the hand-wash and pocket-wash solution and have not proved the link evidence is also liable to be rejected.—Learned counsel for the Appellant contends that PW7 the complainant in his testimony has admitted that the solution when produced in the Court was white. Thus the hand wash and poket wash have not been proved. This contention is also fallacious. PW7 the complainant has no doubt admitted that when the solution was produced in the Court, it was white but he also stated that the powder was visible in the bottles.—It is thus proved beyond reasonable doubt that the hand-wash solution and the shirt poket-wash solution had turned pink and gave positive test for phenolphthalein. In the present case the raid was conducted in 1992 and when the solution was shown to the witness when it was found to be white was on 7th December., 2004 i.e. nearly after more than 12 years. In such a situation the pink colour evaporating by the trap laying officer and

scientific evidence besides the investigating officer. Merely because the panch witness PW8 has supported the case of the complainant with regard to demand and acceptance and has given another story, the case of the prosecution cannot be said to be proved beyond reasonable doubt.—Further, this Court in Hari Kishan Vs. State 2011 X AD (Delhi) 553 also held that even if the panch witness has turned hostile, his part testimony can be looked into seek corroboration to the testimony of the complainant and the trap laying officer. In the present case also PW8 the panch witness has corroborated the version of PW7 on material aspects like joining the investigation, treating three notes of Rs. 100/- denomination and the recovery from the Appellant after a raid was conducted at Preet Vihar office of DESU.—The explanation of the Appellant in his statement under Section 313 Cr.P.C. was that he never demanded money or accepted the same as he was not competent to do the work of the complainant and stated that on the day of the raid he came to him and enquired about Inspector R.B. Singh, he showed his ignorance on which the complainant took out the money and tried to hand-over the same to him to be given to Shri R.B. Singh which he pushed his by his hand and refused to accept. However, this explanation of the Appellant is not borne out from the record as the recovery was not from the ground but from left side pocket of his shirt and the wash of the shirt was also taken—In view of the evidence, the prosecution has proved its case beyond reasonable doubt against the Appellant and hence no illegality in the impugned judgment convicting the Appellant for the aforesaid and the order on sentence—dismissed.

Ram Naresh Pandey v. *State* *4096*

SERVICE LAW—Armed Forces—Promotion—Denial of promotion because of colour blindness—Failure to abide by the directions issued by the court in the case of Sudesh Kumar vs. UOI & Ors. and other similar writ petitions—Brief facts—Respondents issued a policy dated 18th May, 2012 regulating

the continuance of such colour blind personnel in the Central Para Military Forces—Under the shield of this policy, respondents denied promotion to several personnel—This action was challenged—Directions of the court in judgment dated 28.02.2013 WP(C)No.356/2013, P. Suresh Kumar v. Union of India & Others—Respondents own thinking contained in the 3 Circulars dated—17.5.2002, 31.7.2002 and 11.3.2011—would continue to bind the parties—In view of this judgment—all the directions and orders impugned in the case which—denied the petitioners the chance or right to occupy the promotional posts were- quashed the respondents—directed to—issue orders wherever the promotions are effected—with effect form the date juniors were promoted—From the judgment dated 28.02.2013—court had specifically directed—not only the petitioners but "all others like them" to be conferred with full benefits of promotions as given to those who do not suffer from colour blindness—In the present case—The petitioner was recruited as Constable/GD on—03.07.1991 in the CRPF—was promoted on 28.03.2010—from the rank of Constable/GD to HC/GD—Four other also promoted—The petitioner complains—the respondents promoted the other four personnel who were promoted by the same Signal—the promotion was denied to the petitioner on the ground of colour blindness—Hence the present Writ Petition. Held—Given the aforenoticed adjudication and the circular issued by the respondents, the petitioner was entitled to be promoted in terms of the signal dated 28.03.2010—could not be denied promotion on the sole ground—that he was discovered to be colour blind at that stage—Petitioner cannot be denied the relief which he had sought in the writ petition. Accordingly—(i) The respondents directed to issue promotion order—promotion the petitioner from the rank of Constable/GD to Head Constable/GD—with all benefits including seniority with effect—form the date his juniors were promoted—(ii) The petitioner entitled to all

benefits which were granted to the four other persons by the signal dated 28.03.2010—The petitioner entitled to costs- Rs. 15,000/- to be paid along with next month salary to the petitioner.

Suresh Ram v. *Union of India & Others* *4184*

— Armed Forces—Promotion—Denial of Promotion—Assessment endorsed by the Reviewing Officer on ACRs—Brief Facts—Petitioner was enrolled as Driver (MT) on 2nd October, 1982 and was thereafter promoted to the rank of Naik on 1st December, 1997 and thereafter on 1st April, 2003 to the post of Havildar—Petitioner qualified the mandatory promotion cadre on 27th May, 2005 and claims that he became eligible to the rank of Naib Subedar in terms of policy decision dated 10th October, 1997 of the respondents—So far as the criterion for promotion to the rank Naib Subedar is concerned, as per the policy decision dated 10th October, 1997, the last five ACRs of the personnel are required to be considered—out of these five ACRs at least three have to be in the rank of Havildar and in case of shortfall, the rest may be in the rank of Naik—In three ACRs out of five reports which have to be considered, the personnel under consideration should have been assessed "at least above average" with a minimum of two such reports in the rank of Havildar—Petitioner was promoted to the rank of Havildar on 1st April, 2003 and earned the three requisite mandatory minimum ACRs only in the year 2005—In the above circumstances, the petitioner became eligible for consideration for promotion to the post of Naib Subedar only after having passed the mandatory promotion cadre course on 27th May, 2005—In the ACR for the period 2004-2005, the Initiating Officer had graded the petitioner as "above average"—However, on the review by the reviewing authority, the Same was graded down to "high average" by the Reviewing Officer—Further in the year 2004 as well, the petitioner was graded "high average"—However, his reports from the year 2001 to 2003 in the rank of Lance Havildar were

"above average"—Petitioner being aggrieved filed a non statutory complaint which was rejected by an order dated 26th June, 2008—Assailed by the petitioner by way of a Writ Petition (Civil) no.8004/2008 before this court and was disposed of by this court vide an order dated 16th December, 2008 quashing the decision dated 26th June, 2008 with directions for re-examination of the matter by a different officer—After a detailed reconsideration, the petitioner's non-statutory complaint was rejected by the respondents by an order dated 16th February, 2007 which was challenged by way of a statutory petition dated 20th June, 2009 addressed to the Chief of Army Staff which was returned by the respondents by an order dated 3rd September, 2009—Petitioner challenged the order of 3rd September, 2009 before the Armed Forces Tribunal and the same was rejected by an order passed on 6th September, 2011—Tribunal's order dated 6th September, 2011 was accepted by both parties. The respondents revisited the entire matter again and have thereafter passed a detailed order 18th July, 2012—This order was again challenged by the petitioner by a second petition before the Armed Forces Tribunal and was rejected—Aggrieved thereby the petitioner has challenged the same before this court by way of the present petition. Held—The primary challenge in the present with petition is writ regard to his grading in the ACR for the years 2004-2005. So far as the ACR for the year 2004 whereby the petitioner was graded as "High Average" is concerned, the petitioner had challenge the same before the Armed Forces Tribunal—A reading of the order dated 6th September, 2011 passed by the Tribunal would show that no challenge was pressed writ regard to the ACR for the year 2004 inasmuch as there is no mention of the same either in the contentions of either side or in the adjudication—Petitioner has accepted the outcome by the judgment dated 6th September, 2011 of the Armed Forces Tribunal and did not assail it on any ground—In this background, the petitioner has lost the right to challenge the

ACR of the year 2004—So far as the ACR of the year 2005 is concerned, the petitioner has been challenged, as noticed above, his grading as "above average" by the Initiating Officer—However, he was reviewed by the Group Commander/Co Col.Surender Sharma and his grading was downgraded to "high average"—This is in consonance with the grading which was recorded in the year 2004—Before this court, the petitioner has challenged his promotion on the exact ground which was raised before the Armed Forces Tribunal in the first application being O.A.No.345/2010—The findings therein have attained finality—petitioner was considered by the Regimental Unit Promotion Board for the year 2005—2006 for promotion to the rank Naib Subedar but could not be selected by the Promotion Board since "he was lacking in the mandatory criteria of having a minimum of two "above average" assessment in the rank of Hav. as assessment in two out of three available reports in the rank of Hav. were "high average"—The findings of the Tribunal are in terms of the policy of the respondents—The respondents could not have ignored the petitioner's ACR for year 2004-2005 while considering the petitioner for promotion to the post of Naib Subedar for the year 2005-2006—The impugned order and the action of the respondent cannot be faulted on any legally tenable grounds and the challenge thereto is misconceived. This writ petition is, therefore, dismissed.

Haripal Singh v. *The Chief of The Army Staff & Ors.* *4202*

— Financial upgradation under Assured Career Progression Scheme—As per ACP Scheme, an employee is required to have completed 12 years of service from the date of appointment to a post without any promotional financial benefit made available to him and should have also successfully undertaken Promotional Cadre Course—Petitioner became eligible for grant of financial upgradation on 10.04.2004 and

dated 12th March, 2008—Petitioner has complained that his request for a defence assistant with not less than five years working experience was completely ignored by the enquiry officer who informed him that he was required to opt for a defence assistant of his own rank—Petitioner had nominated five officers as his choice for appointment of a defence assistant however, the request of the petitioner was ignored by stating that the petitioner should choose a defence assistant of his own rank—Commandant accepted the report of the Enquiry Officer who found the petitioner guilty of two charges for which disciplinary proceedings were conducted against the petitioner—As a result the petitioner was dismissed from service—Hence the present petition—It is urged by the petitioner that the insistence by the respondents upon the petitioner to appoint a defence assistant of his own rank tantamounts to denial of opportunity to have defence assistant of his choice—It is contended that a person in the same rank as of the petitioner would have been as ignorant of the applicable rules and procedure as the petitioner. Held—Delinquent in disciplinary proceedings is required to be informed of his right to take help of another Government Servant before the commencement of the inquiry and a fair and reasonable opportunity to appoint one—In *Bhagat Ram vs. State of Himachal Pradesh & Ors.* AIR 1983 SC 454, the Supreme Court has held that justice and fair play demand that where in a disciplinary proceeding the department is represented by a Presenting officer, it would be incumbent upon the Disciplinary authority while making appointment of a Presenting officer to appear on his behalf simultaneouly to inform the delinquent of the fact of appointment and the right of the delinquent to take help of another Government servant before the commencement of inquiry—At any rate, the Inquiry Officer at least must enquire form the delinquent officer whether he would like to engage anyone form the department to defend him and when the delinquent is a Government

servant belonging to the lower echelons of service, he would further be informed that he is entitled under the relevant rules to seek assistance of another Government servant belonging to department to represent him—If after this information is conveyed to the delinquent Government servant, he still chooses to proceed with the Inquiry without obtaining assistance, one can say there is substantial compliance with the rules—In the instant case, the respondents do not state that the person whose names had been given by the petitioner as his choice for defence assistant were not the personnel of CRPF—The respondents' enquiry officer was of the rank of Deputy Commandant—Give the nature of the enquiry, this certainly would not have been fair in the facts and circumstances of the case and the petitioner has been deprived of an opportunity to represent himself—The petitioner was only seeking a defence assistant who was senior to him and had knowledge of departmental enquiry proceedings—He had therefore given five names based on such requirement—Such request of the petitioner was a reasonable request—The enforcement of the condition that the defence assistance must be of the same rank, has been held to be unjustified and in violation of the principles of natural justice—The respondents have, thus, denied the petitioner of a fair and reasonable opportunity to defend himself at the disciplinary inquiries vitiating the proceedings and rendering all orders based on such proceedings as violative of principles of natural justice and illegal—In view of the above, findings of the enquiry officer are based on no evidence and are perverse—In view of the above, the orders dated 19th October 2008, 26th March, 2009, 23rd March, 2010 and 24th June, 2011 are held to be violative of the principles of natural justice and contrary to law and are hereby set aside and quashed—Petitioner would stand reinstated in service with consequential benefits of notional seniority and notional increments if any with back wages equivalent to 25% of his pay computed in terms of

the above—Writ Petition is allowed in the above terms.

Balwan Singh v. *Union of India and Ors.* *4257*

— Promotion—Seniority—Petitioners who are directly recruited Deputy Directors with ESI filed writ petition challenging a judgment passed by Central Administrative Tribunal in original application filed before Tribunal by promotees in cadre of Deputy Directors seeking a direction to Director General, ESI to draw a correct seniority list on basis of principles set out in DOP&T Office Memorandum (OM) dated 3rd March, 2008 with all consequential benefits—Tribunal had directed respondents to reconsider drawing up seniority list in cadre of Deputy Directors Strictly on basis of principles culled out in DOP&T OM dated 3rd March, 2008—Plea taken, Issue with regard to validity and bindness of OM dated 3rd March, 2998 and its implications thereof have been settled by SC Which has rule on bindness thereof as well as on OM dated 7th February, 1986—Said memorandum would apply to fixation of seniority of government employees—Counsel for official respondent's and counsel for private respondents submitted they would have no objection to respondents drawing up seniority list complying principal laid down by SC in para 29 of said judgment—Held—Order dated 30th September, 2010 passed by CAT modified only to extent that respondents shall reconsider seniority list in cadre of Deputy Directors in terms of para 29 of *UOI and Ors. vs. N. R. Parmar & Ors.*—In case seniority list is not in compliance with above directions, respondents shall ensure that seniority list is expeditiously drawn up in terms thereof.

Pranay Sinha v. *Union of India and Ors.* *4388*

— Armed Forces—Assured Career Progression Scheme—The petitioner seeks—Restoration of the first financial upgradation as per the Assured Career Progression Scheme ("ACP") w.e.f. 04th January 2004—Completed 12 years of service with Central Industry Security Force (referred as "CISF")—Grant

of second financial upgradation as per MACP Scheme w.e.f. 04th January, 2012—as per the ACP scheme other than—Completion of 12 years of continuous service—Completed 12 years form the date of appointment to a post without any promotional financial benefit—Should have also successfully undertaken the promotional cadre course ("PCC")—Granted three chances for successful completion of PCC—Petitioner had completed 12 years of service on 06th January, 2004—Offered two opportunities to undergo PCC—Unfortunately failed in both the attempts—Qualified in the supplementary PCC held on 12.03.2007—Vide RTC Barwaha Letter no. (913) dt. 12.04.2007 of the respondents—Petitioner was granted financial upgradation by the respondents w.e.f. 4th January, 2004—Respondents have issued an order No. SO Pt. I No. 35/20005 dated 01.04.205—Benefit granted to the petitioner w.e.f. 04th January 2004 was cancelled—Due to his failure in the promotion cared course—The respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation form 04th January 2004—Respondents proceeded to re—Grant the ACP upgradation to the petitioner effective from 01.07.2007—The petitioner was thus denied the benefit of the financial upgradation w.e.f. 04th January, 2004 to 30th July, 2007—Hence the present petition. Held—Apparent From the working of the ACP Scheme—Person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity—The completion of the promotional cadre course is akin to completion of the requisite training upon appointment/promotion—Does not change the date of the appointment or the date of his promotion—Petitioner completed twelve years of service on 04th January, 2004—Petitioner cannot be denied of his rightful dues under the financial upgradation—Petitioner has fact cleared the PCC course in the third chance, when he underwent the same.

Lajjaram Mahor v. *Union of India & Ors.* *4429*

— Armed Forces—Deputation—Petitioners sent on deputation to NSG for 3 years subject to pre-mature repatriation on unsuitability—By way of impugned orders, petitioners were repatriated to their parent department—Repatriation challenged by petitioners merely on the ground that deputation of three other doctors was extended to 5 years, so petitioners are also entitled to the same relaxation—Held, since indisputably the petitioners accepted the deputation that contained specific stipulation of 3 years tenure and the extension granted to the other three doctors was in terms in with a policy then existing and not applicable to the petitioners as the same was reviewed, petitioners cannot claim to have been discriminated against as no person has right to proceed of remain on deputation.

Vinod Kumar Gupta v. *Union of India & Ors.* *4499*

SPECIFIC RELIEF ACT, 1963—Section 16—Code of Civil Procedure, 1908—Order 41 Rule 27—Judgment of a learned Single Judge (SJ) dismissing suit of Appellant for Specific performance of agreement between appellant and seller to sell suit property challenged in first appeal—Several documents sought to be relied upon by Appellant, most were not produced before SJ and were sought to be adduced in present appeal through application for additional evidence—Held—Best evidence to show that appellant was ready and willing to perform his part of contract was application before Sub Registrar (SR) to record his presence and banker's cheque towards sale consideration—Neither of these were produced before learned SJ—Appellant's oral testimony demonstrating his presence at Office of Sub Registrar was also later contradicted by his own evidence—Mere fact of calling Respondent or sending a telegram does not, by itself, establish Appellant's presence at Sub Registrar's Office given other evidence that could possibly have been adduced to prove that fact—Facts and circumstances, do betray a substantial doubt—Given contradictions and absence of documentary

proof—That Appellant was not ready and willing to perform his part of contract—Grounds under Rule 27 are limited and exhaustive, and Appellant's vague claim (brought in 2011, although documents were presumably handed over to counsel 6 years earlier in 2005 at time of institution of suit) as to counsel's fault does not permit limited exception of Rule 27 to be transformed into a getaway to bypass cardinal rule that all evidence must be adduced at trial stage and not before Appellant Court-Documents sought to be adduced were clearly within Appellant's knowledge at time of institution of suit, and indeed, could easily have been produced before Court—Equally, on second ground that such evidence is required "to enable (this Court) to pronounce judgment", this is only in cases where a lacuna in evidence prevents Court from delivering judgment, and such lacuna does not refer to evidentiary lacuna in Appellant's case that merely renders its case weak—In this case, Court is not unable to pronounce a judgment based on evidence and facts available, and indeed, evidence on record can lead to a speaking and reasoned order considering performance of contractual obligations under agreement to sell on a balance of probabilities—Appeal and accompanying applications dismissed.

D.P. Singh v. *Gagan Deep Singh (Since Dec.) Thr. Lrs* *4144*

ILR (2013) VI DELHI 4067
CRL.A.

SHABAB KHAN ....APPELLANT

VERSUS

STATE ....RESPONDENT

(REVA KHETRAPAL & SUNITA GUPTA, JJ.)

CRL.A. NO. : 535/2010 DATE OF DECISION : 24.05.2013
CRL.A. NO. : 536/2010
CRL.A. NO . : 538/2010

Indian Penal Code, 1860—Section 302 read with Section 34 of the IPC—A boy had been stabbed near the Taj Colony Red Light Traffic Booth, who was in a serious condition.—The injured was reported to have been removed to GTB Hospital.—SI Satender Mohan (PW13) Left Constable Sanjeev Kumar at the spot and he alongwith Constable Rajvir reached GTB Hospital from where he collected the MLC of the injured Saleem @ Tikla as per which he was brought dead to the hospital.—He met Jeeshan @ Pappu, Brother-in-law (sister's husband) of the deceased and recorded his statement.—Nawab and After caught hold of Saleem and exhorted Shabab by saying "Aaj iska kaam Khatam kar de" whereupon Shabab assaulted Saleem with a double edged dagger on his chest, right hand and left hand. On hearing the noise, Waseem, his wife reached the spot and both of them raised hue and cry by shouting "Bachao Bachao". All three assailants fled the spot and sine his since his brother-in-law Saleem was fast losing blood he and his wife took him in a TSR to GTB Hospital where he was declared brought dead.—Initially, accused Nawab Anwar Khan and Shabab Khan were sent to face trial for the charge

under Section 302/34 IPC.—A separate charge for the offence under Section 27 of the Arms Act was framed against accused Shabab Khan were sent to face trial for the charge under Sections 302/34 IPC.—A separate charge for the offence under section 27 of the Arms Act was also framed against accused Sabab Khan. Accused persons pleaded not guilty for the aforesaid charges and claimed trial.—Learned counsel next contended that two alleged eye-Witnesses (PW1 and PW2) are the relative of the deceased and are interested witnesses and as such their testimony deserves to be rejected.—In support of his contention, he placed reliance on the case of M.C. Ali & Anr. vs. State of interested witnesses cannot be believed in the absence of independent corroboration.—It was further contended that there are major contradictions and discrepancies the testimonies of theses two eye-witnesses which renders their evidence altogether unreliable and the Appellants deserve to be acquitted on this ground along.—Heavy reliance was placed in this regard upon the judgments of the Supreme Court in Anil and Anr. vs. State of Maharashtra, 2013 (1) C.C. Cases (SC) 259; Eknath Ganpat Aher and Ors. vs. State of Maharashtra AIR 2010 SC 2657 and Govind Raju @ Govind vs. State by Srirampuram and Anr., AIR 2012 SC 1292. It was also submitted that PW2 Jeeshan @ Pappu was a stock witness of the police in several cases and also a mukhbir of the police.—Learned counsel for the accused next that the genesis of the prosecution is based on the call made to the PCR by PW10, namely, Ishrat Khan, who called the PCR on 100 number and gave the information that some person had been stabbed near the traffic booth Seelampur, Delhi.—Motive is a necessary ingredient of any crime and the prosecution having failed to prove any motive on the part of the accused persons to eliminate the deceased, the prosecution story cannot be believed.—Most importantly, there was a grave contradiction in

the ocular testimony and the medical evidence.—It has come in the evidence of PW1 and PW2, who falsely claimed themselves to be the eye-witnesses, that the weapon of offence was a double-edged knife but the medical report shows that the injury caused to the deceased was by a single-edged knife. The doctor examined by the prosecution, namely, PW4 Dr. contradicted the statements given by PWs 1 and 2 with regard to the weapon used for the commission of the offence in that he deposed that the injury on the which caused the death was inflicted by a single sharp edged weapon.—The court therefore, in agreement with the learned trial judge who found the testimony of the eye-witnesses to be credible and trustworthy. The fact that both the eye-witnesses are close relatives of the deceased, in our opinion., does not in any manner impair their testimony or discredit the same as the testimony of "interested witnesses". Being close relatives of the deceased, it does not stand to reason that they would want to screen the real culprit and falsely implicate innocent persons. The contention of the counsel for the parties is also not borne out from the record. DW2 has proved on record that a suit was filed buy by PW2 Jeeshan @ Pappu against Khursheed Ahmed.—The court do not find such discrepancies in Their testimonies as would throw doubt on the prosecution case. The contradiction, if any, are in our opinion too inconsequential to be dwelt upon. When two persons unfold the same story there is bound to be slight variation in the manner in which they narrate the incident. This does not mean that are being untruthful with regard to the occurrence of the incident and so long as the broad outlines of their narration are same the details would be irrelevant in the present case upon being cross-examined with regard to the details of the incident PW1 Waseem Begum stated that accused Nawab was holding an iron chain with which he had first pressed the neck of Saleem (deceased)

and then the chain was thrown down and Saleem was stabbed.—With regard to the absence of light at the spot, it is clear from the evidence on record that though the area of Taj Colony was not receiving electricity, electricity was being drawn by the inhabitants of the colony from unauthorized sources. PW1 Waseem Begum in the course of the cross-examination has admitted has admitted it to be so.—PW1 and PW2 perceived it to be a double-edged knife, the opinion of the doctor was that it was that it was a single edged knife. The knife has not been recovered during investigation and as such the opinion of the doctor could not be sought as to whether the stab injuries found on the deceased could have been inflicted with the recovered weapon of offence. In such circumstance to discard the otherwise clear, cogent and credible testimonies of the eye-witnesses would not, in our opinion, militate against all settled canons of appreciation of evidence.—It is a well settled proposition of law that motive is of paramount importance when the case is based entirely on circumstantial evidence. Motive to a great extent loses relevance when there is ocular evidence which is cogent and convincing. Thus, we are not inclined to throw out the case of the prosecution merely on the ground that the prosecution has failed to establish the motive for the commission of the offence assuming this to be true.—The court , therefore, uphold that the conviction of the Appellants under Section 302 IPC with the aid of Section 34 IPC.—All the three appeals are dismissed.

Important Issue Involved: Incase of conflict between the medical and ocular evidence, ordinarily the medical evidence has to be ignored being merely opinion evidence unless medical evidence renders the ocular evidence improbable—Even if there is some variance, it would still be so immaterial and inconsequential that it would not give any benefit to the accused

Evidence of interested witnesses cannot be believed in the absence of independent corroboration.

Motive is necessary ingredient of crime.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Banamali Shukla, Advocate.

FOR THE RESPONDENTS : Ms. Ritu Gauba, APP.

CASES REFERRED TO:

1. *Anil and Anr.* vs. *State of Maharashtra,* 2013 (1) C.C. Cases (SC) 259.
2. *Govind Raju @ Govinda* vs. *State by Srirampuram and Anr.,* AIR 2012 SC 1292.
3. *Gajoo* vs. *State of Uttarakhand,* (2012) 3 SCC (Cri) 1200 = (2012) 9 SCC 532.
4. *Bhajan Singh @ Harbhajan Singh and Ors.* vs. *State of Haryana,* (2011) 7 SCC 421.
5. *State of Rajasthan* vs. *Hakam Singh,* 2011 (6) SCALE 568.
6. *Durbal* vs. *State of U.P.* AIR 2011 SC 795.
7. *M.C. Ali & Anr.* vs. *State of Kerala* AIR 2010 SC 1639.
8. *Javed Masood and Anr.* vs. *State of Rajasthan,* AIR 2010 SC 979.
9. *Eknath Ganpat Aher and Ors.* vs. *State of Maharashtra and Ors.,* AIR 2010 SC 2657.
10. *State of U.P.* vs. *Hari Chand,* (2009) 13 SCC 542.
11. *Kapildeo Mandal* vs. *State of Bihar* (2008) 16 SCC 99 : (2010) 4 SCC (Cri) 203.
12. *Krishnan* vs. *State,* (2003) 7 SCC 56 : 2003 SCC (Cri) 1577.
13. *Om Prakash and Ors.* vs. *State* 1990 (18) DRJ 270.
14. *State of U.P.* vs. *Krishna Gopal* (1988) 4 SCC 302 : 1988 SCC (Cri) 928.
15. *Man Singh, Prem, Bale & Others* vs. *State* 1979 (16) DLT 70.

RESULT: Dismissed.

REVA KHETRAPAL, J.

1. The present appeals arise out of the judgment and order dated 15.3.2010 and 17.3.2010 wherein the learned trial court convicted the Appellants for the offence under Section 302 read with Section 34 of the IPC and sentenced them to imprisonment for life.

2. The brief facts of the present case are as under:

On 28th March, 2004, at 8.01 p.m., an information was received by PW 17 Head Constable Siya Nand, duty officer of Police Station Seelampur from Constable Ravinder No.2727/PCR that a boy had been stabbed near the Taj Colony Red Light Traffic Booth, who was in a serious condition. This information was recorded by Head Constable Siya Nand (PW17) in the roznamcha as DD No.17A and the DD was marked to SI Satender Mohan (PW13), who along with Constable Sanjeev and Constable Rajvir reached the spot, i.e., Taj Colony, New Seelampur where he noticed blood lying at the spot on the ground near Ganda Nala. The injured was reported to have been removed to GTB Hospital. SI Satender Mohan (PW13) left Constable Sanjeev Kumar at the spot and he along with Constable Rajvir reached GTB Hospital from where he collected the MLC of the injured Saleem @ Tikla as per which he was brought dead to the hospital. He met Jeeshan @ Pappu, brother-in-law (sister‘ husband) of the deceased and recorded his statement. As per the statement of the complainant (Ex.PW2/A), he was residing at E-17/178, Taj Colony, New Seelampur, Delhi and dealing with the sale of cloth strips to cloth traders. Saleem @ Tikla was the brother of his wife Waseem Begum. He was living with his *“bhua”* (paternal aunt) Ballo closed to his house at E-17/174, Taj Colony and was employed in a shoe factory. On the fateful day, that is, 28.03.2004 at 7.45 p.m., while he (Jeeshan) was standing outside his house Nawab, Shabab and Aftab, sons of Abrar Ahmed Khan, residents of House No.E-17/200, Taj Colony started abusing his brother-

in-law Saleem. Nawab and Aftab caught hold of Saleem and exhorted Shabab by saying "Aaj iska kaam khatam kar de" whereupon Shabab assaulted Saleem with a double edged dagger on his chest, right hand and left hand. On hearing the noise, Waseem, his wife reached the spot and both of them raised hue and cry by shouting "Bachao Bachao". All three assailants fled the spot and since his brother-in-law Saleem was fast losing blood he and his wife took him in a TSR to GTB Hospital where he was declared brought dead.

3. On the aforesaid statement of the witness Jeeshan @ Pappu (PW2), the Investigating Officer PW13–SI Satender Mohan prepared the rukka (Ex.PW13/A) and sent the same through Constable Rajvir Singh to the police station for registration of the case. On the basis of the rukka case FIR No.166/04 (Ex.PW17/B) was registered. Thereafter, investigation was handed over to the then SHO Inspector Data Ram (PW21). During investigation, the Investigating Officer recorded the statement of Waseem (PW1), wife of the complainant at GTB Hospital and sent the dead body to the mortuary for postmortem. The Investigating Officer then prepared site plan Ex.PW21/A on the pointing out of the complainant and requisitioned the Crime Team. Constable Rattan Singh (PW16) from the Crime Team took photographs of the spot. The Investigating Officer then affected seizure of incriminating articles from the spot vide seizure memo Ex.PW2/B and recorded statements of SI Nitin Kumar (PW15) and supplementary statements of Jeeshan (PW2) and Waseem (PW1).

4. The police party then proceeded to search for the offenders. The accused Nawab was arrested from near Metro Station Seelampur on the pointing out of the complainant/Jeeshan (PW2). On the following day, i.e. on 29.03.2004 inquest proceedings were done and postmortem conducted. On 21.5.2004, the exhibits were sent to CFSL, Calcutta through Constable Arun Kumar (PW11). On 4.4.2004, accused Shabab was arrested from near Metro Station Seelampur vide arrest memo Exhibit PW8/A on the pointing out of the PW2 Jeeshan, who made a disclosure statement (Ex.PW8/C). No weapon of offence was recovered despite efforts made in this regard. Accused Aftab could not be arrested and was declared proclaimed offender by the Court. Chargesheet was prepared and results collected from the CFSL, which are Ex. PW21/B, Ex. PW21/C and Ex. PW21/D.

5. Initially, accused Nawab Anwar Khan and Shabab Khan were sent to face trial for the charge under Sections 302/34 IPC. A separate charge for the offence under Section 27 of the Arms Act was also framed against accused Shabab Khan. Accused persons pleaded not guilty for the aforesaid charges and claimed trial. The evidence of the prosecution witnesses was recorded. Later on, accused Aftab Khan was also arrested on 25th July, 2006 and a supplementary chargesheet filed against him. He too claimed trial and the prosecution witnesses were recalled for examination.

6. The statements of the accused persons were recorded under Section 313 Cr.P.C. in which they stated that they had been falsely implicated. The accused persons examined 6 witnesses in their defence. The trial court on consideration of the evidence on record held that the prosecution had successfully proved on record that it was the accused persons and none else who had assaulted Saleem @ Tikla and committed his murder. All the three accused persons were accordingly convicted under Sections 302/34 IPC. Accused Shabab was also held guilty for the offence under Section 27 of the Arms Act and convicted for the said offence.

7. We have heard Mr. Banamali Shukla on behalf of the Appellants Shabab Khan, Aftab Khan and Nawab Anwar Khan and the learned counsel for the State.

8. Mr. Shukla contended that the prosecution story is a concocted and tailor made story. The place of occurrence as disclosed by the alleged eye-witnesses itself is doubtful. As per PW9 Constable Ravinder Singh, the information which was received by the PCR and was reduced into writing in the form of Ex.PW9/A was that a boy had been stabbed near the Traffic Booth Red Light, Taj Colony. In the site plan, there is no mention of any traffic booth or red light and this altogether falsifies the case of the prosecution. The testimony of PW10 Ishrat Khan is also relevant. The first information to the police was given by this witness by virtue of the police control room log, i.e., the call made by PW10 Ishrat Khan and as per the said call, recorded in DD No.17A, the incident had taken place not at the spot mentioned by PW1 and PW2, but 200 mtrs. away from the spot, viz., the Red Light Traffic Booth of Taj Colony. The learned trial court in paragraph 17A of its judgment has noted that SI Satender Mohan (PW13) who partly investigated the case deposed that

on 28.3.2004 on receipt of DD No.17A he along with Constable Sanjeev and Constable Rajvir went to the Red Light Traffic Booth where he noticed blood lying at the spot on the ground near Taj Colony street near Ganda Nala. This shows that the murder was committed at the red light and not outside the house of accused persons as claimed by PW1 and PW2. Further, it has come in the cross-examination of the IO himself that the Traffic Booth is 200 mtrs. away from Taj Colony, Seelampur where the alleged incident is stated to have taken place.

9. Learned counsel next contended that the two alleged eye-witnesses (PW1 and PW2) are the relatives of the deceased and are interested witnesses and as such their testimony deserves to be rejected. In support of his contention, he placed reliance on the case of **M.C. Ali & Anr. vs. State of Kerala** AIR 2010 SC 1639, wherein the Supreme Court held that evidence of interested witnesses cannot be believed in the absence of independent corroboration. This was a case which absolutely lacked independent evidence. Also, the case of **Javed Masood and Anr. vs. State of Rajasthan,** AIR 2010 SC 979 was cited by the learned counsel for the accused in which the Supreme Court stated as follows:

> "....we find it difficult and impossible to place any reliance whatsoever on the evidence of PW5 who is a highly interested and partisan witness. No reliance can be placed on his evidence in order to convict the appellants of the charge under Section 302, IPC. For the same reasons, the evidence of PWs 13 and 14 also is to be discarded."

10. It was further contended that there are major contradictions and discrepancies in the testimonies of these two eye-witnesses which renders their evidence altogether unreliable and the Appellants deserve to be acquitted on this ground alone. PW1 Waseem Begum claims that PWs1 and 2 rushed to the spot and saw the incident as it was taking place, while PW2 Jeeshan @ Pappu states that he was standing outside his house when he heard the noise of quarrel taking place at about 20 paces from where he was standing. His wife came out and he (PW2) and she went to the place of quarrel. Learned counsel contended that an incident of the alleged nature takes place within a matter of seconds and hence the testimony of PW1 and her presence on the spot deserves to be disbelieved on account of the clearly contradictory statements of PW1 and her husband PW2. Further, PW1 in her cross-examination had come

out with a new story by stating that accused Nawab was holding an iron chain with which he had first pressed the neck of Saleem and then the chain was thrown down and Saleem was stabbed. No chain has been recovered in the course of investigation or produced by the prosecution as case property. PW2 Jeeshan has also made no reference to any iron chain. The two versions of the incident given by PW1 Waseem Begum and PW2 Jeeshan are thus clearly contradictory to each other and reflective of the fact that the eye-witness account of these witnesses is not worthy of credence. Heavy reliance was placed in this regard upon the judgments of the Supreme Court in **Anil and Anr. vs. State of Maharashtra,** 2013 (1) C.C. Cases (SC) 259; **Eknath Ganpat Aher and Ors. vs. State of Maharashtra and Ors.,** AIR 2010 SC 2657 and **Govind Raju @ Govinda vs. State by Srirampuram and Anr.,** AIR 2012 SC 1292. It was also submitted that PW2 Jeeshan @ Pappu was a stock witness of the police in several cases and also a mukhbir of the police.

11. As regards the antecedents of the deceased, it was contended that PW13 SI Satender Mohan in the course of his cross-examination had admitted that the deceased was involved in 4-5 criminal cases of different police stations and he was a criminal of the area of his division of PS Seelampur. PW5 Constable Kaptan Singh and PW6 Constable Jai Prakash when cross-examined also admitted that the deceased was a declared bad character of the Trans-Yamuna area. This fact had also clearly emerged in defence evidence. DW4 ASI Giri Raj Singh in the course of his testimony had stated that he had brought the summoned Register No.9, Part III in respect of Saleem @ Tikla which showed that there were six cases registered against Saleem @ Tikla, son of Israr, at Police Station Seelampur. He proved on record entries with regard to all the aforesaid cases as Ex.PW4/A running into three pages. The aforesaid evidence on record conclusively showed that deceased Saleem @ Tikla was a bad character of Police Station Seelampur and other police stations in Delhi having enmity with at least 100 persons of the area and adjoining areas; it may be possible that the deceased was separately assaulted by a completely different set of persons for settling their enmity with the deceased and the accused persons had been made scapegoats by the police. Alternatively, it was contended that PW1 and PW2 were inimical to the accused persons because they were in the same business having business rivalry.

12. Learned counsel for the accused next contended that the genesis of the story of the prosecution is based on the call made to the PCR by PW10, namely, Ishrat Khan, son of Puttan Khan, who called the PCR on 100 number and gave the information that some person had been stabbed near the traffic booth Seelampur, Delhi. The caller, i.e., PW10 Ishrat Khan as per the contemporaneous record claimed to know the identity of the Appellants, but in the witness box he refused to identify the accused persons as the assailants. Thus, the only independent witness has not supported the case of the prosecution put forth by PW1 and PW2. The case of **Javed Masood and Anr.** (Supra) was relied upon in this regard by the counsel for the accused. In this case the independent witness failed to support the prosecution case but his testimony was corroborated by the police witnesses. His evidence with the evidence of the police witnesses was held to be binding on the prosecution in view of the fact that he was not declared hostile by the prosecution.

13. As regards motive for the commission of the crime, it is contended that the prosecution has failed to prove the motive behind the murder of the deceased. Motive is a necessary ingredient of any crime and the prosecution having failed to prove any motive on the part of the accused persons to eliminate the deceased, the prosecution story cannot be believed. Mr. Shukla to press upon his point placed reliance on the case of **State of Rajasthan vs. Hakam Singh,** 2011 (6) SCALE 568, wherein the Apex Court while emphasizing the significance of the presence of motive in a crime has held as follows:

> "3. Once there is no motive and the accused himself had taken the deceased to the hospital, shows that he had no intention to commit a crime, much less to give a gunshot, which would inevitably result in the death of deceased...."

14. It is also submitted that there was civil litigation pending between PW2 Jeeshan and the elder brother of the accused, namely, Khursheed which was the motive for the false implication of the accused persons by the alleged eye-witnesses. Reference in this context was made to the testimony of DW2 Raj Rani, UDC, Record Room Civil, Karkardooma Courts who was summoned with the file of Civil Suit No.759/06 Jeeshan @ Pappu vs. Khursheed Ahmed decided on 7.11.2006 by Shri Mukesh Kumar, learned Civil Judge, Delhi, the certified copy of the plaint whereof is proved as Ex.DW2/A and of the order sheet dated 7.11.2006 as Ex.DW2/B.

15. Contention was also sought to be raised that there were no electrification plans for the colony in question, namely, Taj Colony, New Seelampur. This area has yet to receive electricity and, therefore, the story of PW1 and PW2 that they had witnessed the incident was a false one. DW5 Shri S.S. Verma, Sr. Manager in Planning and Construction, BYPL, Delhi in his testimony had clearly stated that there was no proposal till date for electrification of this area. As per DW6 Shri Vishal Modi, Sr. Manager, however, the electrification work of Taj Colony, Seelampur was conducted during the period intervening 14.7.2006 to 14.2.2007 and this shows there was no electricity in the area on the date of the commission of the crime. In this background, it was urged that the case of the prosecution that PW1 and PW2 had seen the accused persons in the light of a bulb installed on the light post is a concocted story and at any rate a highly doubtful one. Mr. Shukla in this context referred to the case of **Durbal vs. State of U.P.** AIR 2011 SC 795, the relevant portion if which is reproduced herein below:

> "15. It is also required to note that all the eye-witnesses had stated in their evidence that lantern was burning in the verandah and Kaldhari (PW 1), Sheo Kumar (PW 2) and Sonai (PW3) were having torch lights in their hands and only with the help of the lantern and the torch lights they could recognize and identify the assailants. The lantern and the torch lights though were alleged to have been seized vide seizure mahazar Exts.Ka-2 and Ka-3 respectively, were not produced in the Court. The seizure memos Ext.Ka-2 and Ka-3 did not contain the crime number and other recovery particulars. In the circumstances, it becomes highly doubtful as to whether those torch lights and lantern were actually seized during the course of investigation by the Investigating Officer. The Investigating (PW 8) did not explain as to why the crime number was not noted on Exts.Ka-2 and Ka-3 and as to why the material objects if all seized, were not produced in the Court. The very fact that the lantern and torch lights were pressed into service for the purpose of identifying the accused, itself suggests that it was a pitched dark night during the mid winter and it was not possible to identify the assailants without the aid of lantern and torch lights. It is highly doubtful as to whether PWs 1, 2 and 3 had actually torch lights in their hands as stated by them, in the absence of their recovery

details in the seizure memo and their non production before the Court. Moreover, Kaldhari (PW 1) refused to state as to whether the assailants were covering their faces with chadar. His evidence does not inspire any confidence."

16. Reliance was also placed by him in this context upon the decision rendered in **M.C. Ali and Anr.** (Supra). In this case the Supreme Court while acquitting the accused persons who had also been acquitted by the trial court but convicted by the High Court, noted that the incident took place in the dark. None of the torches were recovered or produced by any of the concerned persons. There was also no moonlight. The Supreme Court opined that in such circumstances it had been rightly held by the trial court that the recognition of the six accused may not be possible and it was not entirely unbelievable that the torches had been introduced to ensure that the accused could be said to have been identified.

17. Learned counsel next contended that the weapon of the alleged offence was not recovered during the investigation; hence the non-recovery of the weapon of offence is a serious lacuna in the prosecution case. Then again, though the case of the prosecution was that the body of the deceased was oozing with blood, the blood stained clothes of the alleged eye-witnesses who had taken the deceased to the hospital were not seized in the course of investigation. Most importantly, there was a grave contradiction in the ocular testimony and the medical evidence. It has come in the evidence of PW1 and PW2, who falsely claimed themselves to be the eye-witnesses, that the weapon of offence was a double-edged knife but the medical report shows that the injury caused to the deceased was by a single-edged knife. The doctor examined by the prosecution, namely, PW4 Dr. S. Lal contradicted the statements given by PWs 1 and 2 with regard to the weapon used for the commission of the offence in that he deposed that the injury on the chest which caused the death was inflicted by a single sharp edged weapon. Learned counsel contended that the medical evidence has more value than ocular evidence because the medical expert is possessed of special knowledge, experience, skill and expertise to give the opinion regarding his field. For this reason the prosecution has not produced any knife before the Court as the production of the knife would have falsified the testimony of the eye-witnesses. Furthermore, the learned trial court had framed charge against the accused of intentionally causing the death of the deceased with the help of a double-edged dagger and such charge framed by the learned

trial court is unsustainable in the light of the medical evidence on record that the injury caused to the deceased was by a single-edged weapon. For this reason alone, the judgment of the learned trial court deserves to be set aside and the accused persons acquitted of the charge framed against them.

18. Mr. Shukla, learned counsel for the accused also contended that the prosecution has failed to establish äcommon intention. of the accused under section 34 of the IPC. In this context, he relied upon the decision of this Court rendered in the case of **Man Singh, Prem, Bale & Others vs. State** 1979 (16) DLT 70 which highlighted the following principles relating to joint criminal liability:

> "29. Before dealing with the question of joint criminal liability, for which these two appellants can be held responsible, we would like to state the principles governing such liability within the contemplation of section 34 of the IPC. This section envisages only a rule of evidence. It does not create a distinct or substantive offence. The leading features of this provision are common intention and the element of participation in action. The criminal act has to be in furtherance of the common intention.
>
> 30. It is well settled that common intention as contemplated by S.34 has to be anterior in time to the commission of the crime. It implies prearranged plan and the existence of prior concert. It may, in the circumstances of a particular case, develop in the course of events, though it might not be present in the beginning of the unlawful act. Thus a finding with regard to the pre-requisite, viz; furtherance of the common intention, is essential before a person can be held guilty under S. 34 of the IPC."

19. Mr. Shukla finally contended that death caused by injury on a non-vital portion of the body falls under the purview of S.304 Part II of the IPC and not S.302 IPC. To support his contention he relied upon the case of **Om Prakash and Ors. vs. State** 1990 (18) DRJ 270.

20. Per contra, the learned counsel for the State contended that there was clear and cogent evidence on record to bring home the guilt of the accused persons and the judgment of the learned trial court indicting the accused persons deserved to be upheld.

21. We have perused the judgment of the learned trial court and the evidence adduced by the prosecution and the defence, including the statements of PW1 Waseem Begum and PW2 Jeeshan @ Pappu. PW1 Waseem Begum is the sister of the deceased who testified that around 7.45 p.m. she was present in her house. Her husband was outside the house. She heard a noise of quarrel and rushed outside. A quarrel was taking place two houses away from her house. Her husband had also rushed with her to the place of occurrence where Aftab and Nawab were holding the hands of her brother Saleem. Shabab stabbed her brother with a double-edged knife in his chest. She and her husband took Saleem to GTB Hospital where he was declared brought dead. After sometime, the police came and recorded her statement and that of her husband.

22. PW1 Waseem Begum identified all three assailants of her brother. Though subjected to extensive cross-examination, nothing emerged in her said cross-examination to discredit her testimony in any manner. Significantly, in the course of her cross-examination, she stated that her brother had been stabbed on his chest and also on his left hand by the accused persons. On a specific query put to her, she stated that it is correct that her house has no electrical connection, but stated that they had drawn electricity from the pole.

23. PW2 Jeeshan @ Pappu, brother-in-law of the deceased in his testimony stated that at about 7.45 p.m. he was standing outside his house when he heard noise of quarrel taking place at about 20 paces from where he was standing. His wife came out and both he (PW2) and she went to the place of quarrel. Shabab, Aftab and Nawab were abusing Saleem. He knew accused Nawab and Shabab as they lived one house away from his house. Aftab was also a neighbour and in fact they were all real brothers. Accused Shabab had stabbed Saleem in the chest with a double-edged knife. At that stage, the other two accused were holding Saleem. The incident took place within two minutes. He and his wife took Saleem in the TSR to the hospital where he was declared brought dead. Police had come in the hospital and recorded his statement vide Ex.PW2/A which bears his signatures at point "A". Statement of his wife was also recorded in the hospital by the police.

24. PW2 Jeeshan was also subjected to detailed cross-examination. We note at this juncture that in his cross-examination he stated that though there were no electricity meters installed in the houses at Taj

Colony, the people of the colony were using electricity by unauthorized means. He also admitted that 8 or 12 public persons had collected at the place of occurrence who were Ishrat, Rajender, etc. Nothing was elicited from him in the course of his cross-examination to in any manner detract from the statement made by him before the police which was reiterated by him in the course of his testimony.

25. We, therefore, are in agreement with the learned trial Judge who found the testimony of the eye-witnesses to be credible and trustworthy. The fact that both the eye-witnesses are close relatives of the deceased, in our opinion, does not in any manner impair their testimony or discredit the same as the testimony of "interested witnesses". Being close relatives of the deceased, it does not stand to reason that they would want to screen the real culprit and falsely implicate innocent persons. The contention of the counsel for the accused that PW1 and PW2 had a motive for the false implication of the accused persons being a property dispute between the parties is also not borne out from the record. DW2 has proved on record that a suit was filed by PW2 Jeeshan @ Pappu against Khursheed Ahmed. A bare glance at the plaint (Ex.DW2/A) shows that the said suit was instituted on 25th January, 2006 being Civil Suit No.759/06, i.e., much after the commission of the crime in the present case. Document Ex.DW2/B further shows that the suit was dismissed in default for non-appearance on 17.11.2006. Nothing has been brought on record to show that the suit was got restored or that there existed a property dispute between PW2 Jeeshan @ Pappu and Khursheed Ahmed who is stated to be related to the accused persons on the date of the commission of the offence. For this reason, we find the judgments rendered by the Supreme Court in the cases of **M.C. Ali** and **Javed Masood** (Supra) inapplicable on the facts of this case. In both the said cases, the Supreme Court on facts came to the conclusion that there was long standing enmity between the family of the accused and the family of the witnesses, and the statements of the witnesses on the basis of which the accused could be held guilty were unreliable and therefore rightly refused to rely upon the same. As discussed above, in the present case, the prosecution has failed to prove that PW1 and PW2 were interested witnesses and hence the embargo of relying upon their testimonies does not exist.

26. Much has been made by learned counsel for the accused persons about the discrepancies in their testimonies which have been labelled as

"material discrepancies". We do not find any such discrepancies in their testimonies as would throw doubt on the prosecution case. The contradictions, if any, are in our opinion too inconsequential to be dwelt upon. When two persons unfold the same story there is bound to be a slight variation in the manner in which they narrate the incident. This does not mean that they are being untruthful with regard to the occurrence of the incident and so long as the broad outlines of their narration are same the details would be irrelevant as for instance in the present case upon being cross-examined with regard to the details of the incident PW1 Waseem Begum stated that accused Nawab was holding an iron chain with which he had first pressed the neck of Saleem (deceased) and then the chain was thrown down and Saleem was stabbed. True, this fact has not been disclosed in the testimony of PW2 Jeeshan @ Pappu but it is important to bear in mind that this fact was disclosed by PW1 Waseem Begum in her cross-examination. No query was put by counsel for the accused to PW Jeeshan @ Pappu with regard to the details of the incident and presumably for this reason nothing was disclosed by him in this regard. The fact that the iron chain was not seized as incriminating material by the Investigating Officer is also of no import for the reason that the chain was not used as a weapon of assault upon the deceased. The deceased was stabbed with a knife by accused Shabab while both Nawab and Aftab held the arms of the deceased. The knife, therefore, was the only weapon of assault used by the accused for abruptly ending the life of the deceased.

27. As regards the non-identification of the accused persons by PW10 Ishrat Khan, it is undoubtedly true that PW10 Ishrat Khan who was the first informant did not support the prosecution case in its entirety. He deposed that on 28th March, 2004 at around 8.00 p.m. he was present at his place of work at Taj Colony near Seelampur. He heard some brawl in a gali at pushta. He heard someone saying that one Saleem had been stabbed by knife. Said Saleem was known to him. He informed the police at telephone No.100 from a phone belonging to one Rajender. He had seen the brother-in-law of Saleem (jija) taking Saleem to the hospital in a rickshaw. He had also accompanied Saleem to GTB Hospital where doctors had declared him brought dead. He, however deposed that he had not seen anyone causing injury to the said Saleem. PW10 Ishrat Khan was cross-examined by learned counsel for the State on the aspect of identification of the accused persons but he categorically denied the

suggestion that he knew the offenders and volunteered to state that he had disclosed to the police that it was the deceased who was known to him. Thus, no benefit can accrue to the accused from his testimony and to that extent the decision of the Supreme Court in the case of **Javed Masood** (Supra) relied upon by counsel is clearly distinguishable.

28. A deliberate attempt has been made on the part of the accused persons to use the testimonies of PW1 and PW2 to dispel the case of the prosecution that the place of occurrence was near the Red Light Traffic Booth. The contention raised is that there is a distance of 200 meters between the red light traffic booth and the place of occurrence which, as per the testimonies of PW1 and PW2 took place outside their house. The further contention raised is that in the site plan there is no mention of the traffic booth or red light. These contentions, in our opinion, are of no avail to the accused persons. PW1 Waseem Begum has stated that the incident took place two houses away from their house. PW2 Jeeshan @ Pappu has also stated that while he was standing outside his house, he heard the noise of quarrel taking place at about 20 paces from where he was standing. PW13 SI Satender Mohan who partially conducted the investigation deposed that he had gone to the red light traffic booth along with Constable Sanjeev and Constable Rajbir and had noticed blood lying at the spot on the ground near Taj Colony street near Ganda Nala. Not even a suggestion was put to any of these witnesses including PW13 SI Satender Mohan that the place of occurrence was not near the red light traffic booth. Had such a suggestion been put to the witnesses presumably they would have thrown light on the proximity of the place of occurrence to the red light traffic booth. The further contention raised on behalf of the accused persons that in the site plan there is no mention of the traffic booth or red light and this shows the falsity of the prosecution case is to our mind wholly untenable. The site plan was prepared on the pointing out of Jeeshan @ Pappu (PW2) and the fact that no red light was pointed out by him in no manner takes away from the case of the prosecution. PW10 Ishrat Khan who had given first information to the police regarding the incident had mentioned the red light traffic booth as recorded in DD No.17A. No query was put to this witness that the place of occurrence was not near the red light traffic booth. Had this been done by the counsel for the accused persons, the matter would have been clarified by the witness.

29. With regard to the absence of light at the spot, it is clear from the evidence on record that though the area of Taj Colony was not receiving electricity, electricity was being drawn by the inhabitants of the colony from unauthorized sources. PW1 Waseem Begum in the course of her cross-examination has admitted it to be so. Interestingly, on a suggestion put to him, PW2 Jeeshan @ Pappu too stated that it is correct that no electricity meters are installed in houses at Taj Colony and that people use electricity by unauthorized means. Both PW1 Waseem Begum and PW15 SI Nitin Kumar stated that there was street light at the spot from an electric pole. The Investigating Officer PW21 ACP Data Ram too stated that there was street light in that gali. On a query put to him, he stated that an electric pole was there at a distance of about 10 meters from the spot. Thus, the aspect of absence of light also does not come to the rescue of the accused persons. The decisions relied upon in this regard are also clearly distinguishable on facts. Both in the case of **Durbal** and **M.C. Ali** (Supra) the admitted position was that there was no street light and the witnesses were equipped with torches in the light of which they allegedly identified the assailant. In the present case there is on record evidence of the police officials and the independent witnesses that there was street light in the area.

30. Adverting next to the aspect of non-recovery of the weapon, in our considered opinion, the non-recovery of the weapon cannot render at naught the case of the prosecution in the light of the fact that the deceased died a homicidal death caused by a knife, the fatal blow having been inflicted on the left side of his chest. As per the postmortem report, the deceased sustained the following injuries:

> "1. Stab incised wound 4 x 0.3 cm x cavity deep, present Lt. middle front of chest, vertically placed. 6.0 cm Lt to mid line and 2.5 cm medial to nipple and 12.0 cm below the mid point of clavicle, the lower angle is acute and upper angle is blunt. The wound enter the chest cavity through 4th and 5th intercostals space by cutting 5th rib, going backward, inward and medially direction to enter the pericardium and then perforate the Heart from anterior surface and coming out from posteran aspect on anterior surface of heart, the side of wound is 2.3 x 0.2 cm and in postern surface the size of wound is 1.2 x 0.2 cm. There is about 2.0 litre of blood present in chest cavity. Total dept of wound is about 15.0 cm.

> 2. Incised wound 2.5 x 0.4 cm x muscle deep present Lt side of chest over anterior axillary line, 8.0 cm below the Nipple and 13.0 cm Lt to midline. The wound the Horizontally placed and tailing is present on outer end.
>
> 3. Incised wound 1.2 x 0.2 cm present dorsum of Index finger of Lt hand.
>
> 4. Reddish Abrasion 0.5 x 0.5 cm present Lt side of forehead, 1.0 cm lateral to outer end of eye brow."

The cause of death is opined as hemorrhagic shock due to ante mortem stab injury on chest produced by single sharp-edge weapon. Injury No.1 is stated to be sufficient to cause death in the ordinary course of nature. The postmortem report has been proved on record by PW4 Dr. S. Lal who stated that death had occurred 18 hours before the autopsy. The autopsy was done at 12.10 p.m. on 29.3.2004 and therefore as per the postmortem report the deceased died at 6 a.m. or 7 a.m. or thereabout on 28.3.2004.

31. On behalf of the appellants, Mr. Shukla has pressed into service the variation between the ocular and medical testimony to contend that the discrepancy between the two must prove fatal to the case of the prosecution. We are not inclined to agree with the aforesaid submission as the law is well settled that in case of conflict between the medical and ocular evidence, ordinarily, the medical evidence has to be ignored being merely opinion evidence unless medical evidence renders the ocular evidence improbable.

32. In **State of U.P. vs. Hari Chand,** (2009) 13 SCC 542, the Supreme Court while laying down that unless the oral evidence is totally irreconcilable with the medical evidence, has primacy placed reliance upon the following pertinent observations made in the case of **Krishnan vs. State,** (2003) 7 SCC 56 : 2003 SCC (Cri) 1577, pp.62-63, paras 20-21:

> "20. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

21. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for [their] credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts; the ''credit" of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

33. In **Bhajan Singh @ Harbhajan Singh and Ors. vs. State of Haryana,** (2011) 7 SCC 421, the Supreme Court laid down the parameters for the assessment of inconsistencies between the ocular and medical evidence in the following terms:-

"Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

34. In a recent decision of Supreme Court rendered in **Gajoo vs. State of Uttarakhand,** (2012) 3 SCC (Cri) 1200 = (2012) 9 SCC 532, it was noted that according to PW2 and PW3 the deceased was killed by the use of daranti which the accused was carrying, while according to the medical evidence the death resulted from asphyxia. The Supreme Court while noting that one of the accused, namely, Rampal was pushing down the deceased on the earth in the "aangan" while Gajoo had inflicted the injuries with daranti in one hand and holding the neck of the deceased

with the other hand, held that it was the pressing of her neck and body to the earth by both the accused of much greater strength than the deceased, that resulted in her death. The Court thus held that as such, there was no variance between the medical evidence and the ocular evidence but even for the sake of argument if there is some variance, it would still be so immaterial and inconsequential that it would not give any benefit to the accused. The Court observed:

"It is a settled principle by a series of decisions of this Court that while appreciating the variation between the medical evidence and ocular evidence, primacy is given to the oral evidence of the witnesses. Reference can be made to the judgments of this Court in **Kapildeo Mandal v. State of Bihar** (2008) 16 SCC 99 : (2010) 4 SCC (Cri) 203, **State of U.P. v. Krishna Gopal** (1988) 4 SCC 302 : 1988 SCC (Cri) 928 and **Bhajan Singh v. State of Haryana** (2011) 7 SCC 421 : (2011) 3 SCC (Cri) 241."

35. The question which arises for our consideration, therefore, is whether the medical evidence in the instant case completely rules out the possibility of ocular evidence being true. We think not. On a conjoint reading of the ocular and medical evidence on record we find that there is no inconsistency insofar as the weapon of offence is concerned. Both the eye-witnesses and the doctor have opined that the death of the deceased was caused by a sharp-edged weapon. The difference in the medical and ocular testimony is that while according to the ocular testimony it was a double-edged weapon, according to the doctor who conducted the postmortem it was a single-edged weapon. PW1 and PW2 perceived it to be a double-edged knife, the opinion of the doctor was that it was a single edged knife. The knife has not been recovered during investigation and as such the opinion of the doctor could not be sought as to whether the stab injuries found on the deceased could have been inflicted with the recovered weapon of offence. In such circumstance to discard the otherwise clear, cogent and credible testimonies of the eye witnesses would not, in our opinion, militate against all settled canons of appreciation of evidence.

36. Adverting to the argument of the counsel for the accused that the prosecution case must fail the prosecution having failed to establish any motive for the commission of the crime by the accused, we note that motive in the instant case is of no particular significance. It is a well

settled proposition of law that motive is of paramount importance when the case is based entirely on circumstantial evidence. Motive to a great extent loses relevance when there is ocular evidence which is cogent and convincing. Thus, we are not inclined to throw out the case of the prosecution merely on the ground that the prosecution has failed to establish the motive for the commission of the offence assuming this to be true.

37. To conclude, the learned trial court has relied upon the credible eye-witness account of PW1 and PW2, and we see no reason to differ from the findings of the trial court, more so as their testimonies are supported by the evidence of the police officials. The common intention of the accused to commit the offence also stands established from the evidence on record. We, therefore, uphold that the conviction of the Appellants under Section 302 IPC with the aid of Section 34 IPC.

38. Resultantly, all the three appeals are dismissed.

39. Accused Aftab Khan and Nawab Anwar Khan are directed to surrender today before this Court. Their bail bonds stand discharged.

ILR (2013) VI DELHI 4089
CRL.A.

JOGINDER @ JOGA **....APPELLANT**

VERSUS

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

(MUKTA GUPTA, J.)

CRL.A. NO. : 184/2003 , **DATE OF DECISION: 22.07.2013**
CRL.A. NO. : 193/2003

Indian Penal Code, 1860—Section 395, 34 and Section 397—The prosecution case is based on the statement

of PW2 Darshana—As the door was opened 4/5 other persons entered the drawing room. One of the persons, who came on the motorcycle, removed her two gold bangles, one mangalsutra, one gold ring, one pair of ear tops, one gold chain from her person and the other person was holding a country made pistol in his hand when jewellery was being removed. The other persons who came later stated searching the house for other things.—They left by locking them in the bathroom and closing the gate from outside. She identified the Appellant Joginder as the person who was carrying pistol and Appellant joginder as the person who removed the jewellery from her person. She further stated that she had gone to the jail and had identified joginder present in Court.—The evidence of this witness is supported by PW2 Pinki. She identified joginder as the person who had removed the jewellery and Joginder as the person who was having gun with him. She also stated that she went to the jail and identified Joginder in the TIP.—Though PW3 Sushil nephew of PW1 was also examined as a prosecution witness, however he only stated that he found 3-4 Persons present in the drawing room and those persons took all of them to the bathroom and bolted the bathroom from outside. He had seen the two Appellants but there were other person who were statement near him PW4 Shri S.S. Rathi the learned Metropolitan Magistrate the TIP proceedings.—.Learned counsel for the Appellant assails the TIP on the ground PW1 in her cross-examination admitted that the height and figure of the inmates joined in the TIP was different from the Appellant.—The complainant could not have disclosed the names of the assailants in the FIR as she was not aware of their names. They total strangers to her testimony of complainant or PW2 cannot be discarded on ground. Further as per the

prosecution case PW3 reached home only later on, and thus he had not witnesses the entire incident. Thus non-identification on the Appellants by PW3 is immaterial as he entered the house when around six to seven persons were there searching the house. Merely because PW3 has stated in his cross-examination that no one was present outside would not discredit the testimony of PW1 and PW2., as it is not necessary that in each case robbers are supposed to post someone outside for guarding the place.—Further even if in the present case only two accused have been convicted conviction under Section 395 and 397 IPC can still be based as PW1 and PW2 have clearly that besides the Appellant 4 or 5 more persons were Involved and the non trial or conviction of the other 4 or 5 persons would not vitiate the conviction of the Appellants for offences under Section 395 and 397 IPC. In Raj Kumar @ Raju Vs. State of Uttaranchal (2008) 11 SCC 709 it was held:- "21. It is thus clear that recording conviction of an offence of robbery, the must be five or more persons. In absence of such finding an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons—Or even one—Can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity.—The court find no infirmity in the impugned judgment of conviction and order on sentence.—Dismissed.

Important Issue Involved: The recovery of weapons of offence or robbed article is not sine-qua-non to prove an offence under Section 397 or 395 IPC as already held by this Court in Ishtkar @ Intjar Vs. State Govt. of NCT of Delhi MANU/DE/0082/2012. The Appellants were not arrested on the sport or after a chase. They were arrested after about 8 months and thus the possibility of disposing of the knife or the robbed articles cannot be rule out. In case the testimony of the prosecution witness is reliable, the conviction can be safely based thereon.

Merely because PW3 has stated in his cross-examination that no one was present outside would not discredit the testimony of PW1 and PW2, as it is not necessary that in each case robbers are supposed to posed someone outside for the place.

Even if in the present case only two accused have been convicted under Section 395 and 397 IPC conviction can still be based as PW1 and PW2 have clearly stated that besides the Appellant 4 or 5 more persons were involved and the non trial or conviction of the other 4 or 5 persons would not vitiate the conviction of the Appellants for offence under Section 395 or 397 IPC.

[Ch Sh]

APPEARANCES:

FRO THE APPELLANT : Mr. B.S. Chaudhary, Ms. Chitra Goswami, Ms. Kanta Chaudhary, Advocate.

FOR THE RESPONDENTS : Mr. Manoj Ohri, APP for State.

CASES REFERRED TO:

1. *Ishtkar @ Intjar* vs. *State Govt. of NCT of Delhi* MANU/DE/0082/2012.
2. *Raj Kumar @ Raju* vs. *State of Uttaranchal* (2008) 11

SCC 709.

RESULT. Dismissed.

MUKTA GUPTA, J.

1. The present appeals impugn the judgment dated 24th January, 2003 convicting the Appellants for offences under Section 395/34 IPC and Appellant Yoginder also for offence under Section 397 IPC and the order on sentence dated 24th January, 2003 directing them to undergo rigorous imprisonment for 7 years and to pay a fine of Rs. 1000/- and in default of payment of fine to undergo simple imprisonment for 1month.

2. The prosecution case is based on the statement of PW2 Darshana who stated that on 10th July, 2001 she along with her mother-in-law and the domestic maid Pinki were present at home. At about 3.00 PM the call bell of the house rang and the domestic help Pinki opened the gate. She came back and stated that two boys had come on black motorcycle from the village and were enquiring about her husband Ashok. She found the two boys present on the gate on a black motorcycle and on enquiry they stated that they had been sent from village by Ramesh and they wanted to talk about a plot. These persons had come to her house two days earlier as well and had made enquiry about her husband but she had not opened the gate. She made these persons sit in drawing room, went to her mother-in-law, told her that someone had come from the village and she should see them. Her mother-in-law went to the drawing room and after seeing those persons stated that they were not from the village and she did not know them. As the door was opened 4/5 other persons entered the drawing room. One of the persons, who came on the motorcycle, removed her two gold bangles, one mangalsutra, one gold ring, one pair of ear tops, one gold chain from her person and the other person was holding a country made pistol in his hand when her jewellery was being removed. The other persons who came later started searching the house for other things. The persons who had come later were having revolver/ pistol with them. In the meantime her nephew Sushil, her daughter Garima and son Ashu also came inside the house. The intruders also took away one National VCR, one Philips 2 in 1, one camera and Rs. 2,000/- cash from her house. They left by locking them in the bathroom and closing the gate from outside. She identified the Appellant Yoginder as the person who was carrying pistol and Appellant Joginder as the person who removed the jewellery from her person. She further

stated that she had gone to the jail and had identified Joginder present in Court.

3. The evidence of this witness is supported by PW2 Pinki. She also identified Joginder as the person who had removed the jewellery and Yoginder as the person who was having gun with him. She also stated that she went to the jail and identified Joginder in the TIP. Though PW3 Sushil nephew of PW1 was also examined as a prosecution witness, however he only stated that he found 3 – 4 persons present in the drawing room and those persons took all of them to the bathroom and bolted the bathroom from outside. He had not seen the two Appellants but there were other persons who were standing near him. PW4 Shri S.S. Rathi the then learned Metropolitan Magistrate exhibited the TIP proceedings. He stated that on 16th March, 2002 Joginder @ Joga was produced before him and duly identified by the Duty officer, he expressed his desire to join the TIP. Joginder @ Joga himself choose 10 other inmates. After the necessary positioning of the jail inmates, witness Darshna was called. She looked at all the 11 persons and rightly identified Joginder @ Joga. Thereafter witness Pinki also identified accused Joginder in the TIP before him. On 20th May, 2002 the date for TIP of Yoginder @ Guddu was fixed for 24th May, 2002, however, when he went to the jail, Yoginder stated that he did not wish to join the TIP. Yoginder was clearly informed that an adverse inference could be raised against him, however he still maintained his decision. The said statement was recorded by him and duly signed by Yoginder. This witness has not been cross-examined.

4. Learned counsel for the Appellants assails the TIP on the ground that PW1 in her cross-examination admitted that the height and figure of the inmates joined in the TIP was different from the Appellant. In this regard PW4 the learned Metropolitan Magistrate has not been cross-examined. Further in examination-in-chief this witness stated that Joginder @ Joga himself selected 10 prisoners from amongst whom the Appellant was identified by PW1 and PW2.

5. Learned counsel for the Appellant has sought to assail the evidence of these witnesses on the ground that the date of alleged incident was 10th July, 2001, however the Appellants were arrested on 4th March, 2002 in FIR No. 69/2002 under Section 186/353/307/471/34 IPC and 25 Arms Act registered at PS Paschim Vihar by the Crime Branch and

pursuant to the disclosure made, the Appellants were arrested in this case. Thus, there is no material evidence except the disclosure statement, as there is no recovery of either the weapon of offence or the jewellery. To prove an offence under Section 397 or 395 IPC the recovery of weapon of offence or the robbed article is not a sine-qua-non as already held by this Court in **Ishtkar @ Intjar Vs. State Govt. of NCT of Delhi** MANU/DE/0082/2012. The Appellants were not arrested on the spot or after a chase. They were arrested after about 8 months and thus the possibility of disposing of the knife or the robbed articles cannot be ruled out. In case the testimony of the prosecution witnesses is reliable, the conviction can be safely based thereon. In the present case the version of PW1 Darshna is fully supported by PW2 Pinki. The only ground to assail the testimony of PW2 Pinki is that admittedly she was not working as a maid servant with PW1 at the relevant time, thus her presence was doubtful. PW2 Pinki has also been cross-examined in this respect and she stated that though she was not working as a maid servant at the relevant time in the house of PW1, however she often came to her house and at the relevant time she was present in the house.

6. The complainant could not have disclosed the names of the assailants in the FIR as she was not aware of their names. They were total strangers to her and the testimony of complainant or PW2 cannot be discarded on this ground. Further as per the prosecution case PW3 reached home only later on, and thus he had not witnesses the entire incident. Thus non-identification of the Appellants by PW3 is immaterial as he entered the house when around six to seven persons were there searching the house. Merely because PW3 has stated in his cross-examination that no one was present outside would not discredit the testimony of PW1 and PW2, as it is not necessary that in each case robbers are supposed to post someone outside for guarding the place.

7. Further even if in the present case only two accused have been convicted the conviction under Section 395 and 397 IPC can still be based as PW1 and PW2 have clearly stated that besides the Appellant 4 or 5 more persons were involved and the non trial or conviction of the other 4 or 5 persons would not vitiate the conviction of the Appellants for offences under Section 395 and 397 IPC. In **Raj Kumar @ Raju Vs. State of Uttaranchal** (2008) 11 SCC 709 it was held:

> "21. It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons - or even one - can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity."

8. In view of the aforesaid discussion, I find no infirmity in the impugned judgment of conviction and the order on sentence. The appeals are accordingly dismissed. Bail Bonds and surety bonds are cancelled.

ILR (2013) VI DELHI 4096
CRL.A.

RAM NARESH PANDEY ....APPELLANT

VERSUS

STATE .....RESPONDENT

(MUKTA GUPTA, J,)

CRL.A. NO. : 295/2005 DATE OF DECISION: 22.07.2013

Indian Penal Code, 1860—Sections 7 and 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988—Learned counsel for the Appellant contends that though the complaint stated about demand at Radhu Place, however the raid was conducted at Preet Vihar Office. Though PW3 prepared the memo

Ex.PW3/A, however there is no corresponding entry in the register No. 19. As per PW8 the money was demanded by Mr. R.B. Singh and not the Appellant because Mr. R.B. Singh was the person competent to sanction the loop connection sought by the complainant. The Appellant is only a Telephone Operator and had on role to play in the sanction of the loop connection. The complainant has not been able to prove the initial demand.—Learned APP for the State on the other hand contends that PW1 and PW2 have proved that the Appellant was working at preet vihar Office. Though bottles were not deposited with Moharar Malkhana PW3, however PW11 S.K. Sharma clearly stated that he handed over Ex. LH1 and P1 along with samples seals to ACP A.K. Singh who kept the same in his almirah in lock and key. Further PW4 A.K. Singh stated that S.K. Sharma the investigating officer deposited the wash with him which he kept in safe custody—The case of the prosecution based on the complaint of PW7 Mohan Chand is that he was posted as a constable in Delhi Police and applied for the a loop connection in Delhi Vidyut Board near Radhu Place Cinema. On 9th April, 1992 he went to DESU office at Preet Vihar for meeting Inspector R.B. Singh in connection with his meter but he did not find him present in the office. In his office Appellant was present who told him that Inspector R.B. Singh had not yet come and there was no difference between the Appellant and Inspector R.B. Singh.—On reaching the DESU Office, the Appellant met them at the office. The complainant talked to the Appellant and enquired about Inspector R.B. Singh. The Appellant again stated that was no difference between him and Inspector R.B. Singh and asked the complainant to give money to him and the work would be done.—On the demand of the Appellant the complainant took out Rs. 300/- from his pocket and gave the same to the same to the Appellant. The Appellant received the money from his

left hand and kept the money in his left side pocket of his shirt. Thereafter panch witness Gurinder Singh PW8 gave the Signal to the raiding party and the Appellant was apprehended. From the search of the Appellant three notes of Rs. 100/- denomination were recovered from his left side pocket of the shirt. The numbers were tallied and thereafter washes of his left hand and the pocket were taken. The same were recovered by recovery memo Ex. PW7/C which bear the signatures of the complainant.—PW8 deposed about the acceptance of Rs. 300/- by the Appellant, However tried to exonerate him by stating that demand and acceptance was for acceptance was for Inspector R.B. Singh.—The version of complainant PW7 is further supported by PW9 Inspector Abhey Ram the Laying who has proved pre-raid proceedings and the statement of the complainant recorded by him vide Ex.PW7/A. This witness has also proved the recovery from the Appellant and he stated that on receiving the signal he went towards the Appellant and recovered the money from the Appellant. The contention of learned counsel for the Appellant that the prosecution has failed to preserve the hand-wash and pocket-wash solution and have not proved the link evidence is also liable to be rejected.—Learned counsel for the Appellant contends that PW7 the complainant in his testimony has admitted that the solution when produced in the Court was white. Thus the hand wash and pocket wash have not been proved. This contention is also fallacious. PW7 the complainant has no doubt admitted that when the solution was produced in the Court, it was white but he also stated that the powder was visible in the bottles.—It is thus proved beyond reasonable doubt that the hand-wash solution and the shirt pocket-wash solution had turned pink and gave positive test for phenolphthalein. In the present case the raid was conducted in 1992 and when the solution was shown to the witness when it

was found to be white was on 7th December., 2004 i.e. nearly after more than 12 years. In such a situation the pink colour evaporating by the trap laying officer and scientific evidence besides the investigating officer. Merely because the panch witness PW8 has supported the case of the complainant with regard to demand and acceptance and has given another story, the case of the prosecution cannot be said to be proved beyond reasonable doubt.—Further, this Court in Hari Kishan Vs. State 2011 X AD (Delhi) 553 also held that even if the panch witness has turned hostile, his part testimony can be looked into seek corroboration to the testimony of the complainant and the trap laying officer. In the present case also PW8 the panch witness has corroborated the version of PW7 on material aspects like joining the investigation, treating three notes of Rs. 100/- denomination and the recovery from the Appellant after a raid was conducted at Preet Vihar office of DESU.—The explanation of the Appellant in his statement under Section 313 Cr.P.C. was that he never demanded money or accepted the same as he was not competent to do the work of the complainant and stated that on the day of the raid he came to him and enquired about Inspector R.B. Singh, he showed his ignorance on which the complainant took out the money and tried to hand-over the same to him to be given to Shri R.B. Singh which he pushed his by his hand and refused to accept. However, this explanation of the Appellant is not borne out from the record as the recovery was not from the ground but from left side pocket of his shirt and the wash of the shirt was also taken—In view of the evidence, the prosecution has proved its case beyond reasonable doubt against the Appellant and hence no illegality in the impugned judgment convicting the Appellant for the aforesaid and the order on sentence—dismissed.

Important Issue Involved: merely because the panch witness has not supported the case of the complainant with regard to demand and acceptance and has given another story, the case of the prosecution cannot be said to be not proved beyond reasonable doubt.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Prag Chawla, Mr. Shiv K. Tyagi and Mr. Sanjeev Soni, Advocate.

FOR THE RESPONDENTS : Mr. Manoj Ohri, APP for State.

CASES REFERRED TO:

1. *Hari Kishan* vs. *State* 2011 X AD (Delhi) 553.
2. *E.V. Shaji* vs. *State of Kerala* 2011 (4) KLJ 400.
3. *State of U.P.* vs. *Dr. G.K. Ghosh* (1984) 1 SCC 254.

RESULT: Dismissed.

MUKTA GUPTA, J.

1. By the present appeal the Appellant lays a challenge to the judgment dated 15th March, 2003 whereby he has been convicted for offences punishable under Sections 7 and 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (in short the PC Act) and the order on sentence dated 19th March, 2005 whereby he has been directed to undergo rigorous imprisonment for a period of one year each and also to pay a fine of Rs. 1000/- on each count and in default of payment of fine to undergo further rigorous imprisonment for a period of two months.

2. Learned counsel for the Appellant contends that though the complaint stated about demand at Radhu Place, however the raid was conducted at Preet Vihar Office. Though PW3 prepared the memo Ex.PW3/A, however there is no corresponding entry in the register No.19. As per PW8 the money was demanded by Mr. R.B. Singh and not the Appellant because Mr. R.B. Singh was the person competent to sanction the loop connection sought by the complainant. The Appellant is only a Telephone Operator and had no role to play in the sanction of the loop

connection. The complainant has not been able to prove the initial demand. He has been confronted on all material aspects. The trap laying officer PW9 Inspector Abhey Ram admitted that he did not verify the complaint that the bribe money was to be given at 2.00 PM at Radhu Place. PW7 the complainant admitted that he had not met the Appellant prior to the raid. Thus there was no question of initial demand. Once the demand was by R.B. Singh who was at Radhu Place, it is not known how the raid was conducted at Preet Vihar office. The evidence of hand-wash cannot be used as the bottles were not deposited in malkhana. The link evidence has not been proved. Further when the bottles were produced before the learned Trial Court, they did not have pink colour solution. There is no material on record as to who took the solution to the CFSL and brought back as the same was not deposited in the malkhana. There is material contradiction in the sense that the complainant states that all proceedings took place in his presence at the spot, however on the other hand he states that he remained at the anti-corruption branch upto 5/ 5.30 PM. In view of the fact that the prosecution has not been able to prove the initial demand, demand at the time of alleged acceptance and acceptance, the Appellant be acquitted of the charges framed.

3. Learned APP for the State on the other hand contends that PW1 and PW2 have proved that the Appellant was working at Preet vihar Office. Though bottles were not deposited with Moharar malkhana PW3, however PW11 S.K. Sharma clearly stated that he handed over Ex. LH1 and P1 along with samples seals to ACP A.K. Singh who kept the same in his almirah in lock and key. Further PW4 A.K. Singh stated that S.K. Sharma the investigating officer deposited the wash with him which he kept in safe custody. It is further deposed by PW11 that he took the samples from PW4 A.K. Singh and deposited the same in the CFSL. Thus the safe custody of the samples and link evidence has been duly proved. PW9 the trap laying officer duly proved the recovery from the Appellant and in view thereof presumption is raised against the Appellant which he has failed to discharge. Reliance is placed on **State of U.P. Vs. Dr. G.K. Ghosh** (1984) 1 SCC 254 and **Hari Kishan Vs. State** 2011 X AD (Delhi) 553 to contend that though shadow witness has turned hostile, the conviction can be safely based on the testimony of the complainant and the trap laying officer.

4. Heard learned counsel for the parties. Briefly the case of the prosecution based on the complaint of PW7 Mohan Chand is that he was

posted as a Constable in Delhi Police and had applied for a loop connection in Delhi Vidyut Board near Radhu Place Cinema. On 9th April, 1992 he went to the DESU office at Preet Vihar for meeting Inspector R.B. Singh in connection with his meter but he did not find him present in the office. In his office Appellant was present who told him that Inspector R.B. Singh had not yet come and there was no difference between the Appellant and Inspector R.B. Singh. The Appellant demanded Rs. 500/- from the complainant and assured that his electricity meter would be installed but he refused to pay Rs. 500/- to the Appellant and the deal was struck for Rs. 300/-. The complainant stated to the Appellant that he would bring Rs. 300/- at about 2.00 PM. Thereafter the complainant went to the office of anti-corruption branch where he met Inspector Abhey Ram and narrated the facts. He exhibited his complaint as Ex.PW7/A on the basis of which a raiding party was organized along with the panch witness. The complainant gave three notes of Rs. 100/- denomination to Inspector Abhey Ram who applied powder thereon and for testing the wash was taken in his presence which turned pink. Thereafter all the three notes of Rs. 100/- denomination were given by the Inspector to the complainant which he kept in the left side pocket of his shirt. The memo of pre-raid proceedings were prepared by Inspector Abhey Ram and was exhibited as PW7/B. On reaching the DESU office, the Appellant met them at the gate of the office. The complainant talked to the Appellant and enquired about Inspector R.B. Singh. The Appellant again stated that there was no difference between him and Inspector R.B. Singh and asked the complainant to give the money to him and the work would be done. On the demand of the Appellant the complainant took out Rs. 300/- from his pocket and gave the same to the Appellant. The Appellant received the money from his left hand and kept the money in his left side pocket of his shirt. Thereafter panch witness Gurinder Singh PW8 gave the signal to the raiding party and the Appellant was apprehended. From the search of the Appellant three notes of Rs. 100/- denomination were recovered from his left side pocket of the shirt. The numbers were tallied and thereafter washes of his left hand and the pocket were taken. The same were recovered by recovery memo Ex. PW7/C which bear the signatures of the complainant.

5. PW7 the complainant has supported the prosecution case in its entirety. However, learned counsel for the Appellant stated that once the complainant had gone to Radhu Place office, it is not known as to how

the raid was conducted at Preet Vihar office. No doubt these are two offices of the DESU, however the witnesses have clearly stated that at the time of raid the Appellant was present at Preet Vihar office and thus the raid was conducted at the said office. Further PW1 and PW2 have proved that the Appellant was working as a Junior Clerk-cum- Telephone Operator at Preet Vihar office. Even though the complainant had applied at DVB office near Radhu Palace cinema he had met the Appellant at Preet Vihar where he went to meet Inspector R.B. Singh on 9th April, 1992 and instead met the Appellant when the initial demand was made. Thus the complainant again met the Appellant at the Preet Vihar office where he was working. The complainant has further clarified the facts in cross-examination. He stated that he had applied for the connection at the counter at Radhu Palace. There the receipt clerk told him that Inspector R.B. Singh was his area Inspector who can install the meter and give the connection. Thus he had gone to meet Inspector R.B. Singh but he was on leave and he was told that the Appellant was looking after his work. He clarified that he never met R.B. Singh.

6. Though the contention of learned counsel of the Appellant is that Inspector R.B. Singh demanded the bribe, however this version is neither of the complainant before the Court nor in his complaint Ex. PW7/A. However this is he version of PW8 Shri Gurinder Singh, the panch witness. Though this witness has supported the prosecution case in al material aspects, however the endeavour of PW8 is to exculpate the Appellant on material aspects. PW8 deposed about the acceptance of Rs. 300/- by the Appellant, however tried to exonerate him by stating that demand and acceptance was for Inspector R.B. Singh. PW8 has also supported the prosecution case in relation the recovery made from the Appellant. It is thus apparent that despite shielding the Appellant, PW8 has corroborated the version of PW7 on material aspects. This witness has been duly cross-examined by the learned APP and confronted with his earlier statement wherein he had not stated that the complainant had given the money to the Appellant on demand for Shri R.B. Singh.

7. The version of complainant PW7 is further supported by PW9 Inspector Abhey Ram the trap laying officer who has proved pre-raid proceedings and the statement of the complainant recorded by him vide Ex.PW7/A. This witness has also proved the recovery from the Appellant and he stated that on receiving the signal he went towards the Appellant

and recovered the money from the Appellant.

8. The contention of learned counsel for the Appellant that the prosecution has failed to preserve the hand-wash and pocket-wash solution and have not proved the link evidence is also liable to be rejected. PW11 Inspector S.K. Sharma stated that on 9th April, 1992 after his apprehension Inspector Abhey Ram handed over the Appellant to him along with the seized exhibits i.e. three currency notes of denomination of Rs. 100/- each, Ex. P6 to P8, the shirt, the pocket and hand wash and the bottles were marked P1 and P2 duly sealed with the seal of AR. He stated that he prepared the site plan, arrested the Appellant and prepared his personal search memo. He further stated that on his return to the anti-corruption branch, he handed over Ex. LH1 and P1 along with sample seal to ACP A.K. Singh who kept the same in his almirah under lock and key and it was sealed by him with his seal "SK". The remaining exhibits i.e. currency notes and jamatalashi articles were deposited by him in intact condition with MHCM, PS Sabji Mandi. He further stated that on 10th April, 1992 he received the Ex. LH1 and P1 from ACP A.K. Singh after seal of the almirah was duly checked and broken in his presence. The exhibits were taken out by ACP Shri A.K. Singh in intact condition. He took the exhibits to FSL and deposited the same in intact condition. The exhibits when reached the FSL the seals were found to be intact as per the report Ex.PW6/A duly proved by PW6 ACP Ram Singh. This version of PW11 is supported by PW6 ACP Ram Singh.

9. Learned counsel for the Appellant contends that PW7 the complainant in his testimony has admitted that the solution when produced in the Court was white. Thus the hand wash and pocket wash have not been proved. This contention is also fallacious. PW7 the complainant has no doubt admitted that when the solution was produced in the Court, it was white but he also stated that the powder was visible in the bottles. It may be further noted that the solution reached the CFSL in intact condition as per Ex.PW6/A and when they were received there on 10th April, 1992 i.e. immediately on the next day of the raid the same were pink in colour. The report Ex.PW6/A clearly opines that Ex. No. LH1 and P1 gave positive test for phenolphthalein and sodium carbonate. It is thus proved beyond reasonable doubt that the hand-wash solution and the shirt pocket-wash solution had turned pink and gave positive test for phenolphthalein. In the present case the raid was conducted in 1992 and when the solution was shown to the witness when it was found to be

white was on 7th December, 2004 i.e. nearly after more than 12 years. In such a situation the pink colour evaporating cannot be ruled out. In **E.V. Shaji Vs. State of Kerala** 2011 (4) KLJ 400 while dealing with a similar situation it was observed:

> "13. The learned counsel for the appellant advanced a contention that though the evidence of PW s 1, 7 and 8 is consistent that when the comer of M.O. 1 series were dipped in the solution the solution turned pink, at the time when the evidence was taken M.O. 5 solution was colourless. That is not at all a reason to reject the prosecution case as such because the very case of PW s. 1, 7 and 8 is that only a corner of M.O. 1 was dipped. So the presence of Phenolphthalein powder in M.O. 5 is very minimum on the upper layer of the solution. If the solution is shaken the pink colour might spread and disappear. Phenolphthalein is an organic compound of the phthalein family. It is widely employed as an acid-base indicator. It is colourless below PH 8 and attains deep red hue above PH 10. When the corner of the currency notes is dipped in the surface, PH value in the surface solution would exceed PH8 and would become pink. When shaken the average PH value would go down and the colour would disappear. In other way, Phenolphthalein is colourless in acidic solution and pink in basic solution. In strong basic solutions its pink colour undergoes a rather slow fading and would become colourless again. Therefore, the possibility for fading the colour by course of time also cannot be ruled out. That shall never be a reason to disbelieve the prosecution because Phenolphthalein test is only a procedure adopted by the trap officer to detect the crime. That procedure is not a mandate of the PC Act or any statute. Mainly it is depended to establish the manner of acceptance of bribe. It is not always relied on as a proof of demand or acceptance, though some times, it may be evidence for acceptance also. Suppose the public servant accepts the bribe money with hand, the stain on hand would be a piece of evidence to establish that it was accepted by hand. There may be clever bribe takers. They may ask the bribe giver to put it in the drawer of the table or place it on the table or even over any file or paper. In such cases, if the trap is made soon after so doing, there may not be any stain on hand Therefore, in such

> circumstances, what is more relevant is the credibility of other evidence, whether it is believable or not. If believable, even if there is no Phenolphthalein test conviction would lie. The appellant has no case that M.O. 1 series were not recovered from the drawer of the table or that the corner of M.O. 1 series was not dipped in the solution. Even otherwise, regarding the identity of M.O. 1 series Ext. P13 which is not at all disputed stares at the appellant. The serial numbers of the notes are noted in Ext. P13. M.O. 1 series also bear the initials of PW. 8. Verification and assertion of identity after recovery deposed by PW. 7 and 8 remains unassailed So, identity of M.O. 1 series can no way be disputed. In the above circumstances, especially taking into account the nature of the defence advanced, even though M.O. 5 solution was found colourless at the time of evidence, it is not at all a sufficient reason to reject the prosecution case as such. Adding to that in Ext. P14 what had transpired after the giving of bribe is specifically narrated. It is a contemporaneous document prepared on the spot under the signature of PW s 7, 8 and other independent witnesses. In Ext. P14, there is clear narration of Phenolphthalein test and the result Adding to the above, there is the unimpeached evidence of PW s 7 and 8 that when the right hand of the appellant was dipped in calcium solution, the hand as well as the solution turned pink. Ext. P14 would corroborate with PW. 7 and 8. That evidence would show that appellant accepted M.O. 1 series with right hand and put into the drawer. Voluntary acceptance is evident. The story that PW. 1 put M.O. 1 series into the drawer of the table is devoid of merit and reflects the fact that appellant has no consistent case. Therefore, the fact that M.O. 5 solution, in which a corner of MO. 1 series was dipped, was found colourless at the time of evidence would not enure to the defence."

10. In the present case the version of the complainant is duly supported by the trap laying officer and scientific evidence besides the investigating officer. Merely because the panch witness PW8 has not supported the case of the complainant with regard to demand and acceptance and has given another story, the case of the prosecution cannot be said to be not proved beyond reasonable doubt. In **State of U.P. Vs. Dr. G.K. Ghosh** (1984) 1 SCC 254 it was held:

"10. It is now time to deal with the criticism urged as a matter of course in the context of the police officer leading the raiding party namely that he is an interested witness. This is true, but only to an extent - a very limited extent. He is interested in the success of the trap to ensure that a citizen, who complains of harassment by a Government officer making a demand for illegal gratification, is protected and the role of his department in the protection of such citizens is vindicated. Perhaps it can be contended that he is interested in the success of the trap so that his ego is satisfied or that he earns a feather in his cap. At the same time it must be realised that it is not frequently that a police officer, himself being a Government servant, would resort to perjury and concoct evidence in order to rope in an innocent Government servant. In the event of the Government servant concerned refusing to accept the currency notes offered by the complainant, it would not be reasonable to except the police officer to go to the length of concocting a false seizure memo for prosecuting and humiliating him merely in order to save the face of the complainant, thereby compromising his own conscience. The court may therefore, depending on the circumstances of a case, feel safe in accepting the prosecution version on the basis of the oral evidence of the complainant and the police officers even if the trap witnesses turn hostile or are found not to be independent. When therefore besides such evidence there is circumstantial evidence which is consistent with the guilt of the accused and not consistent with his innocence, there should be no difficulty in upholding the prosecution case. The present case appears to be a case of that nature. If the circumstantial evidence is of such a nature that it affords adequate corroboration to the prosecution case, as held by the learned Special Judge, the appeal must succeed. If on the other hand the circumstantial evidence is considered to be inadequate to buttress the oral testimony, the appeal necessarily must fail."

11. Further, this Court in **Hari Kishan Vs. State** 2011 X AD (Delhi) 553 also held that even if the panch witness has turned hostile, his part testimony can be looked into to seek corroboration to the testimony of the complainant and the trap laying officer. In the present case also PW8 the panch witness has corroborated the version of PW7 on material

aspects like joining the investigation, treating three notes of Rs. 100/- denomination and the recovery from the Appellant after a raid was conducted at Preet Vihar office of DESU.

12. The explanation of the Appellant in his statement under Section 313 Cr.P.C. was that he never demanded money or accepted the same as he was not competent to do the work of the complainant and stated that on the day of the raid he came to him and enquired about Inspector R.B. Singh, he showed his ignorance on which the complainant took out the money and tried to hand-over the same to him to be given to Shri R.B. Singh which he pushed by his hand and refused to accept. However, this explanation of the Appellant is not borne out from the record as the recovery was not from the ground but from the left side pocket of his shirt and the wash of the shirt was also taken.

13. In view of the evidence on record, the prosecution has proved its case beyond reasonable doubt against the Appellant and hence I find no illegality in the impugned judgment convicting the Appellant for the aforesaid offences and the order on sentence. Appeal is accordingly dismissed. Bail bond and surety bond are cancelled.

ILR (2013) VI DELHI 4108
CO. PET.

SHAHI EXPORTS PVT. LTD. & ANOTHER ....PETITIONERS

VERSUS

CMD BUILDTECH PVT. LTD. ....RESPONDENT

(R.V. EASWAR, J.)

CO. PET. NO. : 468/2011 DATE OF DECISION: 18.09.2013

The Companies Act, 1956—Winding up of Companies - The respondent despite making assurances did not make payment—Respondent did not honour

assurances—Despite time granted for submission of proposals for sale of property etc. for repayment, efforts made at mediation and, a restrained order passed by the court, nothing came from the respondent side to honour commitments—Held respondent company unable to pay its debts and provisional liquidator appointed.

[Di Vi]

APPEARANCES:

FOR THE PETITIONERS : Mr. Parag P. Tripathi, Sr. Advocate, with Ms. Neelima Tripatii.

FOR THE RESPONDENT : Mr. Sanjay Chhabra with Mr. Vaibhav Jairaj, Advocate.

CASES REFERRED TO:

1. *Niti International Ltd.* vs. *Shree Sagarmatha Distributors Pvt. Ltd.,* (2013) 1 Comp. L.J. 335.
2. *Diwan Chand Kapoor* vs. *New Rialto Cinema (P) Ltd.,* 1986 (60) Company Cases 276.
3. *Diwan Chand Kapoor* vs. *New Rialto Cinema Pvt. Ltd.,* 28 (1985) DLT 310.

RESULT: Appeal allowed.

R.V. EASWAR, J.

1. By order dated 10.07.2013 the preliminary objections raised by the respondent to the maintainability of the company petition were rejected and the company petition was admitted.

2. The learned counsel for the petitioner submits that in view of the order passed by this Court on 10.07.2013, it is evident that the respondent is unable to pay its debts. He, therefore, contends that this is a fit case for appointment of provisional liquidator and for winding-up of the company. Reliance is placed on the judgment of this Court in **Niti International Ltd. vs. Shree Sagarmatha Distributors Pvt. Ltd.,** (2013) 1 Comp. L.J. 335. On the other hand the learned counsel for the respondent has argued that the petition is merely used as a tool to exert

pressure upon the respondent-company. It is contended that there is no urgency to appoint a provisional liquidator. It is pointed out that the respondent is building a residential housing project at Kundli in collaboration with Ansal, a reputed builder, and a part of the project land belongs to it. It is further pointed out that the flats constructed in the project have been allotted to hundreds of customers who have invested their hard earned money and are awaiting possession and their expectations and hopes will be dashed if a provisional liquidator is appointed and the winding-up proceedings are ordered.

3. On merits it is submitted that the respondent has not availed of any loan from the petitioner and that it had borrowed monies only from Sarla Fabrics Pvt. Ltd. There was no notice of the amalgamation of Sarla Fabrics Pvt. Ltd. with the present petitioner. It is further contended that the advance of Rs. 2 crores made by Ms. Surabhi Sindhu as share application money was appropriated towards the shares subsequently and at any rate the two causes of action – the advancing of monies by the petitioner and Ms. Surabhi Sindhu – cannot be clubbed in the present petition. It is submitted that the amount acknowledged in the balance sheet is only Rs. 4 crores and the respondent is agreeable to repay this amount with interest as directed by this Court within four months to Sarla Fabrics Pvt. Ltd. from whom the money was borrowed. It is contended that at any rate, the defence raised by the respondent is substantial and, therefore, the petitioner should be relegated to the civil court. The appointment of provisional liquidator is vehemently opposed.

4. I have carefully considered the rival contentions and the written submissions filed by both the sides. I do not see any force in the submissions of the respondent. The submissions on merits have all been considered in my order dated 10.07.2013. The question whether the present petitioner can seek to recover the amount advanced by Sarla Fabrics has been considered therein. It was found that there was an amalgamation of Sarla Fabrics Pvt. Ltd. with Shahi Exports Pvt. Ltd. and, therefore, the latter is competent to initiate proceedings for the winding up of the respondent. The question of limitation was also considered in the aforesaid order and held against the respondent and so was the question as to whether the share application money could be considered to be a debt. Since these issues have already been decided in the aforesaid order, as rightly pointed out on behalf of the petitioner, it is not necessary for me to traverse those issues all over again.

5. As to whether the appointment of a provisional liquidator would be justified, I am satisfied that it is, having regard to the conduct of the respondent-company. Initially, after notice was issued to the respondent by this Court, some efforts were made at mediation and there were 9 hearings between 14.03.2012 and 04.09.2012 but nothing fructified. On 08.11.2012 the respondent stated before this Court that it will be able to arrange funds by the sale of property at Solan, Himachal Pradesh and prayed for 3 months time to make an initial payment of Rs. 3 crores. Time was granted, but no payment was made. When the matter was taken up again on 22.02.2013 the respondent submitted another proposal under which it would transfer 3 immoveable properties in Solan and Yamuna Nagar in favour of the petitioners, which was not acceptable to the petitioners. Time was taken to submit a more concrete proposal. When nothing was forthcoming a restraint order was passed by this Court. Thereafter the respondent was allowed an adjournment subject to payment of costs. When the matter was taken up on 05.07.2013 again an adjournment was sought by the respondent which was opposed by the petitioner. This Court did not allow the request and the matter was heard.

6. It is thus seen that right from November, 2007 when the amount was advanced to the respondent for a period of 3 months, there has been no attempt by the respondent to make any repayment except making assurances which were not honoured. On 05.07.2013 two preliminary objections were raised by the respondent to the maintainability of the company petition one was on the ground that the loan was not given by the present petitioner but was given by Sarla Fabrics Pvt. Ltd. This Court rejected the objection on the ground that the Sarla Fabrics Pvt. Ltd. got amalgamated with the present petitioner and the amalgamation was also sanctioned by this Court. The other objection on the ground that the debt was barred by limitation was also held against the respondent. This Court also noticed that the point of limitation was never raised at any earlier point of time. It was held that the plea of limitation was an act of despair and frivolous and was taken only to delay the proceedings. This Court in the aforesaid order also found that the legal contention taken by the respondent on the basis of the judgment of a Single Judge of this Court in **Diwan Chand Kapoor vs. New Rialto Cinema Pvt. Ltd.,** 28 (1985) DLT 310 cannot be given effect to since it was noticed by the Court that the judgment of the learned Single Judge was later reversed by a Division

Bench of this Court reported in **Diwan Chand Kapoor vs. New Rialto Cinema (P) Ltd.,** 1986 (60) Company Cases 276.

7. All the aforesaid facts, considered cumulatively, show that the respondent is unable to pay its debts and, therefore, is taking frivolous objections and consequently it is necessary to appoint a provisional liquidator. The respondent has not made any payment so far to the petitioner. All objections to the effect that there was no subsisting debt were rejected. A copy of this petition be served on the Official Liquidator ('OL') attached to this Court within five days.

8. The OL attached to this Court is appointed as the Provisional Liquidator ('PL') of the Respondent. The OL is directed to take over all the assets, books of accounts and records of the Respondent forthwith. The OL shall also prepare a complete inventory of all the assets of the Respondent before sealing the premises in which they are kept. He may also seek the assistance of a valuer to value the assets. He is permitted to take the assistance of the local police authorities, if required.

9. Publication of the citation of the petition be effected in the Delhi Gazette, "The Statesman" (English) and "Veer Arjun" (Hindi) in terms of Rule 24 of the Companies (Court) Rules, 1959 ('Rules'), by the Petitioner. The petitioner is also directed to furnish a complete set of petition to the official liquidator.

10. The Directors of the Respondent are directed to strictly comply with the requirements of Section 454 of the Companies Act, 1956 and Rule 130 of the Rules and furnish to the OL a statement of affairs in the prescribed form verified by an affidavit within a period of 21 days from today. They will also file affidavits in this Court, with advance copies to the OL, within four weeks setting out the details of all the assets, both movable and immovable, of the Respondent company and enclose therewith the balance sheets, profit and loss accounts and copies of the statements of all the bank accounts for the last three years. The respondent is also directed to furnish the names, address and telephone number etc. of its directors including the Managing Director, Chairman, if any, to the official liquidator along with the statement of affairs.

A report be filed by the OL before the next date of hearing. List the matter again on 15.01.2014.

ILR (2013) VI DELHI 4113
CRL.A.

KHEM CHAND .....APPELLANT

VERSUS

STATE .....RESPONDENT

(SUNITA GUPTA, J)

CRL.A. NO. : 1414/2010 & CRL. M.B. 165/2013 **DATE OF DECISION: 18.09.2013**

Indian Penal Code, 1860—Section 302, 308, 452, 323, 34—The appellant Khem Chand was convicted under Sections 304-I/34 of Indian Penal Code, 1860 while co-accused Harish, Dharam Pal and Surender were convicted under Sections 323/34 IPC and order of sentence dated 25th November, 2010 vide which the appellant Khem Chand was sentenced to undergo rigorous imprisonment for five years and also to pay fine of Rs. 10,000/-. The convicts were granted benefit of Section 428 Cr.P.C.—It was submitted by Sh. R.N. Sharma, learned counsel for the appellant that the convicted of the appellant has been based on wrong appreciation of evidence. None of the prosecution witnesses supported the case of the prosecution. There are material contradictions in their testimony. Even the blood lifted from the spot was not sent to FSL. Blood stained clothes were also not taken into possession. Under the circumstances, prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. As such, the appellant is entitled to be acquitted—Rebutting the submissions, learned Additional Public Prosecutor for the State that there is no infirmity in the impugned order. The prosecution case stand establish from the testimony of witnesses

which found due corroboration from the medical evidence. The fact that blood stained clothes were not seized or blood lifted from spot was not sent to FSL, can at best be said to be a lapse on the part of investigating officer of the case but that itself is no ground to throw the case of prosecution. That being so, the appeal being devoid of merits, is liable to be dismissed—The material witnesses regarding the incident and the genesis of the case are PW1 Veermati, PW2 Ram Singh, PW3 Vijay Singh, PW5 Anup Singh, PW6 Mittar Pal and PW8 Vajinder Singh—In order to substantiate the aforesaid case of prosecution, the most material witness is PW1 Smt. Veermati—Testimony of Veermati has been assailed on grounds: (i) The witness was in advance stage of pregnancy and therefore it was not possible for her to reach the spot and witness the incident. (ii) She was not believed by the prosecution as she was declared hostile and cross-examined by Additional Public Prosecutor for the State. (iii) Her testimony suffers from discrepancy and improvements. (iv) There was no electricity in the premises in question, therefore, it was not possible for her to identify the accused. As regards the submission that the witness was in advance stage of pregnancy and delivered a child after 10-15 days of the incident, as deposed by PW3 Vijay Singh, therefore, it was not possible for her to come to the spot while running, the contention is without any substance, because the best person to depose about this fact was Veermati herself. She has deposed that at the time of incident she was six months pregnant and she gave birth to a child after 3-4 months. As regards the submission that the witness did not support the case of the prosecution in all material particulars, a perusal of her testimony reveals that she was cross-examined by learned Additional Public Prosecutor only regarding apprehension of accused and identification of documents on which she put thumb impression.

Moreover, it is a settled law that the mere fact that a witness has been declared hostile by the prosecution is not a ground to discard his/her testimony in toto and that portion of the testimony which supports the prosecution can be considered and form the basis of convicted. There is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness in no far as it supports the case of the prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness, who has been called and cross-examined by the party with the leave of the Court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. When a witness is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence. Under the circumstances, mere fact that witness was declared hostile in regard to apprehension of accused and her thumb impression on document is not sufficient to discard her testimony in regard to actual incident which was narrated by her in cohesive manner. In view of this legal position the

minor discrepancies not touching the basic substratum of the case is not sufficient to render her testimony liable to rejection. It has come in her cross-examination that there was no enmity between accused or her family or between accused Khem Chand and deceased Raj Kumar. At no point of time, any quarrel had taken place between accused Khem Chand and his son Mahesh with any of her workers including the deceased. In the absence of any animosity, ill will or grudge against the accused, there is no rhyme or reason as to why she will falsely implicate the appellant in such serious crime.—Under the circumstances, the entire incident including the role played by accused Khem Chand stands proved from the testimony of this witness. Moreover, her testimony finds corroborating from other witness.—Furthermore, the ocular testimony of prosecution witness find corroboration from the medical evidence, inasmuch as, inasmuch as, Raj Kumar was removed to GTB Hospital by PCR van.—As regards other limb of argument that the blood stained earth, etc.. which were seized from the were not sent to FSL and the blood stained clothes were not seized, this, at best, can be termed to be a defect in the investigation. There are catena of decisions to the effect that defects in investigation by itself cannot be a ground for acquittal.—As regards the authorities relied upon by learned counsel for the appellant, the court have carefully gone through the same. However, all the authorities are authorities are on the facts and circumstances of each case and have no application to the case in hand.—In the instant case, it stands proved from the testimony of Veermati which also, to some extent, finds corroboration from other prosecution witness that when the quarrel started initially between Harish, Surender Singh and Dharam Pal with Anup, Mittar Pal, Raj Kumar and Vijay accused Khem Chand initially said "In Saalon Ne Humari Neeind/Sona Haram Kar dia Hai" and thereafter he

came to the place of incident, caught hold of Raj Kumar, who asked khem Chand not to intervene and pushed him (I.E. Khem Chand) as a result of which Khem Chand received injuries on his forehead.—The ocular testimony of the prosecution witnesses, as seen above find substantial corroboration from the medical evidence. Under the circumstances, the learned additional Sessions Judge rightly convicted the appellant for offence under Section 304 IPC.—The question then is whether the case falls under Section 304 Part II of the IPC, inasmuch as, learned Additional Sessions Judge has convicted appellant under Section 304 Part I without assigning any reason.—The nature of injury inflicted by the co-accused, Part of body on which it was inflicted, the weapon used to the same, there was no premeditation in the commission of crime, there is not even a suggestion that appellant or co-accused had any enmity or motive to commit any offence against the deceased, deceased was not given a second blow once he had collapsed to the ground on account of stab injury on thigh, the appellant and his companion took to their heels, do not suggest that there was intention to kill the deceased. All that can be said is that co-accused had the knowledge that the injury inflicted by him was likely to cause the death of deceased. The case would, therefore, more appropriately fall under Section 304 art II of the IPC. Appellant having exhorted his son Mahesh and then catching hold of deceased from behind is also liable with the Section 34 IPC. Conviction is, accordingly, altered to Section 304 Part II/34 IPC.—As regards quantum of sentence, punishment as prescribed under Section 304 IPC is 10 years imprisonment and fine. Learned Additional Sessions Judge has already taken a liberal view by awarding five years rigorous imprisonment. That being so, no further leniency is called for.—Dismissed.

Important Issues Involved: A settled cannon of criminal jurisprudence that the part which has been allowed to be cross examined can also be prosecution and when a witness is declared hostile and examined with the permission of the Court, His evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence.

In a criminal trial even a solitary witness can from the basis of conviction.—Law does not postulate or require that a particular or require that a particular number of eye witnesses should depose before conviction can be sustained, it is not the number of eye witnesses should depose before conviction can be sustained, it is not the number but credibility which can be attached to a statement that matters.

The lapse on the part of the Investigating Officer does not cast any doubt on the prosecution case. The object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of Section 174.

The question whether the case falls under Section 304 Part I or II of the IPC can be seen from the distinction between the two parts of the provision that for punishment under Section 304 I, the prosecution must prove the death of the person in question, that such death was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. R.N. Sharma and Mr. Neeraj Bhardwaj, Advocates.

FOR THE RESPONDENTS : Mr. Fizani Husain, APP for State.

CASES REFERRED TO:

1. *Alister Anthony Pareira* vs. *State of Maharashtra* (2012) 2 SCC 648.
2. *C. Muniappan and Ors.* vs. *State of Tamil Nadu* AIR 2010 SC 3718.
3. *Gore Lal* vs. *State,* 2010 III AD (Delhi) 34.
4. *Prithi* vs. *State of Haryana* (2010) 8 SCC 5363.
5. *Sarvesh Narain Shukla* vs. *Daroga Singh and Ors.* AIR 2008 SC 320.
6. *Akbar & Anr.* vs. *State,* Crl. A. No.327/2007.
7. *Pulicherla Nagaraju @ Nagaraja Reddy* vs. *State of Andhra Pradesh* (2006) 11 SCC 444.
8. *Ganga Kanojia and Anr.* vs. *State of Punjab* (2006) 13 SCC 516.
9. *Radha Mohan Singh @ Lal Saheb* vs. *State of U.P.* AIR 2006 SC 951.
10. *Ganga Dhar* vs. *State of Orissa* AIR 2002 SC 3633.
11. *Balu Sonba Shinde* vs. *State of Maharashtra* (2002) 7 SCC 543.
12. *Parshuram Singh* vs. *State of Bihar,* 2002 (1) JCC 349.
13. *Jibril* vs. *State of U.P.* 2000(4) Crimes 18 (SC).
14. *Malempati Pattabi Narendra* vs. *Ghattamaneni Maruthi Prasad* 2000 (2) JCC (SC) 702.
15. *Leela Ram (Dead) through Dulichand* vs. *State of Haryana,* AIR 1999 SC 3717.
16. *Ramashish Yadav & Ors.* vs. *State of Bihar* 1999(2) JCC (SC) 471.
17. *Koli Lakhmanbhai Chanabhai* vs. *State of Gujarat* (1999) 8 SCC 624.
18. *Ram Bihari Yadav* vs. *State of Bihar,* AIR 1998 SC 1850.
19. *Jag Narain Prasad* vs. *State of Bihar,* AIR 1998 SC 2879.
20. *Ajay Sharma* vs. *State of Rajasthan* AIR 1998 SC 2798.
21. *Raghbir Singh* vs. *State of Haryana* 1998 (1) C.C. Cases 378 (HC).
22. *Baji* vs. *State of U.P.* 1998 (1) JCC (SC) 184.
23. *Khujji @ Surendra Tiwari* vs. *State of Madhya Pradesh* 1991 (3) SCC 627.
24. *State (Delhi Admn.)* vs. *Balbir Singh and Ors.* 1991 JC 56 (Delhi).
25. *Shahul Hameed alias Ameetha & Anr.* vs. *State* 1990 (2) Crimes 178.
26. *Inderjit* vs. *State* 1986 Crl. L.J. 966.
27. *Bharwada Bhoginbhai Hirjibhai* vs. *State of Gujarat,* AIR 1983 SC 753.
28. *State of Uttar Pradesh* vs. *Shankar* AIR 1981 SC 897.
29. *Syad Akbar* vs. *State of Karnataka* (1980) 1 SCC 30.
30. *Bhagwan Singh* vs. *State of Haryana* (1976) 1 SCC 389.
31. *Sri Rabindra Kumar Dey* vs. *State of Orissa* (1976) 4 SCC 233.
32. *Bholu* vs. *State of Haryana* AIR 1976 SC 2499.
33. *Bhagwan* vs. *State of Maharashtra* AIR 1974 SC 21.
34. *Jainul Haque* vs. *State of Bihar* AIR 1974 SC 45.
35. *Laxman* vs. *State of Maharashtra* AIR 1974 SC 308.
36. *Garib Singh and Ors.* vs. *State of Punjab* AIR 1973 SC 460.
37. *Sorabh* vs. *State of M.P.* (1972), 3 SCC 751.
38. *Rai Singh* vs. *State of Haryana* AIR 1971 SC 2505.
39. *Tahsildar Singh* vs. *State of UP,* AIR 1959 SC 1012.

RESULT: Dismissed.

SUNITA GUPTA, J.

1. The challenge in this appeal under Section 374 of Criminal Procedure Code, 1973 is to the judgment dated 24th November, 2010 in Sessions Case No.34/2009 arising out of FIR No. 239/2003 under Sections 302/308/452/323/34 IPC registered at Police Station New Usman Pur vide which the appellant Khem Chand was convicted under Sections 304-I/34 of Indian Penal Code, 1860 while co-accused Harish, Dharam Pal and Surender were convicted under Sections 323/34 IPC and order of sentence dated 25th November, 2010 vide which the appellant Khem Chand was sentenced to undergo rigorous imprisonment for five years and also to pay fine of Rs.10,000/-. In default of payment of fine, to undergo simple imprisonment for ten months, whereas his co-accused were sentenced to the period already undergone and to pay fine of Rs.5,000/- each. In default of payment of fine the convicts were to undergo simple imprisonment of five months. The convicts were granted benefit of Section 428 Cr.P.C.

2. The gravamen of the charge against the appellant and co-accused is that on 14th December, 2003 on receipt of information regarding quarrel at Jai Prakash Nagar, Gali No. 4, towards Bittu Chowk, Usman Pur, DD No. 51B Ex.PW13/A was recorded by PW13-Constable Shiv Ram. On receipt of this DD, PW17-Sub Inspector Bhagwat Prasad along with PW23-Constable Satveer Singh reached the place of occurrence i.e. L-Block, Jai Prakash Nagar, Gali No.4 at Bittoo Chowk at the crossing of Gali No. 4 and 9. Some blood was lying near naali. They were informed that a quarrel had taken place at the factory of Ram Singh. Blood stains from Gali No. 4 to Gali No. 9 were found. One blood stained hawai chappal was lying near the factory of Ram Singh. No eye witness was available. He came to know that injured had already been removed to GTB Hospital. MLC of Raj Kumar was collected on which doctor declared him äbrought dead.. He also collected MLC of Mittar Pal and Anup Singh. Doctor declared them unfit. One Veermati (PW1), wife of Ram Singh met him at the hospital. He recorded her statement Ex.PW1/A, prepared rukka Ex.PW17/B and sent the same through Constable Satveer for registration of FIR, on the basis of which FIR No. 293/2003 under Sections 302/308/452/323/34 IPC was registered. He along with the complainant came back at the place of occurrence. SHO Police

Station New Usman Pur and members of crime team and photographer met him there. Photographs were taken. Site plan Ex.PW17/C was prepared. Blood lying at the spot, hawai chapple lying near the factory of Ram Singh was seized. During the course of investigation, accused Khem Chand, Dharam Pal, Harish and Surender were arrested. Their disclosure statements were recorded. In pursuance to the disclosure statement Ex.PW2/B made by co-accused Harish, a brick piece was got recovered which was taken into possession vide memo Ex.PW17/E. Post-mortem on the dead body of Raj Kumar was got conducted. Accused Mahesh could not be arrested. After completion of investigation, chargesheet was submitted for offence under Sections 302/308/323/452/34 IPC. After committal of the case, charge for offence under Sections 304/34 IPC was framed against accused Khem Chand while charge under Sections 308/34 IPC was framed against accused Harish Kumar, Surender and Dharam Pal. All the accused pleaded not guilty and claimed trial.

3. In order to substantiate its case, prosecution examined 28 witnesses. All the incriminating evidence was put to the accused persons while recording their statement under Section 313 Cr.P.C. Their case is one of denial simplicitor by stating that they are not concerned with this case. Although, initially they stated that they want to lead defence evidence, however, no evidence was led in defence. After minutely going through the testimony of the witnesses, vide impugned order, the appellant was held guilty for offence under Section 304-I IPC while the remaining accused were convicted for offence under Sections 323/34 IPC and sentenced, as stated above.

4. Feeling aggrieved by the impugned order, present appeal has been preferred by one of the accused only, namely, Khem Chand.

5. It was submitted by Sh. R.N. Sharma, learned counsel for the appellant that the conviction of the appellant has been based on wrong appreciation of evidence. None of the prosecution witnesses supported the case of the prosecution. There are material contradictions in their testimony. Even the blood lifted from the spot was not sent to FSL. Blood stained clothes were also not taken into possession. Under the circumstances, prosecution has failed to prove the guilt of the appellant beyond reasonable doubt. As such, the appellant is entitled to be acquitted. Reliance was placed on the decisions in **Jag Narain Prasad v. State of**

Bihar, AIR 1998 SC 2879, **Ajay Sharma v. State of Rajasthan** AIR 1998 SC 2798, **Jainul Haque v. State of Bihar** AIR 1974 SC 45, **Garib Singh and Ors. v. State of Punjab** AIR 1973 SC 460, **Raghbir Singh v. State of Haryana** 1998 (1) C.C. Cases 378 (HC), **Baji v. State of U.P.** 1998 (1) JCC (SC) 184, **Parshuram Singh v. State of Bihar,** 2002 (1) JCC 349, **Jibril v. State of U.P.** 2000(4) Crimes 18 (SC), **State (Delhi Admn.) v. Balbir Singh and Ors.** 1991 JC 56 (Delhi), **Ramashish Yadav & Ors. v. State of Bihar** 1999(2) JCC (SC) 471, **Shahul Hameed alias Ameetha & Anr. v. State** 1990 (2) Crimes 178, **Malempati Pattabi Narendra v. Ghattamaneni Maruthi Prasad** 2000 (2) JCC (SC) 702 and **Inderjit v. State** 1986 Crl. L.J. 966.

6. Rebutting the submissions, it was submitted by Ms. Fizani Husain, learned Additional Public Prosecutor for the State that there is no infirmity in the impugned order. The prosecution case stand establish from the testimony of witnesses which found due corroboration from the medical evidence. The fact that blood stained clothes were not seized or blood lifted from spot was not sent to FSL, can at best be said to be a lapse on the part of investigating officer of the case but that itself is no ground to throw the case of prosecution. That being so, the appeal being devoid of merits, is liable to be dismissed.

7. I have given my considerable thoughts to the respective submissions made by learned counsel for the parties and have perused the record.

8. The material witnesses regarding the incident and the genesis of the case are PW1 Veermati, PW2 Ram Singh, PW3 Vijay Singh, PW5 Anup Singh, PW6 Mittar Pal and PW8 Vajinder Singh.

9. It has come on record that PW2 Ram Singh was running a factory at Gali No. 4, Jai Prakash Nagar, Delhi where he used to get the clothes stitched on contract basis. Vijay Singh, Mittar Pal, Anup Singh, Vajinder Singh and Raj Kumar used to work in his factory as karigar at the relevant time.

10. On 14th December, 2003 during day time Harish and his brother Surender had come to the factory and they expressed their displeasure over Vijender Singh while abusing him saying that why he had sent a message that Harish had died. Vijender tried to pacify Harish and Surender saying that he had not sent such type of information to anyone but they

were not pacified and left the place while threatening to see him. In the evening, at about 9:30 p.m. Harish, Surender and Dharam Pal came. Anup Singh, Mittar Pal, Vajinder, Raj Kumar and Vijay Singh were present at the factory. As soon as Harish, Surender and Dharam Pal reached there, they started calling names to Vijender and started grappling with him. Vijender tried to go inside the factory but he was restrained from going further, but was saved by the other employees and was made to run away from there. Harish, Surender and Dharam Pal started quarrelling with Vijay Singh, Anup Singh, Mittar Pal and Raj Kumar. There upon, Vijay Singh went to the house of Ram Singh and informed PW1 Smt. Veermati regarding quarrel and giving beatings by Surender, Harish and Dharam Pal. Veermati reached the spot. Appellant Khem Chand who used to reside in neighbourhood got enraged, came and caught hold of Raj Kumar. Raj Kumar asked him not to intervene and pushed Khem Chand, as a result of which he received injuries on his forehead. Khem Chand caught hold of Raj Kumar and called his son Mahesh to finish them. On this Mahesh came running from his house with an open knife. Khem Chand caught hold of Raj Kumar. Mahesh stabbed Raj Kumar. Blood started oozing from his body and then all the persons ran away from there.

11. In order to substantiate the aforesaid case of prosecution, the most material witness is PW1 Smt. Veermati who unfolded that she was residing at J-15/2, Gali No. 1, Jai Parkash Nagar, Delhi. She had another house in Gali No. 4, Jai Parkash Nagar, where her husband had installed stitching machines where *karigars* used to work on those machines and used to reside therein. On 14th December, 2003 at about 10:00 p.m. she was present at her house. One *karigar,* namely, Vijay came and informed that a quarrel was going on in the house at Gali No.4. She accompanied Vijay to that house and found Surender, Harish and Dharam Pal giving beating to Anup, Mittar Pal and Raj Kumar. They were known to her prior to the incident as they were doing the same trade of stitching. Khem Chand was standing at the gate of his house and said *"In Saalon Ne Humari Nind/Soona Haram Kar Dia Hai"* and then he came running to house. He caught hold of Raj Kumar. Raj Kumar asked him as to *"who is he to intervene in their matter"* and pushed Khem Chand, as a result of which Khem Chand received injury on his forehead. Khem Chand again caught hold of Raj Kumar and called his son exhorting *"Ek Aad To Thikane Laga Do"*. On this, Mahesh came running from his house

with an open knife. Veermati caught hold of Mahesh. However, he pushed her and stabbed Raj Kumar. After sustaining stab injury, blood starting oozing from the body of Raj Kumar. All the persons ran away from there. Raj Kumar ran towards the gali and fell down on the corner of one house. She held him and requested some persons to take him to the hospital, but nobody agreed. She went to STD booth and gave a call to the police. Police came there and removed Raj Kumar to hospital in the police vehicle. She accompanied him to the hospital. After checking, the doctor declared Raj Kumar as dead. Her statement Ex.PW1/A was recorded by the police on which she affixed her thumb impression at point äA.. From the hospital she came to the spot along with the police and police lifted the blood, blood stained earth and one hawai chappal of Raj Kumar from the spot. The place where Raj Kumar had fallen down had blood stains which were also lifted by the police. The site plan was also prepared by the police. The accused persons were apprehended by the police on the same day. She identified the chappal Ex. P-1 which was taken by the police from the spot. She further deposed that she can also identify Mahesh Kumar, if shown to her. Since the witness did not support the case of the prosecution with regard to the apprehension of accused persons and identification of documents on which she affixed her thumb impression, she was cross-examined by learned Additional Public Prosecutor.

12. Testimony of Veermati has been assailed on following grounds:

(i) The witness was in advance stage of pregnancy and therefore it was not possible for her to reach the spot and witness the incident.

(ii) She was not believed by the prosecution as she was declared hostile and cross-examined by Additional Public Prosecutor for the State.

(iii) Her testimony suffers from discrepancy and improvements.

(iv) There was no electricity in the premises in question, therefore, it was not possible for her to identify the accused.

13. As regards the submission that the witness was in advance stage of pregnancy and delivered a child after 10-15 days of the incident, as deposed by PW3 Vijay Singh, therefore, it was not possible for her to come to the spot while running, the contention is without any substance,

because the best person to depose about this fact was Veermati herself. She has deposed that at the time of incident she was six months pregnant and she gave birth to a child after 3-4 months. To the same effect is the testimony of her husband Ram Singh. Moreover, from the fact that the witness was pregnant, at the most, it can be taken that she may not be in a position to run, but her presence at the spot has been proved by all the prosecution witnesses. Moreover, it was she who had informed about the incident to the police. Even PW4 ASI Om Prakash who was posted at PCR Van Bekar 43, North-East Zone has deposed that on receipt of call at about 10:30 p.m. from gali No. 9 Bittu Chowk regarding quarrel, he reached the spot and found a body in pool of blood. He was removed to GTB Hospital in PCR van along with one lady Veermati. He denied the suggestion that no PCR call was received or injured was not removed to hospital along with Veermati in PCR Van. He was not cross-examined by accused Khem Chand despite opportunity given. As such, it is proved that Veermati was present at the spot and accompanied the injured to hospital in PCR Van.

14. Not only that, on receipt of DD No. 51B Sub Inspector Bhagwat Prasad reached the spot and on coming to know that injured has been removed to hospital, he went to GTB Hospital where he met Veermati and recorded her statement Ex.PW1/A which became bed rock of investigation. Under the circumstances, presence of Veermati on the spot stands proved.

15. As regards the submission that the witness did not support the case of the prosecution in all material particulars, a perusal of her testimony reveals that she was cross-examined by learned Additional Public Prosecutor only regarding apprehension of accused and identification of documents on which she put thumb impression. Moreover, it is a settled law that the mere fact that a witness has been declared hostile by the prosecution is not a ground to discard his/her testimony in toto and that portion of the testimony which supports the prosecution can be considered and form the basis of conviction.

16. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 of the Code of Criminal Procedure, the prosecutor, with the permission of the Court, can pray to the Court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission

is granted by the Court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness in so far as it supports the case of the prosecution. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Act enables the Court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party. The view that the evidence of the witness, who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The Courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now settled cannon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution.

17. Dealing with the legal position with regard to a hostile witness in the light of Section 154 of the Evidence Act, 1872, in **Koli Lakhmanbhai Chanabhai v. State of Gujarat** (1999) 8 SCC 624, Hon'ble Supreme Court reiterated that testimony of a hostile witness is useful to the extent to which it supports the prosecution case. When a witness is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence.

18. In **Prithi v. State of Haryana** (2010) 8 SCC 5363 it was held as under:

> "Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Some High Courts had earlier taken the view that

> when a witness is cross- examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary. In **Khujji @ Surendra Tiwari v. State of M.P.** (1991) 3 SCC 627, a three-Judge Bench of this Court relying upon earlier decisions of this Court in **Bhagwan Singh v. State of Haryana** (1976) 1 SCC 389, **Sri Rabindra Kumar Dey v. State of Orissa** (1976) 4 SCC 233 and **Syad Akbar v. State of Karnataka** (1980) 1 SCC 30 reiterated the legal position that: (Khujji case, SCC p. 635, para 6)
>
> > 6. ...the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof."

19. In **Ramesh Harijan v. State of Uttar Pradesh** (2012) 5 SCC 777 it was reiterated that the evidence of such witnesses could not be treated as effaced or washed off the record altogether but the same could be accepted to extent that their version was found to be dependable on a careful scrutiny thereof. Similar view has been reiterated by Hon'ble Supreme Court in **Balu Sonba Shinde v. State of Maharashtra** (2002) 7 SCC 543, **Ganga Kanojia and Anr. V. State of Punjab** (2006) 13 SCC 516, **Radha Mohan Singh @ Lal Saheb v. State of U.P.** AIR 2006 SC 951, **Sarvesh Narain Shukla v. Daroga Singh and Ors.** AIR 2008 SC 320 and **C. Muniappan and Ors. v. State of Tamil Nadu** AIR 2010 SC 3718.

20. Under the circumstances, mere fact that witness was declared hostile in regard to apprehension of accused and her thumb impression on document is not sufficient to discard her testimony in regard to actual incident which was narrated by her in cohesive manner.

21. She projected the sequence of events in a cohesive manner. True account of events has been projected by her. She fared well during the course of cross examination. Defence could not dispel the case detailed by this witness. She is a reliable witness and accountability of

the accused can be adjudged on her sole testimony. It is well settled that in a criminal trial even a solitary witness can form the basis of conviction. Law does not postulate or require that a particular number of eye witnesses should depose before conviction can be sustained. It is not the number but credibility which can be attached to a statement that matters. Conviction is possible on the basis of statement made by sole eye witness where his presence at the spot is established and proved. The incident in the instant case has taken place at Krishna Nagar at Gali No.4 and her presence at the spot is established. Moreover, her testimony finds corroboration from other prosecution witness.

22. As regards certain variation in the testimony of the witness, a perusal of the same goes to show that it is not on basic substratum of the case. Even if some minor contradictions or improvements have taken place that does not affect the sub stratum of the case. The incident took place on 14th December, 2003. The witness came to be examined for the first time on 6th December, 2004. Thereafter her cross-examination was deferred from time to time and she was cross-examined on 7th May, 2005, 20th July, 2005 and 24th February, 2006. The witness is illiterate, which is reflective from the fact that her initial statement made to the police, the documents and in her deposition she has put her thumb impression. Since the witness is illiterate and was subjected to such grilling cross-examination by learned counsel for the accused, certain discrepancies were bound to occur in her testimony as human memory fades away with lapse of time. In **State of U.P. v. M.K. Anthony** AIR 1985 SC 48, it was reiterated that cross-examination is an unequal duel between a rustic and refined lawyer.

23. Dealing with discrepancies, improvement and variance in **Krishna Pillai v. State of Kerala,** 1981 Cr.L.J. 1743:AIR 1981 SC 1237, it was held as under :-

> "The prosecution evidence no doubt suffers from inconsistencies here and discrepancies there, but that is a short coming from which no criminal case is free. The main thing to be seen is whether those inconsistencies etc. go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it. That is a salutary method of

> appreciation of evidence in criminal cases."

24. In **Sidhan Vs. State of Kerala,** 1986 Cr.L.J. 470, it was held:-

> "Minor discrepancies regarding minute details of the incident including the sequence of events and overt acts are possible even in the versions of truthful witnesses. In fact such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their evidence. If, on the other hand, these witnesses have given evidence with mechanical accuracy that must have been a reason to contend that they were giving tutored versions. Minor discrepancies on facts which do not affect the main fabric need not be taken into account by the Courts if the evidence of the witnesses is found acceptable on broad probabilities." "The principles that can be culled out from the aforesaid decisions are minor discrepancies and inconsistencies cannot give (sic) importance. The Court has to see whether inconsistencies can go to the root of the matter and affect the truthfulness of the witnesses while keeping in view that discrepancies are inevitable in case of evidence of rustic and illiterate villagers, who speak them after long lapse of time."

25. In 2010 III AD (Delhi) 34 **Gore Lal v. State,** Division Bench of this Court observed that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of their testimony, provided there is the impress of truth and conformity to probability in the substantial fabric of the testimony delivered. High Court relied upon Crl. A. No.327/2007 titled as **Akbar & Anr. v. State,** and decisions of Hon'ble Supreme Court reported as **Tahsildar Singh v. State of UP,** AIR 1959 SC 1012, **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,** AIR 1983 SC 753 & **Leela Ram (Dead) through Dulichand v. State of Haryana,** AIR 1999 SC 3717 and observed that 13 principles are to be followed while evaluating evidence of eye witnesses:

> "I. While appreciating the evidence of a witness, the approach must be whether the evidence of a witness 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 witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement

might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence usually people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimate in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to be confused, or mixed up when interrogated later on.

XII. A witness though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub- conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."

26. Substantially similar view was taken in **Sorabh vs. State of M.P.** (1972), 3 SCC 751, **Ganga Dhar v. State of Orissa** AIR 2002 SC 3633, **State of Uttar Pradesh vs. Shankar** AIR 1981 SC 897, **Bhagwan v. State of Maharashtra** AIR 1974 SC 21, **Laxman v. State of Maharashtra** AIR 1974 SC 308, **Rai Singh v. State of Haryana** AIR 1971 SC 2505 and **Bholu v. State of Haryana** AIR 1976 SC 2499.

27. In view of this legal position the minor discrepancies not touching the basic substratum of the case is not sufficient to render her testimony liable to rejection.

28. As regards the submission that there was no electricity at the spot and, therefore, it was not possible to identify the accused, although, it is true that it has come on record that there was no electricity and electricity used to be taken from neighbourhood or earthern lamp were used, but it has also come on record that light was coming from adjoining house. Moreover, the accused persons were not strangers, but were well known to the prosecution witnesses from before. Therefore, it was not difficult to identify them.

29. It has come in her cross-examination that there was no enmity between accused or her family or between accused Khem Chand and deceased Raj Kumar. At no point of time, any quarrel had taken place between accused Khem Chand and his son Mahesh with any of her workers including the deceased. In the absence of any animosity, ill will or grudge against the accused, there is no rhyme or reason as to why she will falsely implicate the appellant in such serious crime.

30. Under the circumstances, the entire incident including the role played by accused Khem Chand stands proved from the testimony of this witness. Moreover, her testimony finds corroboration from other witness.

31. PW2 Ram Singh is the husband of PW1-Smt. Veermati and has deposed that on the date of incident, he had gone to Gandhi Nagar. He was informed by his wife on telephone that a quarrel had ensued between Raj Kumar and Khem Chand. Khem Chand caught hold of Raj Kumar and Mahesh stabbed him with a knife. He came back to the place but did not find anybody. From there, he came to know that injured had been taken to the hospital by police. As such, he went to GTB Hospital where he came to know that Raj Kumar had succumbed to injuries. Thereafter, he went to Police Station Usman Pur, but his wife was not there. He came back to the spot where the police officials and his wife were present. He accompanied the police officials to the house of accused Khem Chand from where he was arrested. Thereafter, the remaining accused persons were arrested.

32. PW3 Vijay Singh was working as a tailor under Ram Singh at Jai Parkash Nagar and has deposed that a quarrel had taken place at

about 10:00 p.m. on 14th December, 2003 between Vajinder and Harish. He called Veermati from her house. Despite intervention of Veermati the quarrel did not subside. Khem Chand was residing in that gali. He got enraged and stated that these persons daily make noise till late night and do not allow to sleep and asked Mahesh "In Aadmio Ko Thikan Say Laga Do". Khem Chand caught hold of Raj Kumar and Mahesh gave knife blow to Raj Kumar as a result of which Raj Kumar started bleeding. He ran for some distance but fell down at gali No. 4. All the persons fled from the spot. He identified Khem Chand and also the remaining accused. Certain leading questions were put to the witness by learned Additional Public Prosecutor wherein he admitted that an incident had taken place during day time when Harish and Surender had come to the factory and expressed their displeasure over Vajinder Singh as to why he sent the message that Harish had died. Despite the fact that Vajinder tried to pacify Harish and Surender, but they did not pacify and left the place while threatening to see him. He further admitted that in the evening at about 9:30 p.m. Harish, Surender and Dharam Pal came there and started grappling with the remaining workers. He then went to call Veermati who accompanied him from her house to the factory. All these facts were admitted by the witness, however, he merely stated that he did not state these facts to the police. In the cross-examination by learned counsel for the accused persons, he deposed that Veermati is her bua. According to him, he was tutored outside the Court by her bua and her counsel as to what he had to depose in the Court. In pursuance to a Court question as to whether his testimony is based on tutoring or he was disclosing the correct facts as per the incident, he repeated that he was narrating the facts which had actually taken place. The testimony of the witness to some extent was shaky, inasmuch as, at one time he tried to show that Ram Singh was present at the factory when the incident had taken place but, thereafter, he stated that Ram Singh was not present in the factory when the incident took place and he came later on. He admitted that he and Veermati lifted the body of Raj Kumar in order to check his injuries. He also admitted that when the police officials reached the spot Veermati was present and body of Raj Kumar was removed from the spot by the police officials, however, then he tried to show that Veermati had gone to her residence and remained there throughout the night. But thereafter stated that Veermati had gone along with the police with the dead body of Raj Kumar. He further deposed that none of the neighbours rendered any assistance in lifting the body of deceased Raj Kumar who has sustained

injuries on his right thigh.

33. PW5 Anup Singh was another worker who was working in the factory of Ram Singh. This witness has also deposed about the altercations which had taken place at about 2/2:30 p.m. on 14th December, 2003 between Vajinder and Harish and thereafter Harish left the spot after threatening to see him. At about 9:30 p.m. they came back along with Dharam Pal and started abusing Vajinder and gave beatings to him. When he tried to rescue Vajinder then they started beating him and his brother Mittar Pal. Harish gave a brick blow on his head, as a result of which he sustained injuries. His brother sustained injury over the head near the right ear. Police reached the spot. However, he deposed that someone gave a stab injury to Raj Kumar. The person who stabbed Raj Kumar had exhorted that they are fighting daily and doing ghapla and when Raj Kumar told the person as to why he is intervening in between, then that person gave a call by saying that that day they will set them at rest and in the meantime that boy brought a knife and entered the door by giving a push to the wife of the factory owner and stabbed Raj Kumar. He further deposed that the person who stabbed Raj Kumar was not present in the Court. He identified accused Dharam Pal and Harish. Since this witness did not support the case of the prosecution in all material particulars, he was cross-examined by learned Additional Public Prosecutor. In cross-examination he admitted that Harish along with his brother had come to the factory during day time on 14th December, 2003. Dharam Pal caught hold of him and Surender caught hold of Mittar Pal and Harish gave brick blow on the head of Mittar Pal and on his foot. He admitted that he had mentioned the name of Khem Chand and Mahesh in his statement as Khem Chand told *"In Sallon Ne Roj Roj Jhagra Kar Ke Sabhi Ki Neend Haram Kar Rakhi Hai In Ka To Kuch Karna Hi Parega"*. He also admitted having stated to the police that Khem Chand called Mahesh by saying *"In Salon Ka Jayda Dimag Ho Gaya Hai Inn Mein Say Ek Adh Ko Thikane Lagana Pare Ga"*. On hearing this, Mahesh left the place by saying that he is just coming and immediately thereafter he returned back with an open knife and attacked Raj Kumar. Veermati tried to intervene, but Khem Chand caught hold of Raj Kumar and Mahesh stabbed Raj Kumar by giving push to Veermati and because of stab injury blood started flowing from the body of Raj Kumar. He also admitted that in the mean time Dharam Pal and Surender left him and Mittar Pal and because of fear, they left the place and after some time

returned back to the factory for knowing the welfare of Raj Kumar and came to know that Raj Kumar had been removed to hospital in a police vehicle and thereafter a second police vehicle came and they were taken to hospital where they met Veermati who informed that Raj Kumar had died. He also admitted that in the hospital statement of Veermati was recorded. In cross-examination, he deposed that his both the statements are correct and he had forgotten certain facts. He admitted that there was no enmity or altercation between accused Khem Chand and his family on the one hand and workers including Veermati on the other hand. He also admitted that no altercation ever took place between them and Khem Chand prior to the incident.

34. PW6 Mittar Pal is another employee of Ram Singh. This witness has also corroborated the testimony of other workers regarding the incident which took place on 14th December, 2003 during day time and that at about 9/9:30 p.m. accused Harish, Surender and Dharam Pal came to the factory and started quarrelling with Vajinder. When they tried to rescue Vajinder from their clutches, they were also given beatings. Accused Surender gave brick blow on his head and on the person of his brother as well. According to him, due to sustaining head injury he became unconscious and gained consciousness in the hospital. This witness did not support the case of the prosecution in all material particulars, as such, he was cross-examined by learned Additional Public Prosecutor. He deposed that due to sustaining injuries he suffered mentally and as such in pursuance to the various questions put by learned Additional Public Prosecutor he replied that he does not remember those things.

35. PW8 Vajinder Singh has also unfolded the incident which took place on 14th December, 2002 in the noon time at about 2/2:30 p.m. However, thereafter he did not support the case of the prosecution by deposing that at about 7:30 p.m. Harish and his brother Surender came to the factory, assaulted him, abused him and gave one or two slaps. Thereafter, they went away. According to him, thereafter he went for taking meals and returned back to the factory at about 9:30 p.m., then he came to know that Raj Kumar has been murdered. He was cross-examined by Additional Public Prosecutor. In cross-examination nothing favourable to the case of prosecution could be elicited.

36. These public witnesses came to be examined at a much later stage. Due to lapse of time, if some of the facts were not deposed

accurately by the witnesses that does not mean that their testimony has to be discarded altogether. Furthermore, at the cost of repetition it may be mentioned that accused has not alleged any enmity, ill will or grudge against any of the witnesses for which reason they would falsely implicate him in this case. PW5 Anup Singh and PW6 Mittar Pal also sustained injuries in the incident. They were taken to hospital and their MLC Ex. PW25/A and PW26/A was prepared by Dr. Sumit. Since they sustained injuries in the same incident, their presence at the spot stand proved. Despite the fact that they were declared hostile by the prosecution, their version so far as support prosecution case, can safely be considered. Moreover, an opportunity was afforded to the accused to explain all the incriminating evidence appearing against him while recording his statement under Section 313 Cr.P.C., but the same reflects that his case was one of denial simplicitor and he has merely stated that he was not involved in the case. No explanation has been furnished as to why the witnesses will depose against him or will implicate him in this case.

37. Furthermore, the ocular testimony of prosecution witnesses find corroboration from the medical evidence, inasmuch as, Raj Kumar was removed to GTB Hospital by PCR van. He was examined by Dr. Durllav Dutta who prepared MLC Ex.PW28/A, and declared "the patient was brought dead". Post-mortem on the dead body of Raj Kumar was conducted by PW18-Dr. S. Lal who found the following injury on his person:

> "Stab incised wound 6x0.3x15 cm present on inner aspect of right thigh, obliquely placed, tailing is present in lower inner end of wound. The wound was present 11 cm above the medial condyle of femur and 16 cm below the groin. The wound goes forward, laterally in upward direction into the thigh and cutting the femoral artery and vessels."

38. He opined that the cause of death was haemorrhagic shock, as a result of antemorten injury to femoral vessels of thigh, produced by single sharp edged pointed weapon and the injury was sufficient to cause death in ordinary course of nature. In cross-examination, he deposed that the injury was possible by pointed sharp weapon. In pursuance to a specific question as to whether there could have been chances of survival if immediate medical intervention was there, he deposed that in this case major artery of thigh was cut as such chances of survival were very

bleak even if there would have been any medial intervention.

39. As regards other limb of argument that the blood stained earth, etc. which were seized from the spot were not sent to FSL and the blood stained clothes were not seized, this, at best, can be termed to be a defect in the investigation. There are catena of decisions to the effect that defects in investigation by itself cannot be a ground for acquittal. In **Ram Bihari Yadav Vs. State of Bihar,** AIR 1998 SC 1850, it was held by Hon'ble Supreme Court that if primacy is given to the omissions or lapses by perfunctory investigation by the investigating agency, the faith and confidence of people would be shaken not only in law enforcing agency, but also in the administration of justice. It is true, if on account of any lapse doubts are created in prosecution case, the accused would be entitled to the benefit of that doubt. But, if the prosecution is able to establish its case beyond reasonable doubt against the accused, in spite of lapses, the accused cannot be acquitted because of the lapse on the part of investigating officer. Substantially similar view was taken in **C. Muniappan and others vs. State of Tamilnadu,** 2010 IX AD (SC) 317 where it was held that where there has been negligence on the part of investigating agency or omissions etc which resulted in defective investigation, there is a legal obligation on the part of the Court to examine the prosecution evidence de hors such lapses carefully to find out whether said evidence is reliable or not or to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of trial in the case cannot be allowed to depend solely on the probity of investigation. That being so, since the case of prosecution stand established from ocular testimony of witness duly corroborated by medical evidence, the lapse on the part of Investigating Officer does not cast any doubt on the prosecution case.

40. As regards the authorities relied upon by learned counsel for the appellant, I have carefully gone through the same. However, all the authorities are on the facts and circumstances of each case and have no application to the facts of the case in hand. **Jag Narain Prasad** (supra) was a case where the appellant Jag Narain Prasad was tried along with his son Om Prakash for the offence of murder. It was the case of the prosecution that the appellant exhorted his son Om Prakash to fire, thereupon, Om Prakash fired a gun which hit deceased Prabhakar. The deceased died before he could reach the hospital. On facts, it was found

that there was no consistency as regards the actual words spoken by the appellant before Om Prakash fired his gun and it was observed that having noticed that his son was going out with a gun the appellant followed him with a view to see what was happening and also to prevent him from committing any offence. As such, the appellant was acquitted. **Ajay Sharma** (supra) was a case where the appellant and two others, namely Daljeet Singh and Ganeshi were convicted for offence under Section 302 read with Section 34 IPC. The charge against them was that three persons came on a motorcycle; Ganeshi and the other caught hold of Kailash Soni and exhorted Daljeet Singh to strike him. On that Daljeet Singh gave 2-3 blows with his kirpan to Kailash Soni which resulted in his instantaneous death. On facts, it was found that the instigation was only to strike and the facts did not reveal that the appellant had shared any common intention to kill the deceased. He might not even have known that Daljeet Singh was having kirpan under his stockings. As such, his conviction was unsustainable under Section 302 IPC, however, he was convicted for offence under Section 324 read with Section 110 IPC. In **Jainul Haque** (supra) the allegations were that on the exhortation of the appellant the co-accused assaulted the deceased. On facts, discrepancies were found between the evidence of the witnesses given at the trial and the version given in the First Information Report regarding the part played by the appellant. As such, the appellant was acquitted. **Garib Singh and Ors.** (supra) was a case under Section 307 and 323 read with Section 149 IPC and the appellant instigated their companions by giving lalkaras and saying that Swaran Singh should not be spared. It was observed that this evidence of instigation was not enough to establish beyond reasonable doubt the participation of the appellant in the assault which took place upon the injured persons. Such allegations of participation by giving lalkaras are sometimes made only to show additional overt acts so as to take in at least five persons and make out the ingredients of an offence under Section 147 against all of them. In **Raghubir Singh** (supra) the only role ascribed to be accused was that of exhortation. Except that no other role was attributed to the appellant. Similarly, in **Baji** (supra) the only role alleged in the FIR against the appellant was that he provoked others to kill the deceased, but all the eye witnesses made consistent improvements by saying that the appellant also gave blows to the deceased. As such, he was granted benefit of doubt. In **Parshuram Singh** (supra) there was a dispute over a timber tree standing on the boundary of fields belonging to two parties. A1 had

only a lathi in his hand but he did not use it at all. In the same way A4 had a pistol in his hand but he did not use it. Only the other two appellants used their weapons. A1 and A4 only exhorted to kill the deceased while A4 showed his pistol warning the people not to come to the spot. It was observed that these facts reflected that both these appellants were having no intention to kill the deceased and the remaining two accused attacked and killed the deceased. As such, no intention could not be established or proved and the appellant were acquitted. In **Jibril** (supra) the appellant allegedly exhorted co-accused to kill the deceased by using words "don.t allow him to flee and don.t spare him this time". On facts and circumstances of the case, it was found that he could not have uttered above words and the role attributed to him was doubtful. As such, benefit of doubt was given. **Balbir Chand** (supra) was a case based on the testimony of relative or friend of the deceased which was full of contradiction and omission. The medical evidence did not support the prosecution case. FIR was found to be anti-timed. In the inquest report also name of the accused persons were not given. As such, the prosecution story was fabricated and doubtful. Hence, the accused was acquitted. In **Ramashish Yadav** (supra) two accused caught hold of the deceased while two others gave gandasa blow. On facts, it was found that the accused who caught hold of the deceased did not share common intention, as such they were acquitted. **Shahul Hameed** (supra) it was found that it could not be proved that the accused shared common intention with the co-accused. In **Malempati Pattabi Narendra** (supra) the presence of accused at the spot was doubtful and therefore he was given benefit of doubt. **Inderjit** (supra) was also a case where on facts it could not be inferred that who caught hold of the deceased or that he shared common intention with co-accused who stabbed him with knife.

41. As regards the submission that in the inquest report under Section 174 IPC names of the accused persons did not find mention, and therefore, the same caste a doubt on the prosecution version, the submission is devoid of merits, inasmuch as, in **Pedda Narayan v. State of A.P.** 1975 (4) SCC 153, while referring to Section 174 it was observed as under:

> "A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an

unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report."

These observations were reiterated in **Khujji @ Surendra Tiwari v. State of Madhya Pradesh** 1991 (3) SCC 627.

42. In the instant case, it stands proved from the testimony of Veermati which also, to some extent, finds corroboration from other prosecution witnesses that when the quarrel started initially between Harish, Surender Singh and Dharam Pal with Anup , Mittar Pal, Raj Kumar and Vijay accused Khem Chand initially said "In Saalon Ne Humari Neeind/Sona Haram Kar Dia Hai" and thereafter he came to the place of incident, caught hold of Raj Kumar, who asked Khem Chand not to intervene and pushed him (i.e. Khem Chand) as a result of which Khem Chand received injuries on his forehead. He again caught hold of Raj Kumar and called his son Mahesh exhorting *"Ek Aadh Ko Thikane Laga Do"* and thereafter Mahesh came running from his house with an open knife and despite the fact that Veermati tried to catch hold of him, he pushed her and stabbed Raj Kumar. Under the circumstances, the role assigned to Khem Chand is not only of exhortation but he also facilitating Mahesh by holding Raj Kumar from behind. As a result of which, Mahesh stabbed him on his thigh which proved fatal. The ocular testimony of the prosecution witnesses, as seen above find substantial corroboration from the medical evidence. Under the circumstances, the learned Additional Sessions Judge rightly convicted the appellant for offence under Section 304 IPC.

43. The question then is whether the case falls under Section 304 Part I or Part II of the IPC, inasmuch as, learned Additional Sessions Judge has convicted appellant under Section 304 Part I without assigning any reason. The distinction between the two parts of that provision was drawn by the Supreme Court in **Alister Anthony Pareira v. State of Maharashtra** (2012) 2 SCC 648, in the following words:

"..... For punishment under Section 304 Part I, the prosecution must prove: the death of the person in question; that such death

was caused by the act of the accused and that the accused intended by such act to cause death or cause such bodily injury as was likely to cause death. As regards punishment for Section 304 Part II, the prosecution has to prove the death of the person in question; that such death was caused by the act of the accused and that he knew that such act of his was likely to cause death...."

44. Reference may also be made to the decision of Hon'ble Supreme Court in **Pulicherla Nagaraju @ Nagaraja Reddy v. State of Andhra Pradesh** (2006) 11 SCC 444 where the Court enumerated some of the circumstances relevant to finding out whether there was any intention to cause death on the part of the accused. It was observed:

"...Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under Section 302, are not converted into offences punishable under Section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under Section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii)

whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention..."

45. Coming back to the case at hand, the nature of injury inflicted by the co-accused, part of body on which it was inflicted, the weapon used to inflict the same, there was no premeditation in the commission of crime, there is not even a suggestion that appellant or co-accused had any enmity or motive to commit any offence against the deceased, deceased was not given a second blow once he had collapsed to the ground on account of stab injury on thigh, the appellant and his companion took to their heels, do not suggest that there was intention to kill the deceased. All that can be said is that co-accused had the knowledge that the injury inflicted by him was likely to cause the death of deceased. The case would, therefore, more appropriately fall under Section 304 Part II of the IPC. Appellant having exhorted his son Mahesh and then catching hold of deceased from behind is also liable with the aid of Section 34 IPC. Conviction is, accordingly, altered to Section 304 Part II/34 IPC.

46. As regards quantum of sentence, punishment as prescribed under Section 304 IPC is 10 years imprisonment and fine. Learned Additional Sessions Judge has already taken a liberal view by awarding five years rigorous imprisonment. That being so, no further leniency is called for.

47. Under the circumstances, I hold that there is no merit in the appeal and the same is accordingly dismissed.

48. Since the appeal is dismissed, Crl.M.B.165/2013 also stands disposed of. Copy of the order along with Trial Court record be sent back.

ILR (2013) VI DELHI 4144
RFA (OS)

D.P. SINGH **.....APPELLANT**

VERSUS

GAGAN DEEP SINGH (SINCE DECEASED) THROUGH LRs **.....RESPONDENT**

(S. RAVINDRA BHAT & NAJMI WAZIRI, JJ.)

RFA (OS). : 67/2011 **DATE OF DECISION: 20.05.2013**
C.M. NO. : 11120/2011
& 11121/2011

Specific Relief Act, 1963—Section 16—Code of Civil Procedure, 1908—Order 41 Rule 27—Judgment of a learned Single Judge (SJ) dismissing suit of Appellant for Specific performance of agreement between appellant and seller to sell suit property challenged in first appeal—Several documents sought to be relied upon by Appellant, most were not produced before SJ and were sought to be adduced in present appeal through application for additional evidence—Held—Best evidence to show that appellant was ready and willing to perform his part of contract was application before Sub Registrar (SR) to record his presence and banker's cheque towards sale consideration—Neither of these were produced before learned SJ—Appellant's oral testimony demonstrating his presence at Office of Sub Registrar was also later contradicted by his own evidence—Mere fact of calling Respondent or sending a telegram does not, by itself, establish Appellant's presence at Sub Registrar's Office given other evidence that could possibly have been adduced to prove that fact—Facts and circumstances, do betray a substantial doubt—Given contradictions and absence

of documentary proof—That Appellant was not ready and willing to perform his part of contract—Grounds under Rule 27 are limited and exhaustive, and Appellant's vague claim (brought in 2011, although documents were presumably handed over to counsel 6 years earlier in 2005 at time of institution of suit) as to counsel's fault does not permit limited exception of Rule 27 to be transformed into a getaway to bypass cardinal rule that all evidence must be adduced at trial stage and not before Appellant Court-Documents sought to be adduced were clearly within Appellant's knowledge at time of institution of suit, and indeed, could easily have been produced before Court—Equally, on second ground that such evidence is required "to enable (this Court) to pronounce judgment", this is only in cases where a lacuna in evidence prevents Court from delivering judgment, and such lacuna does not refer to evidentiary lacuna in Appellant's case that merely renders its case weak—In this case, Court is not unable to pronounce a judgment based on evidence and facts available, and indeed, evidence on record can lead to a speaking and reasoned order considering performance of contractual obligations under agreement to sell on a balance of probabilities—Appeal and accompanying applications dismissed.

Important Issue Involved: Second ground of allowing application under Order 41 Rule 27 of CPC for additional evidence at appellate stage that such evidence is required to enable Appellate Court to pronounce judgment is applicable only in cases where a lacuna in the evidence prevents the Court from delivering the judgment, and such lacuna does not refer to an evidentiary lacuna in the Appellant's case that merely renders its case weak.

[Ar Bh]

APPEARANCES:

FOR THE APPELLANT : Sh. Dhiraj Sachdeva, Advocate.

FOR THE RESPONDENT : Sh. Narendra Gautam, Advocate.

CASES REFERRED TO:

1. *Sriniwas* vs. *Vidyawati and Others,* MANU/DE/2707/2005.
2. *Pushparani S. Sundaram and Ors.* vs. *Pauline Manomani James and Ors.,* ((2002) 9 SCC 582.
3. *N. Kamalam (Dead) and Anr.* vs. *Ayyasamy and Another,* 2001 (5) SCALE 65.
4. *RC Chandiok and Anr.* vs. *Chuni Lal Sabharwal and Ors.,* [1971] 2 SCR 573.
5. *Municipal Corporation for Greater Bombay* vs. *Lal Pancham of Bombay and Ors.,* [1965] 1 SCR 542.

RESULT: Dismissed.

S. RAVINDRA BHAT, J. (OPEN COURT)

1. This is a first appeal against the judgment of a learned Single Judge in CS (OS) 280/2005 dismissing the suit of the Appellant.

2. The Appellant sought a decree of specific performance of an Agreement to Sell dated 19th August, 2004, of Flat No. 97, HIG Category, Mahabhadra Kali CGHS Limited, Plot No. 6, Sector 13, Dwarka, New Delhi between the appellant/plaintiff (buyer) and the defendant/respondent (seller). The agreement stipulated that the flat was to be sold for a total consideration of Rs. 21,15,000/-, with an advance amount of Rs. 2,00,000/-paid by the buyer to the seller as earnest money in part-payment of the whole. The other obligations stipulated in the agreement were to be completed by 9th November, 2004: from the seller's side – the production of a 'No Dues Certificate' and a 'No Objection Certificate' for sale of the said flat from Mahabhadra Kali CGHS Limited Society, production and handing over of all original title documents and delivery of vacant physical possession of the said flat, and from the buyer's side: payment of the balance sale consideration of '19,15,000/-and production of non-judicial stamp paper of the requisite amount. These respective obligations were to be carried out by each party on 9th November at the office of the Sub-Registrar, Janakpuri, New Delhi at the time of execution and

registration of the documents and the sale deed.

3. The Appellant alleged that the Respondent failed to meet his obligations under the sale agreement and did not appear before the Sub-Registrar's office on 9th November,2004 with the required documents nor did he hand over possession of the suit property. The Appellant claims that he provided opportunities for curing this breach of contract through legal notices dated 11 November, 2004 and 17 November, 2004 calling upon the Respondent to receive the balance sale consideration from the Appellant (within one week of each of those notices), and hand over vacant possession of the flat along with the documents required under the agreement. At the other end of the obligations in question, the Appellant claims that he was, on 9th November 2004, and has been since ready and willing to fulfil his obligations under the contract – i.e. on that date, the Appellant reached the Sub-Registrar's office around noon with a banker's cheque of Rs.19,15,000 drawn in favour of the Respondent from ICICI Bank, bearing number 114666 dated 9th November, 2004 and with judicial stamp paper of the required amount. To make out a case for specific performance under Section 16 of the Specific Relief Act, 1963, i.e. to demonstrate that the Appellant was ready and willing to perform the essential terms of the contract himself, the Appellant also relies upon a telegram sent, and a phone call made, to the Respondent on 8th November, one day before the stipulated date in the agreement, confirming that the balance payment was ready and the same shall be paid on the following day. On 9th November, however, the Appellant claims that on reaching the Sub-Registrar's office at noon, the Respondent was not present and despite getting in touch through several phone calls, the transaction could not be completed due to the Respondent's breach. The Appellant also submits that a telegram was also sent at 05.45 PM on the same day to the Respondent relating to this breach. Given these facts, the Appellant submits that first, a breach of the terms of the sale agreement by the Respondent is made out, and secondly, that the appropriate relief in this case is that of specific performance of the agreement (i.e. mandating transfer of the flat) under Section 16 of the Specific Relief Act.

4. The case, therefore, revolves around the performance of obligations by each party, and the consequential relief, if any, available to the appellant. The issues as framed before the Learned Single Judge in this background were as follows:

"1. Is the suit not maintainable?

2. Has the plaintiff been always ready and willing to perform his part of the agreement dated 19.8.2004?

3. Is the plaintiff entitled to a decree of specific performance?

4. Relief?"

5. The Learned Single Judge held that the suit was maintainable, contrary to the defendant's pleadings, given that the written statement did not disclose any particulars as to how the suit was not maintainable. (paragraph 6 of the impugned order). On the second issue, the Single Judge noted that on a consideration of the evidence brought on record and the oral testimony of parties, the balance of the evidence indicated that the Appellant was not ready and willing to perform his obligations on the stipulated date:

"8. Surprisingly, neither the Plaintiff nor the Defendant had been vigilant in getting their presence recorded in the Office of the Sub-Registrar concerned by moving an application there to establish the presence at the Office of the Sub-Registrar concerned and both sides are relying upon their oral evidence as well as of their companions and upon scrutiny of the same, I find that it is just not possible to reasonably conclude that either of them was present in the Office of the Sub-Registrar on the appointed date for execution of the Sale Deed in pursuance to the Agreement in question. The best evidence has been withheld by the Plaintiff, He claims to be in possession of the banker's cheque for the balance sale consideration, but he fails to place on record its copy and has not even placed on record any proof regarding his giving phone calls to the Defendant by disclosing the phone number of the Defendant. Even the assertion of the Plaintiff that he was in possession of the stamp paper and the banker's cheque on 8th November 2004, i.e., a day before the appointed date, remains unsubstantiated Rather, the Plaintiff stands contradicted in cross-examination where he admits that in anticipation of collection of stamp papers as well as bank draft, he had given a telegram on 8th November 2004 that he was in possession of the same, though on that day, he neither had the banker's cheque/ bank draft nor the stamp papers with him. This shows the Plaintiff has not come with clean hands before the Court and is

thus, disentitled to seek discretionary relief of Specific Performance of Agreement to Sell. More so, when Plaintiff stands falsified from the deposition of Mr. Amarpal Singh (DW-3) from the Treasury Office, who has given the date of delivery of the stamp papers as 11th November 2004, whereas, Plaintiff claims that with the requisite stamp papers, he was in the Office of the Sub-Registrar concerned on 9 November, 2004 for the execution of the Sale Deed on those stamp papers. It is so said, as there is unchallenged evidence of Amarpal Singh (DW-3) to the effect that the cash for the purchase of stamp papers was deposited on 9 November 2004 and the challan for the same was deposited with the Treasury on 10th November 2004 and so non-judicial stamp papers could be made available for delivery on 11th November 2004 only. Another pertinent aspect is that as per the deposition of Amarpal Singh (DW-3) the aforesaid stamp papers were not delivered to the Plaintiff but to one Mr. Raj Kumar, with whom, Plaintiff fails to establish any connection..... .....”

6. Based on these *“fundamental contradiction in the Plaintiff’s case,”* (paragraph 8 of the impugned order), along the Appellant’s failure to bring on record the banker’s cheque – which he claimed to have made available at the Sub-Registrar’s Office on the 9th of November – the Single Judge disbelieved the Appellant’s case regarding production of the necessary documents indicating his readiness and willingness to perform the contract. Moreover, the Single Judge noted that the oral testimony led by the Plaintiff with regard to production of the stamp papers, (“I cannot explain it false or true, if the stamp papers were in fact released from Treasury on 9th November 2004 at 4 PM. (Volunteered) I had collected these papers from the Rohilla Documentation Center, at 11 or 12 noon or that the amount for issuance of these stamp papers was deposited on 9th November, 2004 at 11 to 12 PM.”) was contradictory as the Appellant claims to have been in the office of Sub-Registrar along with the stamp paper at the time he, in the above statement, claims to have received the stamp paper himself.

7. On the third issue, the Single Judge held that the Appellant – having not met the requirements of Section 16 – is not entitled to specific performance, but in light of the fact that the Respondent was also in breach on the stipulated date, having admitted to not having the ‘No

Dues’ Certificate, he is entitled to return of the earnest money of Rs. 2,00,000/- with 6% interest with effect from 9th November, 2004.

8. It is crucial here to note that of the several documents sought to be relied upon by the Appellant, most were not produced before the Single Judge and have been sought to be adduced in the present appeal through an application under Order 41, Rule 27 of the CPC, CM No. 11120/2011, which will be dealt with later. These documents unavailable before the Learned Single Judge were: (a) Copy of telegram dated 08.11.2004, (b) Copy of telephone call receipt/bill dated 08.11.2004, (c) Copy of banker’s cheque of Rs. 19,15,000/- dated 09.11.2004; (d) Copy of the required non-judicial stamp paper dated 09.11.2004; (e) Copy of receipt dated 09.11.2004 towards payment of registration fees at the Sub-Registrar’s Office; (f) Copy of telephone call receipt/bill dated 09.11.2004.

9. Going by the issues framed before the Learned Single Judge, the first question that arises for consideration is whether the Appellant was ready and willing to perform his obligations under the contract, for which it must be proven that the Appellant was present before the Sub-Registrar on 9th November, 2004 with the required non-judicial stamp paper and the banker’s cheque for Rs.19,15,000/-. On this count, as the Single Judge rightly notes, the best evidence to be offered was an application before the Sub-Registrar to record his presence, and the banker’s cheque itself. Neither of these were produced before the Learned Single Judge. Indeed, the Appellant’s oral testimony demonstrating his presence at the office was also later contradicted by his assertion that he collected the non-judicial stamp paper from the Rohilla Documentation Centre at around the same time on that day (11 am or 12 noon). Indeed, even otherwise, the deposition of Mr. Amarpal Singh from the Treasury Office indicates that the stamp paper was issued only on the 11th November, with the money having been paid in on the 9th. This evidence went unchallenged in the course of the proceedings before the Learned Single Judge. Equally, the delivery of these stamp papers to one Mr. Raj Kumar, with whom the Appellant failed to establish any connection or indicate how these stamp papers were received by him on the 9th of November, 2004, created sufficient doubt so as to deny the Appellant’s prayer. Indeed, even in the present appeal proceedings, the Appellant does not offer any justification for this, noting instead that “.....*it is of no relevance to whom the aforesaid stamp papers were delivered*

or that the appellant (plaintiff) failed to establish any connection with Mr. Raj Kumar" (Ground N, Appeal Memorandum).

10. The fact that the Appellant called the Respondent on the 8th of November indicating that "he was ready with everything in this deal" (Cross-Examination of DW-1) does not by itself supplant the absence of material on record establishing the Appellant's presence with the necessary documents in the Sub-Registrar's office. Equally, contrary to the Appellant's contention, DW-1's admission that he *"did not have with (him) a No Due Certificate from the President of the Society in respect of the suit flat",* while certainly justifying a breach of contract on the Respondent's part does not touch upon the Appellant's willingness to perform. On the question of the Appellant's presence at the Sub-Registrar's office, the Appellant relies on the telegram sent and calls made on 9th November, as also the payment of the registration charges at the office of the Sub-Registrar on that day. A consideration of the latter is subject to allowing C.M. 11120/2011, and that apart, the mere fact of calling the Respondent or sending a telegram does not, by itself, establish the Appellant's presence at the Sub-Registrar's office given the other evidence that could possibly have been adduced to prove that fact. Moreover, the Appellant's admission that he was collecting that stamp papers at the Rohilla Documentation Centre at 11 AM or 12 noon on 9th November still remains unexplained, further adding doubt to the Appellant's version of the facts. Indeed, the Appellant notes in the Appeal that:

> "T.....by *no stretch of imagination mean (sic) that the appellant was not ready and willing to perform his part of the obligation or that the required stamp papers were not available with him on the appointed date ....."*

However, the very fact that the Appellant claims that he was at the Rohilla Documentation Centre collecting the stamp paper and at the Sub-Registrar's office with the stamp paper at the same time cannot be true, and having been offered no explanation of this contradictory chronology of the events on the day, the Appellant's readiness to perform the contract remains in doubt.

11. It would be relevant to recollect here that the Supreme Court noted in **RC Chandiok and Anr. v. Chuni Lal Sabharwal and Ors.,** [1971] 2 SCR 573,

> *that "..... Readiness and willingness cannot be treated as a straight jacket formula. These have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned....."*

The facts and circumstances, as discussed above, do betray a substantial doubt – given the contradictions and absence of documentary proof – that the Appellant was not ready and willing to perform his part of the contract on 9th November, 2004. Indeed, the existence of a plea in itself is insufficient to satisfy the requirements of law; there has to be proof for the assertions: **Pushparani S. Sundaram and Ors. v. Pauline Manomani James and Ors.,** ((2002) 9 SCC 582. There, it was held that

> *"so far as there being a plea that they (the Appellants) were ready and willing to perform their part of the contract ... this by itself is not sufficient to hold that the appellants were ready and willing in terms of Section 16(c) of the Specific Relief Act. This requires not only such plea but also proof of the same....."*

The evidence available on record in this case, as the Learned Single Judge held, is clearly insubstantial to establish the Appellant's plea that he was ready and willing to perform his obligations.

12. Finally, given the Respondent's admitted failure to perform his part of the contract as well on the stipulated date, the Learned Single Judge rightly noted that the Appellant – though disentitled to specific performance – is entitled to a return of the earnest money of '2,00,000/- with 6% interest, in order to place parties at the position they were in before the contract came into existence, so as ensure that neither party gains from its non-performance and restitution integrum is ensured.

13. On the question of C.M. No. 11120/2011, an application under Order 41 Rule 27 CPC, seeking to adduce additional evidence in this appeal, the documents in question are indeed documents that the Learned Single Judge considered as 'best evidence', and are possibly such evidence as could assist the Appellant's case. The question before the Court is whether this application is to be allowed under the terms of Rule 27, which categorically states that

> *"(1) [t]he parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court."*

A limited exception is carved out, whereby such additional evidence may be introduced, if

> *"(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or*
>
> *(b) the Appellate Court requires any document to be produced ... to enable it to pronounce judgment, or for any substantial cause ..."*

14. The Appellant seeks to adduce the additional documents on the ground that *"the same could not be done earlier as the appellant had already provided the copies of the said documents to his earlier counsel who did not file the same on the court record and the appellant not being legal person was entirely dependant upon his counsel ..."* (paragraph 3 of the application), and further, because *"this Hon'ble Court would be unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands....."* (paragraph 7 of the application).

15. On the first ground, this very question was considered by a Single Judge of this Court in **Sriniwas v. Vidyawati and Others,** MANU/DE/2707/2005, where the Court negated this contention, holding categorically that "[n]egligence of counsel is no ground available in Order 41 Rule 27." (paragraph 3). Indeed, in considering the scope of Order 41, Rule 27, the Supreme Court in **Mahavir Singh and Ors. v. Naresh Chandra and Anr.,** 2000 (7) SCALE 356, restricted the scope of application of Rule 27 and noted in paragraph 5:

> *".....Principle to be observed ordinarily is that the appellate court should not travel outside the record of the lower court and cannot take evidence on appeal. However, Section 107(d) CPC is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the discretion of the court, which is, of course, to be exercised judiciously and sparingly. The scope of Order XLI, Rule 27 CPC was examined by the Privy Council in Kesowji Issur v. G.I.P. Railway, AIR 1931 PC 143, in which it was laid down clearly that this rule alone can be looked to for taking additional evidence and that the court has no jurisdiction to admit such evidence in cases where this rule does not apply....."*

16. The grounds under Rule 27, thus, are limited and exhaustive, and the Appellant's vague claim (brought in 2011, although the documents were presumably handed over to the counsel 6 years earlier in 2005 at the time of institution of the suit) as to counsel's fault does not permit the limited exception of Rule 27 to be transformed into a gateway to bypass the cardinal rule that all evidence must be adduced at the trial stage and not before the Appellate Court. The documents sought to be adduced were clearly within the Appellant's knowledge at the time of the institution of the suit, and indeed, could easily have been produced before the Court. In fact, in **N. Kamalam (Dead) and Anr. v. Ayyasamy and Another,** 2001 (5) SCALE 65, the Supreme Court held that:

> *"the provisions of Order 41 Rule 27 has not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal -It does not authorise any lacunae or gaps in evidence to be filled up....."*

16. Here, this is precisely the reason for which the Appellant seeks to adduce the additional documents in the present proceedings. Crucially, in such cases, where the Appellant has *"had a sufficient opportunity to exhibit (the evidence) in the trial Court"* (ref., **P. Palaniswami Gounder Dead v. C. Swaminathan,** AIR 1997 Mad 160), the document cannot be produced before the Appellate Court. Equally, on the second ground that such evidence is required "to enable (this Court) to pronounce judgment", this is only in cases where a lacuna in the evidence prevents the Court from delivering the judgment, and such lacuna does not refer to an evidentiary lacuna in the Appellant's case that merely renders its case weak. Indeed, "where even without such evidence (the Appellate Court) can pronounce judgment in a case", there exists a bar from letting in fresh evidence as Rule 27, as held in **Municipal Corporation for Greater Bombay v. Lal Pancham of Bombay and Ors.,** [1965] 1 SCR 542, does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way.

17. In this case, the Court is not unable to pronounce a judgment based on the evidence and facts available, and indeed, as the judgment of the Single Judge demonstrates, the evidence on record can lead to a speaking and reasoned order considering the performance of contractual obligations under the agreement to sell on a balance of probabilities. For these reasons, C.M. No. 11120/2011 also has to be dismissed. Accordingly, given the evidence available on record and the above discussion on the merits of this appeal, the judgment and order of the Learned Single Judge does not merit any interference. The appeal and accompanying applications are therefore dismissed without any order as to costs.

ILR (2013) VI DELHI 4155
ITA

COMMISSIONER OF INCOME-TAX DELHI-XV, NEW DELHI **....APPELLANT**

VERSUS

NEENU DUTTA **.....RESPONDENT**

(BADAR DURREZ AHMED & VIBHU BAKHRU, JJ.)

ITA NO. : 279/2013 **DATE OF DECISION: 31.05.2013**

Income Tax Act, 1961—Section 271 (1)(c)—Whether a penalty u/s 271(1)(c) of the Act can be levied when the assesse makes a wrong claim—For the assessment year 2008-09, assessee did not include capital gains while declaring income claiming that the said amounts were long term capital gains, same being invested to acquire a house—Assessing Officer added the capital gains income to income of assessee no the ground that they were short term capital gains—Assessee did not contest the order—Penalty imposed—Appealed before the CIT (Appeals)—Contended that penalty not liable to be imposed since no material facts were hidden nor incorrect particulars furnished—Contention of the assessee accepted—ITAT upheld order of the CIT (Appeals)—Current appeal filed—Held : Merely Making a wrong claim could not be a ground for imposing a penalty u/s 271(1)(c) of the Act—Question of whether gains arising out of cashless options were long term or short term capital gains has long been a contentious issue—no substantial question of law raised in the present appeal.

It was contended on behalf of the assessee that making a wrong claim would not be a ground for imposing penalty under Section 271(1)(c) of the Act as the same did not amount to furnishing inaccurate particulars or concealment of income as the assessee had disclosed all material facts and had claimed exemption under section 54F of the Act based on legal advice that gains from exercise of options would not be taxed. The CIT (Appeals) accepted the contentions of the assessee and set aside the order of penalty dated 29.06.2011. **(Para 7)**

The revenue preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal relying on the decision of the Supreme Court in the case of **Commissioner of Income Tax v. Reliance Petro Product Pvt. Ltd.:** [2010] 322 ITR 158 upheld the decision of CIT (Appeals) that merely making a wrong claim could not be a ground for imposing a penalty under Section 271(1)(c) of the Act. **(Para 8)**

We are in complete agreement with the decision of the CIT (Appeals) and the Income Tax Appellate Tribunal that this is not a case which would attract penalty under Section 271(1)(c) of the Act. The question whether gains arising out of exercise of cashless options was long term capital gains or short term capital gains could have been a contentious issue at the material time. Further the facts of this case do not indicate that the assessee had furnished inaccurate particulars or concealed income. **(Para 9)**

Important Issue Involved: Merely Making a wrong claim is not a ground for imposing a penalty under section 271(1)(c) of the Act.

[An Ba]

APPEARANCES:

FOR THE APPELLANT : Mr. Kiran Babu.

FOR THE RESPONDENTS : Mr. Salil Aggarwal with Mr. Ravi Pratap Mall.

CASES REFERRED TO:

1. *Commissioner of Income Tax* vs. *Jaswinder Singh Ahuja*: ITA No. 81/2013 decided on 08.02.2013.
2. *Commissioner of Income Tax* vs. *Reliance Petro Product Pvt. Ltd.*: [2010] 322 ITR 158.

RESULT: Appeal Dismissed.

VIBHU BAKHRU, J.

1. This is an appeal filed on behalf of the revenue under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as the "Act"). The appellant herein has challenged the order dated 20.07.2012 passed by the Income Tax Appellate Tribunal in ITA No. 215/Del/2012 for the assessment year 2008-09. The controversy in the present case relates to levy of penalty by the Assessing Officer under Section 271(1)(c) of the Act.

2. The assessee filed a return under the Act for the assessment year 2008-09 on 30.09.2008 declaring an income of Rs. 78,83,303/-. The assessee did not include capital gains of Rs. 86,98,461/- that had resulted on account of the assessee exercising of stock options and the sale of the shares vested with the assessee pursuant the exercise of the Employees Stock Option (ESOP). The assessee did not include the said amount as gains were claimed to be long term capital gains.

3. The assessee was a senior executive with Citi Bank N.A. and had been granted the employee stock options by the employer on various dates from January 1998 to January 2004 during the course her of

employment. The first employee stock option was granted to the assessee on 20.01.1998 and on the last option the stock option was granted on 20.01.2004. The employee stock options that were granted to the assessee were exercised by her on various dates. The employee stock option granted to the assessee on 20.01.1998, 2.11.1998, 13.02.2002, 12.02.2003 and 13.02.2002 was exercised by the assessee on 30.04.2007, 03.05.2007, 19.04.2007, 23.04.2007 and 13.07.2007 for 2680, 3431, 514, 600 and 128 nos. of shares respectively. The employee stock options granted to the assessee were cashless options and the shares vested with the assessee pursuant to the exercise of the options were liable to be sold and the net proceeds thereof remitted to the assessee. The shares vested with the assessee pursuant to the options exercised were sold on the date of exercise of options and after deducting the price at which the options were granted and the expenses for sale of shares, the balance proceeds were remitted to the assessee.

4. The return filed by the assessee was taken up for scrutiny and the Assessing Officer made an addition of Rs. 86,98,461/- to the income of the assessee on account of short term capital gains. The said addition was made by the Assessing Officer as he held that the gains arising out of exercising of options and sale of the shares of Citi Bank were not long term capital gains but short term capital gains inasmuch as shares were sold on the very same day on which the assessee exercised her ESOP. The date of grant of ESOP was not considered by the Assessing Officer as the date of acquisition of the capital asset sold by the assessee. The assessee contended that although the assessment raised were contentious she decided not to contest the assessment order in order to avoid litigation and to buy peace. The assessee also wrote a letter dated 06.12.2010 accepting the view of the department and surrendering her right to contest the issue on the condition that no penalty under Section 271(1)(c) of the Act would be imposed on her.

5. The Assessing Officer thereafter commenced penalty proceedings and passed an order dated 29.06.2011 imposing a penalty of Rs. 29,56,610/- which was calculated on 100% of the incremental tax payable on the addition made by the Assessing Officer.

6. The assessee preferred an appeal before CIT (Appeals) challenging the levy of penalty under Section 271(1)(c) of the Act. It was contended by the assessee that the assessee considered the gains arising out of the

exercise of ESOP as long term capital gains taking the date of grant of ESOP as the date of acquisition of the asset sold. The assessee invested Rs. 1 crore in October 2007 with Cedarhills Hospitality Pvt. Ltd and showed the entire amount received by the assessee as having been invested in construction of a residential house. The assessee thus, claimed the capital gains to be exempted under Section 54F of the Act. The assessee contended that she was advised that the amount received for sales by her on account of exercise of option was not taxable as the gains were long terms capital gains and the same had been invested in acquiring a residential house.

7. It was contended on behalf of the assessee that making a wrong claim would not be a ground for imposing penalty under Section 271(1)(c) of the Act as the same did not amount to furnishing inaccurate particulars or concealment of income as the assessee had disclosed all material facts and had claimed exemption under section 54F of the Act based on legal advice that gains from exercise of options would not be taxed. The CIT (Appeals) accepted the contentions of the assessee and set aside the order of penalty dated 29.06.2011.

8. The revenue preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal relying on the decision of the Supreme Court in the case of **Commissioner of Income Tax v. Reliance Petro Product Pvt. Ltd.:** [2010] 322 ITR 158 upheld the decision of CIT (Appeals) that merely making a wrong claim could not be a ground for imposing a penalty under Section 271(1)(c) of the Act.

9. We are in complete agreement with the decision of the CIT (Appeals) and the Income Tax Appellate Tribunal that this is not a case which would attract penalty under Section 271(1)(c) of the Act. The question whether gains arising out of exercise of cashless options was long term capital gains or short term capital gains could have been a contentious issue at the material time. Further the facts of this case do not indicate that the assessee had furnished inaccurate particulars or concealed income.

10. This court has also considered the issue of penalty in a similar situation in the case of **Commissioner of Income Tax v. Jaswinder Singh Ahuja:** ITA No. 81/2013 decided on 08.02.2013.

11. Following the aforesaid judgements, we do not find that any substantial question of law is raised in the present appeal. Consequently, the appeal is dismissed. There shall be no order as to costs.

ILR (2013) VI DELHI 4160
CRL. A.

AVID ALI ....APPELLANT

VERSUS

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

(MUKTA GUPTA, J.)

CRL. A. NO. : 313/2011 DATE OF DECISION: 02.07.2013

Indian Penal Code, 1860—Section 394/397—Appellant convicted of offences punishable u/s 394 and 397 IPC and sentenced to rigorous imprisonment for a period of six years and imposed a fine of Rs.5000/- for the offence punishable u/s 394 IPC and sentenced to seven years for the offence punishable u/s 397 IPC—Impugned judgment/order challenged mainly on the ground that no public witnesses were associated and since nothing was robbed from the complainant and the injury caused to him was only simple, imprisonment imposed is disproportionately higher. Held: It has been proved beyond reasonable doubt by the depositions of PW1 the complainant and his friend PW2 that appellant attempted to commit robbery by voluntarily causing hurt to PW1 and therefore no error in the conviction of the appellant for the offence punishable u/s 394 IPC. However since only an attempt to robbery was made, the act of the appellant causing an injury to the complainant would be an offence punishable u/s

398 IPC and not section 397 IPC. Section 398 IPC being a minor offence of section 397 IPC, no prejudice caused to the appellant and conviction altered from section 397 IPC to 398 IPC. Sentence of imprisonment cannot be reduced as the minimum sentence prescribed under section 398 IPC is seven years. Fine imposed for the offence committed u/s 394 IPC also cannot be waived for imposition of fine is mandatory under the said section. However the simple imprisonment imposed for six months for non payment of fine being on the higher side is hereby reduced to three months.

A perusal of the evidence of PW1 and PW2 shows that no robbery was committed and it was case of attempt to robbery only. Section 394 provides that if any person in committing or in attempting to commit robbery voluntarily causes hurt, such a person and any other person jointly concerned in committing or attempting to commit such robbery shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years and shall also be liable to fine. In the present case it has been proved beyond reasonable doubt on record that the Appellant attempted to commit robbery by voluntarily causing hurt to PW1. Thus, the learned Trial Court committed no error in convicting the Appellant for offence under Section 394 IPC. Further Section 397 IPC provides that if at the time of committing robbery or dacoity the offender uses any deadly weapon or causes grievous hurt to any person or attempt to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than 7 years. In the present case robbery has not been committed, only an attempt to robbery was made which was foiled. Thus, Section 398 IPC would be attracted in the facts of the case, as the same provides that if at the time of attempting to commit robbery or dacoity the offender is armed with any deadly weapon, the punishment would be imprisonment not less than 7 years. The Appellant

was charged for offence under Section 397 IPC and convicted thereof. However, from the facts of the case offence under Section 398 IPC is made out and the same being a minor offence of Section 397 IPC, no prejudice will be caused to the Appellant if the conviction is altered from Section 397 IPC to Section 398 IPC. The minimum sentence prescribed under Section 398 IPC is also 7 years imprisonment. In the facts and circumstances of the case, the conviction of the Appellant is altered to one under Section 394/398 IPC.

(Para 5)

Learned counsel for the Appellant has contended that in default of payment of fine, sentence of imprisonment for six months be waived. Section 394 IPC provides for punishment with imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years and also to pay a fine. Thus, payment of fine is mandatory under Section 394 IPC. In the present case the fine imposed is Rs. 5000/-. However, for non-payment of fine, the default sentence provided is simple imprisonment for six months which in my opinion is on the higher side. It is therefore directed that in case fine of Rs. 5000/- is not paid by the Appellant, he would undergo Simple imprisonment for a period of three months. The appeal is disposed of with the modifications in the judgment of conviction and order on sentence accordingly. Appellant be informed through the Superintendent Tihar Jail.

(Para 6)

Important Issue Involved: In a cases of only an attempt to commit a robbery, the act of an accused causing an injury to the complainant constitutes an offence u/s 398 IPC and not 397 IPC.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Yash Tandon, Advocate with Appellant.

FOR THE RESPONDENT : Mr. Manoj Ohri, APP with SI Yashbir Singh, PS New Usmanpur.

MUKTA GUPTA, J.

1. By the present appeal, the Appellant challenges the judgment dated 4th October, 2010 convicting the Appellant for offences punishable under Section 394/397 IPC and the order on sentence dated 5th October, 2010 awarding rigorous imprisonment for a period of 6 years and a fine of Rs. 5000/- for offence punishable under Section 394 IPC and rigorous imprisonment for a period of 7 years for offence under Section 397 IPC.

2. Learned counsel for the Appellant contends that the alleged incident took place in residential area on 21st December, 2006 at about 7.50 PM when public witnesses would have been around, however no public witness was associated. Even as per the case of the prosecution, in view of the statement of PW1 and PW2, nothing has been robbed from the complainant and thus the sentence for imprisonment as imposed is disproportionately higher. Further, as per the MLC the injury was also simple in nature. The Appellant has by now undergone 6 years 8 months imprisonment with remissions out of the 7 years awarded and thus in the alternative the sentence in default of payment of fine i.e. simple imprisonment of six months be set aside.

3. Learned APP for the State on the other hand contends that from the testimonies of PW1 and PW2, the offence committed by the Appellant is proved beyond reasonable doubt. The Appellant injured PW1 with a hasia (knife). The testimony of PW1 and PW2 is further corroborated by the testimony of PW3 Dr. Banarsi who has exhibited the MLC Ex. PW3/A. PW1 and PW2 despite detailed cross-examination were recalled vide order dated 11th August, 2010 passed by the learned Trial Court and a suggestion of previous enmity was put to them. However, PW1 and PW2 denied the same. In view of the testimony of eye-witnesses, particularly the injured eye-witnesses, the prosecution has proved its case beyond reasonable doubt and thus no case for acquittal is made out.

4. Heard learned counsel for the parties. Briefly the case of the prosecution as per the statement of PW1 Sunil Kumar, the complainant is that on 21st December, 2006 between 6.00 to 7.00 PM he was returning to his house after purchasing a book along with his friend Janardhan Singh PW2. When they were passing through DDA park,

Shastri Park he received a mobile phone call and to attend the same he sat down on a bench, while his friend was standing. In the meantime two persons came and demanded cigarette, match stick, tobacco etc. One of the two persons came from behind, who was pointed out as Abid, the present Appellant. It is further stated that the Appellant took out a knife type object and placed it on his neck and asked him to hand-over his belongings to him. The other boy, who accompanied the Appellant, remained standing at a distance. PW1 caught hold of the hand of the Appellant followed by PW2 catching hold of him. In the meantime the other boy accompanying the Appellant fled away. PW1 and PW2 brought the Appellant in the area of Shastri Park and called the Police. PW1 sustained an injury on his right hand with the knife when he tried to catch it. The Appellant was handed over to the Police and the statements were duly recorded. Since PW1 and PW2 did not identify the accused Nasir in the Court, he was acquitted by the learned Court. However, a perusal of the evidence shows that the material evidence of showing the knife and demanding the belongings relates to the present Appellant, as the role attributed to Nasir was that he was standing at a distance. Both the witnesses have been cross-examined by the learned APP and the learned counsel for the Appellant. During cross-examination, no material improvements or contradictions have been shown. The Appellant was apprehended at the spot. The testimony of PW1 and PW2 is further corroborated by the testimony of PW3 Dr. Banarsi who prepared the MLC of PW1, Ex.PW3/A. As per the MLC, PW1 received an incised wound on the right index finger.

5. A perusal of the evidence of PW1 and PW2 shows that no robbery was committed and it was case of attempt to robbery only. Section 394 provides that if any person in committing or in attempting to commit robbery voluntarily causes hurt, such a person and any other person jointly concerned in committing or attempting to commit such robbery shall be punished with imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years and shall also be liable to fine. In the present case it has been proved beyond reasonable doubt on record that the Appellant attempted to commit robbery by voluntarily causing hurt to PW1. Thus, the learned Trial Court committed no error in convicting the Appellant for offence under Section 394 IPC. Further Section 397 IPC provides that if at the time of committing robbery or dacoity the offender uses any deadly weapon or causes

grievous hurt to any person or attempt to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than 7 years. In the present case robbery has not been committed, only an attempt to robbery was made which was foiled. Thus, Section 398 IPC would be attracted in the facts of the case, as the same provides that if at the time of attempting to commit robbery or dacoity the offender is armed with any deadly weapon, the punishment would be imprisonment not less than 7 years. The Appellant was charged for offence under Section 397 IPC and convicted thereof. However, from the facts of the case offence under Section 398 IPC is made out and the same being a minor offence of Section 397 IPC, no prejudice will be caused to the Appellant if the conviction is altered from Section 397 IPC to Section 398 IPC. The minimum sentence prescribed under Section 398 IPC is also 7 years imprisonment. In the facts and circumstances of the case, the conviction of the Appellant is altered to one under Section 394/398 IPC.

6. Learned counsel for the Appellant has contended that in default of payment of fine, sentence of imprisonment for six months be waived. Section 394 IPC provides for punishment with imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years and also to pay a fine. Thus, payment of fine is mandatory under Section 394 IPC. In the present case the fine imposed is Rs. 5000/-. However, for non-payment of fine, the default sentence provided is simple imprisonment for six months which in my opinion is on the higher side. It is therefore directed that in case fine of Rs. 5000/- is not paid by the Appellant, he would undergo Simple imprisonment for a period of three months. The appeal is disposed of with the modifications in the judgment of conviction and order on sentence accordingly. Appellant be informed through the Superintendent Tihar Jail.

ILR (2013) VI DELHI 4166

CRL. A.

HEM CHANDER ....APPELLANT

VERSUS

STATE OF DELHI ....RESPONDENT

(MUKTA GUPTA, J.)

CRL. A. NO. : 9/2003 DATE OF DECISION: 02.07.2013

Prevention of Corruption Act, 1988—Section 7/13(1)(d)—As per the allegations of complainant he was constructing a house on a plot in Laxmi Nagar and the appellant being the SHO of PS Shakkarpur demanded a bribe without which he would not permit the construction on the plot—Complainant approached PS Anti Corruption Branch and a raiding team apprehended the appellant while accepting the bribe—During trial complainant though admitted giving a complaint to the Anti Corruption Branch, failed to support the case of the prosecution with regard to demand, acceptance and recovery of money at the spot—Appellant convicted however on the basis of the deposition of the trap laying officer and on the recovery of treated notes from the drawer in the room of the appellant. Held: It is well settled law that prosecution is duty bound to prove the demand and acceptance of money either by direct or circumstantial evidence and in the present case there is no such evidence. The Ld. Trial Court failed to consider that the complainant was involved in five cases and that the appellant was also able to prove that the plot on which the complainant was assertedly constructing, belonged to somebody else who was residing in a fully constructed house thereon with his family. Appeal

allowed.

It is thus well settled that the prosecution is duty bound to prove the demand and acceptance of money either by direct or circumstantial evidence before an inference that the money given is an illegal gratification could be raised. In **Zakaullah** (supra) the complainant proved the case of the prosecution and in the light of the said evidence it was held that the testimony of the bribe giver could not be rejected merely because he is aggrieved by the conduct of the accused, however in such a case the evidence of complainant requires greater scrutiny. In **State Vs. G. Premraj** (supra) rendered by two judges bench of the Hon'ble Supreme Court it was held that once the story of demand of bribe and the acceptance thereof by the Respondent therein was acceptable not being demolished in cross-examination and the amount being substantial, the presumption under Section 20 PC Act was raised. In the present case there is no evidence of demand and acceptance either direct or circumstantial. **(Para 10)**

Further the learned Trial Court failed to consider the defence of the Appellant. The complainant was involved in as many as five criminal cases including cases of murder, trespass, cheating by impersonation etc. The Appellant proved that the claim of the complainant in the complaint that he was owner of plot No. 128 Lalita Park Laxmi Nagar and was constructing the same was false. The said house was owned by one Shri Dharamjeet Singh and he was residing therein with his family. The house was fully constructed. The Appellant was required to prove his defence by preponderance of probability which he has been able to do. **(Para 11)**

Important Issue Involved: Presumption of money given as an illegal gratification u/s 20 of Prevention of Corruption Act cannot be raised unless the prosecution proves the demand and acceptance of money, either by direct or circumstantial evidence.

[An Gr]

APPEARANCES:

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

FOR THE RESPONDENT : Mr. Manoj Ohri, APP

CASES REFERRED TO:

1. *Banarasi Dass* vs. *State of Haryana* (2010) 4 SCC 450.
2. *State* vs. *G. Premraj,* 2010 (1) SCC 398
3. *Madhukar Bhaskarrao Joshi* vs. *State of Maharashtra* [(2000) 8 SCC 571 : 2001 SCC (Cri) 34].
4. *Meena (Smt) w/o Balwant Hemke* vs. *State of Maharashtra,* 2000 (5) SCC 21.
5. *State of U.P.* vs. *Zakaullah* AIR 1998 SC 1474.
6. *M.K. Harshan* vs. *State of Kerala* [(1996) 11 SCC 720 : 1997 SCC (Cri) 283.
7. *Suraj Mal* vs. *State (Delhi Admn.)* [(1979) 4 SCC 725 : 1980 SCC (Cri) 159.
8. *Sita Ram* vs. *State of Rajasthan* [(1975) 2 SCC 227: 1975 SCC (Cri) 491].
9. *Hazari Lal* vs. *State* (1980) 2 SCC 390.

MUKTA GUPTA, J.

1. By the present appeal the Appellant challenges the judgment dated 19th December, 2002 convicting the Appellant for offences punishable under Sections 7/ 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (in short the PC Act) and the order on sentence dated 21st December, 2002 directing him to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 10,000/- for offences under Section 7 PC Act and Section 13(1)(d) read with Section 13(2) of the PC Act. There appears to be a typographical error in the impugned order of sentence dated 21st December, 2002 whereby instead of Hem Chander convict Raj Kishore has been mentioned.

2. Learned counsel for the Appellant contends that in the entire prosecution case there is no evidence to prove demand and acceptance

of illegal gratification by the Appellant. Further there is no recovery of the bribe money from the Appellant. The complainant himself stated different plot numbers and finally stated that the money was demanded for illegal construction of plot No. 128, however plot no. 128 was already a constructed building. The alleged recovery was effected from the drawer of the table and thus cannot be said to be a recovery from the Appellant. Even the panch witness has not supported the prosecution case. Merely by proving the hand wash solutions, the prosecution cannot be said to have proved beyond reasonable doubt the commission of offences under Section 7 and Section 13(1)(d) read with Section 13(2) of the PC Act by the Appellant. Reliance is placed on **Banarasi Dass vs. State of Haryana,** 2010 (4) SCC 450.

3. Learned APP on the other hand contends that the recovery of the tainted money has been proved which is duly corroborated by the report of the hand-wash solution, and in view of the law laid down by the Supreme Court in **Hazari Lal Vs. State** (1980) 2 SCC 390; **State of U.P. Vs. Zakaullah** AIR 1998 SC 1474 and **State vs. G. Premraj,** 2010 (1) SCC 398, there is no illegality in the impugned judgment and the appeal be dismissed.

4. Briefly the case of the prosecution as per the complaint of PW6 Umrao Singh Ex. PW5/A dated 4th March, 1993 is that he was doing the business of marble. At plot no. 128 Lalita Park, Laxmi Nagar he started construction of his house when on 3rd March 1993 at about 11.00 AM Inspector Hem Chander, SHO PS Shakarpur came to his plot and took away the labour working there to PS Shakarpur. When the complainant reached the Police Station at about 12.45 noon and met the SHO, he released his labour and called him again in the evening. In the evening at about 8.00 PM he again went to PS Shakarpur and at that time the SHO demanded Rs. 30,000/- as bribe without which he would not permit construction on the plot. On the request of the complainant, the bribe amount was reduced to Rs. 5000/- out of which he paid Rs. 1000/- then and there and the balance amount of Rs. 4000/- he had to give on 4th March, 1993 at 6/7 PM at PS Shakarpur. Since the complainant did not want to give the bribe, he made a complaint, on the basis of which FIR No. 10/93 was registered under Section 7/13 PC Act at PS Anti-corruption Branch. The complainant gave 40 notes of Rs. 100/- denomination, the numbers of which were noted which were stated to be recovered from the Appellant's drawer. The hand-wash was also taken which turned

pink. On the basis of this material the charge-sheet was filed.

5. PW6 the complainant when he appeared in the witness box reiterated that on 4th March, 1993 he went to the Anti-corruption Branch and got his statement recorded vide Ex.PW5/A which bears his signature. The complaint was with regard to the demanding bribe of Rs. 4000/- for which he gave 40 GC notes of Rs. 100/- denomination to the raid officer TR Mirwani who applied phenolphthalein powder on the tainted GC notes. The trap team including the complainant, panch witness, raid officer TR Mirwani and other 5-6 officials reached the Police Station Shakarpur at about 6.15 PM. However the complainant failed to support the case of the prosecution with regard to demand, acceptance and recovery of the money on the spot. Since the complainant had turned hostile, the learned APP cross-examined him, however he denied the suggestions. Thus, no cross-examination was done by the accused. Mere lodging of the complaint and reiterating its contents is not an evidence of demand, acceptance or recovery of the money. The complainant has not stated a single word to prove the demand, acceptance and recovery of the bribe money from the Appellant.

6. PW5 Bali Dutt Joshi the shadow witness has also turned hostile. Even in the cross-examination by the learned APP nothing could be elicited. PW5 states that he was deputed in the Anti-corruption Branch as a panch witness on 4th March, 1993 and in his presence statement of complainant Umrao Singh was recorded in Anti-corruption Branch. This witness in the cross-examination by the learned APP denied that the SHO while sitting in his chair asked whether the complainant had brought the money as demanded by him or that he accepted the money in his right hand, opened the drawer of his table and kept the same in his drawer. The complainant and the shadow witness i.e. PW6 and PW5 being the witnesses to the demand and acceptance having not supported the prosecution case, there is no evidence on record to prove the demand and acceptance of the illegal gratification.

7. As regards the recovery of the GC notes, though PW5 and PW6 have not supported the prosecution case however the trap laying officer TR Mirwani has proved the same. According to PW7 pre-trap formalities were conducted and on reaching PS Shakarpur, the complainant and shadow witness were sent ahead of the trap team to contact the Appellant at about 6.30 PM when they were informed that the Appellant was not

present in the Police Station. Thereafter, the complainant and the panch witnesses were again called at 10.00 PM in the Police Station. At about 10.15 PM they received a signal from the panch witness and thus they immediately rushed to the spot and challenged the Appellant after disclosing their identity. On the pointing out of the complainant the GC notes Ex. P5 to P45 were recovered from the drawer of the table of the Appellant and seized vide memo Ex.PW/B. The right hand-wash and the photoprint envelope wash lying in the drawer were also taken which turned pink and were seized and sealed in separate bottles.

8. Thus, the issue that arises is whether merely by recovery of the treated notes from the drawer in the room of the Appellant, the Prosecution has been able to prove the offences under Sections 7 and 13(1)(d) read with 13(2) PC Act. In **Meena (Smt) w/o Balwant Hemke vs. State of Maharashtra,** 2000 (5) SCC 21 the three Judge bench of the Hon'ble Supreme Court held:

> "11. The learned Judge in the High Court seems to have mechanically affixed his approval to the findings recorded by the trial Judge by profusely extracting such findings. Mere recovery of the currency note of Rs 20 denomination, and that too lying on the pad on the table, by itself cannot be held to be proper or sufficient proof of the acceptance of the bribe, in the peculiar circumstances of this case which lend also credence to the case of the appellant that it fell on the table in the process of the appellant pushing it away with her hands when attempted to be thrust into her hands by PW1. The results of phenolphthalein test, viewed in the context that the appellant could have also come into contact with the currency note when she pushed it away with her hands cannot by itself be considered to be of any relevance to prove that the appellant really accepted the bribe amount. With such perfunctory nature of materials and the prevaricating type of evidence of PW 1 and PW 3, who seem to have a strong prejudice against the appellant, it would be not only unsafe but dangerous to rest conviction upon their testimony. PW 1, if really was keen on getting the copy of the record urgently, could have made an urgent application to have them delivered within 3 days instead of making an ordinary application and going on such an errand, which makes it even reasonable to assume that the trio of PW 1, PW 3 and Jagdish Bokade were

> attempting to weave a web around the appellant to somehow get her into trouble and victimise her."

9. In **Banarasi Dass Vs. State of Haryana** (2010) 4 SCC 450 the Hon'ble Supreme Court while considering the earlier decisions on the point held:

> "19. The above findings recorded by the High Court show that the Court relied upon the statements of PW 10 and PW 11. It is further noticed that recovery of currency notes, Exts. P-1 to P-4 from the shirt pocket of the accused, examined in light of Exts. PC and PD, there was sufficient evidence to record the finding of guilt against the accused. The Court remained uninfluenced by the fact that the shadow witness had turned hostile, as it was the opinion of the Court that recovery witnesses fully satisfied the requisite ingredients. We must notice that the High Court has fallen in error insofar as it has drawn the inference of the demand and receipt of the illegal gratification from the fact that the money was recovered from the accused.
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> 20. It is a settled canon of criminal jurisprudence that the conviction of an accused cannot be founded on the basis of inference. The offence should be proved against the accused beyond reasonable doubt either by direct evidence or even by circumstantial evidence if each link of the chain of events is established pointing towards the guilt of the accused. The prosecution has to lead cogent evidence in that regard so far as it satisfies the essentials of a complete chain duly supported by appropriate evidence. Applying these tests to the facts of the present case, PW 10 and PW 11 were neither the eyewitnesses to the demand nor to the acceptance of money by the accused from Smt Sat Pal Kaur (PW 2). 21.....
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> 22.....
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> 23. To constitute an offence under Section 161 IPC it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused. Similarly, in terms of Section 5(1)(d) of the Act, the demand and acceptance of the money for doing a favour in discharge of his official duties is sine qua non to the conviction of the accused.

24. In **M.K. Harshan v. State of Kerala** [(1996) 11 SCC 720 : 1997 SCC (Cri) 283] this Court in somewhat similar circumstances, where the tainted money was kept in the drawer of the accused who denied the same and said that it was put in the drawer without his knowledge, held as under: (SCC pp. 723-24, para 8)

> "8. ... It is in this context the courts have cautioned that as a rule of prudence, some corroboration is necessary. In all such type of cases of bribery, two aspects are important. Firstly, there must be a demand and secondly, there must be acceptance in the sense that the accused has obtained the illegal gratification. Mere demand by itself is not sufficient to establish the offence. Therefore, the other aspect, namely, acceptance is very important and when the accused has come forward with a plea that the currency notes were put in the drawer without his knowledge, then there must be clinching evidence to show that it was with the tacit approval of the accused that the money had been put in the drawer as an illegal gratification. Unfortunately, on this aspect in the present case we have no other evidence except that of PW 1. Since PW 1's evidence suffers from infirmities, we sought to find some corroboration but in vain. There is no other witness or any other circumstance which supports the evidence of PW 1 that this tainted money as a bribe was put in the drawer, as directed by the accused. Unless we are satisfied on this aspect, it is difficult to hold that the accused tacitly accepted the illegal gratification or obtained the same within the meaning of Section 5(1)(d) of the Act, particularly when the version of the accused appears to be probable."

25. Reliance on behalf of the appellant was placed upon the judgment of this Court in **C.M. Girish Babu** [(2009) 3 SCC 779: (2009) 2 SCC (Cri) 1] where in the facts of the case the Court took the view that mere recovery of money from the accused by itself is not enough in absence of substantive evidence for demand and acceptance. The Court held that there was no voluntary acceptance of the money knowing it to be a bribe and giving

advantage to the accused of the evidence on record, the Court in paras 18 and 20 of the judgment held as under: (SCC pp. 784 & 785-86)

> "18. In **Suraj Mal v. State (Delhi Admn.)** [(1979) 4 SCC 725 : 1980 SCC (Cri) 159] this Court took the view that (at SCC p. 727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe.
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> 20. A three-Judge Bench in **M. Narsinga Rao v. State of A.P.** [(2001) 1 SCC 691 : 2001 SCC (Cri) 258] while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p. 700, para 24)
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> '24. ... we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide **Madhukar Bhaskarrao Joshi v. State of Maharashtra** [(2000) 8 SCC 571 : 2001 SCC (Cri) 34].) The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned counsel: (**Madhukar** case [(2000) 8 SCC 571 : 2001 SCC (Cri) 34], SCC p. 577, para 12)
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> "12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted 'as motive or reward' for doing or forbearing to do any official act. So the word 'gratification' need not

be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like 'gratification or any valuable thing'. If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word 'gratification' must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

'" In fact, the above principle is no way a derivative but is a reiteration of the principle enunciated by this Court in **Suraj Mal** case [(1979) 4 SCC 725 : 1980 SCC (Cri) 159] where the Court had held that mere recovery by itself cannot prove the charge of prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money. Reference can also be made to the judgment of this Court in **Sita Ram v. State of Rajasthan** [(1975) 2 SCC 227: 1975 SCC (Cri) 491] where similar view was taken.

26. **C.M. Girish Babu** case [(2009) 3 SCC 779 : (2009) 2 SCC (Cri) 1] was registered under the Prevention of Corruption Act, 1988, Section 7 of which is in pari materia with Section 5 of the Prevention of Corruption Act, 1947. Section 20 of the 1988 Act raises a rebuttable presumption where the public servant accepts gratification other than legal remuneration, which presumption is absent in the 1947 Act. Despite this, the Court followed the principle that mere recovery of tainted money divorced from the circumstances under which it is paid would not be sufficient to convict the accused despite presumption and, in fact, acquitted the accused in that case."

10. It is thus well settled that the prosecution is duty bound to prove the demand and acceptance of money either by direct or circumstantial evidence before an inference that the money given is an illegal gratification could be raised. In **Zakaullah** (supra) the complainant proved the case of the prosecution and in the light of the said evidence it was held that the testimony of the bribe giver could not be rejected

merely because he is aggrieved by the conduct of the accused, however in such a case the evidence of complainant requires greater scrutiny. In **State Vs. G. Premraj** (supra) rendered by two judges bench of the Hon'ble Supreme Court it was held that once the story of demand of bribe and the acceptance thereof by the Respondent therein was acceptable not being demolished in cross-examination and the amount being substantial, the presumption under Section 20 PC Act was raised. In the present case there is no evidence of demand and acceptance either direct or circumstantial.

11. Further the learned Trial Court failed to consider the defence of the Appellant. The complainant was involved in as many as five criminal cases including cases of murder, trespass, cheating by impersonation etc. The Appellant proved that the claim of the complainant in the complaint that he was owner of plot No. 128 Lalita Park Laxmi Nagar and was constructing the same was false. The said house was owned by one Shri Dharamjeet Singh and he was residing therein with his family. The house was fully constructed. The Appellant was required to prove his defence by preponderance of probability which he has been able to do.

12. In view of the fact that neither the demand nor acceptance has been proved, it cannot be said that the prosecution has proved its case beyond reasonable doubt. The Appellant is thus entitled to the benefit of doubt. He is acquitted of the charges framed. The bail bond and the surety bond are discharged. Appeal is disposed of.

ILR (2013) VI DELHI 4176
W.P. (C)

BALBIR SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 2255/2013 DATE OF DECISION: 08.07.2013

Constitution of India, 1950—Article 226—Writ petition assailing an order dated 9th February, 2010 where petitioner was compulsorily retired from service—Petitioner was employed as a driver in the CRPF from 8th July, 1991—Behaved in an undisciplined manner, threatening a Deputy Commandant and a Sub-Inspector on 3rd October, 2009—Disciplinary Proceedings were conducted, where the petitioner pleaded not guilty—Refused to cross-examine the witnesses—Petitioner found guilty of both charges by the enquiry proceeding—Held: Petitioner has failed to make out any legal grounds—No merits—Petition dismissed.

[An Ba]

APPEARANCES:

FOR THE PETITIONER : Mr. Durga Prasad, Adv.

FOR THE RESPONDENTS : Ms. Barkha Babbar, Adv.

RESULT: Petition dismissed.

GITA MITTAL, J. (Oral)

CM No.4296/2013(exemption)

Allowed, subject to all just exceptions.

Application stands disposed of.

WP(C) No.2255/2013

1. In terms of the last order Ms. Barkha Babbar, has handed over a copy of the original record of the present case which has been produced before us. We have heard learned counsel for the parties.

2. The instant writ petition has been filed by the petitioner assailing an order dated 9th February, 2010 passed by the Commandant -37 Battalion, CRPF, A.D.Nagar, Agartala, Tripura-the respondent No.2 whereby the petitioner has been compulsorily retired from service.

3. It is undisputed that the petitioner was appointed as a driver with effect from 8th July, 1991 by CRPF. It appears that there was an incident on 3rd October 2009 in the Battalion in which after the Marker March, the petitioner started screaming and came and stood in front of Sh. Anil Kumar, Deputy Commandant (Motor Transport Officer) threatening him that the officer was misbehaving with the petitioner; that he would realise the petitioner's political influence and that he would have him set right in his village. Sub Inspector Umashankar Yadav, had intervened and explained to the petitioner that he must behave in a disciplined manner at which the petitioner threatened Sh.Umashankar Yadav that he would pump 35 rounds of his carbine. The petitioner is alleged to have behaved in an utmost indisciplined manner.

4. In view of this conduct the petitioner was allegedly suspended with effect from 3rd October, 2009. The petitioner was served with the charge sheet dated 26th October, 2010 and was informed that disciplinary proceedings were contemplated against him by a covering letter of the same date. By an order dated 9th November, 2009, the respondent appointed an enquiry officer for conducting the disciplinary enquiry against the petitioner who informed the petitioner by a letter dated, 20th November, 2009 to appear before him on 11th November, 2009. The petitioner was also required to indicate the name of the Defence Assistant in term of Rule 14(8)(a) of the CCS (CCA) Rules. The original record shows that the petitioner had endorsed on the letter dated 10th November, 2009 that he did not wish to engage the services of the Defence Assistant.

5. During the enquiry proceedings, the petitioner set up a plea of not guilty whereupon the enquiry officer proceeded to record evidence. Six witnesses were examined in support of the two charges against the petitioner which included testimonies of Sh. Anil Kumar, Deputy

Commandant (Motor Transport Officer) as PW 1 and of SI (MT) Umashankar Yadav as PW 4. The petitioner was duly given opportunity to cross-examine the witnesses which he declined.

6. After a detailed consideration of the evidence, the enquiry officer submitted a report dated 11th September, 2009 to the Disciplinary Authority finding the petitioner guilty of both charges. The Disciplinary Authority considered the report at length and the enquiry report was duly accepted by the disciplinary authority by an order passed on 9th February, 2010.

7. After consideration of the fact that the petitioner had already put in 19 years of service and his family circumstances, the disciplinary authority imposed the punishment of compulsory retirement from service with effect from 9th February, 2010 and further Disciplinary Authority directed that the petitioner would be entitled to pension and gratuity under Rule 14 of the CCS Pension Rules. Having given our considered thought to the facts and circumstances leading to passing of the impugned order dated 9th February, 2010, we are of the view that the petitioner has failed to make out legally any sustainable grounds to maintain the challenge to the order dated 9th of February, 2010 before us.

8. We find no merits in the petition which is hereby dismissed.

ILR (2013) VI DELHI 4179
W.P. (C)

GHAN SHYAM SINGH **.....PETITIONER**

VERSUS

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

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 4275/2013 **DATE OF DECISION: 09.07.2013**

Constitution of India, 1950—Article 226—That the Petitioner was tried and convicted by a Summary Court Martial on 12th September, 1991—Conviction was set aside by the AFT, Delhi—As consequential relief directed that petitioner would be deemed to be in service till he attains minimum pensionable service of 15 years—No entitlement to salary for this period, applying principle of 'No Work, No Pay'—Petitioner only entitled to pension and other retiral benefits from the date of this order—Petitioner challenged the order to the extent of denial of pensionary benefits from 2nd August, 1995 (date of Petitioner's superannuation) to 18th February, 2013 (date of the AFT order). Held: Petitioner would have continued in service if Court Martial had not intervened—No fault attributable to the Petitioner—Pension is a vested right which cannot be taken away arbitrarily—Petitioner entitled to computation of pension and its payment w.e.f. 2nd August, 1995.

Important Issue Involved: Pension is a vested right which cannot be taken away arbitrarily.

[An Ba]

APPEARANCES:

FOR THE PETITIONER **:** Mr. J.S. Manhas, Advocate.

FOR THE RESPONDENTS **:** Mr. Ankur Chhibber, Advocate.

CASES REFERRED TO:

1. *D.S. Nakara & Ors.* vs. *Union of India* (1983) 1 SCC 305.
2. *State of Punjab and Anr.* vs. *Iqbal Singh* AIR 1976 SC 667.
3. *Deoki Nandan Prasad* vs. *State of Bihar and Ors.* (1971) Supp. SCR 634.

RESULT: Writ petition allowed.

GITA MITTAL, J. (Oral)

1. Issue notice to show cause to the respondents as to why rule nisi be not issued. Mr. Ankur Chhibber, Advocate accepts notice on behalf of the respondents.

2. Learned counsel for the parties submit that the writ petition can be disposed of on the basis of available record. With the consent of both the parties, we have accordingly heard the writ petition.

3. The facts giving rise to the present writ petition are in narrow compass. The petitioner was tried and convicted by an order dated 12th September, 1991 of the Summary Court Martial which was assailed before us by way of WP(Crl.)No.77/1993 (which was subsequently registered as WP(C)No.5888/2001). On coming into force of the Armed Forces Tribunal Act, 2007, this writ petition was transferred for adjudication to the Armed Forces Tribunal, Principal Bench, New Delhi and it came to be registered as T.A.No.39/2010.

4. The Armed Forces Tribunal heard the matter and allowed the petition vide its judgment dated 18th February, 2013 setting aside the conviction of the petitioner. So far as consequential relief is concerned, the Tribunal directed that the petitioner would be deemed to be in service till he attains minimum pensionable service of 15 years. The Tribunal thereafter applied the principle of "no work no pay" and held that he would not be entitled to any salary for this period, however, he would be entitled to pension and other such retiral benefits in accordance with rules with effect from the date of this order.

5. Aggrieved thereby, the petitioner first filed a review petition before the Tribunal. It was the petitioner's contention that on account of passage of time, if he had been in service, he would have superannuated on 2nd August, 1995 and that therefore, there was no question of his being in service or discharging duties thereafter. The petitioner sought review of the directions made by the court that pension would be paid only with effect from 18th February, 2013 when the writ petition challenging the court martial was allowed. This review petition came to be rejected by an order dated February, 2013 and 16th April, 2013 only to the extent that it denies 16th April, 2013.

6. The petitioner has challenged the judgment dated 18th him the

pensionary benefits between 2nd August, 1995 till 18th February, 2013. We have heard learned counsel for the parties.

7. The only reason for which the petitioner has been denied the consequential benefits is noted in the judgment dated 18th February, 2013. The Tribunal was of the view that the petitioner was disentitled to the financial benefits based on principle of "no work, no pay". It needs no elaboration that if the petitioner had continued in service in case the court martial had not intervened, petitioner would have superannuated and would not have been performing any duties after 2nd August, 1995.

8. Mr. J.S. Manhas, learned counsel appearing for the petitioner relies upon the decision of the Supreme Court reported at (1983) 1 SCC 305 **D.S. Nakara & Ors. v. Union of India** wherein it is held that the pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that pension is not an ex-gratia payment but it is a payment for the past service rendered. The relevant extract of the judgment is reproduced hereunder:-

> "19. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.
>
> 20. The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in **Deoki Nandan Prasad v. State of Bihar and Ors.** (1971) Supp. SCR 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any

such order but by virtue of the rules. This view was reaffirmed in **State of Punjab and Anr. v. Iqbal Singh** AIR 1976 SC 667.

xxx xxx xxx

32. From the discussion three things emerge : (i) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 rules which are statutory in character because they are enacted in of exercise of powers conferred by the proviso to Article 309and Clause (5) of Article 148 of the Constitution; (ii) that the pension is not an ex-gratia payment but it is a payment for the past service rendered ; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch. It must also be noticed that the quantum of pension is a certain percentage correlated to the average emoluments drawn during last three years of service reduced to ten months under liberalised pension scheme. Its payment is dependent upon an additional condition of impeccable behaviour even subsequent to retirement, that is, since the cessation of the contract of service and that it can be reduced or withdrawn as a disciplinary measure."

9. It is, therefore, trite that pension is vested right and cannot be taken away arbitrarily.

10. In the instant case, there was no question of discharging any duties after 2nd August, 1995. No fault can be attributed to the petitioner for not performing his duties but for the court martial which interdicted the petitioner's service. Thereafter, the matter has remained pending in court since 1993.

11. Before prayer for grant of back wages from 18th September, 1991 (when the petitioner was convicted by the Summary Court Martial) to 2nd August, 1995 (when he would have superannuated) is pressed. In this background, the petitioner would be legally entitled to pension with effect from 2nd August, 1995.

We accordingly direct as follows:

(i) the direction made by the Armed Forces Tribunal in the order dated 18th February, 2013 to the effect that the petitioner would be entitled to pension only with effect from the date of the order is contrary to law and is hereby set aside and quashed.

(ii) for the same reason, the order dated 16th April, 2013 is also set aside and quashed.

(iii) it is held that the petitioner would be entitled to computation of his pension and its payment with effect from 2nd August, 1995.

(iv) the respondents shall ensure that computation in terms of this direction is effected in accordance with applicable rules within four weeks from today and communicated to the petitioner.

(v) The payment shall be effected in terms of this order and released to the petitioner within a further period of four weeks thereafter.

This writ petition is allowed in the above terms.

Dasti to parties.

ILR (2013) VI DELHI 4184
W.P. (C)

SURESH RAM ....PETITIONER

VERSUS

UNION OF INDIA & OTHERS ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 4561/2013 DATE OF DECISION: 22.07.2013

Service Law—Armed Forces—Promotion—Denial of promotion because of colour blindness—Failure to abide by the directions issued by the court in the case

of Sudesh Kumar vs. UOI & Ors. and other similar writ petitions—Brief facts—Respondents issued a policy dated 18th May, 2012 regulating the continuance of such colour blind personnel in the Central Para Military Forces—Under the shield of this policy, respondents denied promotion to several personnel—This action was challenged—Directions of the court in judgment dated 28.02.2013 WP(C)No.356/2013, P. Suresh Kumar v. Union of India & Others—Respondents own thinking contained in the 3 Circulars dated—17.5.2002, 31.7.2002 and 11.3.2011—would continue to bind the parties—In view of this judgment—all the directions and orders impugned in the case which—denied the petitioners the chance or right to occupy the promotional posts were- quashed the respondents—directed to—issue orders wherever the promotions are effected—with effect form the date juniors were promoted—From the judgment dated 28.02.2013—court had specifically directed—not only the petitioners but "all others like them" to be conferred with full benefits of promotions as given to those who do not suffer from colour blindness—In the present case—the petitioner was recruited as Constable/GD on—03.07.1991 in the CRPF—was promoted on 28.03.2010—from the rank of Constable/GD to HC/GD—Four other also promoted—The petitioner complains—the respondents promoted the other four personnel who were promoted by the same Signal—the promotion was denied to the petitioner on the ground of colour blindness—Hence the present Writ Petition. Held—Given the aforenoticed adjudication and the circular issued by the respondents, the petitioner was entitled to be promoted in terms of the signal dated 28.03.2010—could not be denied promotion on the sole ground—that he was discovered to be colour blind at that stage—Petitioner cannot be denied the relief which he had sought in the writ petition. Accordingly—(i) The respondents directed to issue promotion order—

promotion the petitioner from the rank of Constable/GD to Head Constable/GD—with all benefits including seniority with effect—form the date his juniors were promoted—(ii) The petitioner entitled to all benefits which were granted to the four other persons by the signal dated 28.03.2010—The petitioner entitled to costs- Rs. 15,000/- to be paid along with next month salary to the petitioner.

We find substance in the petitioner's contention that given the aforenoticed adjudication and the circular issued by the respondents, the petitioner was entitled to be promoted in terms of the signal dated 28th March, 2010 and could not have been denied promotion on the sole ground that he was discovered to be colour blind at that stage. The petitioner has been repeatedly making representations to the respondents over these years but, let alone passing a favourable order, the pleas of the petitioner appears to have been fallen on deaf ears. **(Para 9)**

The petitioner cannot be denied the relief which he had sought in the writ petition.

We accordingly direct as follow:

(i) The respondents are directed to issue consequential promotion order promoting the petitioner from the rank of Constable/GD to Head Constable/GD with all consequential benefits including seniority with effect from the date his juniors were promoted.

(ii) The petitioner shall be entitled to all benefits which were granted to the four other persons (promoted with the petitioner) by the signal dated 28th March, 2010.

(iii) The petitioner shall be entitled to costs which are quantified at Rs.15,000/-. The same shall be paid along with next month salary to the petitioner.

(Paras 10)

Important Issue Involved: The court authoritatively decided the issue relating to colour blindness in respect of serving personnel writ the Central Para Military Forces whose colour blindness was discovered at the time when they were medically examined for promotional purpose—The court had issued clear directions to the respondents placing reliance on a policy circular dated 29th October, 2008 of the respondents which contained the beneficial policy of adjusting the members of the force who suffer from colour blindness, to be made to perform such duties where colour blindness is not a handicap—This policy deserves to be construed liberally and would apply to all personnel who were serving with the Central Para Military Forces.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Ankur Chhibber, Adv.

FOR THE RESPONDENT : Mr. Ravinder Agarwal, CGSC.

CASES REFERRED TO:

1. *P. Suresh Kumar* vs. *Union of India & Others* WP(C)No.356/2013.
2. *Mohan Lal Sharma* vs. *Union of India & Others* WP(C)No.11855/2009.

RESULT: Petition Allowed.

GITA MITTAL, J. (Oral)

1. The instant writ petition has been filed by the petitioner aggrieved by the failure of the respondents to abide by the directions made by this court as back as in the judgment dated 22nd March, 2011 in WP(C)No.5077/2008, **Sudesh Kumar v. Union of India and Another** and connected writ petitions. The court authoritatively decided the issue relating to colour blindness in respect of serving personnel with the Central Para Military Forces whose colour blindness was discovered at the time when they were medically examined for promotional purpose. The court had issued clear directions to the respondents. The respondents

were not only refusing promotion but were proceeding to board out such personnel who were discovered to be suffering from colour blindness.

This court placed reliance on a policy circular dated 29th October, 2008 of the respondents which contained the beneficial policy of adjusting the members of the force who suffer from colour blindness, to be made to perform such duties where colour blindness is not a handicap. It was held that this policy deserves to be construed liberally and would apply to all personnel who were serving with the Central Para Military Forces.

The challenge by the respondents was rejected by the Supreme Court.

2. Despite clear directives of the court, the respondents have proceeded arbitrarily in the cases of these petitioners. 3. The petitioners who were before this court in the judgment dated 22nd March, 2011 were otherwise fit for promotion. The respondents however issued a policy dated 18th May, 2012 regulating the continuance of such colour blind personnel in the Central Para Military Forces as well as the terms and condition of said service. Under the shield of this policy, the respondents were denying promotion to the several personnel and proposed to hold the Invalidating Medical Board to board out such personnel. This action of the respondents came to be challenged by way of WP(C)No.356/2013, **P. Suresh Kumar v. Union of India & Others.** and connected writ petitions which challenge was also accepted by this court on 28th February, 2013.

4. The following directions of the court in the judgment dated 28th February, 2013 are material for the purposes of the present petition:

> "9. It is, therefore, evident from the above extract that right from 2002 to 2008, the respondents were sensitive and alive to the fact that colour blind personnel recruited prior to 2002 could not be treated differently from their other colleagues who did not suffer from this disability as far as promotion and other conditions of the service were concerned. The doubts expressed from time to time, which were sought to be allayed in the form of Circular dated 29.10.2008 resulted in greater uncertainty and possibly some conflict. All these were given a quietus by the Circular dated 11.3.2011 which reiterated that promotional prospectus of colour blind personnel recruited by any of the forces would not

be prejudicially or adversely affected. One would have thought that in such state of affairs and with two adverse judgments by Division Bench, the matter would have ended. This Court is also conscious that the appeals by the respondents through special leave to the Supreme Court against the directions in **Sudesh Kumar's** case (supra) were unsuccessful; the SLPs were dismissed. It meant that not only did the petitioners in **Mohan Lal Sharma** and **Sudesh Kumar** cases acquire a right in the form of a declaration that they would not be treated differently from their other non-colour blind colleagues, such right also vested and inured in all similarly situated employees and personnel of all the forces. Such being the case, the respondents cannot now argue that in the form of the mere Circular – of 18.5.2012 or in that matter of 27.2.2012, the present petitioners, or those who had not approached the Court, but are found to have the same conditions as the petitioners in Mohan Lal Sharma's case, can be in any manner discriminated against. That some approached the Court whilst the others felt no compulsion to do so, can be no rationale for a valid classification. In fact, the entire class of colour blind personnel under such circumstance is indistinguishable. The respondents cannot treat the equals unequally by separating those who approached the Court and continue to give them promotions and other such benefits while denying the same to those who had not approached the Court and perhaps had no occasion to approach the Court on account of the declaration given. That would be plainly violation of Article 14 of the Constitution of India.

10. As a consequence of the above discussion, it is held that though the respondents have to some extent stated that posts suitable for colour blind personnel have been identified and allocated to accommodate their claims for promotion; it is hereby declared and directed that the effect of the previous judgments of the Court based on the respondents, own thinking contained in the three Circulars dated 17.5.2002, 31.7.2002 and 11.3.2011 would continue to bind the parties. There is, in fact, no denial in the facts situation warranting any different thinking. The petitioners and all others like them would be entitled to full benefits of promotions as is extended to those who do not suffer from

colour blindness impugned in the previous directions of this Court in **Mohan Lal Sharma** and **Sudesh Kumar's** case.

11. In view of the above discussion, all the directions and orders impugned in the present case which denied or deprived the petitioners the chance or right to occupy the promotional posts are hereby quashed. The respondents are directed to issue consequential orders wherever the promotions have been actually effected with effect from the date the petitioners, juniors were promoted."

5. We may note that in para 10 of the judgment dated 28th February, 2013, this court had specifically directed that not only the petitioners but *"all others like them"* would be entitled to full benefits of promotions as is extended to those who do not suffer from colour blindness in terms of the directions of this Court. Unfortunately, the respondents are miserably failing to abide the specific directives of the court compelling their personnel to repeatedly approach the court. 6. We may note that respondents issued a Circular dated 14th March, 2011 which is to the following effect:" Annexure R-1 reads as under:

GOVERNMENT OF INDIA
MINISTRY OF HOME AFFAIRS
PERS-II Desk

Subject: **Colour blindness.**

In continuation of this Ministry's UO of even number dated 29.10.2008 and in suppression of this Ministry's UO of even number dated 08.3.2011, on the subject cited above, the matter has been reconsidered in this Ministry and after taking into consideration comments of ADG(Med) CPFs, the competent authority has approved the following:

a) All duties where use of firearms/identification of various types of coloured signals/identification of criminals in mob/use of specialized equipments are not regularly required and public safety is not involved, may be defined as non-technical duties.

b) In MHA UO of even number dated 29.10.2008, word 'Non-technical Security Force' implies for 'Non-technical Security Duties' within the Force and does not mean creation of any

separate Non-technical Security Force.

2. It is further clarified that promotion of all such force personnel recruited with colour blindness prior to 17.5.2002 will continue to be governed by this Ministry's UO No.I-45020/52/2001-Pers-II dated 17.5.2002.

3. This issues with the approval of Secretary (IS)."

7. The petitioner has placed before this court further directions issued by this court on the 16th of March, 2011 in WP(C)No.11855/2009, **Mohan Lal Sharma v. Union of India & Others** issuing directions to the respondents to pass orders with respect to petitioner's promotion to the rank of Sub-Inspector with effect from the date his junior were promoted.

8. Before us, the petitioner was recruited as Constable/GD on 3rd July, 1991 in the CRPF and was promoted by a signal dated 28th March, 2010 from the rank of Constable/GD to HC/GD. Four other were also so promoted. The petitioner complains that the respondents have effectuated the order of other four personnel similarly situated as the petitioner who were promoted by the same signal, the promotion has been denied to the petitioner on the ground that he has been found to be colour blind in the medical examination conducted after he successfully completed the promotional cadre course.

9. We find substance in the petitioner's contention that given the aforenoticed adjudication and the circular issued by the respondents, the petitioner was entitled to be promoted in terms of the signal dated 28th March, 2010 and could not have been denied promotion on the sole ground that he was discovered to be colour blind at that stage. The petitioner has been repeatedly making representations to the respondents over these years but, let alone passing a favourable order, the pleas of the petitioner appears to have been fallen on deaf ears.

10. The petitioner cannot be denied the relief which he had sought in the writ petition.

We accordingly direct as follow:

(i) The respondents are directed to issue consequential promotion order promoting the petitioner from the rank of Constable/GD to Head Constable/GD with all consequential benefits including seniority with effect from the date his juniors were promoted.

(ii) The petitioner shall be entitled to all benefits which were granted to the four other persons (promoted with the petitioner) by the signal dated 28th March, 2010.

(iii) The petitioner shall be entitled to costs which are quantified at Rs.15,000/-. The same shall be paid along with next month salary to the petitioner.

ILR (2013) VI DELHI 4192
LPA.

VISHNU PAL SINGH **`....APPELLANT**

VERSUS

DELHI TOURISM AND TRANSPORTATION DEVELOPMENT CORPORATION **....RESPONDENT**

(BADAR DURREZ AHMED, ACJ. & VIBHU BAKHRU, J.)

LPA. NO. : 471/2013 **DATE OF DECISION: 24.07.2013**

CCS (Conduct) Rules, 1964—Delhi Excise Act—2009—Section 33—Appellant was facing departmental inquiry initiated by respondent and concerned Officers of respondent had also lodged FIR U/s 33 of Act against respondent—Respondent filed writ petition seeking stay of departmental inquiry pending criminal proceedings—Vide order dated 04/04/13, ad interim stay of departmental inquiry was vacated—Aggrieved appellant challenged said order and alleged disciplinary proceedings as well as FIR stem from same incident, so participation of appellant in departmental proceedings would seriously prejudice him in criminal trial. Held: There is no bar against an employer initiating

disciplinary proceedings against an employee for mis-conduct in relation to an offence which may also be a subject matter of criminal proceedings. However, in certain cases it may be advisable to stay the disciplinary proceedings, if the same are likely to cause prejudice to the employee in the criminal proceedings.

Although, the allegation on the basis of which both the departmental proceedings as well as the criminal proceedings have been initiated may be the same. However, the purpose of the two proceedings as well as the standards of proof required are entirely different. While, criminal proceedings are intended to take punitive measures in relation to offences committed by a person against the society, the disciplinary proceedings are intended to ensure that employees act honestly, maintain discipline and conform to the rules of conduct specified by the employer. **(Para 15)**

Important Issue Involved: There is no bar against an employer initiating disciplinary proceedings against an employee for mis-conduct in relation to an offence which may also be a subject matter of criminal proceedings. However, in certain cases it may be advisable to stay the disciplinary proceedings, if the same are likely to cause prejudice to the employee in the criminal proceedings.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Bharat Bhushan.

FOR THE RESPONDENTS : None.

CASES REFERRED TO:

1. *HPCL* vs. *Sarvesh Berry:* (2005) 10 SCC 471.
2. *M. Paul Anthony* vs. *Bharat Gold Mines Ltd:* AIR 1999 SC 1416.
3. *State of Rajasthan* vs. *B. K. Meena:* (1996) 6 SCC 417.

4. *Kusheshwar Dubey* vs. *Bharat Coking Coal Ltd.:* AIR 1988 SC 2118.
5. *Delhi Cloth and General Mills Ltd.* vs. *Kushal Bhan:* AIR 1960 SC 806.
6. *Shri Bimal Kanta Mukherjee* vs. *Messrs. Newsman's Printing Works,* 1956 Lab AC 188.

RESULT: Appeal dismissed.

VIBHU BAKHRU, J

1. This is an appeal filed by the Vishnu Pal Singh seeking to challenge the order dated 04.04.2013 passed by a learned Single Judge in W.P.(C) No.5331/2012. By the order dated 04.04.2013 impugned in the present proceedings, a learned Single Judge of this Court has vacated the ad interim order passed on 14.09.2012 staying the departmental inquiry initiated against the appellant. By the order dated 04.04.2013, the learned Single Judge has permitted the continuation of departmental proceedings, albeit, with a condition that any order passed pursuant to the departmental proceedings would not be implemented without the permission of the Court.

2. The appellant is an employee of the respondent corporation and at the material time was employed as a store keeper and is alleged to have been incharge of a liquor vend owned by the respondent situated at Deshbandhu Gupta Road, New Delhi. It is alleged that the officers of the respondent corporation received information that a certain quantity of liquor in excess of the transport permit had been off loaded at the liquor vend on 30.07.2011 which was under the charge of the appellant at the material time. It is alleged that based on the information, officers of the respondent corporation visited the liquor vend and conducted a search of the stocks as well as the cash available in the cash box. It is alleged that the stocks of liquor available at the liquor vend as well as the cash available in the cash boxes were found to be in excess. The inference drawn by the respondent is that the appellant was involved in illegal sale of liquor from the vend.

3. Pursuant to the search conducted on 30.07.2011, the concerned officer of the respondent corporation also lodged an FIR bearing No.156/2011 at P.S. Deshbandhu Gupta Road, New Delhi under Section 33 of

the Delhi Excise Act, 2009. The incident of 30.07.2011 has also resulted in the respondent corporation framing a charge of gross misconduct against the appellant. The appellant has been charged with failure to maintain absolute integrity and is alleged to have exhibited conduct unbecoming of a government servant and thus violated Rule 3 of the CCS (Conduct) Rules read with Rule 11 of DTTDC's Staff Service Rules, 1986. The Article of charge as well as the statement of imputation has been served upon the appellant and an inquiry is currently being conducted by the respondent pursuant to the charge framed.

4. The appellant has contended that the disciplinary proceedings as well as the FIR bearing No.156/2011 stem from the same incident of search being conducted on 30.07.2011. The allegations made against the appellant in both the proceedings are identical and based on the allegation that excess stock and excess cash was found at the liquor vend which was under supervision of the appellant at the material time. It is contended on behalf of the appellant that the charges involved are grave and involve complicated questions of fact and law. Whilst examination of witnesses in the criminal case is likely to take some time, the departmental proceedings have commenced. It is urged on behalf of the appellant that participation of the appellant in the departmental proceedings would seriously prejudice the appellant in the criminal trial. The counsel for the appellant has relied upon a decision of the Supreme Court in the case of Captain **M. Paul Anthony v. Bharat Gold Mines Ltd:** AIR 1999 SC 1416 in support of his contention that in cases where departmental proceedings and criminal proceedings arise out of the same alleged set of facts, the departmental proceedings should be stayed in order that the defence of the accused is not prejudiced in the criminal trial.

5. We have heard the learned counsel for the appellant.

6. The question whether disciplinary proceedings can be allowed to proceed in cases where a criminal trial based on similar allegations is pending has come up before the Courts on various occasions. In the case of **Delhi Cloth and General Mills Ltd. v. Kushal Bhan:** AIR 1960 SC 806, the Supreme Court considered a case where the respondent had been accused of stealing a bicycle. Whilst, the employer instituted disciplinary proceedings against the respondent employee, the allegation of theft was also made the subject matter of a criminal case. Although, the respondent appeared before the inquiry committee, he refused to

answer any questions on the ground that a criminal case was pending against him. The inquiry was completed and the respondent was found guilty and consequently, dismissed from services. In the meantime, the criminal court acquitted the respondent of the alleged offence of stealing a bicycle. The employer approached the Labour Appellate Tribunal for approval of the punishment of dismissal which was rejected by the Labour Tribunal. A Special Leave Petition was preferred by the employer. The Supreme Court set aside the order of the Tribunal and granted approval to the order passed by the employer dismissing the services of the respondent. While, allowing the appeal, the Supreme Court held as under:

> "(3) It is true that very often employers stay enquiries pending the decision of the criminal trial courts and that is fair; but we cannot say that principles of natural justice require that an employer must wait for the decision at least of the criminal trial court before taking action against an employee. In **Shri Bimal Kanta Mukherjee v. Messrs. Newsman's Printing Works,** 1956 Lab AC 188, this was the view taken by the Labour Appellate Tribunal. We may, however, add that if the case is of a grave nature or involves questions of fact or law, which are not simple, it would be advisable for the employer to await the decision of the trial court, so that the defence of the employee in the criminal case may not be prejudiced."
>
> (emphasis supplied)

7. It is also relevant to refer to the decision of the Supreme Court in the case of **State of Rajasthan v. B. K. Meena:** (1996) 6 SCC 417. In that case, the Supreme Court noted several other decisions and held as under:

> "14. It would be evident from the above decisions that each of them starts with the indisputable proposition that there is no legal bar for both proceedings to go on simultaneously and then say that in certain situation, it may not be 'desirable', 'advisable' or 'appropriate' to proceed with the disciplinary enquiry when a criminal case is pending on identical charge. The staying of disciplinary proceedings, it is emphasised, is a matter to be determined having regard to the facts and circumstances of a given case and that no hard and fast rules can be enunciated in

that behalf. The only ground suggested in the above decisions as constituting a valid ground for staying the disciplinary proceedings is that "the defence of the employee in the criminal case may not be prejudiced". This ground has, however, been hedged in by providing further that this may be done in cases of grave nature involving questions of fact and law. In our respectful opinion, it means that not only the charges must be grave but that the case must involve complicated questions of law and fact. Moreover, 'advisability', 'desirability' or 'propriety', as the case may be, has to be "determined in each case taking into consideration all the facts and circumstances of the case. The ground indicated in **D.C.M.,** AIR 1960 SC 806 and **Tata Oil Mills,** AIR 1965 SC 155 is also not an invariable rule. It is only a factor which will go into the scales while judging the advisability or desirability of staying the disciplinary proceedings. One of the contending considerations is that the disciplinary enquiry cannot be -and should not be -delayed unduly. So far as criminal cases are concerned, it is well known that they drag on endlessly where high officials or persons are involved. They get bogged down on one or the other ground. They hardly ever reach a prompt conclusion. That is the reality in spite of repeated advice and admonitions from this Court and the High Courts. If a criminal case is unduly delayed that may itself be a good ground for going ahead with the disciplinary enquiry even where the disciplinary proceedings are held over at an earlier stage. The interests of administration and good government demand that these proceedings are concluded expeditiously. It must be remembered that interests of administration demand that undesirable elements are thrown out and any charge of misdemeanour is inquired into promptly. *The disciplinary proceedings are meant not really to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements.* The interest of the delinquent officer also lies in a prompt conclusion of the disciplinary proceedings. If he is not guilty of the charges, his honour should be vindicated at the earliest possible moment and if he is guilty, he should be dealt with promptly according to law. It is not also in the interest of administration that persons accused of serious misdemeanour should be continued in office indefinitely, i.e., for long periods

awaiting the result of criminal proceedings. It is not in the interest of administration. It only serves the interest of the guilty and dishonest. While it is not possible to enumerate the various factors, for and against the stay of disciplinary proceedings, we found it necessary to emphasise some of the important considerations in view of the fact that very often the disciplinary proceedings are being stayed for long periods pending criminal proceedings. Stay of disciplinary proceedings cannot be, and should not be, a matter of course. All the relevant factors, for and against, should be weighed and a decision taken keeping in view of the various principles laid down in the decisions referred to above."

8. It is thus, now well settled that there is no bar against an employer initiating disciplinary proceedings against an employee for misconduct in relation to an offence which may also be a subject matter of criminal proceedings. However, in certain cases it may be advisable to stay the disciplinary proceedings, if the same are likely to cause prejudice to the employee in the criminal proceedings. Each case has to be considered on its own facts and as held by the Supreme Court in the case of **Kusheshwar Dubey v. Bharat Coking Coal Ltd.:** AIR 1988 SC 2118:-

> "6. .....it is neither possible nor advisable to evolve a hard and fast straight-jacket formula valid for all cases and of general application without regard to the particularities of the individual situation."

9. In the case of **M. Paul Anthony** (supra), the Supreme Court was considering the case of a security officer employed with Bharat Gold Mines Ltd. The residence of the security officer was raided by the police and a mining sponge gold ball weighing 4.5 grams and 1276 grams of 'gold bearing sand' were recovered. The security officer was placed under suspension and disciplinary proceedings were commenced. The officer was found guilty of misconduct and consequently dismissed from service. Subsequently, the criminal Court acquitted the security officer and on basis of the acquittal he asked for reinstatement in service which was rejected. The security officer (appellant therein) challenged the denial of reinstatement before the High Court, where he was unsuccessful. He, therefore, approached the Supreme Court. The Supreme Court held that it would be "'unjust', 'unfair' and 'rather oppressive'" to allow findings recorded in the departmental proceedings to stand as there was no

difference in the facts and evidence in the departmental and the criminal proceedings. The Supreme Court also took note of various earlier decisions passed by the Supreme Court and summarized the law as under:

> "22. The conclusions which are deducible from various decisions of this Court referred to above are:
>
> (i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.
>
> (ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.
>
> (iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge sheet.
>
> (iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.
>
> (v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, administration may get rid of him at the earliest."

10. Before considering the facts of the present case we may also refer to the decision of the Supreme Court in the case of **HPCL v. Sarvesh Berry:** (2005) 10 SCC 471. In this case the respondent was charged as being in possession of assets disproportionate to his known

sources of income. A criminal case was registered by CBI and while, the same was pending, the employer (appellant therein) initiated disciplinary proceedings against the respondent employee. A Division Bench of the Andhra Pradesh High Court stayed the departmental proceedings till completion of the criminal case. On appeal, the Supreme Court set aside the decision of the High Court and held as under:

> "8. The purposes of departmental enquiry and of prosecution are two different and distinct aspects. Criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So, crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of a grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act, 1872 (in short the "Evidence Act"). Converse is the case of departmental enquiry. The enquiry in departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the departmental enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending

on its own facts and circumstances."

11. In view of the above settled law, the only question that is necessary to be examined in the present case is whether the charges in the present case are of a grave nature and which involve complicated questions of fact and law. It is further, to be considered whether conduct of the departmental inquiry would prejudice the appellant in the criminal proceedings initiated against him.

12. While, it is alleged in the writ petition that participation of the appellant in the departmental proceedings would cause serious prejudice to him in the criminal trial, no further particulars have been provided as to how the appellant would be prejudiced. Similarly, a bald statement is made that the charges are grave and involve complicated questions of fact and law but the appellant has failed to indicate the questions of law which he considers to be complicated. Similarly, there is no averment as to the facts which are contended to present complications. Although, it is not expected that the appellant should disclose his defence, however, in order for the Court to appreciate and assess whether the case presents complicated questions of fact and law, it would be necessary for the appellant to briefly indicate why he claims that the question of facts and law are complicated. The writ petition filed by the appellant is silent in this respect.

13. The appellant has, further, claimed that the facts, on the basis of which, the charge-sheet has been filed both in the departmental proceedings as well as in the criminal proceedings are essentially based on the same allegations and, the witnesses are also common. The respondent in the affidavit filed in response to the writ petition, has pointed out that there are only six witnesses which are to depose in the disciplinary proceedings while, in the criminal case twenty witnesses have been named and only three witnesses are common with the witnesses named in the departmental proceedings. The respondent has, further, contested the claim of the appellant that the matter involves complicated questions of law and fact.

14. The allegations against the appellant are essentially that the appellant had been selling illegal liquor from the vend in his charge. The evidence against the appellant also essentially revolves around the excess stock and cash alleged to have been found during the search conducted at the vend on 30.07.2011. In our view, the facts relating to the allegations

cannot be stated to be complicated. We also are unable to foresee any complicated questions of law arising in the matter.

15. Although, the allegation on the basis of which both the departmental proceedings as well as the criminal proceedings have been initiated may be the same. However, the purpose of the two proceedings as well as the standards of proof required are entirely different. While, criminal proceedings are intended to take punitive measures in relation to offences committed by a person against the society, the disciplinary proceedings are intended to ensure that employees act honestly, maintain discipline and conform to the rules of conduct specified by the employer. We do not think that facts of the present case warrant any interference in the conduct of the disciplinary proceedings by the respondent. We also note the assertion made by the appellant that the criminal proceedings are likely to take some time. In our view, it would not be apposite to delay domestic proceedings to await progress in the criminal proceedings.

16. We, accordingly, dismiss the present appeal. The parties are left to bear their own costs.

ILR (2013) VI DELHI 4202
W.P. (C)

HARIPAL SINGH ....PETITIONER

VERSUS

THE CHIEF OF THE ARMY STAFF & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 4659/2013 DATE OF DECISION: 26.07.2013

Service Law—Armed Forces—Promotion—Denial of Promotion—Assessment endorsed by the Reviewing Officer on ACRs—Brief Facts—Petitioner was enrolled as Driver (MT) on 2nd October, 1982 and was thereafter

promoted to the rank of Naik on 1st December, 1997 and thereafter on 1st April, 2003 to the post of Havildar—Petitioner qualified the mandatory promotion cadre on 27th May, 2005 and claims that he became eligible to the rank of Naib Subedar in terms of policy decision dated 10th October, 1997 of the respondents—So far as the criterion for promotion to the rank Naib Subedar is concerned, as per the policy decision dated 10th October, 1997, the last five ACRs of the personnel are required to be considered—out of these five ACRs at least three have to be in the rank of Havildar and in case of shortfall, the rest may be in the rank of Naik—In three ACRs out of five reports which have to be considered, the personnel under consideration should have been assessed "at least above average" with a minimum of two such reports in the rank of Havildar—Petitioner was promoted to the rank of Havildar on 1st April, 2003 and earned the three requisite mandatory minimum ACRs only in the year 2005—In the above circumstances, the petitioner became eligible for consideration for promotion to the post of Naib Subedar only after having passed the mandatory promotion cadre course on 27th May, 2005—In the ACR for the period 2004-2005, the Initiating Officer had graded the petitioner as "above average"—However, on the review by the reviewing authority, the Same was graded down to "high average" by the Reviewing Officer—Further in the year 2004 as well, the petitioner was graded "high average"—However, his reports from the year 2001 to 2003 in the rank of Lance Havildar were "above average"—Petitioner being aggrieved filed a non statutory complaint which was rejected by an order dated 26th June, 2008—Assailed by the petitioner by way of a Writ Petition (Civil) no.8004/2008 before this court and was disposed of by this court vide an order dated 16th December, 2008 quashing the decision dated 26th June, 2008 with directions for re-examination of the matter by a

different officer—After a detailed reconsideration, the petitioner's non-statutory complaint was rejected by the respondents by an order dated 16th February, 2007 which was challenged by way of a statutory petition dated 20th June, 2009 addressed to the Chief of Army Staff which was returned by the respondents by an order dated 3rd September, 2009—Petitioner challenged the order of 3rd September, 2009 before the Armed Forces Tribunal and the same was rejected by an order passed on 6th September, 2011—Tribunal's order dated 6th September, 2011 was accepted by both parties. The respondents revisited the entire matter again and have thereafter passed a detailed order 18th July, 2012—This order was again challenged by the petitioner by a second petition before the Armed Forces Tribunal and was rejected—Aggrieved thereby the petitioner has challenged the same before this court by way of the present petition. Held—The primary challenge in the present with petition is writ regard to his grading in the ACR for the years 2004-2005. So far as the ACR for the year 2004 whereby the petitioner was graded as "High Average" is concerned, the petitioner had challenge the same before the Armed Forces Tribunal—A reading of the order dated 6th September, 2011 passed by the Tribunal would show that no challenge was pressed writ regard to the ACR for the year 2004 inasmuch as there is no mention of the same either in the contentions of either side or in the adjudication—Petitioner has accepted the outcome by the judgment dated 6th September, 2011 of the Armed Forces Tribunal and did not assail it on any ground—In this background, the petitioner has lost the right to challenge the ACR of the year 2004—So far as the ACR of the year 2005 is concerned, the petitioner has been challenged, as noticed above, his grading as "above average" by the Initiating Officer—However, he was reviewed by the Group Commander/Co Col.Surender Sharma and his

grading was downgraded to "high average"—This is in consonance with the grading which was recorded in the year 2004—Before this court, the petitioner has challenged his promotion on the exact ground which was raised before the Armed Forces Tribunal in the first application being O.A.No.345/2010—The findings therein have attained finality—petitioner was considered by the Regimental Unit Promotion Board for the year 2005—2006 for promotion to the rank Naib Subedar but could not be selected by the Promotion Board since "he was lacking in the mandatory criteria of having a minimum of two "above average" assessment in the rank of Hav. as assessment in two out of three available reports in the rank of Hav. were "high average"—The findings of the Tribunal are in terms of the policy of the respondents—The respondents could not have ignored the petitioner's ACR for year 2004-2005 while considering the petitioner for promotion to the post of Naib Subedar for the year 2005-2006—The impugned order and the action of the respondent cannot be faulted on any legally tenable grounds and the challenge thereto is misconceived. This writ petition is, therefore, dismissed.

After a detailed reconsideration, the petitioner's non-statutory complaint was rejected by the respondents by an order dated 16th February, 2007 which was challenged by way of a statutory petition dated 20th June, 2009 addressed to the Chief of Army Staff which was returned by the respondents by an order dated 3rd September, 2009. **(Paras 6)**

The petitioner challenged the order of 3rd September, 2009 before the Armed Forces Tribunal in O.A.No.345/2010. This challenge was rejected by an order passed on 6th September, 2011. The operative part of the order, inasmuch as it has material bearing on the challenge in the present writ petition, deserves to be set out in extenso and reads as follows:

"Now coming to the question with regard to the ACR

for the period 2004-05 is concerned, we have seen the ACRs of the petitioner prior to 2004-05 and we find that the incumbent used to get above average prior to 2004-05. He has been down graded from Above Average to High Average by the RO. We cannot go into the allegations as the RO who has reviewed his ACR during that period is not a party before us. However learned counsel for the petitioner modulated his arguments that his case has been considered for the vacancy of the period from December, 2005 to November, 2006. Therefore, his ACR must have been taken into consideration for the period upto 2004 only and not of 2005. If his ACR for the year 2005 is not taken into consideration perhaps he could have made it. He has also submitted that he made a statutory complaint also which was not considered by the respondents on the ground that meanwhile the petitioner has retired. Be that as it may, it is a fact that the petitioner was senior to K.N.Pandey and if the vacancy was of 2005 and the ACR upto 2004 was to be considered then the ACR for the year 2005 was not to be considered. We are not informed that what was the provision of relevant time for writing ACR and ACR of upto which period should be considered. Therefore, we direct that let the case of the petitioner be re-considered for the post of Naib Subedar on the basis of the ACRs especially with reference to the period 2005 but that depends upon the norms of the ACRs obtained at the relevant point of time. The petition is allowed in part and we direct the respondents to consider the petitioner as per the rules or orders bearing on the subject for the post of Naib Subedar as far as possible within a period of three months. No order as to costs."

(Paras 7)

It appears that the respondents have thereafter considered the matter afresh and have passed the Speaking Order

dated 18th July, 2012 which has been assailed by way of the present writ petition. **(Paras 8)**

We find that the Tribunal's order dated 6th September, 2011 was accepted by both parties. The respondents revisited the entire matter again and have thereafter passed a detailed order dated 18th July, 2012. This order was again challenged by the petitioner by a second petition before the Armed Forces Tribunal which came to be registered as O.A.No.429/2012 and rejected vide a judgment dated 1st May, 2013. Aggrieved thereby the petitioner has challenged the same before this court by way of the present petition. **(Paras 9)**

Both parties rely on the various orders which have been passed by this court and the Armed Forces Tribunal. We have heard learned counsel for the parties. The primary challenge in the present writ petition is with regard to his grading in the ACR for the years 2004-2005. So far as the ACR for the year 2004 whereby the petitioner was graded as "High Average" is concerned, we are informed that the petitioner had challenge the same before the Armed Forces Tribunal by way of O.A.No.345/2010. **(Paras 10)**

Important Issue Involved: Denial of Promotion—Assessment endorsed by the Reviewing Officer on ACRs—When no challenge was pressed with regard to the ACR for the year 2004 inasmuch as there is no mention of the same either in the contentions of either side or in the adjudication, the petitioner has lost the right to challenge the ACR of the year 2004.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. N.L. Bareja, Adv.

FOR THE RESPONDENT : Mr. Anil Gautam, Adv.

RESULT: Writ Petition Dismissed.

GITA MITTAL, J. (Oral)

1. By the instant writ petition, the petitioner has challenged the order dated 1st May, 2013 passed by the Armed Forces Tribunal in O.A.No.429/2012 rejecting the petitioner's challenge to the order dated 18th July, 2012 whereby the case of the petitioner for promotion from the post of Havildar to Naib Subedar from the date when Hav.K.N.Pandey being junior to the petitioner was promoted, has been rejected. The petitioner has also prayed for setting aside the assessment endorsed by the Reviewing Officer on the petitioner's ACRs for the year 2004 and 2005.

2. The petitioner was enrolled as Driver (MT) on 2nd October, 1982 and was thereafter promoted to the rank of Naik on 1st December, 1997 and thereafter on 1st April, 2003 to the post of Havildar. It is the admitted position that the petitioner qualified the mandatory promotion cadre on 27th May, 2005 and claims that he became eligible to the rank of Naib Subedar in terms of policy decision dated 10th October, 1997 of the respondents. It is also an admitted position that so far as the criterion for promotion to the rank Naib Subedar is concerned, as per the policy decision dated 10th October, 1997, the last five ACRs of the personnel are required to be considered.

3. It is undisputed that out of these five ACRs at least three have to be in the rank of Havildar and in case of shortfall, the rest may be in the rank of Naik. The respondents have also specified that in three ACRs out of five reports which have to be considered, the personnel under consideration should have been assessed "at least above average" with a minimum of two such reports in the rank of Havildar. This, of course, is in addition to the individual having passed the promotion cadre course. As noted above, the petitioner was promoted to the rank of Havildar on 1st April, 2003 and earned the three requisite mandatory minimum ACRs only in the year 2005. In the above circumstances, the petitioner became eligible for consideration for promotion to the post of Naib Subedar only after having passed the mandatory promotion cadre course on 27th May, 2005.

4. It appears that in the ACR for the period 2004-2005, the Initiating Officer had graded the petitioner as "above average". However, on the review by the reviewing authority, the same was graded down to "high average" by the Reviewing Officer Col.Surender Sharma. The record

placed before us by the petitioner shows that further in the year 2004 as well, the petitioner was graded "high average". However, his reports from the year 2001 to 2003 in the rank of Lance Havildar were "above average".

5. The petitioner was aggrieved by the review of his ACR by the Reviewing Officer for the year 2004-2005. He consequently filed a non statutory complaint dated 7th September, 2006 which was rejected by an order dated 26th June, 2008. This was assailed by the petitioner by way of a Writ Petition (Civil) no.8004/2008 before this court and was disposed of by this court vide an order dated 16th December, 2008 quashing the decision dated 26th June, 2008 with directions for re-examination of the matter by a different officer within a maximum period of three months from the date of the order.

6. After a detailed reconsideration, the petitioner's non-statutory complaint was rejected by the respondents by an order dated 16th February, 2007 which was challenged by way of a statutory petition dated 20th June, 2009 addressed to the Chief of Army Staff which was returned by the respondents by an order dated 3rd September, 2009.

7. The petitioner challenged the order of 3rd September, 2009 before the Armed Forces Tribunal in O.A.No.345/2010. This challenge was rejected by an order passed on 6th September, 2011. The operative part of the order, inasmuch as it has material bearing on the challenge in the present writ petition, deserves to be set out in extenso and reads as follows:

> "Now coming to the question with regard to the ACR for the period 2004-05 is concerned, we have seen the ACRs of the petitioner prior to 2004-05 and we find that the incumbent used to get above average prior to 2004-05. He has been down graded from Above Average to High Average by the RO. We cannot go into the allegations as the RO who has reviewed his ACR during that period is not a party before us. However learned counsel for the petitioner modulated his arguments that his case has been considered for the vacancy of the period from December, 2005 to November, 2006. Therefore, his ACR must have been taken into consideration for the period upto 2004 only and not of 2005. If his ACR for the year 2005 is not taken into consideration perhaps he could have made it. He has also submitted that he made a statutory complaint also which was not considered by the respondents on the ground that meanwhile the petitioner has retired. Be that as it may, it is a fact that the petitioner was senior to K.N.Pandey and if the vacancy was of 2005 and the ACR upto 2004 was to be considered then the ACR for the year 2005 was not to be considered. We are not informed that what was the provision of relevant time for writing ACR and ACR of upto which period should be considered. Therefore, we direct that let the case of the petitioner be re-considered for the post of Naib Subedar on the basis of the ACRs especially with reference to the period 2005 but that depends upon the norms of the ACRs obtained at the relevant point of time. The petition is allowed in part and we direct the respondents to consider the petitioner as per the rules or orders bearing on the subject for the post of Naib Subedar as far as possible within a period of three months. No order as to costs."

8. It appears that the respondents have thereafter considered the matter afresh and have passed the Speaking Order dated 18th July, 2012 which has been assailed by way of the present writ petition.

9. We find that the Tribunal's order dated 6th September, 2011 was accepted by both parties. The respondents revisited the entire matter again and have thereafter passed a detailed order dated 18th July, 2012. This order was again challenged by the petitioner by a second petition before the Armed Forces Tribunal which came to be registered as O.A.No.429/2012 and rejected vide a judgment dated 1st May, 2013. Aggrieved thereby the petitioner has challenged the same before this court by way of the present petition.

10. Both parties rely on the various orders which have been passed by this court and the Armed Forces Tribunal. We have heard learned counsel for the parties. The primary challenge in the present writ petition is with regard to his grading in the ACR for the years 2004-2005. So far as the ACR for the year 2004 whereby the petitioner was graded as "High Average" is concerned, we are informed that the petitioner had challenge the same before the Armed Forces Tribunal by way of O.A.No.345/2010.

11. We have noted the above directions of the Armed Forces Tribunal. A reading of the order dated 6th September, 2011 passed by the Tribunal

would show that no challenge was pressed with regard to the ACR for the year 2004 inasmuch as there is no mention of the same either in the contentions of either side or in the adjudication. It is also found that the petitioner has accepted the outcome by the judgment dated 6th September, 2011 of the Armed Forces Tribunal and did not assail it on any ground. In this background, the petitioner has lost the right to challenge the ACR of the year 2004. So far as the ACR of the year 2005 is concerned, the petitioner has been challenged, as noticed above, his grading as "above average" by the Initiating Officer. However, he was reviewed by the Group Commander/CO Col.Surender Sharma and his grading was downgraded to "high average". This is in consonance with the grading which was recorded in the year 2004. Be that as it may, the petitioner has alleged that his junior Havildar K.N.Pandey was directly working under the Reviewing Officer as a Driver and as such the Reviewing Officer was biased against the petitioner and was in his favour. The petitioner appears to have stated before the Tribunal that he has also been censured by the said Col.Surender Singh.

12. We have set out in extenso the findings of the Tribunal on this challenge. The Tribunal has noted that the allegations of malafide and bias against the Reviewing Officer could not be entertained or adjudicated for the reason that the petitioner had failed to make him party respondent.

The petitioner accepted the outcome of his challenge and has not assailed the final order dated 6th September, 2011.

13. Mr.Bareja, learned counsel for the petitioner submits that he has impleaded Col.Surender Sharma as party respondent in O.A.No.429/2012. In our view, the same is inconsequential, inasmuch as, the petitioner having challenged the grading awarded to him by the said officer in the year 2005 in his first application being O.A.No.345/2010, adjudication wherein had attained finality, could not have legally raised/challenged the same by way of a second petition before the tribunal. Before us the petitioner has challenged his promotion on the exact ground which was raised before the Armed Forces Tribunal in the first application being O.A.No.345/2010. The findings therein have attained finality.

14. The respondents have considered matter in the light of directions made in the order dated 6th September, 2011 and had recorded a detailed speaking order dated 18th July, 2012. The material facts, which we have noted are set out in the order. The order notes that the petitioner passed

the mandatory promotion cadre course only on 27th May, 2005 vide order dated 22nd June, 2005 and became eligible for the promotion of Naib Subedar only thereafter.

15. In these circumstances, the petitioner was considered by the Regimental Unit Promotion Board for the year 2005-2006 for promotion to the rank Naib Subedar but could not be selected by the Promotion Board since "he was lacking in the mandatory criteria of having a minimum of two 'above average' assessment in the rank of Hav. as assessment in two out of three available reports in the rank of Hav. were "high average' ".

16. This finding in the speaking order dated 18th July, 2012 is in consonance with the consideration which the respondents are required to undertake in terms of the policy decision dated 10th October, 1997 which we have noted above and which is undisputed.

17. We have also noted above the ACR grading of the petitioner for five ACRs before his consideration by the Board for the year 2005-2006. The petitioner's challenge to the above came to be rejected by the order dated 1st May, 2013 which is impugned before us. We find that the Tribunal has agreed with the reasoning recorded in the order dated 18th July, 2012. The findings of the Tribunal are in terms of the policy of the respondents. The respondents could not have ignored the petitioner's ACR for year 2004-2005 while considering the petitioner for promotion to the post of Naib Subedar for the year 2005-2006.

18. The impugned order and the action of the respondent cannot be faulted on any legally tenable grounds and the challenge thereto is misconceived. This writ petition is, therefore, dismissed.

ILR (2013) VI DELHI 4213
W.P. (C)

NARENDER SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 4562/2013 DATE OF DECISION: 31.07.2013

Service Law—Financial upgradation under Assured Career Progression Scheme—As per ACP Scheme, an employee is required to have completed 12 years of service from the date of appointment to a post without any promotional financial benefit made available to him and should have also successfully undertaken Promotional Cadre Course—Petitioner became eligible for grant of financial upgradation on 10.04.2004 and was offered opportunity to undergo PCC in June, 2004 but failed in the same and finally qualified PCC in 2005—However, respondent cancelled the ACP benefit given w.e.f. 10.04.2004—Petitioner filed writ petition to seek restoration of the ACP benefit w.e.f. 10.04.2004—Held, in view of law laid down by the Court in WP(C) 6937/10, the petitioner could not be deprived of the financial upgradation.

The court thus held that the respondents were in greater default for not having detailed the petitioner for the PCC till November, 2004. The petitioner completed twelve years of service on 10th April, 2004 when he was granted the first financial upgradation. After April, 2004, the present petitioner was detailed for undertaking PCC only in June, 2004. It is an admitted position that the petitioner accepted this offer but was unsuccessful. He was offered his second chance and has successfully undertaken the PCC vide Order No. 01/

2005 dated 08.06.2005 of the respondents. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes. **(Para 15)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Subhasish Mohanty, Advocate.

FOR THE RESPONDENTS : Mr. Saqib, Advocate.

CASES REFERRED TO:

1. *Hargovind Singh* vs. *Central Industrial Security Force* W.P.(C)6937/2010.
2. *Bhagwan Singh* vs. *UOI & Ors.* W.P.(C) No.8631/2009.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

1. The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as "ACP") w.e.f. 10th April, 2004 when he completed 12 years of service with Central Industry Security Force (herein after referred as "CISF") and became entitled for grant of second financial upgradation as per MACP Scheme w.e.f.10th April, 2012.

2. The undisputed facts in the instant case giving rise to the writ petition are enumerated that as per the ACP scheme other than completion of 12 years of continuous service in the post of Constable, an employee of the CISF is required to have completed 12 years from the date of appointment to a post without any promotional financial benefit being made available to him and he should have also successfully undertaken the Promotion Cadre Course (herein after referred to as "PCC").

3. The petitioner has stated that an employee is granted three chances for successful completion of promotion cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

4. Learned counsel for the petitioner submits that the petitioner had completed 12 years of service on 10th April, 2004 and was offered an opportunity to undergo PCC pursuant to an offer made only in June, 2004. The petitioner unfortunately failed in the first attempt in the PCC,

but qualified in the supplementary PCC vide Order of the Respondent no.01/2005 dated 08.06.2005.

5. It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 10th April, 2004. The record placed before us shows that the petitioner successfully qualified the promotional cadre course and the result of the same was informed on 8th June, 2005 by the respondent.

6. It appears that prior thereto the respondents have issued an order dated 9th October , 2004 whereby the ACP benefit granted to the petitioner w.e.f. 10th April 2004 was cancelled due to his failure in the promotion cadre course which was held w.e.f. June, 2004 which he has undertaken as his first chance. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 10th April 2004. The petitioner's representations to respondents were of no avail. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner vide order no. Comdt. SSTPS Shakti Nagar S.O. No. 42/ 2005 dt. 23rd July 2005 which was made effective only from 18th July, 2005. The petitioner was thus denied the benefit of the financial upgradation w.e.f. 10th April, 2004 to 17th July 2005, from which date he was granted the first financial upgradation.

7. Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already completed on 10th April 2004. The manner in which the respondents worked the ACP Scheme is that the effective date for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 10th April, 2004 when he completed 12 years of continuous service in the rank of Constable without any opportunity for

promotion to the next post of Head Constable being made available to him till 10th April 2004. It is submitted that as per the Scheme of the respondents, every employee is given three opportunities to complete PCC. As such, the inability to successfully complete the PCC in the first or second attempt would render the petitioner eligible for a third opportunity.

8. So far as withdrawal of financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme to the date of stoppage of such financial up-gradation. Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is pointed out that the respondents have themselves drawn a distinction between "stoppage" of the financial upgradation and "withdrawal" of the amount given as the benefit thereunder.

9. In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 **Hargovind Singh v. Central Industrial Security Force.** In this case, the petitioner was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is note-worthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course

commencing on 15.11.2009 for which he expressed his unwillingness to attend the course on 29.10.2004."

10. This very contention is urged before us. Just as the present case in hand, the petitioner Hargovind Singh also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which was withdrawn. On this aspect, in **Hargovind Singh's** case (supra) the court has ruled on the respondents. contention urged before us as well, commented on the responsibility of the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus :

"8. Learned counsel for the respondent would urge that the issue at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**

9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.

10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under:-

"10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. IN regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the

ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted

that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

11. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 10th April, 2004 which was actually granted to him. So far his being given an opportunity to undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on June, 2004.

12. Undoubtedly for the reasons recorded in **Hargobind Singh's** case (supra), an employee cannot be deprived of the financial upgradation for the period for which an employee is unable and unwilling to undergo the PCC Course. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in Hargovind Singh's case as well as the present case. The completion of the promotion cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

13. On this aspect, we may usefully extract the observations of the Division Bench judgment in **Hargovind Singh's** case (supra) which are in consonance with the facts of the present case.

14. So far as failure of the petitioner to undertake the promotion cadre course for which he was detailed in June 2004 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be "a technical default". On this aspect it was held as follows:-

"14 As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word "unwilling" would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the

petitioner he had sought for and was granted leave to proceed to his native village.

15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.

16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing".

15. The court thus held that the respondents were in greater default for not having detailed the petitioner for the PCC till November, 2004. The petitioner completed twelve years of service on 10th April, 2004 when he was granted the first financial upgradation. After April, 2004, the present petitioner was detailed for undertaking PCC only in June, 2004. It is an admitted position that the petitioner accepted this offer but was unsuccessful. He was offered his second chance and has successfully undertaken the PCC vide Order No. 01/2005 dated 08.06.2005 of the respondents. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes.

16. We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a second; and thereafter, even a third chance to successfully complete the same. This being the position, a person who failed in PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course at the second chance, when he underwent the same.

17. Looked at from any angle, the acts of the respondents in recovering the amount and denying the financial upgradation to the petitioner from 10April, 2004 till 17July, 2005 cannot be justified on any

ground at all. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra).

18. Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows :-

> "02. Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground.
>
> 04. In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made".

19. We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th November, 2003. Furthermore recovery can only be made if the respondents have given three chances for undergoing the PCC and the employee is unable to do so or is unsuccessful. Such reading and application of this Circular is in consonance with the above discussion. The respondents could not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire

period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003, which has been placed before us.

20. The respondents hold a person entitled to the PCC for the several years when the employee is not offered an opportunity to undergo the PCC course after completion of the twelve years of service and even though he may be willing and able to do so. He is given the pay uprgadation for this period (between April , 2004 and October, 2004 in the case of the petitioner). This amount is then recovered as the employee was unsuccessful in the promotion cadre course in the first chance. The respondents have not waited for the petitioner to avail the three available chances for qualifying in PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily.

21. For all the foregoing facts and reasons this writ petition has to be allowed. We hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 10th April, 2004. The petitioner is entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

22. In case the petitioner is entitled to the benefit of the second upgradation as per ACP Scheme as well, the respondent shall consider the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

23. The order passed therein shall be conveyed to the petitioner.

24. The amounts falling due and payable in terms of the above shall be released to the petitioner within a period of six weeks thereafter.

25. This writ petition is allowed in the above terms. Dasti to learned counsel for the parties.

ILR (2013) VI DELHI 4223
W.P. (C)

MASTAN SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ANR. .....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 4559/2013 DATE OF DECISION: 31.07.2013

Service Law—Financial upgradation under Assured Career Progression Scheme—As per ACP Scheme, an employee is required to have completed 12 years of service from the date of appointment to a post without any promotional financial benefit made available to him and should have also successfully undertaken Promotional Cadre Course—Petitioner became eligible for grant of financial upgradation on 02.07.2004 and was offered opportunity to undergo PCC in August, 2004 but failed in the same and finally qualified PCC in 2006—However, respondent canceled the ACP benefit given w.e.f. 02.07.2004—Petitioner filed writ petition to seek restoration of the ACP benefit w.e.f. 02.07.2004—Held, in view of law laid down by the Court in WP(C) 6937/10, the petitioner could not be deprived of the financial upgradation.

In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 Hargovind Singh v. Central Industrial Security Force. In this case, the petitioner was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is noteworthy that the petitioner was granted the second upgradation

under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his unwillingness to attend the course on 29.10.2004." **(Para 9)**

Undoubtedly for the reasons recorded in **Hargobind Singh's** case (supra), an employee cannot be deprived of the financial upgradation for the period for which an employee is unable and unwilling to undergo the PCC Course. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in Hargovind Singh's case as well as the present case. The completion of the promotion cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion. **(Para 12)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Subhasish Mohanty, Advocate.

FOR THE RESPONDENTS : Mr. Saqib, Advocate.

CASE REFERRED TO:

1. *Bhagwan Singh* vs. *UOI & Ors.* W.P.(C) No.8631/2009.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

1. The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as "ACP") w.e.f. 2nd July, 2004 when he completed 12 years of service with Central Industry Security Force (herein after referred as "CISF") and became entitled for grant of second financial upgradation as per MACP Scheme w.e.f.2nd July, 2012.

2. The undisputed facts in the instant case giving rise to the writ petition are enumerated that as per the ACP scheme other than completion of 12 years of continuous service in the post of Constable, an employee of the CISF is required to have completed 12 years from the date of appointment to a post without any promotional financial benefit being made available to him and he should have also successfully undertaken the Promotional Cadre Course (herein after referred to as "PCC").

3. The petitioner has stated that an employee is granted three chances for successful completion of promotional cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

4. Learned counsels for the parties submitted that the petitioner had completed 12 years of service on 2nd July, 2004 and was offered an opportunity to undergo PCC pursuant to an offer made only in August, 2004. The petitioner unfortunately failed in the first attempt in the PCC, but qualified in the supplementary PCC vide Order of the Respondent no. RTC Deoli-II S.O.No.226/2006 dated 29.12.2006.

5. It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 2nd July, 2004. The record placed before us shows that the petitioner successfully qualified the promotional cadre course and the result of the same was informed on 29th December 2006 by the respondent.

6. It appears that prior thereto the respondents have issued an order dated 26th May, 2006 whereby the ACP benefit granted to the petitioner

w.e.f. 2nd July 2004 was cancelled due to his failure in the promotion cadre course which was held w.e.f. August, 2004 which he has undertaken as his first chance. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 2nd July 2004. The petitioner's representations to respondents were of no avail. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner vide order no. Comdt., 8th RB Kishtwar S.O. No. 10/2007 dt. 8th March 2007 which was made effective only from 27th February 2007. The petitioner was thus denied the benefit of the financial upgradation w.e.f. 2nd July, 2004 to 26th February 2007, from which date he was granted the first financial upgradation.

7. Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already completed on 2nd July 2004. The manner in which the respondents worked the ACP Scheme is that the effective date for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 2nd July, 2004 when he completed 12 years of continuous service in the rank of Constable without any opportunity for promotion to the next post of Head Constable being made available to him till 2nd July 2004. It is submitted that as per the Scheme of the respondents, every employee is given three opportunities to complete PCC. As such, the inability to successfully complete the PCC in the first or second attempt would render the petitioner eligible for a third opportunity.

8. So far as withdrawal of financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme

to the date of stoppage of such financial up-gradation. Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is pointed out that the respondents have themselves drawn a distinction between "stoppage" of the financial upgradation and "withdrawal" of the amount given as the benefit thereunder.

9. In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 Hargovind Singh v. Central Industrial Security Force. In this case, the petitioner was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is note-worthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his unwillingness to attend the course on 29.10.2004."

10. This very contention is urged before us. Just as the present case in hand, the petitioner Hargovind Singh also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which was withdrawn. On this aspect, in **Hargovind Singh's** case (supra) the court has ruled on the respondents, contention urged before us as well, commented on the responsibility of the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus :

> "8. Learned counsel for the respondent would urge that the issue at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**

9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.

10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under :-

> "10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. IN regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e.

after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

11. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 2nd July, 2004 which was actually granted to him. So far his being given an opportunity to undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on August, 2004.

12. Undoubtedly for the reasons recorded in **Hargobind Singh's**

case (supra), an employee cannot be deprived of the financial upgradation for the period for which an employee is unable and unwilling to undergo the PCC Course. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in Hargovind Singh's case as well as the present case. The completion of the promotion cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

13. On this aspect, we may usefully extract the observations of the Division Bench judgment in **Hargovind Singh's** case (supra) which are in consonance with the facts of the present case.

14. So far as failure of the petitioner to undertake the promotion cadre course for which he was detailed in August 2004 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be " a technical default". On this aspect it was held as follows :

"14 As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word "unwilling" would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.

15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.

16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing".

15. The court thus held that the respondents were in greater default for not having detailed the petitioner for the PCC till November, 2004. The petitioner completed twelve years of service on 2nd July, 2004 when he was granted the first financial upgradation. After July, 2004, the present petitioner was detailed for undertaking PCC only in August, 2004. It is an admitted position that the petitioner accepted this offer but was unsuccessful. He was offered his second chance and has successfully undertaken the PCC vide Order No. RTC Deoli-II S.O. No. 226/2006 dated 29.12.2006 of the respondents. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes.

16. We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a second, and thereafter, even a third chance to successfully complete the same. This being the position, a person who failed in PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course at the second chance, when he underwent the same.

17. Looked at from any angle, the acts of the respondents in recovering the amount and denying financial upgradation to the petitioner from 2nd July 2004 till 26th February 2007 cannot be justified on any ground at all. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra).

18. Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows :-

> "02. Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground.
>
> 04. In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made".

19. We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th November, 2003. Furthermore recovery can only be made if the respondents have given three chances for undergoing the PCC and the employee is unable to do so or is unsuccessful. Such reading and application of this Circular is in consonance with the above discussion. The respondents could not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003 and 7th November, 2003 which has been placed before us.

20. The respondents hold a person entitled to the PCC for the several years when the employee is not offered an opportunity to undergo the PCC course after completion of the twelve years of service and even though he may be willing and able to do so. He is given the pay uprgadation for this period (between July 2004 and May, 2006 in the case of the petitioner). This amount is then recovered as the employee was unsuccessful in the promotion cadre course in the first chance. The

respondents have not waited for the petitioner to avail the three available chances for qualifying in PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily.

21. For all the foregoing facts and reasons this writ petition has to be allowed. We hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 2nd July, 2004. The petitioner is entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

22. In case the petitioner is entitled to the benefit of the second upgradation as per ACP Scheme as well, the respondent shall consider the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

23. The order passed therein shall be conveyed to the petitioner.

24. The amounts falling due and payable in terms of the above shall be released to the petitioner within a period of six weeks thereafter.

25. This writ petition is allowed in the above terms.

Dasti to learned counsel for the parties.

ILR (2013) VI DELHI 4234
W.P. (C)

BALDEV SINGH ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 4569/2013 DATE OF DECISION: 31.07.2013

Service Law—Financial upgradation under Assured Career Progression Scheme—As per ACP Scheme, an employee is required to have completed 12 years of service from the date of appointment to a post without any promotional financial benefit made available to him and should have also successfully undertaken Promotional Cadre Course—Petitioner became eligible for grant of financial upgradation on 02.07.2004 and offered opportunity to undergo PCC in March, 2004 but was compelled to express unwillingness on the ground of his availing leave to proceed to his native place, so he was not able to undergo PCC in 2004—In October, 2004 petitioner failed PCC as second chance and finally qualified PCC in 2006—However respondent canceled the ACP benefit given w.e.f. 02.07.2004—Petitioner filed writ petition to seek restoration of the ACP benefit w.e.f. 02.07.2004—Held, in view of law laid down by the Court in WP(C) 6937/10, the petitioner could not be deprived of the financial upgradation and the petitioner has given a genuine and reasonable explanation for his inability to undergo PCC in the first attempt.

So far as the unwillingness of the petitioner to undertake the promotional cadre course for which he was detailed in March, 2004 is concerned, in **Hargovind Singh's** case

(supra), this court has deemed the same to be "a technical default". On this aspect it was held as follows:-

> "14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word "unwilling" would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 04.12.2006, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.
>
> 15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.
>
> 16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing". **(Para 17)**

It cannot be denied that in the case in hand as well the petitioner has given a genuine and reasonable explanation for his inability to undergo the PCC course which has not been doubted by the respondents. We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a second; and thereafter, even a third chance to successfully complete

the same. This being the position, a person who was prevented by just and sufficient cause from undertaking PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course at the first chance, when he underwent the same. **(Para 19)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Subhasish Mohanty, Advocate.

FOR THE RESPONDENTS : Mr. Saqib, Advocate.

CASE REFERRED TO:

1. *Hargovind Singh* vs. *Central Industrial Security Force* W.P.(C)6937/2010.
2. *Bhagwan Singh* vs. *UOI & Ors.* W.P.(C) No.8631/2009.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

1. The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as "ACP") w.e.f. 02nd July, 2004 when he completed 12 years of service with Central Industry Security Force (herein after referred as "CISF") and became entitled for grant of first financial upgradation in the grade of Head Constable under the ACP Scheme and grant of second financial upgradation as per MACP Scheme w.e.f 2nd July, 2012.

2. The undisputed facts in the instant case necessary for adjudication of the writ petition are noticed hereafter. As per the ACP scheme, in order to be eligible the employee of the CISF is required to have completed 12 years from the date of appointment to a post without any promotional financial benefit being made available to him and he should have also successfully undertaken the Promotion Cadre Course (herein after referred to as "PCC").

3. The petitioner has stated that an employee is granted three chances for successful completion of promotional cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

4. Learned counsel for the petitioner submitted that the petitioner completed 12 years of service on 2nd July, 2004 and was offered an opportunity to undergo PCC pursuant to an offer made only in March, 2004. The petitioner was compelled to express his unwillingness to undergo this PCC on the ground of his availing leave to proceed to his native place. The petitioner was offered to undergo PCC commencing w.e.f. 16.08.2004 to 02.10.2004 in the 2nd chance. The petitioner unfortunately failed in the 2nd chance in the PCC, but qualified in the supplementary PCC vide Order No. Comdt, HEP Uri (J&K) S.O. No. 17/2006 dt. 21.02.2006 of the respondent.

5. Learned counsel for the parties have placed reliance on the Model Unwillingness Certificate wherein it is stated as follows :

"UNWILLINGNESS CERTIFICATE

"I, No.....Rank.....Name.....of CISF Unit, CSLA Mumbai is not willing to undergo promotion cadre course of ..... to ..... as per CISF HQRS, New Delhi letter No. ..... dated ..... I am willing to forgo my promotion and I have no objection if any juniors are promoted.

Further, it is well known to me that out of three chances to attend PCC I will loose a chance as per CIST Circular No. Estt.1/319/2006 dated 05.06.2006 due to this unwillingness for undergoing PCC."

6. While learned counsel for the respondent would contend that the petitioner had unequivocally expressed his unwillingness to undertake the PCC and that he had also clearly given his no objection to his supersession for the ACP due to his unwillingness. Learned counsel for the petitioner has however urged at some length that the unwillingness was restricted and limited only to the specific offer. It is submitted that the petitioner has expressed his unwillingness only to undergo the PCC which commenced from March, 2004 and had not repudiated any other offer made by the respondents.

7. It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 2nd July 2004. The record placed before us shows that the petitioner successfully qualified the promotion cadre course and the result 21stof the same was informed

on February, 2006 by the respondent. The petitioner had undergone the course between 21st March 2005 to 7th May 2005.

8. It appears that prior thereto the respondents have issued an order No. 57/2004 dated 09.06.2004 whereby the ACP benefit granted to the petitioner w.e.f. 2nd July 2004 was cancelled due to the submission of his unwillingness to undergo the promotion cadre course which was held w.e.f. March, 2004. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 2nd July 2004. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner effective from 29th January 2006.

9. Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already 2nd completed on July, 2004. The manner in which the respondents worked the ACP Scheme is that the effective date for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 2nd July 2004 when he completed 12 years of continuous service in the rank of Constable without any opportunity for promotion to the next post of Head Constable being made available to him. It is contended that as per the Circular issued by the respondents every employee is given three opportunities to complete PCC.

10. Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is pointed out that the respondents have themselves drawn a distinction between "stoppage" of the financial upgradation and 'withdrawal' of the amount given as the benefit thereunder. As against withdrawal of financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered

decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme to the date of stoppage of such financial up-gradation.

11. In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 **Hargovind Singh v. Central Industrial Security Force**. In this case, the petitioner was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is noteworthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2004 for which he expressed his unwillingness to attend the course on 29.10.2004."

12. This very contention is urged before us. Just as the present case in hand, the petitioner Hargovind Singh also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which was withdrawn. On this aspect, in Hargovind Singh's case (supra) the court has ruled on the respondents, contention urged before us as well, commented on the responsibility of the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus :

> "8. Learned counsel for the respondent would urge that the issue

at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**

9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.

10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under :-

> "10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. In regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e.

after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

13. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 2nd July, 2004 which was actually granted to him. So far his being given an opportunity to undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on June 2004.

14. Undoubtedly for the reasons recorded in **Hargobind Singh's**

case (supra), the petitioner could not be deprived of the financial upgradation for this period. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in Hargovind Singh's case as well as the present case. The completion of the promotion cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

15. We may now come to the second aspect of the matter. The respondents have relied upon the Unwillingness Certificate submitted by the petitioner which is to urge that the petitioner had submitted his unwillingness to undergo the PCC and stated that he had no objection if he was superseded due to his unwillingness. We have reproduced hereinafter therefore the exact words of the unwillingness expressed by the petitioner. The unwillingness was restricted to petitioner's inability to undergo the promotional course which commenced on March, 2004 and non other. Obviously, the petitioner could not have made any legally tenable objection in case he was superseded because of such unwillingness. There is nothing before us to show that the petitioner was detailed to undergo any other PCC for which he had expressed his unwillingness.

16. On this aspect, we may usefully extract the observations of the Division Bench judgment in **Hargovind Singh's** case (supra) which are in consonance with the facts of the present case. After June, 2004, the present petitioner was detailed for undertaking PCC only in March, 2005. It is an admitted position that the petitioner accepted this offer and has successfully undertaken the PCC which was conducted between 21st March 2005 to 7th May, 2005. In this background, the petitioner cannot be denied of his rightful dues till date.

17. So far as the unwillingness of the petitioner to undertake the promotional cadre course for which he was detailed in March, 2004 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be "a technical default". On this aspect it was held as follows:-

"14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word "unwilling" would be a

misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 04.12.2006, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.

15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.

16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing".

18. The court has thus held that the petitioner had a reason for so doing.

19. It cannot be denied that in the case in hand as well the petitioner has given a genuine and reasonable explanation for his inability to undergo the PCC course which has not been doubted by the respondents. We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a second; and thereafter, even a third chance to successfully complete the same. This being the position, a person who was prevented by just and sufficient cause from undertaking PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course at the first chance, when he underwent the same.

20. Looked at from any angle, the acts of the respondents in depriving the petitioner from first financial upgradation from 2nd July, 2004 till 28th January 2006 cannot be justified on any ground at all. It

is further urged that the petitioner is entitled to the second financial upgradation as per the modified MACP 2nd Scheme w.e.f. July, 2012. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra). Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows :

"02. Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground.

04. In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made".

21. We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular.

22. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th February, 2003. Such reading and application of this Circular is in consonance with the above discussion. The respondents would not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation

of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003 and 7th November, 2003 which has been placed before us.

23. The respondents have not waited for any employee to take the three available chances for undergoing the PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily. The respondents hold a person entitled to the PCC for the several years when the employee is not offered an opportunity to undergo the PCC course even though he may be willing and able to do so. He is given the pay uprgadation for the period from and then the amount in respect of said benefit is recovered on the ground that the employee though desirous, but is not able (on account of some unavoidable circumstances) to go for the PCC.

24. For all the foregoing facts and reasons this writ petition has to be allowed. We accordingly hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 2nd July, 2004. The petitioner is as a result entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

25. In case the petitioner is entitled to the benefit of second financial upgradation as per the Modified ACP Scheme as well, the respondent shall consider the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months. The order passed thereon shall be conveyed to the petitioner. The amounts falling due and payable in terms of the above shall be released to the petitioner within a period of six weeks thereafter.

26. This writ petition is allowed in the above terms. Dasti to learned counsel for the parties.

ILR (2013) VI DELHI 4246
W.P. (C)

R.A.S. YADAV ....PETITIONER

VERSUS

UNION OF INDIA & ANR. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 4549/2013 DATE OF DECISION: 31.07.2013

Service Law—Financial upgradation under Assured Career Progression Scheme—As per ACP Scheme, an employee is required to have completed 12 years of service from the date of appointment to a post without any promotional financial benefit made available to him and should have also successfully undertaken Promotional Cadre Course—Petitioner became eligible for grant of financial upgradation on 25.04.2004 and was offered opportunity to undergo PCC in June, 2004 but failed in the same and finally qualified PCC in 2005—However, respondent canceled the ACP benefit given w.e.f. 25.04.2004 and proceeded to recover the amount paid towards financial upgradation—Petitioner challanged by way of petition—Held, in view of law down by the Court in WP(C) 6937/10, respondent could not cancel the ACP benefits and the petitioner is entitled to restoration of the same.

In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 **Hargovind Singh v. Central Industrial Security Force.** The petitioner in this case was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008.

It is noteworthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his unwillingness to attend the course on 29.10.2004." **(Para 9)**

Undoubtedly for the reasons recorded in **Hargobind Singh's** case (supra), an employee cannot be deprived of the financial upgradation for the period for which an employee is unable and unwilling to undergo the PCC Course. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in Hargovind Singh's case as well as the present case. The completion of the promotion cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion. **(Para 12)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Subhasish Mohanty, Advocate.

FOR THE RESPONDENTS : Mr. Saqib, Advocate.

CASE REFERRED TO:

1. *Hargovind Singh* vs. *Central Industrial Security Force* W.P.(C)6937/2010.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

1. The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as "ACP") w.e.f. 25th April 2004 when he completed 12 years of service with Central Industry Security Force (herein after referred as "CISF") and became entitled for grant of second financial upgradation as per MACP Scheme w.e.f. 25th April 2012.

2. The undisputed facts in the instant case giving rise to the writ petition are enumerated that as per the ACP scheme other than completion of 12 years of continuous service in the post of Constable, an employee of the CISF is required to have completed 12 years from the date of appointment to a post without any promotional financial benefit being made available to him and he should have also successfully undertaken the Promotion Cadre Course (herein after referred to as "PCC").

3. The petitioner has stated that an employee is granted three chances for successful completion of promotion cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

4. Learned counsel for the petitioner submitted that the petitioner 25th had completed 12 years of service on April, 2004 and was offered an opportunity to undergo PCC pursuant to an offer made only in June, 2004, which the petitioner could not avail by submitting the unwillingness to the respondents. Although the petitioner was again detailed for the promotion cadre course from 16th August, 2004 2nd to October, 2004, he unfortunately failed in the same, but qualified in the supplementary PCC conducted from 23rd March 2005 to 30th March 2005.

5. It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 25th April 2004. The record placed before us shows that the petitioner successfully qualified the promotional cadre course and the result of the same was informed on 3rd June, 2005 by the respondent.

6. It appears that prior thereto the respondents have issued an order dated 4th May, 2005 whereby the ACP benefit granted to the petitioner w.e.f. 25th April, 2004 was cancelled due to his submission of unwillingness to undergo PCC commencing from 7th June, 2004 to 24th July, 2004 and his failure in the promotion cadre course which was held w.e.f. 16th August, 2004 to 2nd October, 2004 which he has undertaken as his second chance. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his 25th financial upgradation from April, 2004. The petitioner's representations to respondents were of no avail. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner 9th by order passed on September 2005 which was made effective only from 6th September, 2005. The petitioner was thus denied the benefit of the financial upgradation w.e.f. 25th April 2004 to 5th September, 2005.

7. Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already completed on 25th April, 2004. The manner in which the respondents worked the ACP Scheme is that the effective date for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 25th April 2004 when he completed 12 years of continuous service in the rank of Constable without any opportunity for promotion to the next post of Head Constable being made available to him till June 2004. It is submitted that as per the Scheme of the respondents, every

employee is given three opportunities to complete PCC. As such, the inability to successfully complete the PCC in the first or second attempt would render the petitioner eligible for a third opportunity.

8. So far as withdrawal of financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme to the date of stoppage of such financial up-gradation. Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is pointed out that the respondents have themselves drawn a distinction between "stoppage" of the financial upgradation and "withdrawal" of the amount given as the benefit thereunder.

9. In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P.(C)6937/2010 **Hargovind Singh v. Central Industrial Security Force.** The petitioner in this case was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is noteworthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his unwillingness to attend the course on 29.10.2004."

10. This very contention is urged before us. Just as the present case in hand, the petitioner Hargovind Singh also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which was withdrawn. On this aspect, in **Hargovind Singh's** case (supra) the court has ruled on the respondents, contention urged before us as well, commented on the responsibility of the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus :

> "8. Learned counsel for the respondent would urge that the issue at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 Bhagwan Singh Vs. UOI & Ors.
>
> 9.A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.
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> 10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under:-
>
> > "10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. IN regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.

14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course

commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

11. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 25th April 2004 which was actually granted to him. So far his being given an opportunity to undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on June, 2004.

12. Undoubtedly for the reasons recorded in **Hargobind Singh's** case (supra), an employee cannot be deprived of the financial upgradation for the period for which an employee is unable and unwilling to undergo the PCC Course. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in Hargovind Singh's case as well as the present case. The completion of the promotion cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

13. On this aspect, we may usefully extract the observations of the Division Bench judgment in **Hargovind Singh's** case (supra) which are in consonance with the facts of the present case.

14. So far as the failure of the petitioner to undertake the promotional cadre course for which he was detailed in June 2003 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be "a technical default". On this aspect it was held as follows:-

> "14 As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word 'unwilling' would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.
>
> 15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the

> petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.
>
> 16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.11.2004, suffice would it be to state that he has a reason for so doing".

15. The court thus held that the respondents were in greater default for not having detailed the petitioner for the PCC till November, 2004 The petitioner completed twelve years of service on 25th April 2004 when he was granted the first financial upgradation. After June, 2004, the present petitioner was detailed for undertaking PCC in August, 2004. It is an admitted position that the petitioner accepted this offer but was unsuccessful. He was offered his third chance and has successfully undertaken the PCC which was conducted between 23rd March, 2005 to 30th March, 2005. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes.

16. We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled to three chances to complete the PCC. In this case, although the petitioner submitted his unwillingness for undertaking PCC in the first chance and failed to clear the course in the second chance, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a third chance to successfully complete the same. This being the position, a person who submitted unwillingness to undergo PCC at the first option and failed in PCC at the second option cannot be deprived of the benefit of the financial upgradation. The petitioner has in fact cleared the PCC course at the third chance, when he underwent the same.

17. Looked at from any angle, the acts of the respondents in recovering the amount and denying financial upgradation to the petitioner from 25th April, 2004 till 05th September, 2005 cannot be justified on any ground at all. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra).

18. Before we part with the case, it is necessary to deal with the

submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows :

> "02. Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground.
>
> 04. In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made".

19. We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular.

20. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th November, 2003. Furthermore recovery can only be made if the respondents have given three chances for undergoing the PCC and the employee is unable to do so or is unsuccessful. Such reading and application of this Circular is in consonance with the above discussion. The respondents could not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit unless a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the

respondent's directive in the Circulars dated 16th April, 2003 and 7th November, 2003 which has been placed before us.

21. The respondents hold a person entitled to the PCC for several years when the employee is not offered an opportunity to undergo the PCC course after completion of the twelve years of service, even though he may be willing and able to do so. He is given the pay uprgadation for this period (between 25th April 2004 and May 2005 in the case of the petitioner). This amount is then recovered as the employee was unsuccessful in the promotion cadre course in the second chance. The respondents have not waited for the petitioner to avail the three available chances for qualifying in PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily.

22. For all the foregoing facts and reasons this writ petition has to be allowed. We hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 25th April 2004. The petitioner is entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

23. In case the petitioner is entitled to the benefit of the second upgradation as per ACP Scheme as well, the respondent shall consider the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

24. The order passed therein shall be conveyed to the petitioner.

25. The amounts falling due and payable in terms of the above shall be released to the petitioner within a period of six weeks thereafter.

26. This writ petition is allowed in the above terms.

Dasti to learned counsel for the parties.

ILR (2013) VI DELHI 4257
W.P. (C)

BALWAN SINGH ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 523/2012 DATE OF DECISION: 14.08.2013

Service Law—Armed Forces—Disciplinary Proceedings—Principles of natural justice—Defence Assistant—Brief Facts—Petitioner was recruited as a Constable /GD in the Central Reserve Police Force (CRPF) on 12th March, 2008—He was subjected to a disciplinary enquiry conducted pursuant to a chargesheet dated 12th March, 2008—Petitioner has complained that his request for a defence assistant with not less than five years working experience was completely ignored by the enquiry officer who informed him that he was required to opt for a defence assistant of his own rank—Petitioner had nominated five officers as his choice for appointment of a defence assistant however, the request of the petitioner was ignored by stating that the petitioner should choose a defence assistant of his own rank—Commandant accepted the report of the Enquiry Officer who found the petitioner guilty of two charges for which disciplinary proceedings were conducted against the petitioner—As a result the petitioner was dismissed from service—Hence the present petition—It is urged by the petitioner that the insistence by the respondents upon the petitioner to appoint a defence assistant of his own rank tantamounts to denial of opportunity to have defence assistant of his choice—It is contended that a person in the same rank as of the petitioner would have been

as ignorant of the applicable rules and procedure as the petitioner. Held—Delinquent in disciplinary proceedings is required to be informed of his right to take help of another Government Servant before the commencement of the inquiry and a fair and reasonable opportunity to appoint one—In *Bhagat Ram vs. State of Himachal Pradesh & Ors.* AIR 1983 SC 454, the Supreme Court has held that justice and fair play demand that where in a disciplinary proceeding the department is represented by a Presenting officer, it would be incumbent upon the Disciplinary authority while making appointment of a Presenting officer to appear on his behalf simultaneouly to inform the delinquent of the fact of appointment and the right of the delinquent to take help of another Government servant before the commencement of inquiry—At any rate, the Inquiry Officer at least must enquire form the delinquent officer whether he would like to engage anyone form the department to defend him and when the delinquent is a Government servant belonging to the lower echelons of service, he would further be informed that he is entitled under the relevant rules to seek assistance of another Government servant belonging to department to represent him—If after this information is conveyed to the delinquent Government servant, he still chooses to proceed with the Inquiry without obtaining assistance, one can say there is substantial compliance with the rules—In the instant case, the respondents do not state that the person whose names had been given by the petitioner as his choice for defence assistant were not the personnel of CRPF—The respondents' enquiry officer was of the rank of Deputy Commandant—Give the nature of the enquiry, this certainly would not have been fair in the facts and circumstances of the case and the petitioner has been deprived of an opportunity to represent himself—The petitioner was only seeking a defence assistant who was senior to him and had knowledge

of departmental enquiry proceedings—He had therefore given five names based on such requirement—Such request of the petitioner was a reasonable request—The enforcement of the condition that the defence assistance must be of the same rank, has been held to be unjustified and in violation of the principles of natural justice—The respondents have, thus, denied the petitioner of a fair and reasonable opportunity to defend himself at the disciplinary inquiries vitiating the proceedings and rendering all orders based on such proceedings as violative of principles of natural justice and illegal—In view of the above, findings of the enquiry officer are based on no evidence and are perverse—In view of the above, the orders dated 19th October 2008, 26th March, 2009, 23rd March, 2010 and 24th June, 2011 are held to be violative of the principles of natural justice and contrary to law and are hereby set aside and quashed—Petitioner would stand reinstated in service with consequential benefits of notional seniority and notional increments if any with back wages equivalent to 25% of his pay computed in terms of the above—Writ Petition is allowed in the above terms.

So far as the appointment of a defence assistant is concerned, it has been repeatedly held that the delinquent in disciplinary proceedings is required to be informed of his right to take help of another Government Servant before the commencement of the inquiry and a fair and reasonable opportunity to appoint one. In this regard our attention has been drawn to AIR 1983 SC 454 in **Bhagat Ram vs. State of Himachal Pradesh & Ors.** wherein the Supreme Court has held as follows:

> "In fact, justice and fair play demand that where in a disciplinary proceeding the department is represented by a Presenting officer, it would be incumbent upon the Disciplinary authority while making appointment of a Presenting Officer to appear on his behalf

> simultaneously to inform the delinquent of the fact of appointment and the right of the delinquent to take help of another Government servant before the commencement of inquiry. At any rate the Inquiry Officer at least must enquire from the delinquent officer whether he would like to engage anyone from the department to defend him and when the delinquent is a Government servant belonging to the lower echelons of service, he would further be informed that he is entitled under the relevant rules to seek assistance of another Government servant belonging to department to represent him. If after this information is conveyed to the delinquent Government servant, he still chooses to proceed with the Inquiry without obtaining assistance, one can say there is substantial compliance with the rules." **(Para 19)**

In the instant case, the respondents do not state that the person whose names had been given by the petitioner as his choice for defence assistant were not the personnel of CRPF. The respondents, enquiry officer Shri Awadesh Kumar was of the rank of Deputy Commnandant. Given the nature of the enquiry, this certainly would not have been fair in the facts and circumstances of the case and the petitioner has been deprived of an opportunity to represent himself. **(Para 20)**

The petitioner was only seeking a defence assistant who was senior to him and had knowledge of departmental enquiry proceedings. He had therefore given five names based on such requirement.

Such request of the petitioner was a reasonable request. **(Para 21)**

The enforcement of the condition that the defence assistance must be of the same rank, has been held to be unjustified and in violation of the principles of natural justice. The respondents have, thus, denied the petitioner of a fair and

reasonable opportunity to defend himself at the disciplinary inquiries vitiating the proceedings and rendering all orders based on such proceedings as violative of principles of natural justice and illegal.

In view of the above, we find that findings of the enquiry officer which are based on no evidence and are perverse. **(Para 22)**

In view of the above, the orders dated 19th October, 2008, 26th March, 2009, 23rd March, 2010 and 24th June, 2011 are held to be violative of the principles of natural justice and contrary to law and are hereby set aside and quashed. As a result, it is directed that the petitioner would stand reinstated in service. The petitioner shall be entitled to consequential benefits of notional seniority and notional increments if any. The petitioner's pay fixation shall be made accordingly. The petitioner would also be entitled to back wages equivalent to 25% of his pay computed in terms of the above.

The present writ petition is allowed in the above terms. **(Para 23)**

Important Issue Involved: Disciplinary Proceedings—Principles of natural justice—Defence Assistant—The enforcement of the condition that the defence assistance must be of the same rank, has been held to be unjustified and in violation of the Principles of natural justice—The respondents have, thus, denied the petitioner of a fair and reasonable opportunity to defend himself at the disciplinary inquiries vitiating the proceedings and rendering all orders based on such proceedings as violative of principles of natural justice and illegal.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Ms. Avni Singh, Adv.

FOR THE RESPONDENT : Mr. Asis Nischal, Adv.

CASES REFERRED TO:

1. *Vijender Singh* vs. *UOI and Others WP (C) no.182/2005.*
2. *Bhagat Ram* vs. *State of Himachal Pradesh & Ors. AIR 1983 SC 454.*

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

1. Petitioner has assailed the order dated 19th October, 2008 passed by the Commandant, 136 Battalion whereby he accepted the report dated 19th August, 2008 of the Enquiry Officer who found the petitioner guilty of two charges for which disciplinary proceedings were conducted against the petitioner. As a result the petitioner was dismissed from service by the same order.

The petitioner has also impugned order dated 26th March, 2009 rejecting his appeal and the order dated 23rd March, 2010 passed by the Revisional authority rejecting his revision petition.

2. The facts giving rise to the present petition are briefly noted hereafter, the petitioner was recruited as a Constable /GD in the Central Reserve Police Force (CRPF) on 12th March, 2008. It appears that he was subjected to a disciplinary enquiry conducted pursuant to a chargesheet dated 12th March, 2008 on the following charges:

Charge - I

"That the above referred Force No.901112622 Constable/GD Balwan Singh (136 Battalion), being a member of the Force (constable) has violated the rule as provided under Section 11 (1) of the Central Reserve Police Force Act, 1949 and accordingly committed an offence of indiscipline and ignorance of duty, under which the above referred person obtained photocopies of some pages of Quarter Guard Register of main time table without permission of any competent officer, which is against the good character and discipline of Force."

Charge - II

"That the above referred Force No.901112622 Constable/GD

Balwan Singh (136 Battalion) being a member of the Force (constable) has violated the rule provided under Section 11 (1) of the Central Reserve Police Force Act, 1949 and accordingly committed an offence of indiscipline and bad conduct. In which the above referred person illegally obtained photocopies of some pages of Quarter Guard Register of main time table without permission of any competent officer and during the enquiry he gave false statement and told that the same has been received through higher officer and accordingly he misguided the office. Therefore, on the basis of the above referred situation being a member of the Force, this person has committed an offence of indiscipline."

3. The petitioner has complained that the disciplinary proceedings which were conducted against him were held in violation of principles of natural justice inasmuch as the petitioner being in the rank of only a constable, was ignorant about the procedure relating to enquiries. The petitioner has complained that his request by a letter dated 11th April, 2008 for a defence assistant with not less than five years working experience was completely ignored by the enquiry officer. Instead a letter dated 3rd June, 2008 was issued by the enquiry officer informing to the petitioner that he was required to opt for a defence assistant of his own rank. In response to this letter, the petitioner had nominated five officers as his choice for appointment of a defence assistant by a letter dated 5th June, 2008. However, the request of the petitioner was ignored by the respondents who by a letter dated 6th June, 2008 again stated that the petitioner should choose a defence assistant of his own rank. It is urged by Ms Avni Singh, learned counsel for the petitioner that the insistence by the respondents upon the petitioner to appoint a defence assistant of his own rank tantamounts to denial of opportunity to have defence assistant of his choice. It is contended that a person in the same rank as of the petitioner would have been as ignorant of the applicable rules and procedure as the petitioner. Such defence assistant would also be in awe of the authority of the respondents and the enquiry officer as the petitioner.

4. So far as the enquiry is concerned, it is urged by Ms.Avni Singh, learned counsel for the petitioner, that the respondents examined a total of ten witnesses in support of the charges. It is contended that despite the statements of ten persons, there is not a whisper of evidence to

support the charges against the petitioner.

5. Learned counsel for the petitioner has urged that it was the case of the petitioner that the documents which were subject matter of the charges were actually supplied to him in previous enquiry proceedings which had been conducted by Shri Shahnawaz Khan as enquiry officer. It is contended that Shri Khan was a material witness in the case. It is pointed out that the witnesses who were examined by the respondents only established existence of the documents and not the contents which only Mr. Shahnawaz Khan could have done.

6. The petitioner submits that in view of the above material facts, the recommendation of the enquiry officer by the report dated 19th August, 2008 to the effect that the petitioner was guilty of charges; the impugned orders dated 19th October, 2008 of the Disciplinary Authority accepting the report; the orders dated 26th March, 2009 of the Appellate Authority and 23rd March, 2010 of the Revisional Authority and the order dated 24th June, 2011 passed by the Director General finding the petitioner guilty of the charges and sustaining the punishment of dismissal from service are in violation of principles of natural justice as well as well settled principles of law inasmuch as there was no evidence at all to support the charges levelled against the petitioner.

7. We have also heard learned counsel for the respondents on the above submissions and perused the original record which has been produced before us. We may now examine the first objection raised by the learned counsel for the petitioner to the effect that there was no evidence in support of the charges.

8. In the counter affidavit, the respondents have referred to two prior departmental inquiries against the petitioner. So far as the report in the first inquiry is concerned, the same had been kept in abeyance as per orders of the High Court of Jharkhand dated 2nd-3rd April, 2007.

9. A second departmental inquiry was conducted against the petitioner for alleged commission of offence under Section 11(1) of the CRPF Act, 1949. The report of the inquiry officer, finding the petitioner guilty of the charge, was accepted by the disciplinary authority who passed an order dated 15th May, 2006 awarding the punishment of "compulsory retirement from service" (page 158).

10. The petitioner's appeal was rejected vide an order dated 26th March, 2009 with the finding that the same was devoid of merit. The petitioner's review petition was accepted by the Inspector General of Police, North-East Sector, CRPF and by an order dated 2nd May, 2007, the petitioner was directed to be reinstated into service. The punishment of the petitioner was modified from compulsory retirement into punishment of stoppage of increment for a period of three years with cumulative effect.

11. The charges on which the disciplinary proceedings were commenced on third charge as set out hereinabove, refer to the "same documents". A perusal of the petitioner's appeal to the Director General of the CISF shows that in para 7, the petitioner has stated as follows:-

> "7. Inspector General of Police, Shillong (Meghalaya) has given clarification in its order dated 01/05/2007 at page 5 para 3 that at the time of production of the documents (Photo copies); the commandant had enquired about these photocopies. The applicant had submitted these photo copies on 04/05/2006 in his defence. Constable Yogesh Sharma received total 21 documents on 04/05/2006 at 17:00 hours on the objection of applicant and accordingly he put his signature. Even the present investigating officer Shri Awadhesh Kumar has proved the charges after taking these photo copies from witness No.8(1). Serial numbers of these photo copies are 82, 83 and 84 in departmental enquiry. There is signature of Deputy Commandant Shri H.L. Ojha over these photo copies. Applicant has produced these photo copies during the period of 21/06/2005 to 30/06/2005 which is under the signature of Deputy Commandant Shri H.L. Ojha before the earlier enquiring officer Second Commandant Officer Shri Shahnawaj on 28/08/2008 in his defence. There is signature of both the officers over these photo copies. The Commandant had not asked even a single word about these documents at the time of submission on 04/05/2006. Rejecting the objection of Applicant, punishment of compulsory retirement was awarded on 15/05/2006. That punishment was cancelled by the Inspector General of Police, Shilong (Meghalaya) on 01/05/2007 and he reinstated the applicant in service."

12. The petitioner has complained that the third disciplinary proceedings were initiated as the order dated 1st May, 2007 of reinstatement of the petitioner was not palatable to the authorities even though that they were without merit.

13. Our attention has been drawn to the testimony of seven witnesses i.e. PW 1 Hawaldar/GD Krishan Kumar; PW 2 Hawaldar/GD Akhtar Ali; PW 3 Hawaldar/GD Om Prakash; PW 4 Hawaldar/GD Kuldeep Singth; PW 5 Hawaldar/GD Zakir Hussain; PW 6 Hawaldar/GD Devendra Singh & PW 7 Ct./GD Haripal Singh who do not give an iota of evidence against the petitioner. It is evident from the above that the petitioner was subjected to disciplinary proceedings on a completely vague charge without even specifying the details of the documents which were alleged to have been illegally obtained without permission of the competent authority. There is no evidence that the signatures on the photocopies did not belong to the afore-noticed inquiry officer. It is an admitted position that there are signatures of the CRPF officials on the photocopies.

14. In view the above, it would appear that the petitioner had been given possession of the extract of the guard register in the previous enquiry and therefore he cannot be charged with commission of offence for illegally having obtained photocopies of the said extracts. The documents were given during the course of the disciplinary proceedings when they were relied upon by the respondents. The same therefore cannot be the subject matter of the disciplinary proceedings resulting in imposition of the serious punishment of removal from service. In view of the above facts, there is merit in the petitioner's contention that there was no evidence to support charges.

15. So far as the petitioner's contention that Sh.Shahnawaz Khan a material witness who was not called into witness box is concerned, we find that the appellate authority in order dated 26th March, 2009 has placed reliance on message received from this officer stating that he had not provided photocopies of any page of the quarter guard register to the petitioner. The message has been received behind the back of the petitioner and outside the enquiry. This officer was not called in the witness box. Without having given an opportunity to the petitioner to challenge the statement attributed to him or to cross examine the said officer, could

not have relied on such material to form the basis of the findings of guilty of the petitioner or his punishment.

16. So far as appointment of the defence assistant within the same rank as the petitioner is concerned, it is urged that the respondents have issued a circular dated 16th September, 2005, relevant portion of which reads as follows:

> "3. Keeping in view the inherent problems likely to be faced by the administrative authority on account of requirement of a number of personnel to act as Defence Asstts in the large number of inquiries pending with the Deptt, on the one hand and at the same time the requirements of natural justice to be full filled in keeping with the observation of the Courts, it is hereby advised that in all Departmental Proceedings against NGOs in CRPF, the delinquent person may be represented/assisted by a person from within the rank whose services the delinquent may be able to procure and who shall be called as "Defence Assist".

17. This very issue has been the subject matter of consideration in an order dated 30th November, 2005 in WP (C) no.182/2005 **Vijender Singh vs. UOI and Others** wherein this court observed thereon as follows:

> "While the circular displays an intent to abide by the requirement of natural justice, nevertheless the interpretation of the letter dated 22nd November, 2005 confining the defence assistance "within the rank" does not appear to be justified and in consonance with the principles of natural justice. In other cognate military enactments no such restrictions exist. Accordingly, we direct that the defence assistance as prayed for by the petitioner which was rejected by the letter dated 22nd November, 2005, shall be provided to the petitioner in the inquiry against him."

18. In the instant case, it is not the respondents, contention that the persons named by the petitioner as his choice for appointment as defence assistant were not available for appointment as defence assistant. Shelter is taken only in the circular dated 16th September, 2005 to deny him a defence assistant of his choice. This was certainly in violation of natural justice. The denial of the defence assistant and the conduct of the enquiry proceedings in the absence of a defence assistant to the petitioner, were

in violation of the principles of natural justice and are not sustainable.

19. So far as the appointment of a defence assistant is concerned, it has been repeatedly held that the delinquent in disciplinary proceedings is required to be informed of his right to take help of another Government Servant before the commencement of the inquiry and a fair and reasonable opportunity to appoint one. In this regard our attention has been drawn to AIR 1983 SC 454 in **Bhagat Ram vs. State of Himachal Pradesh & Ors.** wherein the Supreme Court has held as follows:

> "In fact, justice and fair play demand that where in a disciplinary proceeding the department is represented by a Presenting officer, it would be incumbent upon the Disciplinary authority while making appointment of a Presenting Officer to appear on his behalf simultaneously to inform the delinquent of the fact of appointment and the right of the delinquent to take help of another Government servant before the commencement of inquiry. At any rate the Inquiry Officer at least must enquire from the delinquent officer whether he would like to engage anyone from the department to defend him and when the delinquent is a Government servant belonging to the lower echelons of service, he would further be informed that he is entitled under the relevant rules to seek assistance of another Government servant belonging to department to represent him. If after this information is conveyed to the delinquent Government servant, he still chooses to proceed with the Inquiry without obtaining assistance, one can say there is substantial compliance with the rules."

20. In the instant case, the respondents do not state that the person whose names had been given by the petitioner as his choice for defence assistant were not the personnel of CRPF. The respondents, enquiry officer Shri Awadesh Kumar was of the rank of Deputy Commnandant. Given the nature of the enquiry, this certainly would not have been fair in the facts and circumstances of the case and the petitioner has been deprived of an opportunity to represent himself.

21. The petitioner was only seeking a defence assistant who was senior to him and had knowledge of departmental enquiry proceedings. He had therefore given five names based on such requirement.

Such request of the petitioner was a reasonable request.

22. The enforcement of the condition that the defence assistance must be of the same rank, has been held to be unjustified and in violation of the principles of natural justice. The respondents have, thus, denied the petitioner of a fair and reasonable opportunity to defend himself at the disciplinary inquiries vitiating the proceedings and rendering all orders based on such proceedings as violative of principles of natural justice and illegal.

In view of the above, we find that findings of the enquiry officer which are based on no evidence and are perverse.

23. In view of the above, the orders dated 19th October, 2008, 26th March, 2009, 23rd March, 2010 and 24th June, 2011 are held to be violative of the principles of natural justice and contrary to law and are hereby set aside and quashed. As a result, it is directed that the petitioner would stand reinstated in service. The petitioner shall be entitled to consequential benefits of notional seniority and notional increments if any. The petitioner's pay fixation shall be made accordingly. The petitioner would also be entitled to back wages equivalent to 25% of his pay computed in terms of the above.

The present writ petition is allowed in the above terms.

ILR (2013) VI DELHI 4269
CRL. A.

WASIM PAHARI **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(SUNITA GUPTA, J.)

CRL. A. NO. : 588/2012 **DATE OF DECISION: 05.09.2013**

(A) Indian Penal Code, 1860—Section 392, 394 & 397—Appellant challenged his conviction and Sentence U/s 392/394/397 of Code and urged in absence of conducting of TIP proceedings, identification of appellant for first time in the court was highly doubtful. Held:—When immediately after the incident, before there was any extraneous intervention, the incident was narrated and name of culprit along with his parentage and address given, there was no need for conducting Test Identification Parade of the accused.

(B) Indian Penal Code, 1860—Section 392,394 & 397—Appellant challenged his conviction and sentence U/s 392/394/397 of Code and urged nature of injuries on person of injured were opined to be simple, therefore, offence U/s 397 of Code not made out. Held:— When robbery committed by offender armed with deadly weapon which was within vision so as to create terror in his mind, then it is not mandatory that grievous hurt is to be caused to any person to bring case within four corners of Section 397 of IPC.

In order to invoke Section 397, causing of grievous hurt is not the *sine qua non* inasmuch as, an act would fall within the mischief of this section, if at the time of committing robbery or dacoity, the offender-

(a) Uses any deadly weapon;

(b) Causes grievous hurt to any person; or

(c) Attempts to cause death or grievous hurt to any person.

The word 'uses' was interpreted by Hon'ble Supreme Court in **Phool Kumar Vs. Delhi Administration,** 1975 Crl.LJ 778 where it was laid down that it is not necessary that deadly weapon must be actually used by the culprit in the robbery or dacoity by way of causing hurt or brandishing the same and that it is 'used' within the meaning of Section 397 if the deadly weapon is merely held out for terrorising or frightening a victim to obtain property. **(Para 23)**

Important Issue Involved: (A) When immediately after the incident, before there was any extraneous intervention, the incident was narrated and name of culprit along with his parentage and address given, there was no need for conducting Test Identification Parade of the accused.

(B) When robbery committed by offender armed with deadly weapon was within vision of victim so as to create terror in his mind, then it is not mandatory that grievous hurt is to be caused to any person to bring case within four corners of Section 397 of IPC.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Ms. Anita Abraham, Advocate.

FOR THE RESPONDENT : Ms. Fizani Husain, APP for the State with SI Mohd. Faizan, P.S. Welcome

CASES REFERRED TO:

1. *Lal Bahadur and Others* vs. *State (NCT of Delhi,* (2013) 4 SCC 557.
2. *Ramesh Harijan* vs. *State of Uttar Pradesh* (2012) 5 SCC 777.
3. *Sunil Clifford Daniel* vs. *State of Punjab,* 2012 11 SCC 205.
4. *State of U.P* vs. *Naresh,* (2011) 4 SCC 324
5. *C. Muniappan and Ors.* vs. *State of Tamil Nadu,* AIR 2010 SC 3718.
6. *Gore Lal* vs. *State,* 2010 III AD (Delhi) 34.
7. *Sarvesh Narain Shukla* vs. *Daroga Singh and Ors.,* AIR 2008 SC 320.
8. *Ganga Kanojia and Anr.* vs. *State of Punjab* (2006) 13 SCC 516.
9. *Radha Mohan Singh @ Lal Saheb* vs. *State of U.P,* AIR 2006 SC 951.

10. *Karanjit Singh* vs. *State (Delhi Admn.)* 2003 5 SCC 291.
11. *Balu Sonba Shinde* vs. *State of Maharashtra* (2002) 7 SCC 543.
12. *Krishna Mochi* vs. *State of Bihar,* 2002 6 SCC 81.
13. *C. Ronald & Anr.* vs. *Union Territory of Andaman & Nicobar Islands,* (2001) 1 SCC (Crl.) 596.
14. *Khujji @ Surendra Tiwari* vs. *State of Madhya Pradesh,* (1991) 3 SCC 627.
15. *Sidhan* vs. *State of Kerala,* 1986, Cr.L.J. 470.
16. *Bharwada Bhoginbhai Hirjibhai* vs. *State of Gujarat,* AIR 1983 SC 753.

RESULT: Appeal dismissed.

SUNITA GUPTA, J.

1. This appeal is preferred by the appellant Wasim @ Pahari who has been convicted by learned Additional Sessions Judge in Sessions Case No. 124/2008 arising out of FIR No. 276/2008, PS Welcome for offence under Section 392/394/397 IPC vide impugned order dated 10th March, 2011 and sentenced as under vide order on sentence dated 15th March, 2011: (i) rigorous imprisonment for seven years for offence under Section 394 IPC and fine of Rs.3000/-, in default of payment of fine to undergo simple imprisonment for six months, (ii) seven years rigorous imprisonment for offence under Section 392 IPC and fine of Rs.3000/- in default of payment of fine to undergo SI for six months and (iii) seven years rigorous imprisonment for offence under Section 397 IPC. Benefit of Section 428 Cr.P.C was given. All the sentences were to run concurrently.

2. The facts leading to this appeal, briefly stated, are that on receipt of DD No. 28A, Ex.PW8/A regarding assault to a boy at Kabir Nagar, 33 Foota Road and he is being taken to G.T.B. hospital Head Constable Birender (PW1) along with Constable Chaman (PW4) reached 33 ft. Road, Gali No. 1, Kabir Nagar where they came to know that injured had been shifted to hospital. As such, they reached hospital where PW-2 Mehraj met them while his brother PW3 Vikar @ Vicky was getting treatment. He recorded statement of Mehraj, Ex.PW2/A wherein he unfolded that on 26th July, 2008 at about 11:00 pm, he along with his

brother Vikar @ Vicky was returning back to his tenanted room after finishing the work in the factory. His brother Vikar @ Vicky was ahead of him. When they took a turn towards their street, then one person stopped his brother and tried to remove money from his pocket. When his brother protested, then that person inflicted some pointed object on left portion of his face. As a result of which, blood started oozing out. In the meantime, he reached near his brother and caught his brother who was about to fall on the ground. That person removed Rs.5000/- from the upper pocket of his brother. While he was managing his brother, then he saw that, that person was resident of Gali No.1, named as Wasim @ Pahari, S/o Zamir, who had inflicted injuries on his brother by some pointed object and had robbed him of money. He removed his brother to GTB Hospital where he was receiving treatment and was not in a position to make a statement. On the basis of this statement, Rukka, Ex.PW-1/A was prepared and was sent to Police Station for registration of the case on the basis of which, FIR Ex.PW8/B was recorded by ASI Vijay Kumar (PW8).

3. It is further the case of prosecution that on 27th July, 2008, accused was apprehended at Kabir Nagar Shamshan Ghat Pulia on the identification of Mehraj. He was arrested and his personal search was conducted vide memo Ex.PW1/C. The accused made a disclosure statement Ex.PW1/D pursuant to which one 'ustra' was recovered from the side of wall of nala. Sketch of the 'ustra', Ex.PW1/E was prepared and it was taken possession vide memo Ex.PW1/F. During the course of investigation, blood stained shirt of injured Vikar @ Vicky was seized vide seizure memo Ex.PW1/G. The accused pointed out the place of incident vide Ex.PW1/G-1. During search of accused, Rs.2,200/- in cash out of robbed amount of Rs.5000/- was recovered which were seized vide memo Ex.PW1/H. After completing investigation, charge sheet was submitted against the accused.

4. Charge for offence under Sections 392/394/397 IPC was framed against the accused to which he pleaded not guilty and claimed trial.

5. In order to substantiate its case, prosecution examined eight witnesses. All the incriminating evidence was put to the accused while recording his statement under Section 313 Cr. P.C. wherein he denied the case of prosecution and pleaded innocence. According to him, he was lifted from his house when he was sleeping. Police obtained his

signatures on blank papers. Alleged recovery was planted upon him. Although initially he stated that he wanted to lead evidence in defence but no witness was examined by him. After hearing learned counsels for the parties, vide impugned order dated 10th March, 2011, the accused was held guilty and convicted for offence under Sections 392/394/397 IPC and was sentenced as stated above. Feeling aggrieved by the same, the present appeal has been preferred.

6. I have heard Ms. Anita Abraham, learned counsel for the petitioner and Ms. Fizani Hussain, learned Additional Public Prosecutor for the State and have perused the record.

7. It was submitted by learned counsel for the appellant that PW2 Mehraj, in his cross-examination, has deposed that accused was not known to him from earlier. PW3 Vikar has admitted that there was no light at the time of incident and faces of the persons coming and going were not visible, that being so, there was no possibility to identify the accused. Moreover, his identification for the first time in Court by PW2, Mehraj makes his identity doubtful. No test identification parade was arranged. She further referred to the discrepancies appearing in the prosecution witnesses by submitting that according to PW2, Mehraj, the accused caused injuries to his brother on right side of his face whereas Vikar has deposed that he received injury on left portion of his face. Moreover, according to PW2 Mehraj, Vikar remained admitted in hospital for about 12 days whereas Vikar deposed that he remained in the hospital for 5-6 days. There is also discrepancy regarding the date, time and place from where accused was arrested, inasmuch as, according to Mehraj, the accused was apprehended by the Police on the same night at 2:30 am from his house whereas according to the police officials, accused was apprehended on the next day at Kabir Nagar Shamshan Ghat Pulia on the identification of Mehraj. Under the circumstances, it was submitted that prosecution has failed to bring home the guilt of accused beyond reasonable doubt. As such, he is entitled to benefit of doubt and be acquitted of the offences alleged against him.

8. Rebutting the submissions of learned counsel for the appellant, learned Public Prosecutor for State submitted that complainant Mehraj has fully supported the case of prosecution and even the victim Vikar has supported the case of prosecution when he was examined on 12th January, 2010, however, thereafter, his cross-examination was deferred and then

he tried to resile from his earlier statement. There is no reason to disbelieve the statement made by him on 12th January, 2010. In the complaint itself, the complainant has given the name and parentage of the accused. That being so, since the accused was known to the complainant from before, there was no need for conducting Test Identification Parade. Slight discrepancy in regard to the date, time and place of arrest of the accused does not caste any dent on the prosecution version. After the arrest of the accused, weapon of offence and part of robbed amount was recovered at his instance/from his possession, which substantiates the case of prosecution. As such, there is no infirmity in the impugned order which calls for interference. The appeal is liable to be dismissed.

9. I have given my anxious thoughts to the respective submissions of learned counsel for the parties and have perused the record.

10. The submission of learned counsel for the appellant that in the absence of conducting TIP proceedings, identification of the appellant for the first time in the Court is highly doubtful is without substance, inasmuch as, a perusal of the complaint goes to show that immediately after the incident since Vikar had sustained injury and was bleeding profusely, the first endeavour of the complainant was to provide him medical treatment. Therefore, he took him to a local doctor, namely, Dr. Fridi, however, the doctor did not entertain his brother and asked him to go to the hospital. As such, he took his brother to GTB Hospital. Meanwhile, he also made a call to the police at 100 number. The MLC Ex.PW-6/A of Vikar @ Vicky corroborated the version of complainant Mehraj that he got him admitted in the hospital as in the column of "brought by", name of Mehraj (brother) was mentioned. Since he had also informed the police at 100 number, therefore, ASI Vijay Kumar (PW8) received an information from control room regarding assault on a boy at 33 ft. Road, Kabir Nagar and he recorded DD No.28A, Ex.PW8/A and assigned the same to Head Constable Birender to take action in the matter. On being assigned this DD No. 28A, Head Constable Birender along with Chaman reached the spot but no witness met him there and on coming to know that injured had been shifted to hospital, he reached the hospital where he met Mehraj and recorded his statement Ex.PW2/A. As seen above, in his statement, Mehraj has specifically mentioned the name of Wasim @ Pahari, S/o Zamir, R/o his Gali No.1 to be responsible for robbing his brother and inflicting injuries on left portion of his face by some pointed object. Since immediately after the incident, before there

was any extraneous intervention, the incident was narrated and name of the culprit along with his parentage and address was also given, that being so, there was no need for conducting Test Identification Parade of the accused.

11. Moreover, in his deposition before the Court, the witness has correctly identified the accused. Even the victim PW3 Vikar has also fully supported the case of prosecution by narrating the incident succinctly and identifying the appellant as the assailant of the crime when his examination-in-chief was recorded on 12th January, 2010. Record reveals that his cross-examination was deferred at the request of learned defence counsel and, thereafter, he was recalled for cross-examination on 14th February, 2012. At that juncture, he tried to resile from his earlier statement regarding the identity of the accused by deposing that there was no light at the time of incident. Faces of the persons were not visible and the accused did not cause any injury to him nor robbed him. He went on stating that his deposition on 12th January, 2010 was at the instance of one police official who had tutored him outside the Court. Thereupon, this witness was re-examined by learned Public Prosecutor and admitted that on 12th January, 2010, he had deposed before the Court after taking oath. He also admitted that he met mother of the accused Wasim @ Pahari on that day (i.e. 14.02.2012) outside the Court. He, however, denied the suggestion that in order to save the accused at the instance of his mother, he is deposing falsely. Thereafter, the witness was not cross-examined by learned counsel for the accused.

12. It is settled law that evidence of a prosecution witness cannot be rejected *in toto* merely because the prosecution chose to treat him as hostile and cross-examines him. The evidence of such witness cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof as held in **Ramesh Harijan v. State of Uttar Pradesh** (2012) 5 SCC 777; **Balu Sonba Shinde v. State of Maharashtra** (2002) 7 SCC 543; **Ganga Kanojia and Anr. V. State of Punjab** (2006) 13 SCC 516; **Radha Mohan Singh @ Lal Saheb v. State of U.P,** AIR 2006 SC 951, **Sarvesh Narain Shukla v. Daroga Singh and Ors.,** AIR 2008 SC 320 and **C. Muniappan and Ors. v. State of Tamil Nadu,** AIR 2010 SC 3718.

13. Khujji @ Surendra Tiwari vs. State of Madhya Pradesh,

(1991) 3 SCC 627 is a direct authority on the point. In that case also, the witness had correctly identified the accused when his examination-in-chief was recorded on 16th November, 1976. After one month, when he was cross-examined then, he stated that he had seen the accused from back, as such, could not see their faces. It was held by the High Court that during the one month period that elapsed since the recording of his examination-in-chief, something transpired which made him shift his evidence on the question of identity to help the appellant. His statement in cross-examination on the question of identity of the appellant was a clear attempt to wriggle out all what he had stated earlier in his examination-in-chief. As such, there was no reason to doubt the testimony of the witness. The reasoning was approved by Hon'ble Supreme Court.

14. In the instant case also, as referred above, when the witness was examined on 12th January, 2010, he gave the exact version of the incident and also named and identified the accused, who robbed him on the point of 'ustra. and inflicted injury on his person. It was only thereafter when he was recalled for cross-examination on 14th February, 2011 that he tried to resile from his earlier statement by deposing that the appellant was not the person who caused injury to him or robbed him. This statement of the witness, in itself, is contradictory because, if according to him, there was no light at the time of incident and faces of the persons coming and going through place of incident were not visible, then how could he say with exactitude that accused did not cause any injury to him or robbed him. In fact, his plea that he has identified the accused on 12.01.2010 at the instance of the police official is devoid of merits, inasmuch as, when he was re-examined by learned Public Prosecutor, he admitted that he met the mother of the accused Wasim @ Pahari and the possibility of his being won over by her on that date cannot be ruled out. Moreover, no complaint was made by him during this intervening period that the statement made on oath on 12.01.2010 was not voluntary or was result of tutoring. He has not even named the police official who tutored him. As such, his statement in cross-examination on the question of identity of accused was a clear attempt to wriggle out of what he stated in his examination-in-chief. There is no reason to disbelieve his statement made on 12.01.2010. Moreover, in the face of voluminous evidence which has come on record and will be discussed hereinafter, there is no reason to doubt the identity of the appellant as the assailant of the crime who was named in the FIR by Mehraj at the first available opportunity

and thereafter was also identified in the Court. Accused is not alleging any enmity, ill-will or grudge against the complainant, or the victim for which reason they would falsely implicate him in this case. Rather, since the appellant is residing in the same gali and therefore, known to the witnesses, therefore, the victim in fact tried to exonerate him by not identifying him during his cross-examination but as stated above, that must have been at the instance of mother of the appellant, who was present in the Court when this witness came for his cross-examination. The fact remains that he was named at the very first available opportunity when the complaint was made by Mehraj which became bedrock of investigation and thereafter duly identified in the Court. Despite lengthy cross-examination, nothing material could be elicited to discredit the testimony of the witnesses for which reason they would falsely implicate him in this case. As such, identity of the accused being assailant of the crime is duly established.

15. It further stands proved from the testimony of prosecution witnesses that accused was apprehended on the identification of PW Mehraj. Thereafter he was arrested. During the course of interrogation, he made a disclosure statement Ex.PW1/D and got recovered the weapon of offence i.e. 'ustra. from the side of nala. Out of the robbed amount of Rs.5,000/-, a sum of Rs.2,200/- was also recovered from his possession. Recovery of 'ustra' and Rs.2,200/- stand proved from the corroborative testimony of PW5 ASI Rajpal and PW1 HC Birender. Mere fact that they are police officials is no ground to discard their testimony. The testimony of police personnel have to be treated in the same manner as testimony of any other witnesses and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies, as much in favour of police personnel as of other person and it is not a proper judicial approach to distrust and suspect them without good ground. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down as held in **Karanjit Singh Vs. State (Delhi Admn.)** 2003 5 SCC 291, **C. Ronald & Anr. Vs. Union Territory of Andaman & Nicobar Islands,** (2001) 1 SCC (Crl.) 596; **Sunil Clifford Daniel vs. State of Punjab,** 2012 11 SCC 205.

16. Record reveals that no ill-will or animus has been alleged against

any of the police officials for which reason they will falsely implicate the accused. Under the circumstances, recovery of 'ustra' at the instance of appellant and recovery of Rs.2,200/- out of the robbed amount from his possession stands established.

17. The ocular testimony of PW2 Mehraj and PW3 Vikar that while committing robbery, accused used a deadly weapon and inflicted injury on left portion of his face find corroboration from medical evidence inasmuch as it has come on record that PW2 Mehraj took his brother PW3 Vikar initially to Dr. Fridi, a private doctor who refused to entertain him and asked him to go to a hospital. Thereupon, Mehraj took him to GTB hospital. His MLC Ex.PW6/A was prepared by Dr. Phunstok. As per MLC, injured was having incised wound on left mandible 12 cm x 2 cm. Injuries were opined to be simple by Dr. Sameer vide his opinion Ex.PW6/A. It has further come in the statement of complainant and victim that victim had to remain hospitalised for number of days and received 22 stitches. Testimony of injured regarding sustaining injuries by deadly weapon when incident of robbery took place goes unrebutted and unchallenged, in asmuch as, with regard to the incident, he was not cross-examined at all.

18. Coming to the discrepancies referred by learned counsel for the appellant, same does not go to the root of the matter. Dealing with the discrepancies and minor inconsistencies, in **Sidhan Vs. State of Kerala,** 1986, Cr.L.J. 470, it was held :-

> "Minor discrepancies regarding minute details of the incident including the sequence of events and overt acts are possible even in the versions of truthful witnesses. In fact such discrepancies are inevitable. Such minor discrepancies only add to the truthfulness of their evidence. If, on the other hand, these witnesses have given evidence with mechanical accuracy that must have been a reason to contend that they were giving tutored versions. Minor discrepancies on facts which do not affect the main fabric need not be taken into account by the Courts if the evidence of the witnesses is found acceptable on broad probabilities."
>
> "The principles that can be culled out from the aforesaid decisions are minor discrepancies and inconsistencies cannot give (sic) importance. The Court has to see whether inconsistencies can go to the root of the matter and affect the truthfulness of the witnesses while keeping in view that discrepancies are inevitable in case of evidence of rustic and illiterate villagers, who speak them after long lapse of time."

19. In **State of U.P v. Naresh,** (2011) 4 SCC 324, this Court observed:

> "30. .....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....."

20. In **Lal Bahadur and Others v. State (NCT of Delhi,** (2013) 4 SCC 557, it was held:-

> "So far as the contradictions and inconsistencies in the evidence of the prosecution witnesses, as pointed out by the counsel for the appellants, are concerned, we have gone through the entire evidence and found that the evidence of the witnesses cannot be brushed aside merely because of some minor contradictions, particularly for the reason that the evidence and testimonies of the witnesses are trustworthy...."

21. Similar view was taken in **Krishna Mochi vs. State of Bihar,** 2002 6 SCC 81; **Gore Lal vs. State,** 2010 III AD (Delhi) 34; **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat,** AIR 1983 SC 753.

22. I have carefully gone through the entire evidence and found that the evidence of the witnesses cannot be brushed aside merely because of some minor contradiction, particularly for the reason that the evidence and testimonies of the witnesses are trustworthy. Not only that, the witnesses have consistently deposed with regard to the offence committed by the appellant and in fact testimony of PW3 Vikar as regards the incident of robbing, snatching Rs.5,000/- from him and inflicting injury upon his left portion of the face with 'ustra., goes un-rebutted and un-challenged, inasmuch as, in regard to the actual incident, he was not cross-examined at all by learned counsel for the appellant. Mere marginal variation and contradiction in the statement of witnesses cannot be a ground to discard the testimony of witnesses.

23. As regards last limb of the argument that the injuries on the person of Vikar were opined to be simple and, therefore, offence under Section 397 IPC is not made out, same is devoid of substance. In order to invoke Section 397, causing of grievous hurt is not the *sine qua non* inasmuch as, an act would fall within the mischief of this section, if at the time of committing robbery or dacoity, the offender-

(a) Uses any deadly weapon;

(b) Causes grievous hurt to any person; or

(c) Attempts to cause death or grievous hurt to any person.

The word 'uses' was interpreted by Hon'ble Supreme Court in **Phool Kumar Vs. Delhi Administration,** 1975 Crl.LJ 778 where it was laid down that it is not necessary that deadly weapon must be actually used by the culprit in the robbery or dacoity by way of causing hurt or brandishing the same and that it is 'used' within the meaning of Section 397 if the deadly weapon is merely held out for terrorising or frightening a victim to obtain property.

24. This view was reiterated in **Ashfaq Vs. State,** 2004 AIR (SC) 1253 wherein it was held that what is essential to satisfy the word 'uses' for the purposes of Section 397 IPC is the robbery being committed by an offender who was armed with a deadly weapon which was within the vision of the victim so as to be capable of creating a terror in the mind of the victim and not that it should be further shown to have been actually used for cutting, stabbing, shooting as the case may be. In order to bring the case within the four corners of Section 397 IPC, it is not mandatory that grievous hurt is caused to any person. It is sufficient, if a deadly weapon is used. In the instant case, 'ustra. which is a deadly weapon was not only used while committing robbery by the accused but in fact, injuries were also caused on the person of Vikar by inflicting the same on left portion of his face which resulted in profuse bleeding. He had to remain hospitalized and received 22 stitches. Mere fact that injuries were opined to be simple is of no consequence.

25. As such, the prosecution has succeeded in establishing that at the time of committing robbery, the accused used deadly weapon and caused simple hurt to Vikar and thereby committed the offence punishable under Section 392/394/397 IPC. Under the circumstances, the appellant

was rightly convicted by the learned Trial Court. The impugned order does not call for any interference.

26. As regards the quantum of sentence, learned counsel for the appellant prayed for a lenient view. Learned Additional Public Prosecutor for the State, on the other hand, referred to the antecedents of appellant for submitting that he is involved in as many as six other cases and, therefore, does not deserve any leniency. The appellant has, in sum and substance, been sentenced to undergo seven years rigorous imprisonment. Section 397 IPC prescribes the punishment which "shall not be less than seven years". The word 'shall. mandates that sentence cannot be less than seven years, therefore, besides the fact that antecedents of the appellant are not clear, even otherwise, sentence cannot be reduced. That being so, even regarding quantum of sentence, no interference is called for.

27. The appeal, being bereft of merits, is dismissed. Copy of the order along with Trial Court record be sent back.

ILR (2013) VI DELHI 4282
CRL. A.

RAJKUMAR @ BABLOO .....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL. A. NO. : 542/2012 DATE OF DECISION: 06.09.2013

Indian Penal Code, 1860—Section 394/395/397—Appellant challenged judgment and conviction U/s 394/395/ read with section 397 of Code and urged trial court did not appreciate evidence in its true and proper prospective. Held:—Minor contradictions and

improvements do not discredit otherwise natural and reliable testimony of public injured witnesses. Corroboration of evidence with mathematical precision cannot be expected in criminal cases.

The court has no reasons to disbelieve the statements of PWs-1, 4 and 11 regarding identification of the present appellant in the court. They had no ulterior motive to implicate an innocent person and to let the real culprit go scot free. No specific suggestion was put in the cross-examination to claim that the appellant was present on the date and time of occurrence at some other specific place i.e. at his house or at the place of his work. No such witness from these places was examined in defence. They were fair enough to not to identify Pappu @ Chuha, Kallu and Raju in the TIP proceedings. Minor contradictions and improvements highlighted by the appellant's counsel do not discredit the otherwise natural and reliable testimony of the public injured witnesses. The discrepancies referred to by the counsel are insignificant and not material. The occurrence took place at the residential houses at the dead of night. The intruders were 7/8 in number and were armed with weapons. The court can well understand and realize the trauma and shock of inmates of the house on finding strangers with deadly weapons in their hands at that odd hours. There are bound to be some discrepancies between the narration of different witnesses when they speak of details, after witnessing such a horrible incidence. Corroboration of evidence with mathematical precision cannot be expected in criminal cases. I find no valid reasons to interfere in the impugned judgment which is based upon fair appraisal of the evidence. **(Para 8)**

Important Issue Involved: Minor contradictions and improvements do not discredit otherwise natural and reliable testimony of public injured witnesses. Corroboration of evidence with mathematical precision cannot be expected in criminal cases.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Chetan Lokur, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

RESULT: Appeal disposed of.

S.P. GARG, J.

1. Rajkumar @ Babloo (the appellant) challenges a judgment dated 20.11.2010 of learned Sessions Judge in Sessions Case No.51/2008 arising out of FIR No.11/2005 registered at Police Station Uttam Nagar by which he along with Malkiat Singh, Charan Singh and Nand Kishore @ Sanjay was convicted for committing offences punishable under Sections 394/395 read with Section 397 IPC. By an order dated 22.11.2010, he was sentenced to undergo RI for ten years with fine Rs. 5,000/- under Section 394 IPC and RI for ten years with fine Rs. 5,000/- under Section 395 read with Section 397 IPC.

2. Allegations against the appellant were that on 04.01.2005, he and his associates con-jointly committed dacoity at Pawan's house bearing No.168, Gali No.9, Laxmi Vihar, Mohan Garden, Uttam Nagar and robbed articles detailed in the FIR and Sunita's supplementary statement. Further allegations were that they also committed decoity in the House of Bhim Sain at E-65, Bhagwati Garden, Uttam Nagar in between 02.30 to 03.00 A.M. and robbed articles detailed in the statements of the victim and his family members. It is further alleged that the assailants were armed with deadly weapons and they used it to commit decoity and voluntarily caused injuries to Tek Chand, Bhagwan Devi, Bhim Sain, Rakesh Kumar, Pawan Kumar and Sunita. The police machinery came into motion when DD No.35-A (Ex.PW19/A) was recorded at Police Station Uttam Nagar on 04.01.2005 on getting information that the assailants had entered inside House No.168, Gali No.9, Laxmi Vihar, Mohan Garden, Uttam Nagar and had killed informant's husband. The investigation was assigned to SI Bhagwan Singh who with HC Davinder went to the spot. Another DD No.37-A (Ex.PW-10/A) was recorded at 04.20 A.M. on getting information that the assailants had entered in House No. E-65, Bhagwati Garden, Uttam Nagar and had robbed its inmates after beating them. The Investigating Officer lodged First Information Report after recording

Pawan Kumar's statement (Ex.PW-1/A). During the course of investigation, the culprits were arrested and few robbed articles were recovered at their instance. Applications for TIP were moved and statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted in the court. The prosecution examined 24 witnesses to prove the charges. In his 313 statement, the appellant pleaded false implication. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted the appellant for the offence mentioned previously and sentenced him accordingly. Being aggrieved, he has preferred the appeal. It is significant to note that Kalu, Raju and Pappu @ Chuha were also arrested during investigation, however, the eye-witnesses could not identify them in the Test Identification Proceedings and they were discharged.

3. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. No incriminating article was recovered from appellant's possession. The prosecution witnesses have given contradictory version as to the number of assailants and the role played by them in the incident. PWs 3, 5 and 6 did not identify the appellant as one of the assailants who committed robbery/decoity at E-65, Bhagwati Garden, Uttam Nagar. The appellant was shown to the witnesses in the Police Station and for that reason he did not participate in the TIP proceedings. The prosecution witnesses have given divergent statements as to what cash and other articles were robbed. No independent public witness was associated at any stage of the investigation. Chance prints lifted from the spot did not match. Appellant's disclosure statement was not recorded and he was not named by co-accused persons in their disclosure statements. Learned Additional Public Prosecutor urged that there are no sound reasons to discard the testimony of injured witnesses who had no prior animosity with the appellant to falsely implicate him in the incident.

4. I have considered the submissions of the parties and have examined the Trial Court record. There are no good reasons to discard the prosecution version about the incidents of robberies that took place at House No.168, Gali No.9, Laxmi Vihar, Mohan Garden, Uttam Nagar and House No.E-65, Bhagwati Extension on the night intervening 03/04.01.2005. Daily Diary (DD) No.35-A (Ex.PW19/A) was recorded in this regard at 03.00 A.M. without any delay. The informant was the

inmate of the house and she disclosed that the assailants had killed her husband. Again DD No.37-A (Ex.PW10/A) was recorded at 04.20 A.M. regarding commission of decoity at E-65, Bhagwati Garden, Uttam Nagar. Statement of victim Pawan Kumar was recorded and Investigating Officer lodged First Information Report by making endorsement (Ex.PW19/A) over it at 09.30 A.M. In the statement, the victim gave graphic detail as to how and under what circumstances, 7-8 intruders armed with iron rods and pistol committed decoity in his house and injured him and his wife. He also disclosed that the said intruders also committed decoity at a nearby house of Tek Chand. The victim had no reasons to fake the incident of decoity at the dead of night at his house. In the incident, he and his wife Sunita Arya sustained injuries. PW-1 (Pawan Kumar) was injured with iron rod on his mouth, lower jaw, forehead and left cheek. When PW-4 (Sunita Arya) intervened to save him, one of the assailants (Malkiat Singh) fired at her twice and injured her. Both were taken to hospital. PW-18 (Dr.Udai Kumar Singh) medically examined Pawan and prepared MLC (Ex.PW-18/B). PW-20 (Dr.Nishu Dhawan) proved the MLC (Ex.PW20/A) pertaining to injured Sunita Arya. As per MLC, she suffered gunshot injuries. Similarly, victims PW-3 (Tek Chand) was medically examined by Dr.Vishal Sehgal at DDU hospital. The MLC (Ex.PW-20/C) has been proved by PW-20 (Dr.Nishu Dhawan). She also proved MLCs of injured Rakesh (Ex.PW-20/B), Bhim Sain (Ex.PW-20/D) and that of Bhagwan Devi (Ex.PW-18/A). The injuries sustained by them were not suggested to be self-inflicted or accidental. All the injuries sustained by them confirm their presence at the place of occurrences and make them reliable witnesses. There is no conflict between the ocular and medical evidence. There are no sound reasons to disbelieve their testimonies. It is significant to note that co-convicts Malkiat Singh, Nand Kishore @ Sanjay and Charan Singh had preferred Crl.A.Nos.1369/2010, 18/2011 and 1369/2010 respectively before this Court. While maintaining their conviction vide orders dated 31.05.2012 and 17.10.2012, sentence order was modified to the extent that they were sentenced to undergo the period already spent by them in custody.

5. The appellant (Raj Kumar @ Babloo) was arrested on 01.02.2005 by the police of Special Cell vide arrest memo (Ex.PW19/D). His involvement in the instant case surfaced in the disclosure statements. PW-19 (Insp.Bhagwan Singh) moved applications for holding TIP proceedings for Pappu @ Chuha, Kallu, Raj Kumar and Raju. The

witnesses did not identify Pappu @ Chuha, Kallu and Raju in the TIP proceedings. The appellant refused to participate in the TIP proceedings. Adverse inference is to be drawn against him for declining to participate in the TIP proceedings. No plausible explanation has been given for refusal to join the Test Identification Proceedings. No worthful evidence has emerged to establish that he was shown to the public witnesses in the police station.

6. PW-1 (Pawan Kumar) in his statement (Ex.PW-1/A) had given description of the assailants and had claimed to identify them if shown to him. In his Court statement, Pawan Kumar identified Malkiat Singh, Nand Kishore, Charan Singh and Raj Kumar to be assailants and attributed specific role to them. He was categorical to depose that Malkiat Singh had a katta in his hand and fired on his wife. Nand Kishore had an iron rod and he caused injuries to him. Charan Singh and Rajkumar (appellant) were present at the spot with them (Malkiat Singh and Nand Kisihore). The assailants had remained in the house of the victim for sufficient long duration and had direct confrontation with them. PW-1 (Pawan Kumar) and his wife PW-4 (Sunita Arya) were injured in the incident. Apparently, they had clear and sufficient opportunity to identify and recognize the assailants. In the cross-examination, he denied that the accused persons were shown to him before conducting TIP. He denied the suggestion that Raj Kumar was apprehended by the police at Mansa Mandi (Punjab) and was falsely implicated in this case. PW-4 (Sunita Arya) also identified the present appellant along with co-convicts in the court. She deposed that Malkiat Singh had a revolver in his hand and the other three assailants stood near her bed along with him (Malkiat Singh). They all gave beatings to her husband. Three assailants had danda, hocky and knife. In the cross-examination, she disclosed that she was unable to participate in the Test Identification Proceedings of case property as she remained in bed for seven to eight months due to the injuries caused to her. She denied that the police had shown the accused persons after her discharge from the hospital by bringing them to her house.

7. PW-3 (Tek Chand), PW-5 (Bhagwan Devi), PW-6 (Bhim Sain) were fair enough to depose that they were unable to identify Raj Kumar to be one of the assailants. They identified Charan Singh and Nand Kishore and assigned specific role to them in the incident. However, PW-11 (Rakesh Kumar) was able to identify all the assailants Malkiat Singh, Charan Singh, Nand Kishore and Raj Kumar. In his deposition in the

court, he clarified that Malkiat Singh had a katta in his hand and Charan Singh, Raj Kumar and Nand Kishore had iron rods at the time of incident. In the cross-examination, he admitted that the accused persons were not known to him prior to the incident and he saw their faces on the night of incident only. He denied that the police officials had shown him the photographs of some persons. He volunteered to add that he identified the accused persons for the first time before the Metropolitan Magistrate. He denied to have visited the police on 06.01.2005 or on 09.01.2005 or to have seen the accused persons sitting there.

8. The court has no reasons to disbelieve the statements of PWs-1, 4 and 11 regarding identification of the present appellant in the court. They had no ulterior motive to implicate an innocent person and to let the real culprit go scot free. No specific suggestion was put in the cross-examination to claim that the appellant was present on the date and time of occurrence at some other specific place i.e. at his house or at the place of his work. No such witness from these places was examined in defence. They were fair enough to not to identify Pappu @ Chuha, Kallu and Raju in the TIP proceedings. Minor contradictions and improvements highlighted by the appellant's counsel do not discredit the otherwise natural and reliable testimony of the public injured witnesses. The discrepancies referred to by the counsel are insignificant and not material. The occurrence took place at the residential houses at the dead of night. The intruders were 7/8 in number and were armed with weapons. The court can well understand and realize the trauma and shock of inmates of the house on finding strangers with deadly weapons in their hands at that odd hours. There are bound to be some discrepancies between the narration of different witnesses when they speak of details, after witnessing such a horrible incidence. Corroboration of evidence with mathematical precision cannot be expected in criminal cases. I find no valid reasons to interfere in the impugned judgment which is based upon fair appraisal of the evidence.

9. Malkiat Singh, Charan Singh, Nand Kishore and Raj Kumar were sentenced to undergo RI for ten years with total fine Rs.10,000/-. Malkiat Skingh and Charan Singh were further sentenced to undergo RI for seven years with fine Rs.3,000/- under Section 412 IPC. Malkiat Singh was sentenced for two years RI under Section 25 Arms Act with fine Rs.2,000/-. All the sentences were to run concurrently. The convicts were given benefit of Section 428 Cr.P.C. As observed above, Malkiat

Singh, Charan Singh and Nand Kishore were sentenced to undergo custody period already spent by them in this case. The custody period of Charan Singh was more than seven years. Nominal roll of the present appellant reveals that he has spent seven years, one month and twenty days incarceration as on 26.04.2012. He also earned remission for six months and fifteen days as on 26.04.2012. The said custody period has increased to almost more than eight years. Taking into consideration, facts and circumstances, the present appellant is directed to undergo the sentence already served by him in this case.

10. The appeal stands disposed of in the above terms. A copy of the order be sent to Jail Superintendent, Tihar Jail with the direction to release the appellant, if he is not required in any other case. Copy be also sent to the accused/appellant through Jail Superintendent. Trial Court record, if any, along with copy of this order be sent back.

ILR (2013) VI DELHI 4289
CRL. L.P

STATE **....PETITIONER**

VERSUS

MOHD. IQBAL **....RESPONDENT**

(G.S. SISTANI & G.P. MITTAL, JJ.)

CRL.L.P. NO. : 472/2013 **DATE OF DECISION: 09.09.2013**

Code of Criminal Procedure, 1973—Petition filed under Section 378 of the (Cr.P.C) by State seeking leave to appeal against the judgment passed by the learned Additional Sessions Judge (ASJ)—Acquitting respondent of the charge under Sections 302 of the Indian Penal Code, 1860 (IPC)—The respondent was alleged to have stabbing his deceased brother as indicated by the three eye—Witnesses—Presence of three witnesses was disbelieved by the Trial Court holding that the recovery of knife was not admissible—Recovery of the mobile phone belonging to the respondent from the spot also doubtful—The prosecution case not established beyond reasonable doubt—Hence the present leave petition. Held—The Trial Court has given valid and substantial reasons for disbelieving the alleged three eye—Witnesses—No evidence that the bold on the knife was of deceased and hence mere recovery is of no consequence *Pulukuri Kottaya & Ors. v. The knife Emperor* (relied on)—Recovery of mobile phone—Leave of Appeal can be granted only when the conclusions arrived by the Trial Court is perverse or misapplication of any legal principle—The High Court cannot entertain a leave of Appeal against the order of acquittal merely because another view is more plausible—*Arulvelu and Anr. Vs. State* represented by the public prosecutor and Anr (relied on)—*Ghurey Lal vs. State of Uttar Pradesh* (relied on).

Important Issue Involved: Leave of Appeal can be granted only when the conclusions arrived by the Trial Court is perverse or misapplication of law or any legal principle. The High Court cannot entertain a leave of Appeal against the order of acquittal merely because another view is more plausible.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Rajdipa Behura, APP for the State

FOR THE RESPONDENT : Nemo

CASES REFERRED TO:

1. *Arulvelu and Anr.* vs. *State represented by the Public Prosecutor and Anr.,* 2009 (10) SCC 206.

2. *Ghurey Lal* vs. *State of Uttar Pradesh,* (2008) 10 SCC 450.

3. *Bharwada Bhoginbhai Hirjibhai* vs. *State of Gujarat* AIR 1983 SC 753.

4. *Pulukuri Kottaya & Ors.* vs. *The King Emperor* AIR 1947 PC 67.

RESULT: The leave petition is dismissed.

G.P. MITTAL, J. (ORAL)

CRL.M.A. 13466/2013 & CRL.M.A. 13467/2013 (delay)

1. Crl.M.A.13466/2013 has been filed by the State seeking condonation of 70 days' delay in filing the present petition for leave to appeal and Crl.M.A.13467/2013 has been filed by the State seeking condonation of 72 days' delay in re-filing the present petition for leave to appeal.

2. Heard. For the reasons stated in the applications, present applications are allowed. Delay in filing and re-filing the petition for leave to appeal is condoned.

3. Applications stand disposed of.

4. By this petition under Section 378 of the Code of Criminal Procedure, 1973 (the Code), the State seeks leave to appeal against the judgment dated 08.02.2013 passed by the learned Additional Sessions Judge (ASJ), (Central) Delhi in Sessions Case No.25/2010 whereby the respondent was acquitted of the charge under Section 302 of the Indian Penal Code, 1860 (IPC).

5. The case of the prosecution as unfolded by PW-3 (Mohd. Akbar), who is the star witness of the prosecution, is that on 20.03.2010 at about 1:30 P.M. he was returning home from the barber shop. When he reached the street near his house, he noticed respondent Mohd. Iqbal rushing out of their house holding a knife in his hand, chasing deceased Mohd. Akhtar uttering *"mai usko aaj chhodunga nahi"*. PW-3 also chased the respondent. Since the respondent was running very fast, PW-3 could not catch up with him. When he (PW-3) reached Shahganj Chowk, he saw the respondent catching hold of his deceased brother (Mohd. Akhtar) and repeatedly stabbing him with a knife. When he reached near the respondent,

he found the deceased had fallen on the ground and the respondent was trying to cut the neck of the deceased. He pushed the respondent aside with force. The respondent escaped towards G.B. Road with the knife which he was holding in his hand. In the meanwhile, a policeman (Constable Bandhu Kumar PW-7) reached the spot. PW-3 with the help of PW-7 removed the deceased to LNJP hospital where Mohd. Akhtar was declared 'brought dead'. The IO recorded the statement (Ex.PW-3/A) of Mohd. Akbar, made his endorsement (Ex.PW-29/A) on the same and on the basis of which the instant case was registered. During the course of investigation, the respondent was apprehended and a bloodstained knife was recovered in pursuance of the disclosure statement made by him. On completion of the investigation, the respondent was forwarded to the court for trial for an offence punishable under Section 302 IPC.

6. On the respondent pleading not guilty to the charge, prosecution examined 29 witnesses which included Mohd. Akbar PW-3, Pawan Kumar PW-8 and Mohd. Salaman PW-15, who were projected as eye-witnesses to the alleged incident, Constable Bandhu Kumar PW-7 who had removed the deceased to the hospital, apart from the witnesses to the recovery of the mobile phone, bloodstains etc. from the spot and recovery of the knife at the instance of the respondent.

7. On appreciation of evidence, the learned ASJ disbelieved PWs 3, 8 and 15 to be eye-witnesses of the incident. He further disbelieved the recovery of the knife at respondent's instance. He found the recovery of the mobile phone belonging to the respondent from the spot to be doubtful because of the calls having been received and made therefrom even after the incident. The learned ASJ thus reasoned that the prosecution case was not established against the respondent beyond the shadow of all reasonable doubts. He, therefore, acquitted the respondent giving him benefit of doubt.

8. Learned APP for the State argues that the trial court committed manifest error of law in disbelieving the testimonies of the three eye witnesses and the recovery of knife at respondent's instance in pursuance of the disclosure statement made by him. While relying on **Bharwada Bhoginbhai Hirjibhai v. State of Gujarat** AIR 1983 SC 753, the learned counsel argues that on seeing a gruesome incident, different witnesses behave differently and simply because PW-3's clothes were not stained with blood or that the same were not seized by the IO or that his name

was not mentioned in the relevant column of MLC as the person who had brought the injured to the hospital, the learned ASJ ought not to have disbelieved PW-3 to be an eye witness. It is stated that PW-8 and PW-15 also supported the prosecution version with regard to the injuries inflicted by the respondent on the deceased. Constable Bandhu Kumar PW-7 also stated about the presence of PW-3 in the hospital. Thus, the three eye-witnesses (PWs-3, 8 and 15) ought to have been believed by the learned ASJ which was sufficient to bring home the respondent's guilt. It is urged that in view of the overwhelming evidence adduced by the prosecution, the order of acquittal passed by the learned ASJ is liable to be reversed.

9. We have heard the learned APP for the State and have perused the impugned judgment and the testimonies of the material witnesses relied upon by the State.

10. In our view, the trial court has given valid and substantial reasons for disbelieving the alleged three eye witnesses as also the recovery of the mobile phone from the spot and the recovery of the knife in pursuance of the disclosure statement (Ex.PW-24/B) alleged to have been made by the respondent. We are unable to be persuaded by the learned APP to take a different view than the one taken by the learned ASJ. The relevant reasoning of the trial court is extracted hereunder:-

> "11. PW3 Mohd. Akbar is younger brother of the accused and Mohd. Akhtar (since deceased) was the youngest brother. According to PW3 Mohd. Akbar, on 20.03.2010 at about 1.30 pm he was returning home from a barber saloon. When he reached in the street, near his house, he saw the accused rushing out of the house holding a knife in his hand. The accused was uttering that he was not going to leave him (Mohd. Akhtar). On hearing these words, he (PW3) chased the accused. He could not catch hold of him (accused) but kept following him, because the accused was running very fast. On reaching Shah Ganj Crossing, he saw that accused had caught hold of Mohd. Akhtar and repeatedly stabbed him with the knife. Further according to the witness, when he reached near the accused, he found him trying to cut neck of Mohd. Akhtar, who had fallen on the road. He then pushed the accused on one side with force and the accused ran away.

It is not case of the prosecution that any other family member of the accused was not present inside the house when PW3 Mohd. Akbar saw accused and the victim running out of the house. There is no evidence that any other family member also rushed out of the house. Had the accused come out of the house with a knife while chasing the younger brother, it is not believable that other family members would have remained behind. They would have also chased the accused so as to avoid any harm to Mohd. Akhtar. Since there is nothing on record to suggest that any other family member came out of the house or chased the accused so as to save the victim, it is difficult to believe the version of PW3 Mohd. Akbar that it is only he who came out of the house and chased the accused.

Even otherwise on having seen the accused chasing his younger brother, with a knife in his hand, Mohd. Akhtar (sic Akbar) must have raised hue and cry attracting other persons of the area or in the street, but from the evidence led by the prosecution, it appears as if no hue and cry was raised by Mohd. Akbar.

Further reference has been made to the cross examination of PW3 Mohd. Akbar, were (sic where) he displayed ignorance on material aspects of the case and also improved upon his statement Ex PW3/A made before the police, while narrating the incident in Court, so on to contend that these omissions are improvements further go to suggest that PW3 Mohd. Akbar was not present on the given date, time and place. In his cross examination, PW3 displayed ignorance on various aspect.

In this regard statement of the witness reads as under:

"I do not remember if I had specifically mentioned in my statement that behaviour of the accused was bad or cruel towards my deceased brother.

I do not remember whether I had told the police that accused used to force him to work him without any remuneration.

I do not remember whether I told the police that when Akhtar was still in gali accused Iqbal stared beating him.

I do not remember whether I stated to the police that Akhtar

saved himself and rushed inside the house.

I do not remember whether I told to the police that Akhtar told us that Iqbal was beating him to extort money.

I do not remember whether I stated to the police that when I reached near the accused he was trying to cut the neck of my brother with knife, who had fell on the road.

I do not remember whether I told the police that I pushed the accused on one side with the force.

I do not remember whether I stated to the police that one police man had come from nearby chowki, with whose help I took my injured brother to the hospital."

A perusal of his cross examination would reveal that he has improved upon material aspect. In this regard statement of the PW3 when reproduced reads as under:

"I think I stated to the police that whenever accused used to beat the deceased, we all used to save the deceased from the accused.

I stated to the police that accused in routine used to extort money from our deceased brother who was working independently in Sita Ram Bazar.

I stated to the police that on 20.03.2010 at about 1.30 pm, I was returning home after getting my shave done from the shop.

I stated to the police that when I reached in the gali near my house, I saw accused rushing out of the house."

A comparison of this statement Ex PW3/A made before the police, with the statement made in Court, would reveal that PW3 Mohd. Akhtar (sic Akbar) has improved upon these material aspects of the prosecution version.

It is case of prosecution that on 18.03.2010, during the night, Mohd. Akhtar was severely beaten by the accused when the former did not pay him money; that on that night all of them saved Mohd. Akhtar from the accused but the accused extended threat that he would kill Mohd. Akhtar in case he fail to (sic pay)

money every week.

In his statement made in Court, when the witnessed was cross examined, PW3 Mohd. Akhtar stated that he had told the police that two days before the date of incident Akhtar had returned home at about 01.30 am in the night after work as he used to make video films marriages and that Iqbal threatened that if Akhtar will not work for him, he will kill him. In his statement made in Court, it does not find mention that other family members were present at the house on the night of 18.03.2010 or that they have saved Mohd. Akhtar from the accused or that accused has extended threat to kill Mohd. Akhtar in case he failed to pay him money every week. This goes to show that even in this regard PW Mohd. Akbar has not made statement in consonance with statement Ex PW3/A made before the police.

12. During investigation no person from the neighbouring house was associated in the evidence to lend corroboration to the prosecution version that any one of them had heard any cry being raised by PW3 Mohd. Akbar or any other family member or to have seen accused chasing the victim. In this regard, when there is not corroboration from any other person, it is difficult to rely on the sole statement of PW3 Mohd. Akbar that he saw accused coming out of the house with knife and chasing the victim.

According to PW3 Mohd. Akbar, one policeman came from a nearby chowki and helped him in removal of his brother to LNJP Hospital. But a perusal of MLC Ex PW9/A would reveal that there is no mention in the relevant column meant for name of the relative or friend of the injured, accompanying injured at the time he was brought LNJP Hospital. There is only the name of Ct. Bandhu. Had Mohd. Akbar PW3 accompanied Ct. Bandhu and Mohd. Akhtar to LNJP Hospital, his name must have been recorded by the doctor in the relevant column. Furthermore, the alleged history, as recorded in MLC Ex PW9/A was provided by Ct. Bandhu. Doctor no where mentioned that any alleged history was provided by any person by the name of Mohd. Akbar. As per alleged history, it was a case of physical assault at Shah Ganj crossing. There is no mention in the alleged history that it was

a case of assault by brother on the person of other brother.,

When we advert to the statement of PW7 Ct. Bandhu, it becomes clear that he was informed by many persons that one person was stabbing another at Shah Ganj Crossing and thereupon he reached the said crossing and found Mohd. Akbar (sic Akhtar) lying in pool of blood. The witness nowhere stated that Mohd. Akbar met him at the place where said injured was lying. Had Mohd. Akhtar (sic Akbar) been present there, Ct. Bandhu must have specifically stated about presence of Mohd. Akbar there. Had Mohd. Akbar accompanied Ct. Bandhu to the hospital, he would not have omitted to state about the same. But there is nothing in the statement of PW7 that Mohd. Akbar accompanied from spot to the hospital. Ct. Bandhu simply stated about recording of statement of Mohd. Akbar by Inspector Jarnail Singh at the hospital.

During investigation, IO did not seize any blood stained clothes of PW Mohd. Akbar to substantiate prosecution version regarding his presence at the given date, time and place or that he had accompanied to the hospital.

As rightly pointed out by learned defence counsel there is contradiction in the statements of PW3 about conveyance used in removal of Mohd. Akhtar to the hospital. According to PW3 Mohd. Akbar, injured was taken to hospital in a cycle rickshaw. Contrary to it is statement of PW7 Ct. Bandhu who stated in his cross examination that within a minute or two a TSR was arranged and the injured was removed to hospital.

Recovery of mobile phone from the spot

13 . It is case of prosecution that one mobile phone no.9213880289 i.e. of the accused, was found lying near an electric pole, at the scene of crime and the same was seized by recovery memo Ex.PW3/B by Inspector Jarnail Singh in presence of Mohd. Akhtar (sic Akbar) SI Brijesh Mishra, HC Mahesh Tyagi.

While appearing in court as PW3 Mohd. Akbar deposed that two mobile phones were recovered by the police from the spot. He specifically stated that one mobile phone was of the accused and

other was of the deceased. But surprisingly police officers have nowhere whispered about recovery of another phone i.e. of the deceased from the same place.

Electronic Evidence

14 . Prosecution has examined PW5 M.N. Vijayanand to prove that mobile phone connection no.9213880289 was in the name of the accused and also to prove call details Ex.PW5/C. As per the prosecution version, occurrence took place on 20.03.2010 at about 1.35 p.m. but PW5 has admitted in his cross examination that as per call detail record on 20.03.2010 four incoming calls were received on his mobile phone at 2.10, 3.49, 4.13 and 5.34 and the last outgoing call made from his mobile phone was at 6.22 p.m.

It has rightly been contended that in case this mobile phone is alleged to have been found lying at the spot soon after the occurrence but it remains unexplained as to how conversation could take place by way of "four incoming calls: and "one outgoing call" depicting after the occurrence. The last four incoming calls were made from 9311899168, 9871858349, 9911887592, 9811155938. There is nothing on record to suggest that any such caller was associated in the investigation or enquired to know as to who had made calls on this mobile phone. The last outgoing call made from this mobile phone was made at phone no.9250131777. No such person having this mobile phone connection no.9250131777 was associated in the investigation to inquire from him or her as to who had made this outgoing call to him at about 5.34 p.m. When prosecution has failed to establish as to who made last four incoming calls and who received the same and as to who made the last outgoing calls and who received the same, the prosecution version that accused was present on the given date, time and place of occurrence with this mobile phone connection becomes doubtful.

PW8

15. As per prosecution version, PW8 Pawan Kumar who runs a scooter repair work in shop no. 3804, Shah Ganj, Ajmeri Gate, Delhi also witnessed the accused and Mohd. Akhtar (since

deceased) coming from the side of Shah Ganj while running and then stabbing Mohd. Akhtar with knife. According to this witness, their brother Mohd. Akbar was also seen rushing to save Mohd. Akhtar but by then accused had already stabbed Mohd. Akhtar and ran away with knife.

Learned defence counsel has pointed out that this witness did not make any phone call although there a telephone connection his shop. He also did not try to save Mohd. Akhtar.

Attention has also been made to the statement of PW8 Pawan Kumar where he admitted to have not stated to the police that he had seen Mohd. Akbar rushing after Iqbal and Mohd. Akhtar.

Learned defence counsel has contended that PW8 Pawan Kumar has made improvements on material aspects of the case which create doubt in the prosecution version that he witnessed to the occurrence.

Learned defence counsel has rightly pointed out improvements in the statement of PW8 on the aforesaid three aspects i.e. he knew the accused and the deceased and that they used to come to his shop for scooter repair; that he had seen accused and deceased coming while running from Shah Ganj side and on the point that he had seen Mohd. Akbar rushing after Iqbal and Mohd. Akhtar, the reason being that these facts were not stated by him before the police.

As a result, it cannot be said that Pawan Kumar knew the three brothers or that he saw accused and deceased coming while running from the side of Shah Ganj side or that he saw Akbar rushing after them.

Even if it be assumed for the sake of arguments that it depends upon each individual as to how he or she reacts in a given situation and PW8 Pawan Kumar did not rang up the police from his landline phone or tried to save Akhtar, he could go to the police lateron and tell about the occurrence and at least help in removal of injured from the spot to the hospital after the assailant had run away. Since he did not take any such step, it becomes difficult to believe what he has narrated before this Court claiming himself to be an eye witness There is nothing in his statement

to suggest as to who told the police that he had witnessed the occurrence. This further creates doubt that PW8 Pawan Kumar saw the accused inflicting injuries on the person of Mohd. Akhtar.

PW15

16. It is case of the prosecution that PW15 Salman, also witnessed the accused giving injuries on the person of his brother Mohd. Akhtar with knife and Mohd. Akbar reaching there and giving push to accused or that whereupon accused ran away.

Learned defence counsel has pointed out that according to PW15 he was having a mobile phone but he did not make any call to the police, which remained there for about a hour to tell about the facts witnessed by him, or tried to save the injured. That he did not tell the police about arrival of Mohd. Akbar to save Mohd. Akhtar or that Mohd. Akbar had pushed accused Iqbal, which creates doubt regarding his presence on the given date, time and place.

Another contention raised by learned defence is that from the cross Examination of PW 15, it would transpire that he has nowhere explained as to how he knew the three brothers i.e. accused, deceased and PW Mohd. Akbar and that having regard to this fact, no reliance should be placed on his testimony when he named all three brothers in his statement.

According to PW15 Mohd. Salman, on 20.03.2010, at about 1.15 2pm, while present in his street, he heard noise emanating from the side of Shah Ganj Crossing. On reaching Shah Ganj crossing, he saw Iqbal accused inflicting injuries on the person of his brother Akhtar, their brother Akbar also came there to rescue Akhtar.

A perusal of cross examination of PW15 would reveal that he nowhere stated to have made any statement before the police. On the other hand, he clearly stated that he had not informed the police about the facts seen by him. He did not make any call to the police or even tried to save the injured. Admittedly, the witness was having a mobile phone with him. Even if the explanation furnished by him that he got scared as the accused was having a knife is accepted for the sake of arguments, he

could easily make a phone call after the accused had run away from the spot, but there is no explanation for his having not gone to the police station or nearby police post or to have called the police on phone to inform them about the occurrence.

According to PW15 Mohd. Salman, PW Akbar had given a push to the accused and thereafter the accused had run away. However, it is significant to note that PW Pawan Kumar nowhere stated to have witnessed or stated that PW Akbar had pushed the accused or that thereafter the accused had run away. Rather according to PW8 by the time Akbar tried to save Akhtar, Iqbal had stabbed Akhtar and run away. As noticed above, PW8 Pawan Kumar has improved upon his statement on the point of Akbar having been seen rushing after the accused and the deceased.

As rightly pointed out by ld. defence counsel, when PW15 has denied to have stated before the police that he was on visiting terms with the deceased but this fact finds recorded in his statement made before the police, same creates doubt if he ever made any such statement before the police or he was associated in the investigation."

11. A perusal of Constable Bandhu Kumar's (PW-7) statement shows that he with the help of persons of public had removed the deceased to LNJP hospital. He testified that SI Jaswant Singh, Constable Abdul Karim and brother of the deceased also reached the hospital. It is, therefore, evident that Mohd. Akbar (PW-3) did not accompany the deceased to the hospital. Thus, apart from the fact that PW-3's clothes were not stained with blood and that his name was not mentioned in the MLC as the person who had brought the deceased to the hospital. PW-7 categorically stated that the brother of the deceased along with two police officials had subsequently reached the hospital. He nowhere stated that Mohd. Akbar met him at the place of the incident.

12. Thus, PW-3 could not have been an eye witness to the incident. Similarly, with regard to PW-8 and PW-15, apart from the fact that they did not help PW-7 in removing the deceased to the hospital, the trial court noticed various improvements and omissions in their testimony in the court as against their statements under Section 161 Cr.P.C. recorded by the IO. Moreover, if PW-8 and PW-15 say that PW-3 Mohd. Akbar (the deceased's brother) was an eye witness to the incident, which we

have already disbelieved, this would negate the presence of PWs-8 and PW-15 on the spot at the time of the incident.

13. As noticed by the learned ASJ, PW-15 did possess a mobile phone but he did not make any call to the police and nor did he tell the police about the incident which remained at the spot for about one hour. Thus, the trial court rightly disbelieved the presence of the three witnesses at the time of the incident.

14. As far as the recovery of the knife is concerned, the trial court disbelieved the same as the same was not done in the presence of any independent witness and it was improbable that the respondent would have concealed the knife over the roof of a toilet after putting it in a polythene bag. Otherwise also, mere recovery of a knife stained with human blood without there being any proof of presence of the blood group of the deceased by itself would be of no consequence in view of the judgment of the Privy Council in **Pulukuri Kottaya & Ors. v. The King Emperor** AIR 1947 PC 67.

15. The law with regard to the grant of leave is well settled by a catena of judgments. Leave to Appeal can be granted only where it is shown that the conclusions arrived at by the Trial Court are perverse or there is mis-application of law or any legal principle. The High Court cannot entertain a petition merely because another view is possible or that another view is more plausible. In **Arulvelu and Anr. vs. State represented by the Public Prosecutor and Anr.,** 2009 (10) SCC 206, while referring with approval the earlier judgment in **Ghurey Lal vs. State of Uttar Pradesh,** (2008) 10 SCC 450, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against acquittal. The principles are:-

"1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/ appellate courts must rule in favour of the accused.

6. Careful scrutiny of all these judgments lead to the definite conclusion that the appellant court should be very slow in setting aside a judgment of acquittal particularly in a case where two views are possible. The trial court judgment cannot be set aside because the appellate court's view is more probable. The appellate court would not be justified in setting aside the trial court judgment unless it arrives at a clear finding on marshalling the entire evidence on record that the judgment of the trial court is either 'perverse' or wholly unsustainable in law."

16. We have already stated above that the appreciation of evidence by the trial court is in consonance with the settled legal principles. Even if two views are possible, it is not permissible for this court to interfere in the order of acquittal.

17. The leave petition, therefore, has to fail; the same is accordingly dismissed.

ILR (2013) VI DELHI 4304
CRL. A.

RAJESH GUPTA ....APPELLANT

VERSUS

STATE (NCT) OF DELHI ....RESPONDENT

(SUNITA GUPTA, J.)

CRL. A. NO. : 239/2010 & CRL. M.B. NO. : 119/2013 **DATE OF DECISION 11.09.2013**

(A) India Penal Code, 1860—Sections 392/394/397/452/506 (ii)/342/34—Arms Act, 1959—25/27—Appellants aggrieved by judgment and their conviction challenged the same by way of appeal and alleged wrong appreciation of evidence by trial Court—Also, some of prosecution witness interested witness and no independent witness joined in investigation. Held: Evidence of related or interested witness should be meticulously and carefully examined. In a case where the related witness may have an enmity with the assailant, the bar would need to be raised and the evidence of witness would have to be examined by applying the standard of discerning scrutiny. However, this is only a rule of prudence and not one of law.

However, the suggestions given to the prosecution witnesses and statement of accused under Section 313 Cr.P.C makes it clear that the accused are not disputing their presence in the house of complainant. They are also not disputing regarding beatings given to them by public. In this background, since the presence of the accused persons in the house of complainant is undisputed, the entire incident has to be considered. Learned counsel for the appellant had placed reliance on **Raju alias Balachandran & Ors. v. State of Tamil Nadu,** AIR 2013 SCC 983, for submitting

that PW1 and PW3 are interested witnesses. There is no independent witness hence no reliance can be placed on their testimony. In this case, it was observed that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related witness may have an enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying the standard of discerning scrutiny. However, this is only a rule of prudence and not one of law. Though the prosecution case rests on the testimony of Savita and her husband Gagan and there is no other independent witness but that itself is not sufficient to cast any doubt on their testimony keeping in view the fact that the accused persons have failed to show that there was any enmity between them and the complainant/her husband. Once it is not proved as to for what purpose the accused persons had gone to the house of the complainant, there is no reason to disbelieve the testimony of Savita who had given a detailed account of the entire incident by explaining the role of each and every accused with minute details. Despite cross examination, nothing could be elicited to discredit her testimony. Furthermore, according to Gagan Bhola, on search of the accused persons a loaded country made pistol and four cartridges were recovered from the accused persons. His testimony in this regard goes absolutely unchallenged and unshattered as he was not cross examined in regard to this recovery at all. In fact, except for giving a bare suggestion that no such incident had taken place, his entire testimony regarding the incident has not been assailed in cross examination. **(Para 13)**

(B) Indian Penal Code, 1860—Sections 392/394/397/452/506 (ii)/342/34—Arms Act, 1959—25/27—Appellants aggrieved by judgment and their conviction challenged the same by way of appeal and urged Constable who took accused persons to hospital was not examined which is fatal to prosecution case. Held: It is not the number of witnesses but it is the quality of evidence

which is required to be taken note of for ascertaining the truth of the allegations made against the accused.

Much emphasis was led by learned counsel for the appellants for submitting that the Constable who had taken the accused persons to hospital was not examined by prosecution and reliance was placed on **Parkha Ram Suri** (supra) and **Pramil**(supra). Section 134 of the Indian Evidence Act provides that no particular number of witnesses are required for proof of any fact. It is trite law that it is not the number of witnesses but it is the quality of evidence which is required to be taken note of for ascertaining the truth of the allegations made against the accused. In **Thakaji Hiraji vs. Thakore Kubersing Chamansing** (2001) 6 SCC 145, it was observed as follows:-

> "It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being

withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses." **(Para 15)**

Important Issue Involved: Evidence of related or interested witness should be meticulously and carefully examined. In a case where the related witness may have an enmity with the assailant, the bar would need to be raised and the evidence of witness would have to be examined by applying the standard of discerning scrutiny. However, this is only a of prudence and not one of law.

(B) It is not the number of witnesses but it is the quality of evidence which is required to be taken note of for ascertaining the truth of the allegations made against the accused.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. S.B. Dandapani, Advocate.

FOR THE RESPONDENT : Ms. Fizani Husain, APP for the State with SI Vinod Kumar, P.S. Pandav Nagar.

CASES REFERRED TO:

1. *Raju alias Balachandran & Ors.* vs. *State of Tamil Nadu,* AIR 2013 SCC 983.
2. *Anil Kumar Goswami* vs. *State (NCT of Delhi),* 2012 (1) JCC 47.
3. *State* vs. *Parkha Ram Suri & Ors.,* 2011(3) JCC 2094.
4. *Sanjay Kumar Gupta* vs. *The State, Govt. of NCT of Delhi,* 2009(4) JCC 2544.

5. *Dharambir* vs. *State of Haryana,* 2008(4) JCC Narcotics 197.
6. *Vijay Kumar @ Bhushan* vs. *State and State Delhi Administration* vs. *Vijay @ Bhushan,* 2007(1) JCC 16.
7. *Dharam Singh* vs. *State,* 2007(4) JCC 3068.
8. *Pramil @ Parmanand Gajanan Rao* vs. *State of Goa,* 2006(2) Bom, C.R.434.
9. *Man Preet Singh* vs. *State,* 2004 Cr.L.J 530.
10. *Thakaji Hiraji* vs. *Thakore Kubersing Chamansing* (2001) 6 SCC 145.
11. *Harendra Narain Singh & Ors.* vs. *State of Bihar,* 1991 SCC (Cri) 905.

RESULT: Appeals dismissed.

SUNITA GUPTA, J.

1. Challenge in these appeals is to the judgment dated 30.10.2009 and order on sentence dated 06.11.2009 arising out of Sessions Case No.76/2005 in case FIR No. 631/2004 u/s 392/394/397/452/506 (ii)/342/34 IPC & 25/27 Arms Act vide which the accused were held guilty for all the offences and were sentenced as under:-

- Sentenced to undergo rigorous imprisonment for a period of seven years each and were also directed to pay fine in the sum of Rs.2,000/- each, in default of payment of fine, to undergo simple imprisonment for a period of three months each for offence u/s 397/394/392 IPC read with Section 34 IPC
- Sentenced to undergo rigorous imprisonment for a period of two years and also to pay fine of Rs.1,000/- each, failing which to undergo simple imprisonment for a period of two months each for offence u/s 452/34 IPC;
- Sentenced to undergo rigorous imprisonment for a period of one year each for offences punishable u/s 506(ii) IPC read with Section 34 IPC;
- Sentenced to undergo rigorous imprisonment for a period of six months for offence u/s 342 IPC;

- Sentenced to undergo rigorous imprisonment for a period of one year each for offences punishable u/s 25 read with Section 27 Arms Act.

All the sentences were to run concurrently. Benefit of Section 428 Cr.P.C was extended to each of the convicts.

2. Prosecution case emanates from the fact that on 27.11.2004, at about 8.15 p.m, both the appellants along with their third associate entered the house of complainant Savita Bhola at III Floor, A-12, Pandav Nagar, Delhi and committed robbery on pointing out a country made pistol and robbed her of her gold jewellery. The two accused were apprehended while they tried to flee away, below the house, by the public persons who gave severe beatings to them. The husband of the complainant also reached the spot and recovered one loaded country made pistol from the pant of accused Pankaj and four live cartridges from accused Rajesh. PCR also reached the spot and took the accused to L.B.S. Hospital. Local police arrived and took the complainant and her husband to L.B.S.Hospital where the statement of complainant was recorded, which culminated in registration of FIR against the accused persons. One sweater, muffler and a kitchen knife was also recovered from the dining room of the house of the complainant while one half sleeve sweater was recovered from the stair case. Same were seized. One gold pendent and one silver *jhumka* belonging to the complainant were also recovered from accused Rajesh and Pankaj respectively by the duty constable during their medical examination at the hospital. The country made pistol and cartridges were sent to CFSL, Hyderabad. Permission under Section 39 Arms Act was obtained from DCP (East). After completing investigation, charge-sheet was submitted against the accused persons.

3. Initially on 19.05.2005, charge for offence u/s 392/394/397/34 IPC was framed against the accused persons. Subsequently on 27.01.2006, additional charge u/s 452/506(ii)/342/34 IPC read with Section 25/27 Arms Act was also framed. Accused pleaded not guilty to the charge and claimed trial.

4. In order to substantiate its case, prosecution examined 13 witnesses. All the incriminating evidence was put to the accused while recording their statements u/s 313 Cr.P.C wherein they denied the case of prosecution and alleged that accused Pankaj along with his co-accused Rajesh had gone to demand money from the complainant as he had

worked with the complainant at his shop and amount of salary was to be taken from him. When they came to demand the dues, then a quarrel had taken place between them and Gagan Bhola who raised alarm of 'chor-chor' and got them apprehended with the help of public who gave beatings to them. Complainant handed over one piece of silver ear ring and one pendent to the police for planting the same upon them. They, however, did not prefer to lead any evidence.

5. After meticulously examining the evidence led by the prosecution, vide impugned order, the appellants were convicted and sentenced as stated above, which has been assailed by the appellants by filing the present appeals.

6. It was submitted by learned counsel for the appellants that this is a case of wrong appreciation of evidence. Conviction is based on the testimony of PW-1 and PW-3 who are interested witnesses. No independent witness has been examined. It has been admitted by the Investigating Officer of the case that he himself did not recover any article from the possession or at the instance of the accused. The articles were handed over to him either by PW-3 Gagan Bhola or the duty constable. If the pistol and cartridges were recovered by Gagan Bhola, why the same were not handed over at the spot and why the same were handed over in the police station. Moreover, if he had taken search of the accused persons why did he not find *jhumka* and pendent which was recovered by Duty Constable. This shows that the *jhumka* and pendent has been planted upon the accused. It is not established that the muffler and sweater given by Gagan Bhola to police belongs to accused. It was further submitted that the FIR has been recorded prior to the MLC, that being so, why in the MLC, names of the accused do not find mention. The Constable who took the accused to hospital was not examined by the prosecution. There are contradictions in the testimony of PW-1 and PW-3. Under the circumstances, prosecution has failed to bring home the guilt of the accused beyond shadow of doubt and as such they are entitled to be acquitted. Reliance was placed on **Sanjay Kumar Gupta v. The State, Govt. of NCT of Delhi,** 2009(4) JCC 2544; **State v. Parkha Ram Suri & Ors.,** 2011(3) JCC 2094; **Harendra Narain Singh & Ors vs. State of Bihar,** 1991 SCC (Cri) 905; **Man Preet Singh vs. State,** 2004 Cr.L.J 530; **Pramil @ Parmanand Gajanan Rao v State of Goa,** 2006(2) Bom, C.R.434; **Vijay Kumar @ Bhushan v. State and State Delhi Administration vs. Vijay @ Bhushan,** 2007(1) JCC 16;

Dharam Singh vs. State, 2007(4) JCC 3068; **Dharambir vs. State of Haryana,** 2008(4) JCC Narcotics 197 and **Anil Kumar Goswami vs. State (NCT of Delhi),** 2012(1) JCC 47.

7. Rebutting the submissions of learned counsel for the appellants, it was submitted by learned Additional Public Prosecutor for the State that the impugned order does not suffer from any infirmity which calls for interference. The accused persons have admitted their presence in the house of the complainant. The suggestion given to the complainant and her husband is contrary to the case set up by accused in their statements recorded under Section 313 Cr.P.C. On the other hand, there is no reason to disbelieve the testimony of PW-1 and PW-3 which on material points goes unrebutted. As regards omission to mention name of accused in the MLC, it was submitted that the accused were taken to hospital by PCR van and, therefore, since their names were not known to them, as such in the MLC it was shown 'unknown'. FIR was registered later on. The recovery of country made revolver and the cartridges stands proved and testimony of PW-3 in this regard goes unchallenged. The FSL report further proves the case of prosecution, as such it was submitted that the appeal is devoid of merit and is liable to be dismissed.

8. I have given my anxious thoughts to the respective submissions of learned counsel for the parties and have perused the record.

9. In order to substantiate its case, Prosecution has basically relied upon the testimony of PW-1 Savita Bhola and PW-3 Gagan Bhola. Savita Bhola has unfolded that on 27.11.2004, at about 8 p.m, she was present in her house along her two children, namely, Mahima, aged about six years and son Yash, aged about two years. The door bell rang. She thought her husband had come and asked her daughter Mahima to open the door. Mahima opened the door. Savita also reached there and saw a person outside the door. That person was the same person who had come 7-8 days back to repair the water tap but at that time she did not open the door. He told her that he had come to repair the water tap but she asked him to leave the place. Meanwhile, two associates joined him and they pushed her inside the house and all the three entered her house. One of them caught hold of her daughter while remaining two intruders started beating her and they put their hands into her mouth in order to stop her raising alarm. Meanwhile, she noticed that the third person who caught hold of her daughter was pressing her mouth. She requested the

third person to release her daughter, by giving signal to him without speaking any word and that she would not raise alarm. One of the assailants took her in the middle room and asked her to open the almirah. Due to fear, she opened the almirah. One assailant continued to cover her while the second who was with her took out all the ornaments including three gold chains, five gold rings, two pairs of gold ear rings, two gold heavy lockets from the almirah and also demanded cash from her. She told that there is no cash in the house, on which one of them took out a pistol and loaded the same with a cartridge and put the pistol into her mouth. She repeated her request that she had no cash in the house. Thereafter they confined her and her children in the bathroom of the house. She also bolted the bathroom from inside. Thereafter, she heard the cries of her husband Gagan Bhola. After about 10-15 minutes, her husband opened the door of the bathroom from outside and she also unbolted the bath room from inside. Her husband informed her that the intruders have been over powered by the public persons. She came down along with her husband and saw a crowd of public persons and the two intruders were over powered by them. She identified accused Rajesh to be the person who had rung the bell of the door and entered the house along with co-accused Pankaj. She further deposed that she can also identify the third associate of the accused persons, if shown to her. Accused was armed with knife at the time of the incident and he put his fingers in her mouth to stop her from raising alarm while co-accused Pankaj had caught hold of her daughter Mahima. The third associate had taken the ornaments from the almirah.

10. She further deposed that pistol which was used by the accused persons was recovered. Police arrived and took them to L.B.S. hospital where they were medically examined. In the hospital, her statement Ex.PW1/A was recorded by the police which bears her signature at point A. Accused were also admitted in the same hospital and were medically examined. In the hospital, one piece of *jhumka* and one gold pendent was recovered from the accused persons which were seized vide memo Ex.PW1/D. The katta and cartridges were recovered which were also seized vide recovery memo Ex.PW1/E. Sketch of the same Ex.PW1/B was also prepared. Both the accused were arrested vide arrest memo Ex.PW1/H and Ex.PW1/J. Police had prepared the site plan of the place of incident. They had seized one sweater and one knife also which was produced by her husband. In cross-examination she admitted that accused

Rajesh was known to her prior to the incident. She, however could not say if he was working at the shop for 5-6 months. She denied the suggestion that he worked at the shop for about 5-6 months and his money was due towards her husband or that on the day of the incident, he had come to the house for demanding money or that a quarrel had taken place between her husband and the accused persons or that they raised alarm 'chor-chor' and got the accused persons apprehended by the public and beaten up.

11. PW-3 Gagan Bhola has deposed that he was running the business of interior decorator at his shop at house No.63, Pandav Nagar. On 27.11.2004, he had to go to attend a wedding along with his family. So after closing the shop at 8.20 p.m, he reached the house which was situated at 3rd floor. When he pushed the call-back button, he found one person inside the house. An iron mesh gate was also fixed on the main door of the house. That person open the wooden door. He enquired from him as to why he was present in the house. He replied that he was an electrician. On suspicion, he tried to bolt the door from outside but in the meantime two other persons came there and tried to pull him inside the house. He raised hue and cry. Those three persons started running out of the house. He caught hold of one person by his sweater but he managed to wriggle out of the sweater and ran away. He followed them downstairs and raised alarm. On hearing this, some boys who had come to visit the nearby gym caught hold of the accused persons and public persons gave beatings to them. He went upstairs and found his wife and two children locked up in the toilet by the assailants. He opened the door and brought them out. He along with his wife came downstairs to the place where public persons were giving beatings to the accused persons with kick and fist blows. His wife informed him that accused persons were the same who committed robbery in her house on which he conducted search of the accused persons. On search of accused Pankaj Gupta, one loaded country made pistol was recovered and four live cartridges were recovered from accused Rajesh. Accused Rajesh Gupta had worked as a plumber prior to 1-1/2 months of the incident. In the meantime, PCR reached the spot and took the accused persons to hospital as they had received injuries due to beatings given by public persons. He and his wife had also received injuries. As such, they were also taken to L.B.S. hospital by police. He handed over the country made pistol and five cartridges to the Investigating Officer of the case in the hospital.

I.O. recorded the statement of his wife and seized the pistol, vide seizure memo Ex.PW1/E. The accused persons were also given treatment in the hospital. Their search was conducted. One silver *jhumka* and gold pendent was recovered from their person which was identified by his wife as belonging to her. From the hospital, he along with his wife and police came back to his house. One kitchen knife and one muffler was lying in the room of the house while the sweater was lying on the second floor near the stair-case. He handed over the same to the I.O of the case who took the same in possession vide memo Ex.PW3/A. Crime team reached the spot and inspected the scene of occurrence and developed chance prints. Thereafter he along with his wife went to police station. Accused persons were arrested vide Ex. PW1/H and Ex.PW1/J and their personal search was conducted vide Ex.PW1/F and G. This witness also denied in cross examination that accused Rajesh was employed by him or that he worked as an employee for six months or that a sum of Rs.6,000/- towards his salary was still payable by him. He went on stating that since accused Rajesh was not employed by him, therefore, the question of outstanding salary did not arise. He further denied the suggestion that accused Rajesh had come to his house along with his friend Pankaj for demanding his dues of Rs.6,000/- or that he did not pay the same, as such, a quarrel had taken place between them.

12. A perusal of statement of both the accused recorded u/s 313 Cr.P.C goes to show that the plea taken by accused Pankaj was that he had gone along with his co-accused to demand money from the complainant as he worked with the complainant at his shop and amount of salary was to be taken from him. A quarrel had taken place between them and PW-3 Gagan Bhola raised alarm 'chor-chor' and got them apprehended by the public who gave beatings to them. It was further pleaded that the pistol, cartridges, silver ear-ring and gold pendant had been planted upon them. Accused Rajesh in his statement u/s 313 Cr.P.C had taken the plea that he had accompanied his co-accused to the house of the complainant as his co-accused had gone to demand money from the complainant as he had worked at his shop. Thereupon instead of paying money, a quarrel took place and Gagan Bhola raised alarm 'chor-chor'. Public apprehended them and gave beatings to them. Under the circumstances, the suggestion given to the prosecution witnesses and the stand taken by the accused persons makes it clear that contradictory stand has been taken by accused. It was suggested to PW-1 and PW-

3 that Rajesh used to work at the shop of Gagan Bhola and a sum of Rs.6,000/- was due for which he had gone to the house of the complainant to demand the money whereas in their statement recorded u/s 313 Cr.P.C, no such plea has been taken by accused Rajesh that he had worked at the shop of Gagan Bhola. In fact now the stand taken was that accused Pankaj was working at the shop of Gagan Bhola and his salary was due. Therefore, Pankaj had gone along with Rajesh to the house of the complainant where the quarrel ensued. No evidence has been led by the accused persons in order to prove as to who was working at the shop of Gagan Bhola and whether any amount was due to him or not. That being so, the suggestion given to the prosecution witnesses which was denied by them was not even carried forward by the accused persons in their statement u/s 313 Cr.P.C.

13. However, the suggestions given to the prosecution witnesses and statement of accused under Section 313 Cr.P.C makes it clear that the accused are not disputing their presence in the house of complainant. They are also not disputing regarding beatings given to them by public. In this background, since the presence of the accused persons in the house of complainant is undisputed, the entire incident has to be considered. Learned counsel for the appellant had placed reliance on **Raju alias Balachandran & Ors. v. State of Tamil Nadu,** AIR 2013 SCC 983, for submitting that PW1 and PW3 are interested witnesses. There is no independent witness hence no reliance can be placed on their testimony. In this case, it was observed that the evidence of a related or interested witness should be meticulously and carefully examined. In a case where the related witness may have an enmity with the assailant, the bar would need to be raised and the evidence of the witness would have to be examined by applying the standard of discerning scrutiny. However, this is only a rule of prudence and not one of law. Though the prosecution case rests on the testimony of Savita and her husband Gagan and there is no other independent witness but that itself is not sufficient to cast any doubt on their testimony keeping in view the fact that the accused persons have failed to show that there was any enmity between them and the complainant/her husband. Once it is not proved as to for what purpose the accused persons had gone to the house of the complainant, there is no reason to disbelieve the testimony of Savita who had given a detailed account of the entire incident by explaining the role of each and every accused with minute details. Despite cross examination, nothing

could be elicited to discredit her testimony. Furthermore, according to Gagan Bhola, on search of the accused persons a loaded country made pistol and four cartridges were recovered from the accused persons. His testimony in this regard goes absolutely unchallenged and unshattered as he was not cross examined in regard to this recovery at all. In fact, except for giving a bare suggestion that no such incident had taken place, his entire testimony regarding the incident has not been assailed in cross examination.

14. It further stands proved that the accused persons were taken to L.B.S. hospital where their search was taken by the Duty Constable and one silver *jhumka* and one pendent was recovered from the search of both the accused persons which were duly identified by the complainant and the same were seized. There is no plausible reason as to why the complainant or her husband would get the *jhumka* and the pendent planted upon the accused persons since recovery is not a *sine qua non* for proving the offence of robbery.

15. Much emphasis was led by learned counsel for the appellants for submitting that the Constable who had taken the accused persons to hospital was not examined by prosecution and reliance was placed on **Parkha Ram Suri** (supra) and **Pramil**(supra). Section 134 of the Indian Evidence Act provides that no particular number of witnesses are required for proof of any fact. It is trite law that it is not the number of witnesses but it is the quality of evidence which is required to be taken note of for ascertaining the truth of the allegations made against the accused. In **Thakaji Hiraji vs. Thakore Kubersing Chamansing** (2001) 6 SCC 145, it was observed as follows:-

> "It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available

and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

16. **Surinder Narain @ Munna Pandey vs. State of U.P,** AIR 1998 SC 192 was also a case where murder took place while deceased was travelling in rickshaw. Non- examination of rickshaw puller was held not to be fatal by observing that evidence has to be weighed and not counted.

17. I have carefully gone through both the judgments relied upon by learned counsel for the appellants. Same has no application to the facts of the case in hand inasmuch as in **Parkha Ram Suri**(supra) there was a dispute between the husband and his family members on one side and the members of wife's family regarding the character of the wife. The matter reached the community Panchayat. Panchayat decided to hold Jal Pariksha by erecting two bamboos on the banks of river Yamuna at the cost of mother of the wife and brother of the wife. Bamboos were fixed. Her husband Mohan Lal and his wife's brother Lalit were asked to enter the water and hold on to the bamboos which were firmly held by two other persons. Two swimmers were also kept ready inside the water. However, none of the two came out even after a considerable time and got drowned and their dead bodies were retrieved after about four days. Mohan Lal's father and elder brother along with members of the Panchayat were prosecuted for offence u/s 304 and 384 read with Section 34 IPC for causing death of the deceased. According to the prosecution version, two persons, namely Hari and Sardari held the bamboos with the support of which deceased Lalit and Mohan sat inside the water. However, those persons were neither interrogated nor cited as a witness. It was observed that they were the most crucial witnesses for

the prosecution to depose what exactly happened before or after the deceased entered the water. As such an adverse inference had to be drawn against the prosecution for their non-examination. Similarly in **Pramil** (supra), for non-examination of material witness, an adverse inference was drawn. It was case based on circumstantial evidence. However, things are entirely different in the instant case inasmuch as Constable who had taken the accused persons to hospital was not an eye witness of the incident. He merely removed the accused to hospital. That being so, his non-examination is not fatal.

18. Similarly, as regards the omission to mention the name of the accused persons in the MLC, it is a matter of record that the accused persons were taken to hospital by PCR van and as per the MLC, the accused persons were unconscious/semi-unconscious and the police officials were not aware of their names. That being so, the MLC was prepared as 'unknown'. The FIR was recorded subsequently when the complainant reached the hospital. Therefore, no significance can be attached to non-mention of names of accused in MLC.

19. The plea that the country made pistol and cartridges were planted upon the accused by Gagan Bhola, does not inspire confidence inasmuch as it has come in his deposition that when he took search of accused, then the loaded country made pistol was recovered from accused Pankaj while four cartridges were recovered from accused Rajesh. His testimony was not assailed in cross-examination. That being so, it does not appeal to reason as to why and how Gagan Bhola would hand over the country made pistol or the cartridges to the police officials in order to plant the same upon the accused persons with whom no enmity could be proved. The country made pistol and cartridges were sent to CFSL which confirmed that they were arms and ammunitions within the definition of Arms Act. The sanction u/s 39 Arms Act for the prosecution of the accused for the possession of the said arms was also accorded by PW-13 Sh. Ajay Chaudhary DCP.

20. The other authorities relied upon by learned counsel for the appellant has no application to the facts of the case in hand inasmuch as same pertains to circumstantial evidence where it is incumbent upon the prosecution to prove all the links in the chain whereas the present case is based on direct evidence in the form of testimony of Savita and Gagan Bhola and as discussed above, on material points, testimony of both the

witnesses goes unrebutted. Savita has also given a clear, vivid and cogent picture of the entire incident with specific role of each and every accused.

21. The nut shell of the aforesaid discussion is that the prosecution had succeeded in establishing its case and the impugned order does not suffer from any infirmity which calls for interference.

22. Even as regards the quantum of sentence, although learned counsel for the appellant prayed for a lenient view by submitting that accused Rajesh has remained in jail for 5 years while Pankaj remained in jail for 3-½ years when he was released on bail by Hon'ble Supreme Court, however, the accused persons have been convicted for offence u/s 397 IPC besides other offences. Section 397 IPC mandates that "the imprisonment shall not be less than seven years". That being so, the sentence, even otherwise, cannot be reduced.

23. Under the circumstances, there is no merit in both the appeals. The same are accordingly dismissed. Copy of this order along with Trial Court record be sent back.

ILR (2013) VI DELHI 4319
CRL. A.

SHEIKH MUNNA @ MUNNA SHEIKH .....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 1298/2012 DATE OF DECISION: 11.09.2013

Indian Penal Code, 1860—Section 397—Appellant challenged his conviction and sentence U/s 397 of Code—Appellant urged, evidence adduced on record not appreciated in its true and proper prospective—Appellant did not join TIP as his photo was shown to complainant and his identification after gap of about 7 months in court was highly doubtful. Held:—Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. The practice is not born out of procedure but cut of prudence. Substantive evidence is evidence of identification in court.

Both PWs 2 and 3 had direct confrontation with the assailants for long and had ample opportunity to observe and note their features. They identified the present appellant as one of the assailants in the court and attributed specific role to him whereby in an attempt to snatch the golden chain, he assaulted PW-3 (B.Udayraj) with knife/razor and inflicted injuries to him. The Investigating Officer moved application for holding TIP after appellant's arrest in case FIR No.252/2011 under Section 307/34 IPC but he declined to participate in the TIP proceedings. Adverse inference is to be drawn against him for not participating in the TIP proceedings. When PW-3 visited the police station on 29.11.2011 and was shown the photograph, he immediately identified him. The appellant had declined to participate in the TIP proceedings prior to that. It is settled legal preposition that Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. It is trite to say that substantive evidence is the evidence of identification in court. In **Prem Singh Vs.State of Haryana** 2011 (10) SCALE 102 the Supreme Court held as under:

> "The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been

shown to the eye-witnesses in advance. In my considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-Appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case." **(Para 6)**

In **Shyam Babu Vs. State of Haryana** AIR 2009 SC 577 the accused persons had refused to participate in the TIP parade. It was held that it would speak volumes, about the participation in the commission of the crime. In **Rabinder Kumar Pal @ Dara Singh Vs. Republic of India** (2011) SCC 490 the Supreme Court held that "photo identification and TIP are only an aides in the investigation and do not form substantive evidence. The substantive evidence is the evidence in the court on oath. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation." **(Para 7)**

Important Issue Involved: Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. The practice is not born out of procedure but of prudence. Substantive evidence is evidence of identification in court.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Ms. Anita Abraham, Advocate.

FOR THE RESPONDENT : Mr. Feroz Khan Ghazi, APP.

CASES REFERRED TO:

1. *Shyam Babu* vs. *State of Haryana* AIR 2009 SC 577.
2. *Rabinder Kumar Pal @ Dara Singh* vs. *Republic of India* (2011) SCC 490.
3. *Prem Singh* vs. *State of Haryana* 2011 (10) SCALE 102.

RESULT: Appeal dismissed.

S.P. GARG, J.

1. Sheikh Munna @ Munna Sheikh (the appellant) impugns a judgment dated 07.07.2012 of learned Additional Sessions Judge in Sessions Case No.57/2011 arising out of FIR No.64/2011 registered at Police Station N.D.R.S. by which he was convicted under Section 394 read with Section 397 IPC. By an order dated 09.07.2012, he was directed to undergo Rigorous Imprisonment for eight years with fine Rs.50,000/- under Section 394 IPC and Rigorous Imprisonment for seven years with fine Rs.10,000/-under Section 397 IPC.

2. Allegations against the appellant were that on 12.03.2011 at about 04.00 P.M. under a pucca flyover in front of platform No.8/9 of New Delhi Railway Station, he with his associates Saddam and Bhura (not arrested) in furtherance of common intention robbed Smt.Asha Rani of her gold chain and caused injuries to her husband B.Udayraj with surgical blade. Daily Diary (DD) No.19A (Ex.PW-1/A) was recorded at Police Station N.D.R.S. at 05.28 P.M. on getting information that an

army man has been stabbed with knife. The investigation was assigned to ASI Ashok Kumar who with Ct.Bheem Singh went to LNJP hospital and collected the MLC of B.Udayraj. Asha Rani (PW-2) recorded her statement (Ex.PW-2/A). The Investigating Officer made endorsement (Ex.PW-6/A) and lodged First Information Report. Attempts were made to find out the culprits but in vain. On 17.10.2011 Sheikh Munna @ Munna Sheikh was arrested in case FIR No.252/2011 under Section 307/34 IPC and his involvement surfaced in the disclosure statement (Ex.PW-5/C). He declined to participate in Test Identification Proceedings. The Investigating Officer recorded the statements of witnesses conversant with the facts and after completion of investigation filed a charge-sheet in the court. The appellant was duly charged and brought to trial. The prosecution examined ten witnesses to prove the charges. In his 313 statement, the appellant pleaded false implication due to refusal to do cleaning work in the police station. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment held the appellant guilty for the offences mentioned previously and sentenced him. Being aggrieved, he has filed the present appeal.

3. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The appellant did not join TIP as his photo was shown to the complainant. Appellant's identification by PWs-2 and 3 after a gap of about seven months is highly doubtful. No weapon of offence and robbed article was recovered from the appellant's possession or at his instance. The Trial Court did not pay attention to the discrepancies emerging in the evidence about the exact number of assailants. PWs have given divergent versions and have made improvements. It is also not certain whether the weapon used was a razor or knife. Identification by photograph is not valid. Learned Additional Public Prosecutor urged that there are no sound reasons to discard the testimony of victim and her husband who was injured at the time of committing robbery. Minor discrepancies highlighted by the appellant's counsel are not fatal.

4. I have considered the submissions of the parties and have examined the record. Occurrence took place at around 04.00 P.M. DD No.19/A (Ex.PW-4/A) was recorded at 05.28 P.M. at Police Station N.D.R.S. PW-1 (HC Davis B.J.) Duty Officer, disclosed in the cross-

examination that on the basis of PCR call received at about 05.28 P.M. he recorded DD No.19/A. The injured was taken to JPN hospital and MLC (Ex.PW-8/A) records the time of arrival of the patient at 05.09 P.M. PW6 (ASI Ashok Kumar) recorded Asha Rani's statement (Ex.PW-2/A) and sent the rukka for lodging First Information Report at 07.15 P.M. It reveals that there was no delay in lodging the FIR. FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Earliest reporting of the occurrence by the informant with all its minute details gives assurance regarding truth of its version. In the instant case, the FIR was lodged on the complaint of Smt.Asha Rani in which she gave detail account as to how and under what circumstances she was robbed of her golden chain and when her husband B.Udayraj intervened, he was inflicted injuries with knife/razor. While appearing as PW-2 in her Court statement, she proved the version given to the police at the earliest without any major variations/improvements. She deposed that on 12.03.2011 when they reached near bridge located at Hanuman Temple, an individual came near to her and attempted to snatch her gold chain. She raised alarm to call her husband who was going 15 mts. ahead of her. On that, the said individual fled the spot. In the meantime, another assailant came and attempted to snatch her gold chain. However, he was caught hold by her husband. When her husband had a scuffle with the snatcher, someone picked up their baby and they rushed towards her. Her husband was thereafter assaulted with some sharp object i.e knife/razor. There were two assailants; one had run away and the other assaulted her husband with sharp object. She identified Sheikh Munna @ Munna Sheikh as the assailant who assaulted her husband. She proved statement (Ex.PW-2/A) lodged by her. In the cross-examination, she denied that after the first snatcher fled away, two more assailants reached the spot. She clarified how in her statement (Ex.PW-2/A) she had referred to two assailants i.e. one the snatcher who had fled and other the appellant who assaulted her husband. She admitted that after the incident, she had no occasion to see the appellant. It transpires that material facts deposed by the witness remained unchallenged and uncontroverted in the cross-examination. The

accused did not deny his presence at the spot. No ulterior motive was assigned to the witness for falsely implicating him in the incident. PW-3 (B.Uday Raj) corroborated PW-2's testimony on all relevant facts and deposed that there were two assailants; one was able to flee after making attempt to snatch golden chain from her wife and the other (the appellant present before the court) attempted to snatch the 'mangal sutra' of his wife. When he caught hold of him, he took out a knife and assaulted him. He sustained injuries on his left arm and face. He was forced to release the appellant due to multiple injuries sustained by him on his face. The accused succeeded in taking away half part/portion of the mangal sutra. He further deposed that he was called by the police to identify the appellant in Tihar Jail. However, the appellant refused to participate in the TIP proceedings. On 29.11.2011, when he visited the police station to make inquiries about the case, he saw the photograph of the accused and identified him. In the cross-examination, he denied the suggestion that he was assaulted by three individuals or that on 17.10.2011 the police had shown him the photograph of the accused in the police station. Again the witness was not confronted on core issues whereby the appellant inflicted injuries on his body when he intervened in the incident.

5. PWs-2 and 3 had no prior acquaintance with the appellant to falsely implicate him in the case. In the absence of prior animosity or ill-will both these independent witnesses were not expected to falsely rope in the accused for the injuries caused to the victim. Their ocular testimony has been fully corroborated by medical evidence. PW-8 (Dr.Vijay Kumar) medically examined the victim at 05.09 P.M. and prepared MLC (Ex.PW8/A). He found multiple injuries on his body as under:-

(i) 8 cm incised wound on anterior aspect of left elbow.

(ii) 3 cm incised wound on medial aspect of left hand writs.

(iii) 7 cm incised wound on left side chin.

(iv) 2 cm incised wound on nose.

(v) 4 cm incised wound on lower aspect of nose.

PW-9 (Dr.Sanjay) after examining and re-examining the patient along with the documents was of the opinion (Ex.PW-9/A) that the injuries were 'grievous' in nature and there was facial disfigurement also. He proved his opinion as Ex.PW-9/A.

6. Both PWs 2 and 3 had direct confrontation with the assailants for long and had ample opportunity to observe and note their features. They identified the present appellant as one of the assailants in the court and attributed specific role to him whereby in an attempt to snatch the golden chain, he assaulted PW-3 (B.Udayraj) with knife/razor and inflicted injuries to him. The Investigating Officer moved application for holding TIP after appellant's arrest in case FIR No.252/2011 under Section 307/34 IPC but he declined to participate in the TIP proceedings. Adverse inference is to be drawn against him for not participating in the TIP proceedings. When PW-3 visited the police station on 29.11.2011 and was shown the photograph, he immediately identified him. The appellant had declined to participate in the TIP proceedings prior to that. It is settled legal preposition that Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that accused in the case are actual culprits. It is trite to say that substantive evidence is the evidence of identification in court. In **Prem Singh Vs.State of Haryana** 2011 (10) SCALE 102 the Supreme Court held as under:

> "The two eye-witnesses PW-11 and PW-12 have given a graphic description of the incident and have stood the test of scrutiny of cross-examination and had also stated that they could identify the assailants, but the accused had declined to participate in the test identification parade on the ground that he had been shown to the eye-witnesses in advance. In my considered view, it was not open to the accused to refuse to participate in the T.I. parade nor it was a correct legal approach for the prosecution to accept refusal of the accused to participate in the test identification parade. If the accused-Appellant had reason to do so, specially on the plea that he had been shown to the eye-witnesses in advance, the value and admissibility of the evidence of T.I. Parade could have been assailed by the defence at the stage of trial in order to demolish the value of test identification parade. But merely on account of the objection of the accused, he could not have been permitted to decline from participating in the test identification parade from which adverse inference can surely be drawn against him at least in order to corroborate the prosecution case."

7. In **Shyam Babu Vs.State of Haryana** AIR 2009 SC 577 the accused persons had refused to participate in the TIP parade. It was held that it would speak volumes, about the participation in the commission of the crime. In **Rabinder Kumar Pal @ Dara Singh Vs.Republic of India** (2011) SCC 490 the Supreme Court held that "photo identification and TIP are only an aides in the investigation and do not form substantive evidence. The substantive evidence is the evidence in the court on oath. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation."

8. There are no good reasons to discard the statement of PW-3 who was badly injured in the incident. It is settled legal proposition that normally an injured witness would enjoy greater credibility because he is the sufferer himself and thus there will be no occasion for such a person to state incorrect version of the occurrence or to involve anybody falsely in the bargain to protect the real culprit.

9. Minor discrepancies and contradictions referred to above by appellant's counsel are not enough to discard the testimony of PWs 2 and 3 in its entirety. It makes no difference if the assailants were two or three in number, the fact remains that the appellant was one of the assailants who attempted to snatch the mangal sutra and when PW-3 intervened, he was assaulted repeatedly on his body. Non-recovery of the stolen property is insignificant as the appellant was arrested after a long gap of seven months. It is inconsequential if weapon used was knife or razor. PW-8 observed five incised wounds on the body of the victim and the nature of injuries was 'grievous' in nature to attract Section 397 IPC.

10. In the light of the above discussion, I am of the view that there are no valid reasons to interfere with the impugned judgment which was delivered after proper appreciation of the evidence on record. The sentence order is modified to the extent that default sentence for non payment of fine of Rs.50,000/-under Section 394 IPC shall be three months and for non-payment of Rs.10,000/-under Section 397 it shall be one month.

Other terms and conditions of the sentence order are left undisturbed.

11. The appeal stands disposed of. Trial Court record be sent back forthwith.

ILR (2013) VI DELHI 4328
CRL. L.P.

STATE **....PETITIONER**

VERSUS

LALITA **....RESPONDENT**

(G.S. SISTANI & G.P. MITTAL, JJ.)

CRL.L.P. NO. : 501/2013 **DATE OF DECISION: 16.09.2013**

Code of Criminal Procedure, 1973 (Cr.P.C)—Petition filed under Section 378 of the (Cr.P.C) by the State seeking leave to appeal against the judgment passed by the learned Additional Sessions Judge (ASJ)—Acquitting the respondent of the charge under Sections 363/372/376/34 of the Indian Penal Code, 1860 (IPC)—The prosecutrix alleged that she was kidnapped by the respondent and her husband—Statement of the prosecutrix was recorded—The respondent denied the allegations—The Trial Court, on appreciation of evidence disbelieved the prosecution version—Noticed contradictions in the prosecution version and acquitted the respondent giving her benefit of doubt—Special Leave Petition contending that in case of sexual assault conviction can be based on the sole testimony—The Trial Court erred in disbelieving the testimony of the prosecutrix. Held—The Trial Court was conscious of the position of law that evidence of

solitary witness, if it inspires confidence, is sufficient to base conviction of the accused—The Trial Court gave good and valid reasons to disbelieve the prosecutrix—*Rai Sandeep @ Deepu vs. State of NCT of Delhi* (relied on), the Supreme Court Commented on the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused—*Abbas Ahmed Choudhury v. State of Assam* (relied on), the Supreme Court observed that a case of sexual assault has to be proved beyond reasonable doubt—*Raju vs. State of Madhya Pradesh* (relied on) the testimony of the witness has to be tested—Cannot be presumed to be a gospel truth—Story put forth was highly improbable and unbelievable.

Important Issue Involved: In a case of sexual assault the prosecution has to prove its case beyond reasonable doubt. The Supreme Court has observed that, the version of the *'sterling witness'* should be of very high quality and caliber whose version should be unassailable.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Saleem Ahmed, ASC for the State

FOR THE RESPONDENT : Nemo

CASES REFERRED TO:

1. *Rai Sandeep @ Deepu* vs. *State of NCT of Delhi* (2012) 8 SCC 21.
2. *Abbas Ahmed Choudhury* vs. *State of Assam* (2010) 12 SCC 115.
3. *Raju* vs. *State of Madhya Pradesh* (2008) 15 SCC 133.

RESULT: The leave petition dismissed.

G.P. MITTAL, J. (ORAL)

CRL.M.A. 13958/2013 (delay)

1. This application has been filed by the State seeking condonation of 94 days' delay in filing the present petition for leave to appeal.

2. Heard. For the reasons stated in the application, present application is allowed. Delay in filing the petition for leave to appeal is condoned.

3. Application stands disposed of.

CRL.L.P. 501/2013

4. By this petition under Section 378 of the Code of Criminal Procedure, 1973 (Cr.P.C.), the State seeks leave to appeal against the judgment dated 11.03.2013 passed by the learned Additional Sessions Judge (ASJ), (North-West) Rohini, Delhi in Sessions Case No.12/2009 whereby the respondent was acquitted of the charge under Sections 363/372/376/34 of the Indian Penal Code, 1860 (IPC).

5. The prosecutrix 'J' got missing on 31.12.2006 at 6:00 A.M. A DD No.11-A (Ex.PW-12/A) dated 06.01.2007 was recorded at Police Station Uttam Nagar. ASI Tej Singh (PW-12) reached at DDA Flat No.D-230, Bindapur where father of the prosecutrix informed him that his daughter aged about 15 years had been missing since 31.12.2006 from 6:00 A.M. He was unable to trace the whereabouts of his missing daughter despite best efforts. He further informed the ASI that one Lalita, wife of Dalip, resident of Flat No.D-223, DDA Flats, Bindapur was a frequent visitor to their house and she too had been missing along with her husband and children since the same time. The complainant expressed his suspicion that his daughter might have been enticed away by Smt. Lalita (the respondent) and her husband Dalip Singh. On the basis of the complaint, FIR was registered under Section 363 read with Section 34 of the IPC.

6. During investigation of the case, on 07.01.2007, ASI Tej Singh received a phone call from SI Rajender Pandey of P.S. Char Bagh, Lucknow regarding apprehension of the prosecutrix along with respondent Lalita. Further investigation of the case was assigned to ASI Om Prakash who along with Constable Rajesh Kumar and W/Constable Rekha reached Lucknow and met ASI Rajender Pandey of GRP Lucknow. The

prosecutrix was brought to the Police Post GRP from the children home. Respondent Lalita along with her three children was also found there. Statement of the prosecutrix was recorded by ASI Om Prakash wherein she informed the IO that she was kidnapped from the lawful guardianship of her parents by the respondent and her husband Dalip on the morning of 31.12.2006 on the pretext of attending a marriage in the village. She was taken to Sitamari (Bihar) where she was raped by Dalip (PO) with the assistance of the respondent. The prosecutrix as well as the respondent were brought to Delhi.

7. On an application moved by the IO, statement (Ex.PW-1/A) of the prosecutrix was recorded under Section 164 of the Cr.P.C. Whereabouts of the main accused Dalip Singh were not known. NBWs issued against him remained unexecuted. He was ultimately declared a proclaimed offender (PO).

8. On the respondent pleading not guilty to the charge for the offence punishable under Sections 363/372/376 read with Section 34 of the IPC, the prosecution examined 13 witnesses. On close of the prosecution evidence, in order to afford an opportunity to the respondent to explain the incriminating evidence appearing against her, she was examined under Section 313 Cr.P.C. She denied the prosecution allegations and came out with a specific defence that it was the prosecutrix who had herself eloped with her husband (Dalip Singh) on 31.12.2006. She (the respondent) went in search of the prosecutrix as well as her husband. She stated that while she, her husband and the prosecutrix were present at the railway station, (for returning to Delhi) her husband ran away from the railway station leaving her and the prosecutrix there. Thereafter, the prosecutrix got her implicated in the case falsely.

9. On appreciation of the evidence, the Trial Court disbelieved the prosecution version that the prosecutrix could have been made to leave her parents' house consisting of just one room tenement, that too in the early hours of 31.12.2006 when all the family members were present at home and were busy in the early morning chores. The Trial Court noticed various improvements vis-a-vis statements under Section 161 Cr.P.C., 164 Cr.P.C. and the testimony made in the court and also contradictions in the prosecution version and acquitted the respondent giving her benefit of doubt.

10. The learned counsel for the State urges that in case of sexual assault conviction can be based on the sole testimony of the prosecutrix. The Trial Court erred in disbelieving the testimony of the prosecutrix and attached unnecessary importance to the delay of seven days in recording the FIR. The learned counsel, therefore, contends that the order of acquittal passed by the Trial Court cannot be sustained.

11. A perusal of the Trial Court judgment reveals that the Trial Court was conscious of the proposition of law that evidence of a solitary witness if it inspires confidence is sufficient to base conviction of the accused. The Trial Court referred to this proposition in Para 37 of the impugned judgment. The Trial Court also opined that the prosecutrix who is a victim of sexual assault is not to be treated as an accomplice and if her evidence inspires confidence, the court should not have any hesitation in accepting the same.

12. In the instant leave petition which arises out of the order of acquittal in respect of respondent Lalita, we are not concerned with the case as against co-accused Dalip Singh who was declared a PO. PW-1 the prosecutrix was the star witness of the prosecution. The prosecutrix's testimony was discussed in great detail by the Trial Court and in the circumstances, the Court observed that the prosecutrix was unworthy of reliance and there was no explanation as to why the complainant, that is, the prosecutrix's father after having received phone call from the prosecutrix on 05.01.2007 did not lodge a police report even thereafter once they did not give any satisfactory explanation about the delay in lodging the FIR. The observations of the Trial Court are extracted hereunder:-

> *"40 In the present case when we scrutinize the testimony of prosecutrix carefully we find that the same is full of contradictions and embellishments which make it difficult to rely upon her testimony alone to convict the accused Lalita. In the first instance when the prosecutrix stated in her statement Ex.PW1/ DA made to the Police that accused Lalita had come to her house to call her, it appeared that accused Lalita had come to her all of a sudden and prosecutrix also went with her without any preparation and it was only when prosecutrix reached house of accused Lalita, accused Lalita and her husband convinced prosecutrix to accompany them and their children to their native village and*

assured prosecutrix that her father would have no objection to it as they had already taken permission from him. In her statement u/s.164 CrPC Ex.PW1/ A made to learned MM, prosecutrix stated that accused Lalita had come to her house on 31.12.2006 in the morning at about 6:00 AM and had influenced her to leave her parental house and to accompany her to her village at Bihar where she made her husband to commit wrong act with the prosecutrix. In her statement Ex.PW1/A again there is no clue that prosecutrix had made any preparation before going with accused Lalita i.e. taking her clothes etc. From statement Ex.PW1/ A it appears that husband of accused Lalita i.e. accused Dalip was already in the village. There is no mention of the children of accused Lalita in Ex.PW1/A. In her deposition before the Court as PW1, the prosecutrix has made further improvements in as much as she states that when accused Lalita came to her house on 31.12.2006, her father and brother were present in their one room accommodation and that she did not speak to her father or brother before leaving with accused Lalita. She volunteered to state that accused Lalita had already sought permission of her father, however, at the same time prosecutrix states that she had left with a bag containing some clothes to be worn for the marriage ceremony. From this response of prosecutrix, it appears that she was well prepared to leave with accused Lalita, if at all accused Lalita had come to take her. Further contrary to her earlier statements i.e. Ex.PW1/DA and Ex.PW1/ A in her cross-examination as PW1 prosecutrix stated that she had gone straightaway from her house to Railway Station. Thus there was no occasion for prosecutrix to be enticed or induced to go by accused Lalita after prosecutrix had left her house. There is nothing on record to show that prosecutrix had gone with accused Lalita, without telling her father about it, on any previous occasion. It is rather unusual for prosecutrix to be convinced by accused Lalita on such short notice, to accompany her to Bihar, without even seeking permission of her father or brother, who were very much present in the house when she had not done so on an earlier occasion and was otherwise an obedient child, as claimed by her.

41 Further in her statement Ex.PW1/ DA, prosecutrix has stated

that accused Lalita and her husband accused Dalip had taken her to house of their relative on 01.01.2007 where accused Dalip had committed wrong act with her with the help of accused Lalita for 2 days and thereafter accused Lalita and Dalip took her to Village Kishan Pur, P.S. Bela, District Sitamari, Bihar, and kept her in her house where also accused Dalip committed wrong act with her for 3 – 4 days and then they both decided to use her for illicit flesh trade and earn money by selling her. In her statement u/s.164 CrPC Ex.PW1/ A, prosecutrix does not mention about going to any other place with accused Lalita and accused Dalip from their village in Bihar. She also does not state about presence of any relative of the accused. She further states that it was accused Lalita, who was taking her in train so that she could sell prosecutrix in Nepal and that she told one aunty everything who made call to the Police. Prosecutrix herself claims to have given phone call to her father. In her testimony before the Court, prosecutrix has again made further improvements in her statements Ex.PW1/DA and Ex.PW1/A wherein she claims that accused had taken her to Sitamari, Bihar, to house of their Bhabhi where they stay for 2 – 3 days and that during the said stay, accused Dalip used to return home at night heavily drunk and that accused Lalita used to remove her clothes and hand over prosecutrix to him and that accused Dalip also removed his clothes and committed sexual intercourse with PW-1 against her wishes and that at that time accused Lalita used to press her mouth. It is noteworthy that from the cross-examination of the prosecutrix it is brought out that there were several other persons staying in house of said relative / Bhabhi i.e. her child, her husband and 4 – 5 men, all of whom used to sleep inside the room of said house which comprised of two rooms and kitchen. During her subsequent cross-examination, however, prosecutrix stated that she did not remember how many members were there in the house of Bhabhi of accused apart from herself, accused persons and the said Bhabhi. It is pertinent to note that accused Lalita and accused Dalip (Proclaimed Offender) had already been married for good numbers of years, at the time of incident, and had three children born from their wedlock. There is nothing on record to show that accused Dalip

was otherwise a womanizer and a pervert, who paid no heed to presence of his wife while publicly demonstrating his lustful behaviour. In these circumstances, it is difficult to comprehend that a married woman with three children would aid and abet her husband in satisfying his lust with a young woman and jeopardize her own married life and future of her small children by encouraging such untowards behaviour of her husband that too in presence of several relatives, in whose house they themselves were guests, and in presence of her children and the children of the relatives with whom they were staying. Further the claim that during stay at Bhabhi's house, accused Dalip used to return home at night heavily drunk and that accused Lalita used to remove clothes of PW-1 and hand her over to her husband has also been made for the first time by prosecutrix in the statement as PW-1. In the said statement, prosecutrix also states that from Sitamari, they had gone to house of father of accused Dalip and that the said house was locked and that lock was broken open by the accused Dalip. The prosecutrix did not raise any alarm while going Sitamari to the house of parents of accused Dalip and though she claims that she was scared, such a plea does not inspire any confidence considering that she has not mentioned about it in any of her previous statements. The prosecutrix tried to cover up by stating that driver was known to accused Dalip but does not explain how she got the information that driver was a person known to accused Dalip. It is also brought out from the cross examination of the prosecutrix that she had made further improvements upon her earlier statements in as much as she states that she had made a telephonic call to her father on 05.01.2007 and then she stated that she had made call to her aunt Savita as her father was not having mobile phone. During her said cross examination, prosecutrix also stated that she had taken help from a person residing in neighbourhood of house of the parents of accused Dalip and had given call from his mobile phone and that at that time she was accompanied by a girl, who was residing in the neighbourhood. These facts have nowhere been disclosed by prosecutrix in her statement Ex.PW1/A or Ex.PW1/ DA. The manner in which prosecutrix was rescued and accused Lalita was apprehended also vary in various statements

made by prosecutrix. In her statement Ex.PW1/DA prosecutrix states that when accused Lalita was taking her in train. She raised alarm hearing which public person stopped train. In her statement Ex.PW1/A, prosecutrix stated that she had told everything to one aunty, who was also going in train in which accused Lalita was taking her and that said aunty called Police and train was stopped. In her statement as PW-1, prosecutrix again stated that she, accused Lalita and her children were going somewhere in train and she raised alarm, hearing which copassengers handed over PW1 to Lucknow Police.

42 In all when all the three statements of the prosecutrix are considered conjointly, it is seen that she has changed her version in each of the statements regarding the manner in which she was enticed away by the accused Lalita to accompany her and accused Dalip to their native village at Bihar, the manner in which they arrived to Bihar, the place where they stayed in Bihar, during period from 31.12.2006 to 07.01.2007, the manner in which accused Lalita assisted her husband in raping the prosecutrix, the manner in which prosecutrix informed her family about her whereabouts and also the manner in which prosecutrix and accused Lalita were ultimately apprehended by the Police. The fact that no public witness either from the places where prosecutrix and / or accused persons had resided and the persons/passengers who had handed over the prosecutrix and the accused Lalita to PW-11 SI Rajinder Pandey have not been joined in investigations also casts a doubt about the prosecution case. The call details of the phone from which prosecutrix had informed her father, which otherwise prosecutrix has denied as PW-1, have also not been placed on record. Further the delay in lodging of the FIR also does not stand explained, in the present case. The father of prosecutrix, who was examined as PW-2 has stated that he had found prosecutrix missing from house on 31.12.2006 at about 8:00 AM i.e. within 2 –3 hours of prosecutrix going amiss. He claims to have received a phone call from prosecutrix on 05.01.2007. Even assuming that father of prosecutrix continued to search for prosecutrix from 31.12.2006 to 05.01.2007 does not explain why he waited for another day and informed the Police about missing of his daughter only on 06.01.2007 and

filed his complaint Ex.PW2/A thereafter. The delay in lodging the FIR also does not stand explained satisfactorily."

13. Thus, the Trial Court noticed improvements and contradictions in PW-1's testimony in the court and her previous statement under Section 161 Cr.P.C. as to how she was enticed, how she was kept at different places, how she was moved from one place to another place and how and why did she not avail an opportunity to inform the public that she had been kidnapped or that she had been raped by Dalip Singh in connivance with the present respondent and found her unworthy of reliance.

14. In our view, the Trial Court has given good and valid reasons to disbelieve the prosecutrix. In **Rai Sandeep @ Deepu vs. State of NCT of Delhi** (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. The Supreme Court held as under:-

"22. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be

stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

15. In the case of **Abbas Ahmed Choudhury v. State of Assam** (2010) 12 SCC 115, while observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court observed as under:-

"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1"

16. Similarly, in **Raju v. State of Madhya Pradesh** (2008) 15 SCC 133, the Supreme Court stated that the testimony of a victim of rape has to be tested as if she is an injured witness but cannot be presumed to be a gospel truth. Para 11 of the judgment is extracted hereunder:-

"11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be

protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

17. It is important to note that the respondent is a married lady with three children. No evidence was brought in by the prosecution that the respondent was in flesh trade. Ordinarily a married woman with three children will not abet, assist and aid her husband to commit rape on a young girl of 15 years and that too in the house of her husband's sister-in-law/parents. Although, the prosecutrix tried to build up a case in her testimony in the court that she heard the two accused saying that the prosecutrix was beautiful and that she could be sold for money, the same was, however, disbelieved by the Trial Court being an improvement to her earlier statements under Section 161 Cr.P.C. and 164 Cr.P.C. There were not only grave doubts in the prosecution case, but the story put forth was highly improbable and unbelievable. On the other hand, the explanation given by the respondent that the prosecutrix ran away with her husband and that she had gone to the village in search of the prosecutrix and her husband and that while they all three were at the railway station, her husband fled away and she was implicated falsely is more plausible and probable. In the circumstances, the judgment of acquittal recorded by the trial court does not call for any interference.

18. The leave petition is meritless; the same is accordingly dismissed.

ILR (2013) VI DELHI 4340
CRL.

KAMAL JAISWAL & ORS. .....APPELLANTS

VERSUS

STATE OF NCT OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 221/2003 DATE OF DECISION: 17.09.2013

Indian Penal Code, 1860—Section 307/427/34 IPC—Conviction of the appellants u/s 307/427/34 IPC challenged inter alia on the ground of false implication and the fact that the victim had criminal antecedents and was involved in a number of criminal case . Held: material contradiction/discrepancy emerged regarding the version narrated by complainant/injured. It was not suggested that the injuries were self inflicted or accidental in nature or the appellants were not its author. The appellants did not deny their presence at the spot of the incident. No ulterior motive was proved to prompt the complainant to falsely implicate the appellants for the injuries sustained by him and to let the culprits go scot free. The contention with respect to the criminal antecedents of the victim has no merit as these are not enough to discard the testimony of the complainant. Conviction u/s 307/34 IPC however altered to section 324/34 IPC for the injuries suffered by the victim were ascertained 'simple' in nature and were not found sufficient in the ordinary course of nature to cause death. The weapons used could not be recovered to ascertain if these were 'deadly' ones. At no stage prior to the occurrence any threat was extended by the appellants to eliminate the victim. No attempt to cause physical assault or harm was made

earlier. From the facts and circumstances of the cases, it is not prudent to hold that an attempt to murder the victim was made.

PW-6 (Kapil Arora) is the victim/injured. The First Information Report was lodged on his statement (Ex.PW-6/A) recorded on 29.05.2000 in the hospital without inordinate delay. Kapil Arora gave graphic detail as to how the accused persons came at about 10.30 P.M. on 28.05.2000 at his restaurant and on his declining permission to consume liquor inside the restaurant, they got annoyed and started causing damage to the articles/furniture. When he attempted to restrain them, they assaulted him with swords and knives. The police had already received intimation about the quarrel at 11.05 P.M. when DD No.66 B (Ex.PW10/A) was recorded. MLC (Ex.PW-8/A) was prepared where the victim/patient was examined at 11.20 P.M. The victim disclosed to the examining doctor that he was stabbed about 40 minutes prior to his arrival in the GTB hospital. The injuries were 'simple' caused by sharp object. While appearing in the court, PW-6 (Kapil Arora) proved the version given to the police at the first instance without any major improvements or variations. He attributed specific role to all the appellants for inflicting injuries on his body on his refusal to allow them to consume liquor in the restaurant. In the cross-examination the injuries sustained by the witness were not challenged. No material contradictions/discrepancies emerged regarding the version narrated by the complainant/injured. It was not suggested that the injuries were self-inflicted or accidental in nature or the appellants were not its author. The appellants did not deny their presence inside the restaurant, at the time of occurrence. No ulterior motive was proved to prompt the complainant to falsely implicate the appellants for the injuries sustained by him and to let the real culprits go scot free. The appellants had prior acquaintance with him and they all lived in the same locality. There was no previous animosity among them. The appellants got enraged when PW-6 (Kapil Arora) did not permit them to consume liquor in the

restaurant. Testimony of PW-6 is in consonance with medical evidence and there is no inconsistency between the two. The testimony of a stamped witness has its own relevance and efficacy. It 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."* **(Para 3)**

The appellants were convicted under Section 307/34 IPC. Admittedly, they had gone to Milan Restaurant at about 10.30 P.M. with an intention to consume liquor. When PW-6 (Kapil) did not allow them, a quarrel ensued and in a rage, they caused injuries to him. Kapil Arora was taken to GTB hospital and was medically examined. The injuries were ascertained 'simple' in nature. He was discharged from the hospital the next day. The injuries were not sufficient in the

ordinary course of nature to cause death. The appellants did not inflict repeated forceful blows with weapons on vital organs of the body. The victim and the assailants were known to each other and they lived in the same locality. No previous animosity surfaced between the parties. The weapons used could not be recovered during investigation to ascertain if these were 'deadly' ones. At no stage prior to the occurrence any threat was extended by the appellants to eliminate him. No attempt to cause physical assault or harm was made earlier. I am conscious that to justify conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge or under circumstances mentioned in Section 307 IPC. It is sufficient by law, if there is present an intent coupled with some overt act in execution thereof. It depends upon the facts and circumstances of each case whether accused had the intention to cause death or knew in the circumstances that his act was going to cause death. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive for commission of the offence, the nature and the size of the injuries, the parts of the body of the victim selected for causing the injuries and the severity of the blow or blows are important factors to be taken into consideration in arriving findings under Section 307 IPC. In the instant case there was no obstruction to the appellants to inflict blows with swords and knives repeatedly to cause dangerous injuries to the complainant. From the facts and circumstances of the case it is not prudent to hold that an attempt to murder the victim was made. The prosecution was able to establish that the appellants in furtherance of their common intention voluntarily caused simple injuries with sharp object on a trivial issue at the spot. The appellants are liable to the punished under Section 324/427/34 IPC. **(Para 5)**

Important Issue Involved: The nature of weapon used, the intention expressed by the accused at the time of the act, the motive for commission of the offence, the nature and the size of the injuries, the parts of the body of the victim selected for causing the injuries and the severity of the blow or blows are important factors to be taken into consideration in arriving findings under Section 307 IPC.

[An Gr]

APPEARANCES:

FOR THE APPELLANTS : Mr. Manish Aggarwal, Advocate with Ms. Parul Sharma, Advocate.

FOR THE RESPONDENT : Mr. Navin K. Jha, App

CASE REFERRED TO:

1. *State of Uttar Pradesh* vs. *Naresh and Ors.,* (2011) 4 SCC 324.

S.P. GARG, J.

1. Kamal Jaiswal (A-1), Arun Punia (A-2), Shekar Verma (A-3) and Sushil Kumar @ Shalu (A-4) impugn a judgment dated 24.03.2003 and sentence order dated 27.03.2003 in Sessions Case No.102/2002 arising out of FIR No.142/2000 registered at Police Station Bhajan Pura by which they were convicted under Sections 307/427/34 IPC and sentenced to undergo RI for two years with fine Rs.10,000/- each under Section 307/34 IPC and RI for six months with fine Rs.5,000/- each under Section 427/34 IPC.

2. Allegations against the appellants were that on 28.05.2000 at about 10.30 P.M. at Milan Restaurant, C-6, DDA Market, Yamuna Vihar they inflicted injuries to Kapil Arora with swords and knives in an attempt to murder him. They also caused loss to the victim's property by smashing the furniture and other articles in the restaurant. The police machinery was set into motion when information was conveyed at 11.05 P.M. that an individual has been stabbed with a sword and Daily Diary (DD) No.66 B (Ex.PW10/A) was recorded. The investigation was assigned to SI Rajesh Dangwal who with Ct.Jagat went to the spot. The First Information

Report was lodged after recording victim-Kapil Arora's statement (Ex.PW-6/A) on 29.05.2000 at 12.45 A.M. During the course of investigation, statements of witnesses conversant with the facts were recorded. The appellants were arrested. After completion of investigation a charge-sheet was submitted against them in the court. They were duly charged and brought to trial. The prosecution examined 10 witnesses to establish its case. In their 313 statements, the appellants pleaded false implication but did not adduce evidence in defence. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court held all the appellants perpetrators of the crime for the offences mentioned previously and sentenced them. It is relevant to note that during pendency of the appeal, Sushil Kumar (A-4) expired and the proceedings were dropped as abated by an order dated 24.05.2013.

3. PW-6 (Kapil Arora) is the victim/injured. The First Information Report was lodged on his statement (Ex.PW-6/A) recorded on 29.05.2000 in the hospital without inordinate delay. Kapil Arora gave graphic detail as to how the accused persons came at about 10.30 P.M. on 28.05.2000 at his restaurant and on his declining permission to consume liquor inside the restaurant, they got annoyed and started causing damage to the articles/furniture. When he attempted to restrain them, they assaulted him with swords and knives. The police had already received intimation about the quarrel at 11.05 P.M. when DD No.66 B (Ex.PW10/A) was recorded. MLC (Ex.PW-8/A) was prepared where the victim/patient was examined at 11.20 P.M. The victim disclosed to the examining doctor that he was stabbed about 40 minutes prior to his arrival in the GTB hospital. The injuries were 'simple' caused by sharp object. While appearing in the court, PW-6 (Kapil Arora) proved the version given to the police at the first instance without any major improvements or variations. He attributed specific role to all the appellants for inflicting injuries on his body on his refusal to allow them to consume liquor in the restaurant. In the cross-examination the injuries sustained by the witness were not challenged. No material contradictions/discrepancies emerged regarding the version narrated by the complainant/injured. It was not suggested that the injuries were self-inflicted or accidental in nature or the appellants were not its author. The appellants did not deny their presence inside the restaurant, at the time of occurrence. No ulterior motive was proved to prompt the complainant to falsely implicate the appellants for the injuries sustained by him and to let the real culprits go scot free. The appellants had prior

acquaintance with him and they all lived in the same locality. There was no previous animosity among them. The appellants got enraged when PW-6 (Kapil Arora) did not permit them to consume liquor in the restaurant. Testimony of PW-6 is in consonance with medical evidence and there is no inconsistency between the two. The testimony of a stamped witness has its own relevance and efficacy. It 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."*

4. It is true that PW-3 (Ct.Preet Singh) and PW-5 (Ct.Jagat Singh) have given inconsistent version to whom the investigation was assigned. However, this lapse does not dilute the credibility of injured's statement. Counsel pointed out that victim had criminal antecedents and was involved in a number of criminal cases. The contention has no merit as these are not enough to discard the testimony of the complainant. It does not give licence to the appellants to take law into their hands to cause injuries even to a person of criminal background. Non-recovery of weapon of offence is inconsequential as PW-2 (Dr.Zulfikar) was of the opinion (Ex.PW-2/A on MLC Mark A) that the injuries were caused with a 'sharp' weapon.

5. The appellants were convicted under Section 307/34 IPC. Admittedly, they had gone to Milan Restaurant at about 10.30 P.M. with an intention to consume liquor. When PW-6 (Kapil) did not allow them, a quarrel ensued and in a rage, they caused injuries to him. Kapil Arora was taken to GTB hospital and was medically examined. The injuries were ascertained 'simple' in nature. He was discharged from the hospital the next day. The injuries were not sufficient in the ordinary course of nature to cause death. The appellants did not inflict repeated forceful blows with weapons on vital organs of the body. The victim and the assailants were known to each other and they lived in the same locality. No previous animosity surfaced between the parties. The weapons used could not be recovered during investigation to ascertain if these were 'deadly' ones. At no stage prior to the occurrence any threat was extended by the appellants to eliminate him. No attempt to cause physical assault or harm was made earlier. I am conscious that to justify conviction under Section 307 IPC, it is not essential that bodily injury capable of causing death should have been inflicted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge or under circumstances mentioned in Section 307 IPC. It is sufficient by law, if there is present an intent coupled with some overt act in execution thereof. It depends upon the facts and circumstances of each case whether accused had the intention to cause death or knew in the circumstances that his act was going to cause death. The nature of weapon used, the intention expressed by the accused at the time of the act, the motive for commission of the offence, the nature and the size of the injuries, the parts of the body of the victim selected for causing the injuries and the severity of the blow or blows are important factors to be taken into consideration in arriving findings under Section 307 IPC. In the instant case there was no obstruction to the appellants to inflict blows with swords and knives repeatedly to cause dangerous injuries to the complainant. From the facts and circumstances of the case it is not prudent to hold that an attempt to murder the victim was made. The prosecution was able to establish that the appellants in furtherance of their common intention voluntarily caused simple injuries with sharp object on a trivial issue at the spot. The appellants are liable to the punished under Section 324/427/34 IPC.

6. Under Section 307 IPC the appellants were sentenced to undergo RI for two years with fine Rs.10,000/-each. A-4 (Sushil Kumar) has

passed away. A-1 (Kamal Jaiswal) remained in custody for some period prior to his release on bail during trial. The appellants have suffered agony of trial/appeal for about 13 years. It is significant to note that during trial, the complainant and the appellants settled the disputes and filed a compromise deed in the court. Since Section 307 IPC was not compoundable, the compromise was not taken into consideration. However, the sentence order specifically records settlement among the victim and the appellants and for that reason lenient view was taken and the appellants were sentenced to undergo RI for two years each only. Since the offence has been altered to Section 324/34 IPC and the matter has already been settled by the complainant/victim with the appellants, I am not inclined to award any further substantive sentence to the appellants. The fine imposed by the Trial Court shall be released to the victim as compensation.

7. The appeal stands disposed of in the above terms. The Registry shall transmit the Trial Court records forthwith.

ILR (2013) VI DELHI 4348
CRL. A.

GAURAV @ VICKY ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 261/2010, 489/2009, 369/2009 **DATE OF DECISION: 19.09.2013**

Indian Penal Code, 1860—Section 367/341/394/34—Appellant preferred appeals to challenge their conviction and sentence U/s 3767/341/392/394/34 of Code—They urged, improper investigation, thus, convicted on flimsy evidence is bad. Held:—The

prosecution is bound to prove the guilt beyond reasonable doubt. Mere suspicion is not enough and no substitute for proof. Court's verdict must rest not upon suspicion but legal grounds established by legal testimony to base conviction.

The prosecution is bound to prove the guilt beyond reasonable doubt. Mere suspicion is not enough and no substitute for proof. Court's verdict must rest not upon suspicion but upon legal grounds established by legal testimony to base conviction. **(Para 7)**

Important Issue Involved: The prosecution is bound to prove the guilt beyond reasonable doubt. Mere suspicion is not enough and no substitute for proof. Court's verdict must rest not upon suspicion but upon legal grounds established by legal testimony to base conviction.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANTS : Mr. Avninder Singh, Advocate with Mr. Aditya Vaibhav Singh, Advocate. (in CRL.A.261/2010) Mr. Mohd. Arif, Advocate (in CRL.A. 489/2009) Mr. Prashant Mendiratta, Advocate with Mr. Ashish Singh, Advocate. (in CRL.A. 369/2009)

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

RESULT: Appeals allowed.

S.P. GARG, J.

1. Gaurav @ Vicky (A-1), Pankaj Kumar Verma (A-2), Rahul (A-3) and Dilpal (facing trial before Juvenile Justice Board) were arrested in case FIR No.217/2003 registered at Police Station Mandawali and sent for trial on the allegations that on 14.06.2003 at about 02.00 P.M. in front of CBSE building, Preet Vihar, they abducted Yogesh Kumar and

Javed Ahmed and took them to Main Road near Hasan Pur Depot. At about 2.30 P.M. they robbed '60/- and mobile phone make Nokia by putting them in fear of instant death and inflicted injury with stone on Yogesh's head. The police machinery was set in motion when Daily Diary (DD) No.13A (Ex.PW-4/A) was recorded at police station Mandawali at 15.00 hours on getting information from Head Constable Jaibir about apprehension of four assailants and recovery of mobile phone and Rs. 60/from their possession. The investigation was assigned to ASI Jahir Ahmed who with Ct.Geetesh went to the spot. HC Jaibir handed over custody of all the assailants along with case property to him. During the course of investigation, the investigation officer lodged First Information Report (FIR No.217/2003) after recording victim Yogesh Kumar's statement (Ex.PW-2/A) under Sections 394/411/34 IPC. By an order dated 28.04.2007 Dilpal's age was ascertained 16 years on the date of incidence and he was sent to Juvenile Justice Board for trial. Vide order dated 21.11.2007, A-1 to A-3 were charged for committing offences under Section 367/341/392/394 IPC. A-1 was charged in addition under Section 397 IPC. To substantiate the charges, the prosecution examined 7 witnesses. In their 313 statements, A-1 to A-3 pleaded false implication. They, however, did not prefer to lead any evidence in defence. The Trial Court by the impugned judgment dated 13.04.2009 in Sessions Case No.08/2007 convicted the appellants for the offences under Section 367/341/392/394/34 IPC and acquitted A-1 for offence under Section 397 IPC. By an order dated 27.04.2009, they were sentenced to undergo RI for three years with fine Rs.3,000/- each under Section 367 IPC; RI for four years with fine Rs.4,000/- each under Section 392 IPC; and RI for five years with fine Rs.5,000/- each under Section 394 IPC. Being aggrieved, the appellants have preferred the appeals.

2. I have heard the learned Additional Public Prosecutor and counsel for the appellants and have examined the record. Yogesh Kumar in his statement (Ex.PW-2/A) disclosed to the police that on 14.06.2003 he and his friend Javed had gone to CBSE office to fill up forms for re-checking of answer sheets. The office was closed due to second Saturday. At that juncture, three boys came there and one of them suspected them to have beaten his brother. On their denial to have done so, they asked to accompany them for identification from their brother. Thereafter, they were taken to Bus Stand, Karkari Mode where their friend met them and confirmed that they were the individual to have given beatings to their

brother. The assailants forced them to accompany them in a bus. After travelling some distance in the bus, they were made to get down near Ganda Nala, Hasanpur at Bus Stand, Road No.57. They took them to a deserted place and robbed cash and mobile phone in their possession and he was hit with a stone on his head by Gaurav @ Vicky (A-1). The complainant further informed that they were threatened not to disclose the incident. At about 02.40 P.M. they found a PCR Gypsy at a nearby place and informed them about the occurrence. The PCR officials took them in the PCR van and were able to apprehend all the four assailants at some distance. The mobile phone and cash '60/-were recovered from their possession.

3. In his statement (Ex.PW-2/A), Yogesh Kumar gave graphic detail as to how and under what circumstances they were forced to accompany by the assailants. He attributed specific role to each of the assailants by name. The name of the assailants along with their complete addresses find mention in the complaint (Ex.PW-2/A). DD No.13A (Ex.PW-4/A) was recorded at 03.00 P.M. where there was information about the apprehension of four assailants with recovery of '60/-and mobile phone. The prosecution did not examine any PCR official who had accompanied the victims in search of the assailants and were able to apprehend them. There is no explanation as to why complainant Yogesh Kumar who had sustained injuries with a stone on head was not taken immediately to hospital for treatment. MLC (Ex.PW-5/A) reveals that Yogesh Kumar was taken to LBS hospital at 06.00 P.M. It contains reference of DD No.13A and not FIR number. The delay in getting Yogesh Kumar examined medically has not been explained. Apparently, the investigating officer has already lodged First Information Report by sending rukka at 04.30 P.M. It is unclear why MLC (Ex.PW-5/A) does not contain FIR number and creates doubt if the FIR was ante-timed. The injury i.e. swelling (1 cm X 2) over left occipital region was found on the victim which was simple in nature caused by a blunt object. It rules out use of any 'deadly' weapon. The stone/brick allegedly used to inflict injury was not seized. The bloodstained clothes of the victim were also not taken into possession.

4. The story presented by the prosecution regarding kidnapping and robbery does not inspire confidence and it appears that the victims have not presented true and correct facts. None of the assailants had prior acquaintance with the victims and had anticipated their arrival at CBSE

office on second Saturday which was a holiday. The assailants were not armed with any weapons whatsoever. There was no plausible reason for the victims to accompany the strangers to Bus Stop, Karkari Mode from CBSE office. Again it is unbelievable that the victims would travel in a public bus with the assailants without any objection voluntarily knowing that they were suspecting them to be author of injuries/beatings to their brother. At no stage, the victims raised alarm. There are no allegations that any force was used by the assailants to take the victims with them. It is unclear why the victims would accompany the assailants after alighting from the bus towards a deserted place. They did not have any valuable articles or cash with them prompting the accused persons to kidnap them and rob them at a deserted place. At the place of occurrence also and soon thereafter the complainant or his associate did not raise hue and cry. The accused did not abscond from the place of occurrence. It is unexpected that after committing a serious offence of robbery the accused persons would stay at the place of occurrence to be apprehended by PCR officials at the pointing out of the victims then and there. No application for holding Test Identification Proceedings was moved during investigation. Nothing was recovered in the personal search of A-1 to A-3. Only Dilpal Singh was found in possession of a mobile phone and '12/-. The Investigating Officer did not investigate as to in which private bus, the assailants had travelled with the victims or who had purchased the tickets. No tickets were recovered from the possession of the assailants or victims. The bus number was also not ascertained. The Investigating Officer did not visit the place of occurrence and no site plan was prepared at the instance of the victims. There was no occasion for the assailants to inflict injuries to Yogesh in the absence of any resistance.

5. Yogesh Kumar in his Court statement only identified Pankaj (A-2) as one of the assailants by pointing out towards him without naming him. He was unable to ascribe specific role to each of the accused. He was unable to disclose as to who was the offender who overpowered him or who robbed mobile phone and purse from the pocket. He was also not sure as to which of the accused had struck brick on his head. In the cross-examination, he admitted that he was unable to recollect correctly physical features regarding identity of Rahul (A-3), Pankaj Kumar Verma (PW-2) and Gaurav @ Vicky (A-1). PW-3 (Javed) in his Court statement was not certain that the accused persons standing in the dock were the culprits. He was fair to say that he was not sure completely

about their identity. He was also unable to pinpoint the role played by the each assailant. In the cross-examination, he reiterated that he was not sure as to whether the offenders standing in the dock were the persons who robbed them. No independent public witness was associated at any stage of investigation.

6. Divergent versions have been narrated by PWs-2 and 3 on material facts. PW-2 disclosed that they had gone to CBSE office at about 02.15 P.M. whereas PW-3 narrated the time as 12.00 or 12.30 P.M. PW-2 spoke that after the incident, they walked for three or four minutes and found a police booth and reported the incidence to the police-men present at the police booth. In the meantime PCR van reached and they searched the assailants in the PCR van. The Investigating Officer has admitted in the cross-examination that there was no police booth near the place of incident. No such police booth has been depicted in the site plan. PW-2 Yogesh Kumar and PW-3 (Javed) have given inconsistent version as to how much cash was found in their possession and how much was robbed. PW-2 (Yogesh Kumar) admitted that when they informed the assailants that they were left with no money even for the fare of the bus, one of the offenders gave Rs. 10-20 out of the money kept in the purse. The Investigating Officer did not collect call details of the mobile phone in possession of the assailant/victims. The call details could have disclosed the location of the victims and assailants at the relevant time. There are contradictory versions regarding the manner in which the victims were made to alight from the bus near the spot. There is nothing in their deposition that any threat was extended to the victims to alight at that spot. There are other contradictions regarding the place where the statement of the complainant was recorded or the articles were seized. It is mystery why the assailants would abduct two young persons and take them at a long distance to rob them specially when the victims had no valuable articles/cash with them.

7. The prosecution is bound to prove the guilt beyond reasonable doubt. Mere suspicion is not enough and no substitute for proof. Court's verdict must rest not upon suspicion but upon legal grounds established by legal testimony to base conviction.

8. In the light of the above discussion, the impugned judgment can't be sustained and is set aside. The appeals are allowed and A-1 to A3 be released forthwith if not required to be detained in any other case.

A copy of the order be sent to Jail Superintendent. Copy be also sent to the accused/appellants through Jail Superintendent. Trial Court record along with copy of this order be sent back forthwith.

ILR (2013) VI DELHI 4354
CRL. A.

PREET PAL SINGH ....APPELLANT

VERSUS

STATE OF DELHI .....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 810/2002 DATE OF DECISION: 20.09.2013

Indian Penal Code, 1860—Section 306, 107 & 498A—Appellant challenged his conviction and sentence U/s 306 of Code—As per appellant, utterance even if admitted "Mar Ke Dikha" by appellant could not be said enough to instigate deceased to commit suicide—Prosecution failed to prove, due to conduct of appellant deceased was left with no other option but to commit suicide. Held:—Under Section 306/107 IPC, establishment and attribution of mens rea, on the part of the deceased which caused him to incite the deceased to commit suicide is of great importance. A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation.

Even if, the allegations made out in the dying declaration / charge-sheet are taken on their face value and accepted in entirety, in my considered view, they do not constitute any offence under Section 306 IPC against the appellant. Under

Section 306/107 IPC, establishment and attribution of mens rea, on the part of the accused which caused him to incite the deceased to commit suicide is of great importance. The cruelty shown towards the deceased in such cases, must be of such magnitude, that it would in all likelihood, drive the deceased to commit suicide. The utterances of a few harsh words on one occasion does not amount to harassment/ cruelty of such intensity, that it may be termed as abetment to commit suicide. There is no evidence that the appellant used to persistently and consistently harass the deceased or subject her with cruelty. The prosecution could not establish that it was not an isolated instance of harassment or an occasional offhand remark that was made by the appellant in relation to the deceased. In **'Swamy Prahaladdas vs. State of M.P. & Anr.',** (1995) Supp (3) SCC 438, during the course of a quarrel the words were uttered 'to go and die'. The person to whom such remark was made, went home very dejected and thereafter, committed suicide. The Supreme Court held :

> *".....In the first place, it is difficult in the facts and circumstances, to come to even a prima facie view that what was uttered by the Appellant was enough to instigate the deceased to commit suicide. Those words are casual in nature which are often employed in the heat of the moment between quarrelling people. Nothing serious is expected to follow thereafter. The said act does not reflect the requisite mens rea on the assumption that these words would be carried out in all events. Besides, the deceased had plenty of time to weigh the pros and cons of the act by which he ultimately ended his life. It cannot be said that the suicide by the deceased was the direct result of the words uttered by the Appellant."* **(Para 5)**

A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. In the instant case, domestic discord and differences (if any) between the deceased and the appellant

were not expected to induce her to commit suicide. The present case is not one which may fall under any clauses of Section 107 of the Indian Penal Code. What transpired on the date of incident and at what time was known only to the deceased and the appellant. No adverse inference can be drawn against the appellant for not putting off fire and taking Pinky to the Hospital, as his presence at the spot was not established beyond reasonable doubt. **(Para 8)**

Important Issue Involved: Under Section 306/107 IPC, establishment and attribution of mens rea, on the part of the deceased which caused him to incite the deceased to commit suicide is of great importance. A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. M.L. Yadav, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

CASES REFERRED TO:

1. *Ramesh Kumar* vs. *State of Chhattisgarh,* AIR 2001 SC 3837.
2. *Sanju @ Sanjay Singh Sengar* vs. *State of M.P.,* AIR 2002 SC 1998.
3. *Swamy Prahaladdas* vs. *State of M.P. & Anr.,* (1995) Supp (3) SCC 438.

RESULT: Appeal allowed.

S.P. GARG, J.

1. Preet Pal Singh (the appellant) challenges a judgment dated 29.08.2002 in Sessions Case No. 42/2001 arising out of FIR No. 453/ 2000 under Sections 498A/306 IPC PS Ambedkar Nagar by which he was held guilty for committing offence under Section 306 IPC. By an order dated 01.10.2002, he was sentenced to undergo RI for five years

with fine Rs. 500/-.

2. Allegations against the appellant – Preet Pal Singh were that he used to treat Pinky (his wife) with cruelty during her stay at House No.C-11, Raju Park, Debli. On 26.11.2000, he abetted Pinky to commit suicide by uttering words 'marke dikha'. Pinky poured kerosene oil on her body and put herself on fire. Preet Pal Singh did not take her to hospital and fled the spot. The police machinery was set in motion when Daily Diary (DD) No. 21 was recorded at 07.45 P.M. at Police Post Madangir about admission of Pinky in burnt condition at Safdarjang Hospital. The investigation was assigned to SI Kalu Ram who with Const.Upender went to the hospital. He informed Sh. Amar Singh, SDM to record her statement. Sh. Amar Singh, SDM recorded her statement (Ex.PW-1/A) and directed the Investigating Officer to lodge First Information Report under Section 498A IPC. Pinky succumbed to the injuries on 03.12.2000. Post-mortem examination on the body was conducted. Statements of the witnesses conversant with the facts were recorded. The appellant surrendered in the Court on 09.06.2001. After completion of investigation, a charge-sheet was submitted in the Court. The appellant was duly charged and brought to trial. The prosecution examined ten witnesses to prove the appellant's guilt. In his 313 statement, the appellant pleaded false implication. The Trial Court, after appreciating the evidence and considering the rival contentions of the parties, found the accused guilty of offence under Section 306 IPC only. It is relevant to note that State did not challenge his acquittal under Section 498A IPC.

3. Pinky was earlier married to Gopal Singh in 1995 and was blessed with a daughter. Due to some differences, she left her matrimonial home and came at her parents. home. After some time, she took a house on rent and started living separate. The marriage with Gopal Singh was not dissolved and no divorce was obtained. It appears that she had live in relation with Preet Pal Singh. In her dying declaration (Ex.PW-1/A), she claimed herself Preet Pal Singh's wife after marriage with him in March, 2000. The Investigating Officer, however, could not collect any cogent and reliable evidence to establish if there was any valid marriage in existence between the two. PW-2 (Kishan Bahadur), her father was not aware of any such marriage. Dying declaration (Ex.PW-1/A) reveals that she had not taken into confidence her parents and had voluntarily entered into a relationship with Preet Pal Singh. PW-5 (Inder Singh), her

landlord confirmed that the room was rented to her about two or two and a half months prior to the occurrence. PW-4 (Usha) and PW-5 (Inder Singh) were not having any knowledge if there was relationship of husband-wife between the two.

4. Only allegations against the appellant were that he allegedly uttered words 'marke dikha'. Dying declaration (Ex.PW-1/A) shows that in a quarrel on 26.11.2000, the appellant had told her, 'marke dikha'. On that, she put kerosene oil and burnt herself. It is, however, not clear as to at what time the quarrel had taken place and what was the cause of quarrel. Dying declaration does not disclose if Preet Pal Singh persistently used to treat her with cruelty. There are no indications of physical harm caused to the deceased any time. No such act of cruelty, physical or mental, was reported by the deceased to her parents or to the police, at any time, prior to the incident. The dying declaration does not show that ill-treatment and harassment was constantly meted out to her by the appellant. PW-2 (Kishan Bahadur) did not confirm regarding any such quarrel to have been taken place with the deceased that day. In the cross-examination, he explained that he went to the spot after getting information about the incident from Inderjit at 04.30 P.M. He took Pinky to Safdarjang Hospital and on the way, she did not disclose anything to him. Additional Public Prosecutor cross-examined him after seeking court's permission as he resiled from his previous statement. In the cross-examination, he disclosed that Pinky had told him that a day prior to the incident, her husband Preet Pal Singh had asked her 'marke dikha'. He did not elaborate as to under what circumstances these words were uttered by the appellant. PW-4 (Usha) who went to the spot on hearing noise of 'Aag Lag Gai, Aag Lag Gai' did not find Preet Pal Singh in the house. Similarly, PW-5 (Inder Singh), landlord who put water on Pinky did not speak about appellant's presence in the house at the time of occurrence.

5. Even if, the allegations made out in the dying declaration / charge-sheet are taken on their face value and accepted in entirety, in my considered view, they do not constitute any offence under Section 306 IPC against the appellant. Under Section 306/107 IPC, establishment and attribution of mens rea, on the part of the accused which caused him to incite the deceased to commit suicide is of great importance. The cruelty shown towards the deceased in such cases, must be of such magnitude, that it would in all likelihood, drive the deceased to commit suicide. The

utterances of a few harsh words on one occasion does not amount to harassment/ cruelty of such intensity, that it may be termed as abetment to commit suicide. There is no evidence that the appellant used to persistently and consistently harass the deceased or subject her with cruelty. The prosecution could not establish that it was not an isolated instance of harassment or an occasional offhand remark that was made by the appellant in relation to the deceased. In **'Swamy Prahaladdas vs. State of M.P. & Anr.',** (1995) Supp (3) SCC 438, during the course of a quarrel the words were uttered 'to go and die'. The person to whom such remark was made, went home very dejected and thereafter, committed suicide. The Supreme Court held :

> *".....In the first place, it is difficult in the facts and circumstances, to come to even a prima facie view that what was uttered by the Appellant was enough to instigate the deceased to commit suicide. Those words are casual in nature which are often employed in the heat of the moment between quarrelling people. Nothing serious is expected to follow thereafter. The said act does not reflect the requisite mens rea on the assumption that these words would be carried out in all events. Besides, the deceased had plenty of time to weigh the pros and cons of the act by which he ultimately ended his life. It cannot be said that the suicide by the deceased was the direct result of the words uttered by the Appellant."*

6. Similarly in **'Sanju @ Sanjay Singh Sengar vs. State of M.P.',** AIR 2002 SC 1998, the Supreme Court held:

> *"....a quarrel had taken place between the accused and the deceased during which, the accused asked the deceased "to go and die". A chargesheet was filed against the accused under Section 306 r/w Section 107 Indian Penal Code when the said person actually committed suicide. This Court dealt with the issue elaborately, taking into consideration the fact that the accused had also specifically been named in the suicide note left behind by the deceased, and held that merely asking a person "to go and die" does not in itself amount to instigation and also does not reflect mens rea, which is a necessary concomitant of instigation. The deceased was anyway in great distress and depression. The other evidence on record showed him to be a*

> *frustrated man who was in the habit of drinking. Thus, considering the said circumstances, this Court quashed the proceedings against the accused, holding that ingredients of abetment were not fulfilled therein."*

7. In **'Ramesh Kumar vs. State of Chhattisgarh',** AIR 2001 SC 3837, the Supreme Court held:

> *"....What constitutes 'instigation' must necessarily and specifically be suggestive of the consequences. A reasonable certainty to incite the consequences must be capable of being spelt out. More so, a continued course of conduct is to create such circumstances that the deceased was left with no other option but to commit suicide.*
>
> *14. The offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is done by the person who has abetted. The abetment may be by instigation, conspiracy or intentional aid as provided under Section 107 Indian Penal Code. However, the words uttered in a fit of anger or omission without any intention cannot be termed as instigation."*

8. A word uttered in a fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation. In the instant case, domestic discord and differences (if any) between the deceased and the appellant were not expected to induce her to commit suicide. The present case is not one which may fall under any clauses of Section 107 of the Indian Penal Code. What transpired on the date of incident and at what time was known only to the deceased and the appellant. No adverse inference can be drawn against the appellant for not putting off fire and taking Pinky to the Hospital, as his presence at the spot was not established beyond reasonable doubt.

9. In the light of above discussion, in my opinion, there is no evidence and material available on record wherefrom an inference of the accused / appellant having abetted the commission of suicide by Pinky may necessarily be drawn. The totality of circumstances discussed hereinabove, especially the dying declaration do not permit the presumption under Section 113A of the Evidence Act being raised against the accused. The accused / appellant therefore deserves to be acquitted of the charge

under Section 306 IPC. The appeal is allowed. The conviction and sentence of the appellant are set aside. Bail bond and surety bond of the appellant stand discharged. The Trial Court record be sent back forthwith.

ILR (2013) VI DELHI 4361
CRL. A.

N. DEV DASS SINGHA ....APPELLANT

VERSUS

STATE ....RESPONDENT

(G.S. SISTANI & G.P. MITTAL, JJ.)

CRL.A. NO. : 647/2010 DATE OF DECISION: 20.09.2013

Indian Penal Code, 1860—Section 313, Section 302—Code of Criminal Procedure—1973—Appellant challenged his conviction and sentence U/s 302 of Code and urged prosecution adduced broken chain of circumstantial evidence, alleged dying declaration was not put to him in his statement U/s 313 of Code. Held:—Examination of accused U/s 313 Cr.P.C not to be treated as empty formality. Accused must be granted an opportunity of explaining any circumstance which may be incriminate him with a view to grant him an opportunity of explaining the said circumstance. However, where no examination U/s 313 Cr.P.C conducted by trial court, it is open to examine accused U/s 313 Cr.P.c even at appellate stage.

In the case of **Janak Yadav and Others v. State of Bihar,** reported at (1999) 9 Supreme Court Cases 125 the Supreme Court has observed that where no examination under Section 313 Cr.P.C. was conducted by the trial court in such a

situation it was open for the High Court to have examined the accused, whose statement under Section 313 Cr.P.C. had not been recorded, itself under Section 313 Cr.P.C. and then proceed with the hearing of the appeal or direct retrial. Para 5 of the judgment reads as under:

> "5. Section 313 CrPC prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence. That opportunity is a valuable one and cannot be ignored. It is not a case of defective examination under Section 313 CrPC where the question of prejudice may be examined but a case of no examination at all under Section 313 CrPC and as such the question whether or not the appellants have been prejudiced on account of that omission is really of no relevance. It was open to the High Court to have either examined the accused, whose statements under Section 313 CrPC had not been recorded, itself under Section 313 CrPC and then proceeded with the hearing of the appeal or directed retrial of the case confined to the stage of recording of the statements of the appellants under Section 313 CrPC but it was not justified to order the retrial of the entire case by framing de novo charges and examining afresh prosecution evidence. The direction of the High Court to that extent cannot be sustained." **(Para 17)**

Important Issue Involved: Examination of accused U/s 313 Cr.P.C not to be treated as empty Accused must be granted an opportunity of explaining any circumstance which may be incriminate him with a view to grant him an opportunity of explaining the said circumstance. However, where no examination U/s 313 Cr.P.C conducted by trial court, it is open to examine accused U/s 313 Cr.P.C even at appellate stage.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Anish Dhingra, Advocate.

FOR THE RESPONDENT : Ms. Richa Kapoor, Advocate.

CASES REFERRED TO:

1. *Shyamal Ghosh* vs. *State of West Bengal* reported at (2012) 7 SCC 646.
2. *Subhash* vs. *State of Haryana* [(2011) 2 SCC 715].
3. *Sunil Kumar Sambhudayal Gupta* vs. *State of Maharashtra* [(2010) 13 SCC 657].
4. *Janak Yadav and Others* vs. *State of Bihar,* reported at (1999) 9 Supreme Court Cases 125.
5. *Matru* vs. *State of U.P.* AIR 1972 SC page 1050].

RESULT: Appeal dismissed.

G.S. SISTANI, J.

1. Challenge in this appeal, filed under Section 374(2) of the Criminal Procedure Code, is to the judgment dated 02.3.2010 and the order on sentence dated 06.03.2010 whereby the appellant has been sentenced to imprisonment for life for the offence punishable under Section 302 IPC. 2. The case of the prosecution, as noticed by the trial court, is as under:

> *"On 11/08/2004 on receipt on (sic 'of') DD No. 15, the investigating officer received a telephonic information at Police Post Jungpura. ASI Ram Lal to whom the DD No. 15 was given, along with Ct. Arun Kumar went to the spot. Ct. Ghanshyam and SI Sanjiv Kumar also went to the spot. At the spot blood was found spread on the floor and one knife, used for vegetable cutting, the blade of which was broken, was also lying there. One blood stained Dupatta with blood and one folding bed having blood stained sheet and the handle of the knife were also found there. On inquiry it came to their knowledge that one person Dilip who is brother of Devdass, thereafter had taken the injured to the hospital. SI Ram Lal left Ct. Arun Kumar at the*

> *spot for his safeguard and went to AIIMS Hospital where he received MLC of injured Nilima. No eye witness was found at the spot. Doctor gave opinion that the injured was unfit for statement. ASI Ram Lal returned to the spot and recorded statement of one Maina Devi who has stated that she was employed in AIIMS Hospital and on that day, i.e., 11/08/2004 at about 1.30 AM she was sitting in her room and heard noise of 'Dham Dham' from the upper room belonging to her brother in law (devar) Ramesh. Nilima used to live in that room along with her husband and children and in another room some boys from the village of her husband used to live. After hearing noise she came. She went up stair and saw the door was closed. She thought that it might be a quarrel between husband and wife so she came back. Again she heard the noise of Dham Dham and went upstair again, the door was closed. She knocked at the door and accused Devdass who used to live in the room above her room came outside from the said room and there was blood on his baniyan. He has stated that Nilima got injured. On being asked why there was blood on his baniyan? He pushed and ran down. Then she went inside the room and saw Nilima in pool of blood (khoon se lathpath). She raised noise 'pakdo pakdo' at that time. Accused ran away from the place. Nilima told her that she was stabbed by Devdass. Neighbour Rajinder came there who made the telephonic call to the police and brother of accused Devdass. Dilip took Nilima in three wheeler scooter to AIIMS hospital. After recording the statement, ASI Ram Lal made endorsement on the rukka and went to Police Station for registration of the case on the basis of which the FIR under Section 307 IPC was registered. The Crime Team was called at the spot by the Investigating Officer. Site plan was prepared. The incriminating articles were seized from the spot. The victim Nilima died in the hospital then the FIR was converted under Section 302 IPC. The postmortem of the dead body of the victim was got done and victim was handed over to her relatives. The accused was arrested. The postmortem report of the victim was conducted during investigation. The scaled site plan was got prepared by draftsman and on completion of the investigation, the challan against the accused was prepared which was filed in*

the court, as referred before.

Prima facie case for the offence under Section 302 IPC was found made out against the accused so the charge was framed accordingly against him on 26/05/2005 to which he pleaded not guilty and claimed trial."

3. In support of its case, the prosecution has examined 19 witnesses. Counsel for the appellant submits that the judgment on conviction and the order on sentence passed by learned trial court is bad in law, it is based on conjectures and surmises and mere probabilities and is thus not sustainable in the eyes of law. It is also the case of the appellant that the facts and the evidence placed on record do not conclusively prove the guilt of the appellant; there are no eye witnesses to the case; and on the basis of broken chain of circumstantial evidence a conviction cannot be formed.

4. Counsel further submits that the trial court has failed to appreciate that the evidence of PW-1 is not reliable, as there are material improvements in her evidence. It is contended that PW-1 had not stated to the police that when she went up-stairs, the door of the stairs of the room was half open and half closed and on seeing her, the appellant closed the door; she had also not stated that the appellant came out of the room and he was soaked in blood and blood was present on his hands and he was wearing a jeans pant. Another improvement pointed out is that she had asked the appellant *"tune khoon kar rakha hai"*. It is thus contended that the entire story of PW-1 is concocted with an intention to implicate the appellant in the present case. Counsel also submits that PW-1 has failed to attribute any motive for the act committed by the appellant.

5. Mr.Dhingra, also contends that the trial court has failed to appreciate that PW-8 has clearly improved his version to implicate the appellant to prove the dying declaration of the deceased. It is contended that PW-8 did not state before the Police that the deceased had told him *"uncle mujhe bacha lo, Devdass ne mujhe chaku se mara"* but has subsequently stated the same before the court with an intention to bring home the guilt of the appellant.

6. Elaborating his argument further, counsel for the appellant submits that the dying declaration is not reliable as the witness had not stated the

same before the police, when he had the first opportunity to state the truth and secondly, the trial court has failed to put the alleged evidence of dying declaration before the accused in his statement under section 313 of Cr.P.C. Counsel also submits that it is a well settled principle of law that anything incriminating the accused if not put to the accused in his statement under section 313 of Cr.P.C. the same cannot be read into evidence against him.

7. Mr.Dhingra, counsel for the appellant also submits that the trial court has totally lost sight of the fact that the appellant was not a permanent resident of the place where the incident took place, and had come to the place of incident only a few days before the date of the incident, and thus, he had no motive to kill the deceased.

8. Counsel further submits that the evidence of PW-13 is also not reliable wherein he has stated that appellant used to tease the deceased and a few days before the incident also the appellant had teased her and the appellant had been cautioned by the husband of the deceased and the brother of the appellant was also informed regarding the same.

9. It is also the case of the appellant that there is no eye witness to the murder and the prosecution has not been able to complete the chain of circumstantial evidence to prove the guilt of the appellant.

10. Counsel for the State on the other hand submits that all the circumstances point towards the guilt of the appellant and the appellant has been rightly convicted under Section 302 IPC. Ms.Kapoor submits that the prosecution has been able to establish their case based on the evidence of PW-1 that the appellant was last seen coming out of the door of the room in which the dead body of the deceased was found and he was running away from the spot soaked in blood. It is submitted that PW-1 had also seen blood on the *baniyan* and hands of the appellant. She had enquired and confronted the appellant by saying *"tune khoon kar rakha hai"* and on this the appellant had stated *"current lag gaya, current lag gaya"*.

11. As far as the motive is concerned, counsel for the State submits that the motive for committing the crime also stands duly established by the evidence of PW-13. In addition thereto it is contended that the dying declaration of the victim to PW-8 leaves no room for doubt that the

appellant had murdered the victim on the fateful day and thereafter he ran away from the spot. Moreover, it is established that the deceased was subjected to sexual assault, just prior to murder and as per the FSL semen was found in the vaginal swab slide of the deceased, which reinforces the motive of the appellant.

12. We have heard counsel for the parties and carefully examined the evidence and given our thoughtful consideration to the matter. The argument of counsel for the appellant can be summarized as under:

(i) Improvements in the testimony of PW-1 and PW-10

(ii) The prosecution has failed to establish any motive against the appellant.

(iii) The prosecution has been unable to complete the chain of circumstantial evidence to prove the guilt of the appellant.

(iv) Reliance cannot be placed on the dying declaration made before PW-8, as PW-8 had not stated so before the Police and further the alleged evidence of dying declaration was not put before the accused in the 313 statement.

13. The arguments of Ms.Richa Kapoor, counsel for the State can be summarized as under:

(i) The prosecution has been able to establish that the appellant was last seen in the company of the deceased.

(ii) The dying declaration is reliable.

(iii) There are no material improvements in the testimonies of PW-1 and PW-10.

(iv) Evidence of PW-13 clearly establishes the motive of killing the deceased.

14. We have heard counsel for the parties and carefully examined the evidence placed on the record. It has been contended before us that the prosecution cannot rely on the dying declaration for two reasons: firstly the same did not find mention in the statement made before the police and secondly the dying declaration was not put to the appellant while recording his statement under Section 313 of the Cr.P.C. Section 313 of the Cr.P.C. reads as under:

"313. Power to examine the accused.

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case: Provided that in a summons- case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub- section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

15. Section 313 Cr.P.C. empowers the Court to examine an accused after the completion of evidence of the prosecution. It has repeatedly been held that this act of examining the accused should not be treated as an empty formality. An accused must be granted an opportunity of explaining any circumstance which may incriminate him with a view to grant him an opportunity of explaining the said circumstance that may appear against him in evidence.

16. We have examined the statement of the appellant recorded under Section 313 of the Cr.P.C. and find that there is force in the submission made by learned counsel for the appellant in this regard. We may add that this is a defect, which is curable.

17. In the case of **Janak Yadav and Others v. State of Bihar,** reported at (1999) 9 Supreme Court Cases 125 the Supreme Court has

observed that where no examination under Section 313 Cr.P.C. was conducted by the trial court in such a situation it was open for the High Court to have examined the accused, whose statement under Section 313 Cr.P.C. had not been recorded, itself under Section 313 Cr.P.C. and then proceed with the hearing of the appeal or direct retrial. Para 5 of the judgment reads as under:

> "5. Section 313 CrPC prescribes a procedural safeguard for an accused facing the trial to be granted an opportunity to explain the facts and circumstances appearing against him in the prosecution's evidence. That opportunity is a valuable one and cannot be ignored. It is not a case of defective examination under Section 313 CrPC where the question of prejudice may be examined but a case of no examination at all under Section 313 CrPC and as such the question whether or not the appellants have been prejudiced on account of that omission is really of no relevance. It was open to the High Court to have either examined the accused, whose statements under Section 313 CrPC had not been recorded, itself under Section 313 CrPC and then proceeded with the hearing of the appeal or directed retrial of the case confined to the stage of recording of the statements of the appellants under Section 313 CrPC but it was not justified to order the retrial of the entire case by framing de novo charges and examining afresh prosecution evidence. The direction of the High Court to that extent cannot be sustained."

18. Accordingly, during the course of hearing of this appeal, by an order dated 1.8.2013 we had directed the appellant to remain present in Court to enable this court to record the supplementary statement of the appellant under Section 313 of the Cr.P.C, which was recorded on 7.8.2013. The supplementary statement of the appellant reads as under:

> **"07.08.2013 CRL.A.647/2010 Supplementary statement of the appellant, N Dev Dass Singha, under Section 313 of the Code of Criminal Procedure.**
>
> Question: This is an evidence against you that when the victim, Neelima, was taken to the hospital in a three wheeler scooter she told PW-8, to save her as Devdass had stabbed her with a knife. She said *"Uncle mujhe bacha lo, Devdass ne mujhe chaku se mara"*. The victim was repeatedly telling Dilip, brother of the appellant, that she was stabbed by Devdass.
>
> Answer: I do not know as I was not present there. R.O.A.C."

19. On 7.8.2013 the appellant was also asked if he had anything further to state or lead any evidence. Order dated 7.8.2013 is extracted below:

> "Pursuant to the directions passed by this Court on 1.8.2013 and 5.8.2013, the appellant, N Dev Dass Singha, has been produced in Court in custody, and his supplementary statement under Section 313 of the Cr.P.C. has been recorded separately. The appellant submits that he does not have to say anything further and does not wish to lead any defence evidence."

20. Having regard to the supplementary statement of the appellant recorded by this court on 7.8.2013, the first objection with regard to placing reliance on the dying declaration cannot be pressed. We may clarify at this stage that initially counsel for the appellant had argued before us that the dying declaration made before PW-8, Ashwa Ghosh cannot be relied upon as the same is a material improvement, as the said fact was not stated by PW-8 in the statement recorded before the Police. It has rightly been observed by the trial court and also pointed out by counsel for the appellant that PW-8 had stated in his statement under Section 161 Cr.P.C. that while they were taking the victim in the three wheeler scooter to the AIIMS hospital, the said lady stated by crying that she was stabbed with a knife by Devdass *(Devdass ne usey chakuon se mara hai)*.

21. At this stage it would be useful to reproduce the evidence of PW-8:

> "PW 8 Ashwa Ghosh s/o Late Lekh Ram aged 42 years Car Mechanic r/o 5A, Summon Bazar, Bhogal, New Delhi. On SA
>
> On 11/8/04 I was present at my house at about 11.30 or 12 noon and was watching TV. My wife came to me and told me that some incident had taken place on the ground. One Dilip Kumar used to reside on the second floor in H.No.10, Summon Bazar. When I came downstairs I saw Dilip present there having the

head of his Bhabhi in his lap. His bhabhi was bleeding profusely. One boy brought a three wheeler scooter. The injured was put in the three Wheeler scooter. Name of the injured was Neelima. She was telling me to save her and Devdass had stabbed her with a knife. (uncle mujhe bacha lo, Devdass ne mujhe chaku se mara). She was repeatedly telling Dilip that she was stabbed by Devdass.

We removed Neelima to AIIMS. Doctors asked us to donate blood. I and Dilip both agreed to donate blood. She however expired.

Devdass the accused is now present before the court today and I identify him.

XXXXXX By Sh.K.K. Manan counsel for the accused.

Police had recorded my statement on the day of incident. The incident had taken place on 11/8/04. Police had recorded my statement on 11/8/04 and 12/8/04. (Ld. Addl.PP states that there is no statement of the witness for 11/8/04). Police had called me on 11/8/04 and 12/8/04. I had stated to police in my statement that when I came downstairs I saw Dilip having head of his bhabhi in his lap and his bhabhi was bleeding profusely. Confronted with statement Ex.PW-D/A where it is not so recorded. However, it finds mention that Dilip has caught hold his bhabhi in injured condition. I had stated to police in my statement that Neelima had asked me to save her. Confronted with statement Ex.PW8/DA where it is not so recorded. I had stated to police in my statement that Neelima was repeatedly telling Dilip that she was stabbed by Devdass. Confronted with statement Ex.PW8/DA where it is not so recorded. I had stated to police in my statement that the doctor had asked us to donate blood and we both had agreed and the deceased however expired. Confronted with statement Ex PW8/DA where it is not so recorded. I had stated to police in my statement that accused Devdas was known to me prior to the incident. Confronted with statement Ex.PW8/DA where it is not so recorded. I had not stated to police in my statement that where accused Ddvdas used to reside. Vol Police did not inquire from me about this

fact.

I did note down the no. of the TSR. I did not note down the name and address of TSR driver. I had not told the doctor who medically examined the deceased my name and address. Vol. The doctor had not asked from me. I did not disclose anyone at the hospital that I had brought the injured with Dilip at the hospital. Deceased was alive when she was got admitted at the hospital. She was talking at that time.

It is incorrect to suggest that I did not remove the injured to hospital or that injured did not disclose anything regarding the person who cause injuries to her or that I have given false statement or that for that reason my statement was not recorded on 11/8/04 or that I was introduced as a false witness on the next day."

22. We find that PW-8 is a natural witness, who was present at his home on 11.8.2004. He has deposed that he was watching television and he was informed by his wife that some incident had taken place at the ground floor. He saw the victim bleeding profusely and she was put in a three wheeler scooter and taken to the hospital. This witness has categorically deposed that Nilima told him to save her as Devdass had stabbed her with a knife. She said *"Uncle mujhe bacha lo, Devdass ne mujhe chaku se mara"*. We find the evidence of this witness had remained unshaken during cross-examination, however, certain discrepancies have been pointed out but the same are not material which are evident on mere reading of the cross-examination. The evidence of this witness is reliable and trustworthy and thus the submission made by counsel for the appellant that the prosecution cannot place reliance on the dying declaration, is without any force. The statement is admissible as a dying declaration within the meaning of section 32 of the Indian Evidence Act.

23. We may also notice that the complainant, Maina Devi, PW-1 in her statement, Exhibit PW-1/A, made to the investigating officer, which led to the lodging of the FIR, had clearly stated that the victim had informed her that Devdass had inflicted knife injuries on her. This fact was no doubt omitted by PW-1 in her statement made in the court, which was even over-looked by the prosecution. 24. Another submission of counsel for the appellant is that there are material improvements in the

testimony of PW-1, thus the evidence is unreliable and cannot be the basis of conviction of the appellant. Counsel for the appellant has pointed out the following improvements made by PW-1 in court while testifying from the version given by her to the Police:

> "She never stated to the police that she went upstairs the door of the stairs of the room was half open and half closed and on seeing her, the appellant closed the door. She had also not specifically stated anything before the police that appellant came out of the room and he was soaked in blood and blood was there on his hand and he was wearing a jeans pant. She also improved to the aspect that she asked to the appellant that *"Tune khoon kar rakha Hai"*.

25. In order to appreciate the contention made by counsel for the appellant and also to enable this court to have a holistic view of the entire statement of the PW-1, we deem it appropriate to extract the entire evidence of PW-1:

> "PW-1 Smt. Maina Devi w/o.Nank Chand aged 38 years r/o. Summon Bazar, H.No.10, First Floor, Bhogal, Illiterate, working as "Aya" on compassionate grounds.
>
> On SA
>
> On 11/8 last year I was in my house. At about 11.30 AM I heard a noise of "Dam Dam.. I went upstairs. The door of stairs of the room was half open and half closed and on seeing me, Devdas, accused present in court who was there upstairs in the room closed the door. I came back downstairs.
>
> After some time I again heard the noise and I went upstairs again. On finding the door closed, I knocked at the door. Accused came out rushing from the room, gave a strong push to me while running away and while running away, accused was soaked in blood. Blood was there on his banian and hands. He was wearing a jeans pant. I confronted him by saying "tune khoon kar rakha hai". He said to me on this "current lag gaya, current lag gaya". He went downstairs and tried to escape. I raised noise, on seeing Neelima's condition. Neelima was residing with the accused. When I saw her, she was in a seriously injured

> condition. There were marks of knife blows on her neck, nose, stomach and hands and she was in a very serious condition. I raised noise and one Rajender, neighbour came for help. He telephoned the police. One Ashok brought a three wheeler and she was taken to the hospital. The brother of accused namely Dilip was also called on telephone and he came and accompanied the deceased to the hospital i.e. AIIMS. I lodged a complaint with the police. The same is Ex.PW-1/A which bears my signatures at point A. Police prepared site plan of the place of occurrence at my instance.
>
> XXXXXXXXXX on behalf of the accused. Deferred as his advocate Sh.K.K. Manan is reported to be in Tis Hazari.
>
> XXXXXXXXXX by Ld. Cl. Sh.K.K. Manan for the accused.
>
> I had stated to the police in my statement that after hearing the noise of Dumdum when I went upstairs the door of the stairs of the room was half open and half closed and on seeing me, Devdas accused present in the court who was there upstairs in the room closed the door. Confronted with Ex.PW-1/A where it has not been mentioned that door of the stairs was half opened and half closed and on seeing me accused Devdas closed the door. I had stated to the police in my statement that when the accused came out of the room he was socked in blood the blood was there on his hand he was wearing a jeans pant confronted with Ex.PSW 1/A where this has not been specifically mentioned. I had stated to the police in my statement that I confronted the accused by saying 'Tune Khoon Kar Rakha Hai' confronted with Ex.PW-1/A where this has not been mentioned. I had stated to the police in my statement that he said 'Current Lag Gaya Current Lag Gaya'. Confronted with Ex.PW-1/A where it has been mentioned 'Current Lag Gaya' once and not two times. I had stated to the police in my statement that Nilima was residing with the accused and when I saw her she was in serious condition and there were marks of knife blows on her neck, nose, stomach hand and she was in very serious condition. Confronted with Ex.PW-1/A where it has not been specifically mentioned but it has been mentioned that when PW-1 saw Nilima she was socked in blood. I had stated to the police in my statement that one

Ashok brought a Three Wheeler and Nilima was taken to the hospital Confronted with Ex.PW-1/A where name of Ashok has not been mentioned but name of Dilip has been mentioned who has taken Nilima in the TSR to the hospital.

Police remained at the spot till about 5/6 P.M. in the evening. Police reached the spot at about 11:45 A.M. I was in my house at that time. I was available if police wanted to make any enquiry from me. I had shown the spot of occurrence to the police and articles lying there had been seized in my presence. Police had got 3/4 papers signed from me in my room but I am not educated so I do not know what are the papers. It is correct that I have only signed the rukka and no other documents.

I am working in the AIIMS as a Nursing Orderly and my duty hours vary. I live on the first floor. My Devrani is living on the ground floor. My Dever's name is Om Prakash and name of my Devrani is Prem. My devrani was present in the house on the day of incident. There is common stairs in the house for all the floors and it starts from the ground floor. My Devrani also came out when she heard the noise. It is wrong to suggest that I am deposing falsely being interested witness or that I have never seen Devdas coming out from the house of the deceased. It is further wrong to suggest that I signed the rukka subsequently on the instance of the police or that I was not present there that is why I did not sign any other document."

26. A complete reading of the evidence of PW-1 would show that the evidence of this witness is credible, trustworthy and reliable.

27. The submission that PW-1 had not stated to the Police that when she went upstairs the doors of the stairs of the room was half open and half closed and on seeing her the appellant closed the door, in our view is not a material improvement.

28. In the statement recorded under section 161 Cr.P.C. this witness has stated that when she knocked at the door, Devdass, appellant came out, who had blood on his baniyan and he stated that Nilima has been electrocuted, and when she asked him how there is blood on his baniyan, he pushed her and ran away.

29. It is settled law that every omission cannot be considered a contradiction in law and further discrepancies or omissions must be material, and only material contradictions can entail serious consequences. It has been repeatedly held by the Supreme Court that minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the case of the prosecution cannot be taken as a ground to reject the evidence of the prosecution in its entirety. 30. Reading of the entire evidence would show that the contradictions which are sought to be pointed out are trivial in nature and they are not material contradictions. The Apex Court in the case of **Shyamal Ghosh Vs. State of West Bengal** reported at (2012) 7 SCC 646, has held as under:

"46. Then, it was argued that there are certain discrepancies and contradictions in the statement of the prosecution witnesses inasmuch as these witnesses have given different timing as to when they had seen the scuffling and strangulation of the deceased by the accused. It is true that there is some variation in the timing given by PW 8, PW 17 and PW 19. Similarly, there is some variation in the statement of PW 7, PW 9 and PW 11. Certain variations are also pointed out in the statements of PW 2, PW 4 and PW 6 as to the motive of the accused for commission of the crime. Undoubtedly, some minor discrepancies or variations are traceable in the statements of these witnesses. But what the Court has to see is whether these variations are material and affect the case of the prosecution substantially. Every variation may not be enough to adversely affect the case of the prosecution.

47. xxxx

48. xxxx

49. It is a settled principle of law that the Court should examine the statement of a witness in its entirety and read the said statement along with the statement of other witnesses in order to arrive at a rational conclusion. No statement of a witness can be read in part and/or in isolation. We are unable to see any material or serious contradiction in the statement of these witnesses which may give any advantage to the accused.

xxxxx

68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contra-distinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution.

69. Another settled rule of appreciation of evidence as already indicated is that the court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without adverting to the statement as a whole. Sometimes it may be feasible that admission of a fact or circumstance by the witness is only to clarify his statement or what has been placed on record. Where it is a genuine attempt on the part of a witness to bring correct facts by clarification on record, such statement must be seen in a different light to a situation where the contradiction is of such a nature that it impairs his evidence in its entirety.

70. In terms of the explanation to Section 162 Cr.P.C. which deals with an omission to state a fact or circumstance in

the statement referred to in sub-section (1), such omission may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether there is any omission which amounts to contradiction in particular context shall be a question of fact. A bare reading of this explanation reveals that if a significant omission is made in a statement of a witness under Section 161 Cr.P.C., the same may amount to contradiction and the question whether it so amounts is a question of fact in each case. (**Sunil Kumar Sambhudayal Gupta v. State of Maharashtra** [(2010) 13 SCC 657] and **Subhash v. State of Haryana** [(2011) 2 SCC 715].

71. The basic element which is unambiguously clear from the explanation to Section 162 CrPC is use of the expression 'may'. To put it aptly, it is not every omission or discrepancy that may amount to material contradiction so as to give the accused any advantage. If the legislative intent was to the contra, then the legislature would have used the expression 'shall' in place of the word 'may'. The word 'may' introduces an element of discretion which has to be exercised by the court of competent jurisdiction in accordance with law. Furthermore, whether such omission, variation or discrepancy is a material contradiction or not is again a question of fact which is to be determined with reference to the facts of a given case. The concept of contradiction in evidence under criminal jurisprudence, thus, cannot be stated in any absolute terms and has to be construed liberally so as to leave desirable discretion with the court to determine whether it is a contradiction or material contradiction which renders the entire evidence of the witness untrustworthy and affects the case of the prosecution materially."

31. Applying the settled law to the facts of this case, we are of the view that the contradictions so pointed out are not material and thus the argument of the counsel for the appellant is rejected.

32. It is also submitted by counsel for the appellant that the

prosecution has failed to establish any motive for killing the deceased by the appellant. This submission of counsel for the appellant is also without any force, in view of the evidence of PW-13, the husband of the deceased, who has deposed that the appellant used to reside in another room of the same building and 10 days prior to the incident the appellant had used unparliamentary language to his wife. The conduct of the appellant was brought to the notice of his elder brother and he was warned not to indulge in such acts. He has also testified that initially appellant remained mum for some days, but thereafter again he started teasing his wife telling that he loved her.

33. While there is no quarrel with the proposition that motive is an essential ingredient of an offence, it is also settled law that where the evidence is clear the question of motive need not be considered by the Court. However, in the facts of the present case we see no reason to disbelieve the testimony of PW-13, which clearly establishes the motive against the appellant.

34. It has been strongly urged before us that the prosecution has been unable to complete the chain of circumstantial evidence to prove the guilt of the appellant. This submission of counsel for the appellant is also rejected. The appellant was last seen with the victim, which is clearly established by the testimony of PW-1 in her statement before the Court wherein she had testified that on hearing a noise she went upstairs and found the room of the victim closed. She returned back and only hearing noise again forced her to go upstairs again and when she went upstairs again the appellant had come out rushing from the room and he was soaked in blood, which leaves no room for doubt that the appellant was last seen in the company of the deceased and that there was blood too on his clothes. The evidence of PW-1 is corroborated by the evidence of PW-8 and also the evidence of PW-2 Rajinder Singh, who has deposed that on 11.8.2004 between 11:30 and 12 noon he was present at his house. Maina Devi, PW-1 had raised an alarm that Devdass (appellant) after murdering Nilima was running from the spot of the incident. On hearing the noise he went to the second floor and he found that the appellant had run away. He had identified the appellant in court; and when he went to the room, he saw injury marks of knife on Nilima. He described the place of incident as under:

"When I went in the room of Neelima, I saw that there were injury marks of knife on her person and she was lying in an injured condition. There was blood on the bed sheet and also on the floor. One broken blade of knife was lying on the floor. I rang up brother of accused Devdas namely Dilip who came there. One more person namely Ashu Ghosh also came there and Neelima was brought downstairs. She was taken in a TSR by Dilip and Ashu Ghosh to AIIJMS Hospital. Neelima was having knife injury marks on her nose, stomach and when she was being taken in TSR, I also saw knife injury on her back. Police was also informed by me. Police came to the spot and thereafter, went to hospital. After some time police again came back to the spot. Crime team also came to the spot. SHO, ACP also arrived on the spot. One chunni, knife which was lying on the floor, the bed sheet, the blood lying on the floor were seized by the police. Police carried out the investigation concerning the material objects. The articles were seized and sealed with the seal of RLB. I had signed the seizure memos of the articles seized by the police. The seizure memo of chunni is Ex.PW-2/A which bears my signature at point A. The seizure memo of bed sheet is Ex.PW-2/B which bears my signatures at point A. The seizure memo of blade of knife is Ex.PW-2/C which bears my signature at point A. Later on handle of the blade of the knife as well as wrapper of the knife, which was brand new, was seized and sealed vide memo Ex.PW-2/D which bear my signatures at point A. The blood stains were taken into possession vide memo Ex.PW-2/E and F which bears my signatures at point A. On 15/8/04, I apprehended accused present in the court from temple road and handed over him to the police. I had also informed the police after apprehending the accused at temple road. Again said : after the arrival of police on the spot, accused was apprehended by me along with police. Police made inquiries from accused and he was arrested in this case. Police got my signatures on arrest memo which is Ex.PW-2/G which bears my signatures at point A. I had signed the personal search memo of accused which is Ex.PW-2/H.

Police interrogated the accused and made inquiries from him. I can indentify the case property if shown to me."

35. The evidence of PW-1, PW-2 and PW-8 has proved the case of the prosecution beyond any shadow of doubt. After the appellant was seen at the spot of the incident, he ran from the spot and was arrested only on 15th August, 2004.

36. Absconding by itself may not necessarily lead to a conclusion of guilt [See **Matru Vs. State of U.P.** AIR 1972 SC page 1050], but having regard to the fact that the appellant was last seen in the company of the victim and his leaving the room with blood stained clothes, coupled with his absconding from the spot of the incident would be another very strong circumstance against the appellant. Both the above circumstances have not been explained by the appellant.

37. Having regard to the evidence placed on record, the dying declaration of the injured to PW-8 and taking into consideration that the PW-1 had last seen the appellant with the injured finding blood on his baniyan and the fact of appellant absconding thereafter and the dying declaration made before PW-8, in our view leaves no room for doubt that the appellant had stabbed Nilima which resulted in her death on the fateful day i.e. 11/08/2004. The appeal is without any merit and the same is accordingly, dismissed.

ILR (2013) VI DELHI 4382
CRL. P.

NARCOTICS CONTROL BUREAU ....PETITIONER

VERSUS

GURNAM SINGH & ANR. ....RESPONDENTS

(S.P. GARG, J.)

CRL.L.P. NO. : 121/2012 DATE OF DECISION: 27.09.2013

The Narcotic Drugs and Psychotropic Substances Act, 1985—Respondents alleged to have entered into a criminal conspiracy on or before 27.01.2003—To illegally acquire, possess and deal with controlled substance—Which was exported form India to Manila, Philippines—Both the respondents were arrested and their statements were recorded under Section 67 of the NDPS Act—After recording the statements of the witnesses, the respondents were charge—Sheeted under Sections 29 & 25A of NDPS Act—To establish the charges, prosecution examined thirteen witnesses—The respondents impleaded false implication—Trial Court acquitted the respondents of the charges—Hence the present Criminal Leave Petition by Narcotics and Control Bureau. Held—No corroborating material in support of the statements allegedly recorded under Section 67 of the Ndps Act—The prosecution did not investigate as to from where the contraband was procured by the respondents—The relevant documents showing the export were not collected and proved—Burden to prove the case beyond reasonable doubt was upon the prosecution—The provision of the NDPS Act and the punishment prescribed therein being indisputably stringent, the extent to prove the foundational facts on the prosecution i.e. 'proof

beyond all reasonable doubt' would be more onerous—It is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof—No illegality or material irregularity in the impugned judgment which is based upon fair appraisal of the evidence and needs no interference—The leave petition is numerated and is dismissed.

Important Issue Involved: Burden to prove the case beyond reasonable doubt was upon the prosecution—Where the provision of the NFDPS Act and the punishment prescribed therein being indisputably stringent the extent to prove the foundational facts on the prosecution i.e. 'proof beyond all reasonable doubt' would be more onerous. Since the prosecution was not able to adduce clinching evidence and further corroborate material in support of the statements allegedly recorded under Section 67 of the NDPS Act, hence it is unsafe to rely on them. It is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof.

[Sa Ga]

APPEARANCES:

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

FOR THE RESPONDENTS : Mr. S.S. Das, Advocate.

RESULT: The leave petition dismissed.

S.P. GARG, J. (Open Court)

1. Narcotics Control Bureau (the petitioner) has filed Criminal Leave Petition to challenge a judgment dated 30.08.2011 of learned Special Judge, NDPS, New Delhi by which the respondents – Gurnam Singh and N.C.Chellathambi were acquitted of the charges. The leave petition is contested by the respondents. I have heard the learned counsel for the parties and have examined the record. Allegations against the respondents were that on or before 27.01.2003, they entered into criminal conspiracy

with Lal Man Pua (Chinese national), Gurbachan Singh, Devinder Singh and Shekhar (not arrested) to illegally acquire, possess and deal with controlled substance. On 27.01.2003, the Philippine Drug Enforcement Agency (in short PDEA) seized one ton of Ephedrine, a controlled substance, which was exported by the respondents in furtherance of criminal conspiracy from India to Manila, Philippine. During the course of investigation both the respondents were arrested and their statements under Section 67 of NDPS Act were recorded. It transpired that the Ephedrine was consigned to Philippine through M/s. Gray Fox Inc., RZ-F-208, Nihal Vihar, Sayad Nangloi, New Delhi to M/s. Premier Sea and Air Cargo Movers Corporation, Manila, Philippine in container No. HDMU-2294884 through shipper Aquarius Logistic Pvt. Ltd., 409, Ansal Tower, Nehru Place, New Delhi. The documents received from the concerned agency from Manila were forwarded by the NCB (Headquarters) to the Zonal Director, Delhi Zonal Unit, NCB. The investigation was taken over by Mangal Das, who visited the premises RZ-F-208, Nihal Vihar, Sayad Nangloi, New Delhi on 18.03.2004 and found respondent No.1 – Gurnam Singh present there. Respondent No.1 in his voluntary statement under Section 67 of NDPS Act on 18.03.2004 disclosed that his brother-in-law Devinder Singh and younger brother Gurbachan Singh had floated M/s. Gray Fox Inc. and two other companies by the name of Sidana's Collection and Singh Cargo (Air and Sea). He further disclosed that he was working in Singh Cargo and used to deliver letters to M/s. Impex Trade Agencies, 37B, Pocket-A, Ashok Vihar Phase-III, Delhi run by Gurnam Singh and Virender Singh. The Investigating Officer visited B-2-B Block, Janakpuri, New Delhi, where Devinder Singh was residing with his family. During search of the said house, certain cargo bills and debit notes of Aquarius Logistic Pvt. Ltd. were recovered and seized. In his second statement under Section 67 of NDPS Act on 19.03.2004. Respondent No.1 revealed that he was aware that Ephedrine was sent by his brother-in-law Devinder Singh and younger brother Gurbachan Singh by concealing it along with bleaching powder arranged through M/s. Impex Trade Agencies. Statements of Gurnam Singh and Virender Singh, owner of M/s. Impex Trade Agencies were recorded under Section 67 of NDPS Act and they revealed that they had arranged the bleaching powder from New National Cohan Company, Tilak Bazaar, Delhi and were aware that Devinder Singh had concealed Ephedrine along with the said bleaching powder and exported to Philippine. It also emerged that M/

s. Impex Trade Agencies was dealing with respondent No.2 – N.C.Chellathambi for procuring orders for supply of stainless steel utensils from Myanmar for the last 3 – 4 years and they were aware that respondent No.2 was exporting bleaching powder through Devinder Singh's clearing agency Singh Cargo. They introduced respondent No.2 to Devinder Singh and arranged for the bleaching powder to be consigned to Manila. Statement of respondent No.2 was recorded under Section 67 of NDPS Act and he admitted that Ephedrine was sent by putting the same in bleaching powder to Manila for which he got Rs. 2 lacs to Rs. 3 lacs as commission. After recording the statements of the witnesses conversant with the facts, the respondents were charge-sheeted under Sections 29 & 25A of NDPS Act. To establish the charges, prosecution examined thirteen witnesses. In their 313 statements, the respondents pleaded false implication. Second respondent appeared as defence witness as DW-2. DW-1 (C.Kali Amma) and DW-3 (Ashwani Kumar Gaind) were examined in defence. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, for the detailed reasons acquitted the respondents of the charges.

2. On 27.01.2003, Ephedrine, weighing a ton, was seized by PDEA at Manila (Philippine) allegedly exported through M/s. Gray Fox Inc., RZ-F-208, Nihal Vihar, Sayad Nangloi, New Delhi. No information was conveyed by PDEA to the Indian authorities soon after its seizure on 27.01.2003. Only during a conference held in Bangkok, Mr.A.P.Kala, Deputy Director General (Enforcement) was apprised about the seizure of Ephedrine on 27.01.2003. He thereafter, on 31.12.2003 wrote a letter (Ex.PW-13/A) to Mr.Avenido, Director General, PDEA for a detailed report along with copies of the statements and relevant documents. Pursuant to the said letter, vide letter dated 06.02.2004 (Ex.DX), he received documents from the said agency collectively exhibited (PW13/B) running into 50 pages. It appears that no immediate steps were taken to unearth the conspiracy soon after NCB came to know about the seizure of Ephedrine during Bangkok conference. PW-13 (A.P.Kala) admitted in the cross-examination that he did not see the case property and no efforts were made to bring it into India. He had no personal knowledge about the company who had exported the contraband. The documents were not called from the said country through Letter of Rogatory. PW-7 (Mangal Dass), the Investigating Officer, also admitted in the cross-examination that he had not seen the case property i.e.

Ephedrine at any point of time and had not requisitioned or asked the Philippine Authorities to send it or its samples to India. He was not aware if any officer / staff of NCB had gone to Manila for the purpose of investigation in this case. PW8 (Shankar Rao), who was overall incharge of the investigation, admitted that he had not seen the substance at any point of time. He however, admitted that he had never given any directions either to his subordinate staff or to the Philippine counterpart to send the substance or sample in the present case to India. Similarly is the testimony of PW-9 (Sandeep Kumar), who also admitted that the case property was not seen at any point of time physically either in India or in Manila. He disclosed the he had visited Manila for discussion with PDEA. Oral discussions were reduced into writing and were a matter of record in the office of NCB but are not part of the judicial file. He elaborated that they could not see the case property or sample at Manila due to legal complications despite their efforts. No permission was sought to draw the samples of the substance to bring it to India. Apparently, none of the witnesses was able to physically inspect the case property i.e. Ephedrine and it was never brought to India and exhibited in the Court. The prosecution also did not bring on record any document to show the outcome of the investigation carried out by PDEA at Manila or to place on record the judgment whereby any individual with whom the respondents had allegedly conspired was held responsible / guilty for importing the controlled substance from India. The prosecution did not examine any witness from PDEA to establish recovery of any controlled substance. In the absence of case property / sample and in the absence of cogent and reliable evidence of its recovery, the respondents cannot be held responsible for the controlled substance allegedly recovered by PDEA at Manila. The Trial Court has discussed the relevant contentions of the petitioner's counsel and has dealt with them minutely with valid reasoning. The prosecution did not explain as to why Devinder Singh, brother-in-law of respondent No.1 who was the Director in M/s. Gray Fox Inc. was not implicated despite availability. The prosecution could not produce any cogent material if respondent No.1 had any active role to play in M/s. Gray Fox Inc. or was responsible for its day to day affairs. Mere presence of respondent No.1 at the office of M/s. Gray Fox Inc. at the time of visit of PW-7 (Mangal Dass) is not enough to connect him with M/s. Gray Fox Inc. PW-7 admitted that before summoning Gurnam Singh, premises of M/s. Gray Fox Inc. were searched but no incriminating

article was recovered from there. Despite having come to know that M/s. Gray Fox Inc. was constituted by Devinder Singh as Director, no proceedings were initiated against them. The premises at Nihal Vihar, Sayad Nangloi, New Delhi belonged to Devinder Singh's father-in-law and it were a residential premises occupied by Devinder Singh's father-in-law and family. Devinder Singh and his family were staying at another place at Janakpuri. He admitted that the occupants at RZ-F-208, Nihal Vihar, Sayad Nangloi, New Delhi were residing since long. PW-7 was unable to disclose as to from where Devinder Singh used to perform his day to day affairs of the company M/s. Gray Fox Inc.

3. Number of prosecution witnesses resiled from their previous statements and turned hostile. No independent public witness was associated. The whole case of the prosecution is based only upon the statements recorded under Section 67 of NDPS Act of the respondents and various other witnesses. However, the Trial Court came to the conclusion that the statements were not voluntary. Detailed reasons have been narrated in the impugned judgment to arrive at this conclusion. Moreover, there was no corroborating material in support of the statements allegedly recorded under Section 67 of the NDPS Act. The prosecution did not investigate as to from where the contraband was procured by the respondents. No call details were placed on record. The relevant documents showing the export were not collected and proved. There is no evidence as to how much consideration was received for the alleged export of contraband, and if so, by whom and when. The prosecution was unable to adduce clinching evidence to establish when and under what circumstances, the respondent No.2 made statement under Section 67 of NDPS Act. He appeared as DW-2 in his defence and categorically denied to have made any such statement voluntarily.

4. Burden to prove the case beyond reasonable doubt was upon the prosecution. The provisions of the Act and the punishment prescribed therein being indisputably stringent, the extent of burden to prove the foundational facts on the prosecution i.e. 'proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. Defence witnesses have to be given weightage at par with that of the prosecution witnesses.

5. Taking into consideration all these facts and circumstances, I find no illegality or material irregularity in the impugned judgment which is based upon fair appraisal of the evidence and needs no interference. The leave petition is unmerited and is dismissed. Trial Court record be sent back forthwith.

ILR (2013) VI DELHI 4388
W.P.(C)

PRANAY SINHA ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 5319/2011 DATE OF DECISION: 30.09.2013

Service Law—Promotion—Seniority—Petitioners who are directly recruited Deputy Directors with ESI filed writ petition challenging a judgment passed by Central Administrative Tribunal in original application filed before Tribunal by promotees in cadre of Deputy Directors seeking a direction to Director General, ESI to draw a correct seniority list on basis of principles set out in DOP&T Office Memorandum (OM) dated 3rd March, 2008 with all consequential benefits—Tribunal had directed respondents to reconsider drawing up seniority list in cadre of Deputy Directors Strictly on basis of principles culled out in DOP&T OM dated 3rd March, 2008—Plea taken, Issue with regard to validity and bindness of OM dated 3rd March, 2998 and its implications thereof have been settled by SC Which has rule on bindness thereof as well as on OM dated 7th February, 1986—Said memorandum would apply to

fixation of seniority of government employees—Counsel for official respondent's and counsel for private respondents submitted they would have no objection to respondents drawing up seniority list complying principal laid down by SC in para 29 of said judgment—Held—Order dated 30th September, 2010 passed by CAT modified only to extent that respondents shall reconsider seniority list in cadre of Deputy Directors in terms of para 29 of *UOI and Ors. vs. N. R. Parmar & Ors.*—In case seniority list is not in compliance with above directions, respondents shall ensure that seniority list is expeditiously drawn up in terms thereof.

Important Issue Involved: The authoritative enunciation of the applicable principles by the Supreme Court of India binds all parties.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Kirti Uppal, Sr. Adv. with Mr. S.K. Pandey and Mr. Anshumaan Sahni, Advocates.

FOR THE RESPONDENTS : Mr. A.K. Behura, Adv. with Ms. Meenu Mainee, Advocated for Pvt. Respondents. Mr. Ankur Chhibber, Adv. for R-2.

CASES REFERRED TO:

1. *M.K.Sharma & Ors.* vs. *Union of India & Ors.* R.A.No.95/2011.
2. *Union of India (UOI) and Ors.* vs. *N.R.Parmar and Ors.* JT 2012 (12) 99.

RESULT: Disposed of.

GITA MITTAL, J. (Oral)

1. The instant writ petition raises a challenge to a judgment dated 30th September, 2010 passed by the Central Administrative Tribunal in O.A.NO.567/2009 and order dated 4th July, 2011 in R.A.No.95/2011 titled as **M.K.Sharma & Ors. vs. Union of India & Ors.** The original application was filed before the Tribunal by the promotees in the cadre of deputy directors with the Employees' State Insurance Corporation (ESI) seeking a direction to the Director General, ESI to draw a correct seniority list on the basis of the principles set out in DoP&T Office Memorandum dated 3rd March, 2008 with all consequential benefits. The application was disposed of by the impugned order with following directions:

> "25. Resultantly, as we do not find a prayer to quash the seniority list, we dispose of this OA with a direction to the respondents to reconsider drawing up seniority list in the cadre of Deputy Directors, strictly on the basis of the principle culled out in DoP&T OM dated 3.3.2008 and thereafter consider the claim of applicant for promotion, if eligible, along with all consequential benefits. While doing so, the observations made by us in the body of the order shall also be taken note of. The directions shall be complied with by the respondents within a period of 3 months from the date of receipt of a copy of this order. No costs."

2. During hearing before us today, Mr.Kirti Uppal, learned senior counsel who appears on behalf of the petitioners who are directly recruited Deputy Directors with the ESI, has submitted that the issue with regard to the validity and bindness of the office memorandum dated 3rd March, 2008 and its implications thereof has been settled by the Supreme Court of India which has ruled on the bindness thereof as well as on the Office Memorandums dated 7th February, 1986 and 3rd July, 1986. It has been held that the said memorandums would apply to the fixation of seniority of government employees.

3. In this regard our attention has been drawn to the pronouncement JT 2012 (12) 99 in **Union of India (UOI) and Ors. Vs. N.R.Parmar and Ors.** Para 29 of this pronouncement is relevant and reads as follows:

> "29. A perusal of the OM dated 3.3.2008, would reveal, that a reference to paragraphs 2.4.1 and 2.4.2 of the OM dated 3.7.1986,

has been made therein. Thereupon, the meaning of the term "available" used in paragraph 2.4.2 of the OM dated 3.7.1986, is statedly "clarified". In view of the conclusion drawn in the foregoing paragraph, the said clarification must be deemed to be with reference, not only to the OM dated 3.7.1986 but also the OM dated 7.2.1986. We have already noticed, in an earlier part of the instant judgment, the essential ingredients of a "clarification" are, that it seeks to explain an unclear, doubtful, inexplicit or ambiguous aspect of an instrument, which is sought to be clarified or resolved through the "clarification". And that, it should not be in conflict with the instrument sought to be explained. It is in the aforesaid background, that we will examine the two queries posed in the preceding paragraph. We have already analysed the true purport of the OM dated 7.2.1986 (in paragraph 20 hereinabove). We have also recorded our conclusions with reference to the OM dated 3.7.1986 wherein we have duly taken into consideration the true purport of paragraph 2.4.2 contained in the OM dated 3.7.1986 (in paragraph 21 hereinabove). The aforesaid conclusions are not being repeated again for reasons of brevity. We have separately analysed the effect of the OM dated 3.3.2008 (in paragraph 26 of the instant judgment). It is not possible for us to conclude that the position expressed in the earlier office memoranda is unclear, doubtful, inexplicit or ambiguous. Certainly not on the subject sought to be clarified by the OM dated 3.3.2008. A comparison of the conclusions recorded in paragraph 20 (with reference to the OM dated 7.2.1986) and paragraph 21 (with reference to OM dated 3.7.1986) on the one hand, as against, the conclusions drawn in paragraph 26 (with reference to OM dated 3.3.2008) on the other, would lead to inevitable conclusion, that the OM dated 3.3.2008 clearly propounds, a manner of determining inter se seniority between direct recruits and promotees, by a method which is indisputably in conflict with the OMs dated 7.2.1986 and 3.7.1986. Of course, it was possible for the Department of Personnel and Training to "amend" or "modify" the earlier office memoranda, in the same manner as the OM dated 7.2.1986 had modified/amended the earlier OM dated 22.11.1959. A perusal of the OM dated 3.3.2008, however reveals, that it was not the intention of the Department of Personnel

and Training to alter the manner of determining inter se seniority between promotees and direct recruits, as had been expressed in the OMs dated 7.2.1986 and 3.7.1986. The intention was only to "clarify" the earlier OM dated 3.7.1986 (which would implicitly include the OM dated 7.2.1986). The OM dated 3.3.2008 has clearly breached the parameters and the ingredients of a "clarification". **Therefore, for all intents and purposes the OM dated 3.3.2008, must be deemed to be non-est to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986. Having so concluded, it is natural to record, that as the position presently stands, the OMs dated 7.2.1986 and 3.7.1986 would have an overriding effect over the OM dated 3.3.2008 (to the extent of conflict between them). And the OM dated 3.3.2008 has to be ignored/omitted to the extent that the same is in derogation of the earlier OMs dated 7.2.1986 and 3.7.1986.** In the light of the conclusions recorded hereinabove, we are satisfied that the OM dated 3.3.2008 is not relevant for the determination of the present controversy.

4. Learned senior counsel appearing for the petitioners contends before us that the directions made by the Central Administrative Tribunal have to abide by the principles laid down by the Supreme Court of India in para 29 of **N.R.Parmar** (supra). It is further submitted that if respondents abide by the same, the petitioners would have no further objections. It cannot be disputed that the authoritative enunciation of the applicable principles by the Supreme Court of India binds all parties before us.

5. Mr.Ankur Chhibber, learned counsel for the official respondents and Mr.A.K.Behura , learned counsel representing the private respondents before us submit that the law laid down by the Supreme Court of India binds them and they would have no objection to the respondents drawing up seniority list complying the principles laid down by the Supreme Court of India in para 29 of the said judgment.

In view of the above, we direct as follows:

(i) The order dated 30th September, 2010 passed by the Central Administrative Tribunal is hereby modified only to the extent that the respondents shall re-consider the seniority list in the cadre of Deputy Directors in terms of para 29

of **UOI and Ors. vs. N.R.Parmar & Ors.**

(ii) In case, the seniority list is not in compliance with the above directions, the respondents shall ensure that the seniority list is expeditiously drawn up in terms thereof.

The writ petition is disposed of in the above terms.

C.M.Nos.10798-99/2011

7. In view of the order passed in the writ petition, these applications do not survive for adjudication and the same are accordingly dismissed.

ILR (2013) VI DELHI 4393
CRL.

ASHOK KUMAR @ PINTU & ORS. ....APPELLANTS

VERSUS

STATE OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 472/2001 DATE OF DECISION: 01.10.2013

Indian Penal Code, 1860—Section 308/34 IPC—Appellants convicted u/s 308/34 IPC and sentenced to undergo RI for years each—Appellants pleaded that the victims had sustained injuries at some other place and falsely implicated them due to previous enmity. Held: The injuries on the victims not self inflicted or accidental and no evidence has come on record to substantiate the plea of the appellants. Appellants to be held the author of the injuries inflicted upon the victim however prosecution failed to establish commission of offence of offence u/s 308/34 IPC. Appellants and the victims had no previous enmity. Evidence on record rules out pre-plan or meditation.

No weapon of offence recovered from the possession of the appellants. Appellants also did not inflict repeated fatal blows on the vital organs of the victims and the injuries received by the victims only 'simple' in nature caused by blunt object. In order to succeed in a prosecution u/s 308 IPC, the prosecution has to prove that the injuries to the victims were caused by the appellants with such intention or knowledge and under such circumstances that if these had caused death, the act of the appellants would have amounted to culpable homicide not amounting to murder and since the intention and knowledge are lacking in the present case, the conviction stands altered to 325/34 IPC. Further since the occurrence was an outcome of a sudden flare, appellants deserve to be released on probation.

I am not convinced that the prosecution was able to establish commission of offence under Section 308/34 IPC. It has come on record that the appellants and the victims had no previous enmity. On the day of occurrence, the victims were returning to their respective houses after witnessing Dussehra festival. The accused persons were not aware about their arrival at the spot and did not anticipate it and it ruled out pre-plan or meditation. No weapon of offence was recovered from their possession. The assailants did not inflict repeated fatal blows on the vital organs of the victims. PW-2 (Satish Kumar) sustained only injuries 'simple' in nature caused by blunt object. Injuries on the body of Rajesh Kumar were (a) Clean lacerated wound (CLW) on left ear lobe, tragus & angle of mandible, (b) Contusion haematoma on left occipital region. PW-1 (Dr.M.K.Mittal), who examined the patient Rajesh Kumar did not notice any bone injury in his report (Ex.PW-1/A). The victim was discharged after examination and did not remain admitted in the hospital for long duration. It appears that a quarrel / altercation took place between both the parties and in the incident injuries were inflicted to Rajesh Kumar and Satish Kumar with blunt objects voluntarily. In order to succeed in a prosecution under Section 308 IPC,

the prosecution was to prove that the injuries to Rajesh Kumar were caused by the appellants with such intention or knowledge and under such circumstances that if these had caused death, the act of the appellants would have amounted to culpable homicide not amounting to murder. The intention and knowledge are lacking in the present case. The prosecution has established that the appellants in furtherance of their common intention voluntarily caused 'grievous' injuries with sharp object to Rajesh Kumar and they are perpetrators of the crime under Section 325/34 IPC. **(Para 4)**

Important Issue Involved: In a prosecution u/s 308 IPC, an accused be held guilty of the said offence if the evidence on record reveals that the assault by the accused on the victim was not preplanned and that there was no previous enmity between the victim the accused and further that the accused had not inflicted repeated fatal blows on the vital organs of the victim and the injuries received by the victim were only simple in nature, for the said circumstances show that the accused did not have the requisite intention and knowledge to commit the offence punishable u/s 308 IPC.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. M.L. Yadav, Advocate with Mr. Lokesh Chandra, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

S.P. GARG, J.

1. Ashok Kumar @ Pintu (A-1), Anil Kumar @ Mota (A-2) and Narender Kumar (A-3) were arrested in case FIR No.341/92 PS Mehrauli and sent for trial on the allegations that on 06.10.1992 at about 06.45 P.M. outside shop of Kanwar Pal Halwai, Ward No.1, Mehrauli, they in furtherance of common intention inflicted injuries with iron rod and lathi to Rajesh Kumar and Satish Kumar in an attempt to commit culpable

homicide. The prosecution examined ten witnesses. The Trial Court, on appreciating the evidence, convicted all of them under Section 308/34 IPC by a judgment dated 30.06.2001 in Sessions Case No. 17/94. By an order dated 05.07.2001, they were sentenced to undergo RI for four years each. Being aggrieved, the appellants have preferred the appeal. It is relevant to note that A-2 (Anil Kumar) expired during the pendency of the appeal and proceedings against him were dropped as abated by an order dated 18.11.2010.

2. I have heard the learned counsel for the parties and have examined the record. The police machinery was set in motion when Daily Diary (DD) No. 12A (Ex.PW-3/B) recorded at 07.10 P.M. at PS Mehrauli on getting information about a quarrel at Harijan Basti, Mehrauli. The investigation was assigned to SI Lal Chand who with Const. Naresh went to the spot. Daily Diary (DD) No. 14/A (Ex.PW-3/C) was recorded at 08.15 P.M. when Const.Sunil Kumar informed about admission of Rajesh Kumar in injured condition at Safdarjang Hospital. The Investigating Officer lodged First Information Report after recording Rakesh Kumar's statement (Ex.PW-6/A). He gave detailed account of the incident as to how and under what circumstances the assailants had inflicted injuries to Rajesh Kumar and Satish Kumar. The assailants were named in the FIR and specific role was attributed to them. The occurrence happened at about 06.45 P.M. The FIR was lodged at 09.40 P.M. after sending rukka (Ex.PW-9/B). There was no delay in lodging the report and it ruled out fabrication of a false story.

3. PW-5 (Rajesh Kumar) in his Court statement implicated all the assailants / accused persons and assigned motive for inflicting injuries as they had not contributed donation at the time of Balmiki Jyanti. He deposed that A-3 caught hold him from back and A-1 and A-2 caused injuries with iron rod and lathi. He sustained iron rod blows on his head and became unconscious. When he regained consciousness, he found an injury on his left ear also. Despite lengthy cross-examination, no material discrepancies could be elicited to disbelieve the version given by the victim. PW-6 (Rakesh Kumar) also corroborated him on material facts and deposed on similar lines regarding the role played by each assailant in inflicting injuries to Rajesh Kumar and Satish Kumar. PW-8 (Dr.N.D.Deshpandey) proved Rajesh Kumar's MLC (Ex.PW-8/A) where the injuries were opined as 'grievous' caused by blunt weapon. There is

no inconsistency between the ocular and medical evidence. The injuries sustained by Rajesh Kumar are not under challenge. The appellants have pleaded that he had sustained injuries at some other place and falsely implicated them due to previous enmity. No such evidence has come on record to substantiate this fact. The injuries are not self-inflicted or accidental. The injured were not expected to let the real culprit go scot free and falsely implicate the accused persons in the absence of any prior animosity. It is true that PW-2 (Satish Kumar), the other injured, has opted not to support the prosecution and has exonerated the accused persons. However, that does not dilute the credibility of the version given by PW-5 (Rajesh Kumar). The findings of the Trial Court holding the appellants' guilty for inflicting injuries are based upon fair appraisal of evidence and require no interference. Apparently, the appellants were author of the injuries inflicted to Rajesh Kumar.

4. I am not convinced that the prosecution was able to establish commission of offence under Section 308/34 IPC. It has come on record that the appellants and the victims had no previous enmity. On the day of occurrence, the victims were returning to their respective houses after witnessing Dussehra festival. The accused persons were not aware about their arrival at the spot and did not anticipate it and it ruled out pre-plan or meditation. No weapon of offence was recovered from their possession. The assailants did not inflict repeated fatal blows on the vital organs of the victims. PW-2 (Satish Kumar) sustained only injuries 'simple' in nature caused by blunt object. Injuries on the body of Rajesh Kumar were (a) Clean lacerated wound (CLW) on left ear lobe, tragus & angle of mandible, (b) Contusion haematoma on left occipital region. PW-1 (Dr.M.K.Mittal), who examined the patient Rajesh Kumar did not notice any bone injury in his report (Ex.PW-1/A). The victim was discharged after examination and did not remain admitted in the hospital for long duration. It appears that a quarrel / altercation took place between both the parties and in the incident injuries were inflicted to Rajesh Kumar and Satish Kumar with blunt objects voluntarily. In order to succeed in a prosecution under Section 308 IPC, the prosecution was to prove that the injuries to Rajesh Kumar were caused by the appellants with such intention or knowledge and under such circumstances that if these had caused death, the act of the appellants would have amounted to culpable homicide not amounting to murder. The intention and knowledge are lacking in the present case. The prosecution has established that the

appellants in furtherance of their common intention voluntarily caused 'grievous' injuries with sharp object to Rajesh Kumar and they are perpetrators of the crime under Section 325/34 IPC.

5. The incident took place on 06.10.1992, A-2 (Anil Kumar) has since expired. The appellants have suffered agony of trial / appeal for more than twenty years. They have remained in custody for some duration before grant of bail. They have clean antecedents and are not involved in any other criminal activity. The offence has been altered to 325/34 IPC. There was no previous history of enmity between the parties. The occurrence was an outcome of a sudden flare without prior planning or meditation. They deserve extension of benefit of the beneficial legislation applicable to first offenders. Of course, they can be directed to pay reasonable compensation to the victims. Taking into consideration all these mitigating circumstances, it is a fit case where the appellants can be released on probation of good behaviour. The order on sentence is modified and instead of sentencing the appellants at once to any punishment, they are ordered to be released on probation on their furnishing personal bond in the sum of Rs. 50,000/-, each with one surety, each in the like amount to the satisfaction of the Trial Court for a period of two years and to appear and receive sentence when called upon, and in the meantime, they shall keep peace and be of good behavior. Ashok Kumar @ Pintu (A-1) and Narender Kumar (A-3) shall deposit Rs. 40,000/ each as compensation before the Trial Court within 15 days. The Trial Court shall issue notice to the injured / victims – Rajesh Kumar to receive the compensation. The appeal stands disposed of in the above terms. The Trial Court record be sent back forthwith with the copy of the order for compliance.

ILR (2013) VI DELHI 4399
CRL. A.

HARISH ARORA @ SUNNY ....APPELLANT

VERSUS

STATE .....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 741/2001, 746/2001 **DATE OF DECISION: 01.10.2013**

Indian Penal Code, 1860—Section 304/325/345 IPC—Chargesheet was filed against the appellants for having beaten one Ramesh and thereby causing his death—Trial Court however convicted the appellants only for the offence punishable u/s 325 /34 IPC—Conviction challenged inter alia on the ground that the appellants were not the author of the injuries to the victim and the appellants had been falsely implicated—Held: No delay in lodging the FIR and in the Statement given to the police, the complainant/ eye witness gave a graphic account as to how and kicks, assigning specific roles to each of the appellants and proved the said version in the also without any major variation. The findings of the Trial Court that the appellants were the authors of the injuries no interference however conviction altered to section 323/34 IPC in view of the postmortem examination report which did not record any injury/ violence marks on the body of the victim and opined the cause of death as heart failure consequent to assault.

Appellants' counsel emphasized that the appellants were not author of the injuries to the victim. The Trial Court ignored vital discrepancies and contradictions emerging in the testimonies of the prosecution witnesses without valid reasons.

In the post-mortem examination report, visible injuries on body of the deceased were not noticed. He adopted alternative argument that at the most, the appellants could have been held guilty under Section 323/34 IPC only. Learned Additional Public Prosecutor urged that the injuries inflicted to the deceased proved fatal and conviction under Section 325 IPC needs no interference. A quarrel between the parties ensued at 02.00 P.M. and PCR rushed to the spot at about 02.15 P.M. Soon thereafter, the victim was taken to DDU hospital and was declared 'brought dead'. MLC (Ex.PW-3/A) records arrival time at the hospital as 02.55 P.M. DD No.16 (Ex.PW11/A) was recorded at 03.06 P.M. at Police Post East Uttam Nagar. The Investigating Officer after recording Suresh Chand's statement (Ex.PW-2/A) lodged First Information Report by sending rukka (Ex.PW-13/A) at 04.15 P.M. Apparently, there was no delay in lodging the FIR. FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. In the statement (Ex.PW-2/A) Suresh Kumar gave graphic account as to how and under what circumstances, Ramesh Chand was assaulted with fists and kicks. He narrated specific role played by each accused in the occurrence and also assigned motive for that. Since the FIR was lodged promptly, there was least possibility of false story being fabricated in such a short interval. **(Para 3)**

I am, however, not convinced that the appellants could be held guilty for committing offence under Section 325 IPC. No visible injuries were noticed on the body of the victim. PW-3 (Dr.Suresh Khurana), who medically examined the patient vide MLC (Ex.PW.3/A) did not record any injury on the victim's body. In the post-mortem examination report (Ex.PW4/

A), Dr.L.K.Barua, autopsy Surgeon, did not notice any injury/violence marks on the body on 29.10.1993. The cause of death was heart failure consequent to assault. Apparently, the injuries inflicted to the victim were not the cause of his death. Altercation was the outcome of sudden flare at the spot on the refusal of A-2 and A-3 to part with Rs. 10,000/-claimed as lottery amount by the deceased. The appellants did not anticipate his arrival at the spot and were not armed with any deadly weapons. Since A-1 to A-3 had given beatings in furtherance of their common intention with fists and kick blows on the victim's body, they were responsible for causing simple hurt under Section 323/34 IPC. The conviction is altered from Section 325/34 to Section 323/34. **(Para 5)**

Important Issue Involved: The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by the weapons, if any used also the eye witnesses, if any.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Javed Hashmi, Advocate.

FOR THE RESPONDENTS : Mr. Lovkesh Sawhney, APP.

S.P. GARG, J.

1. Harish Arora @ Sunny (A-1), Suresh Kumar @ Daboo (A-2) and Vijay Kumar @ Kale (A-3) impugn a judgment dated 26.09.2001 of learned Additional Sessions Judge in Sessions Case No.84/2001 arising out of FIR No.610/1993 registered at Police Station Janak Puri by which they were held guilty for committing offence under Section 325/34 IPC. By an order dated 28.09.2001, A-1 was sentenced to undergo RI for one year with fine Rs. 2,000/- and A-2 and A-3 were awarded RI for two years with fine Rs. 3,000/- each.

2. Allegations against the appellants were that on 28.10.1993 at 02.00 P.M. opposite Jagdamba Lottery Centre, Najafgarh Road, Uttam Nagar they in furtherance of common intention inflicted injuries to Ramesh Chand and caused his death. PW-5 (HC Jai Singh) of PCR went to the spot on receiving information of quarrel and found Ramesh Chand lying unconscious in front of Jagdamba Lottery Centre. Ramesh Chand was taken to DDU hospital and was pronounced dead on arrival. The police machinery was set in motion when DD No.16 (Ex.PW11/A) was recorded at 03.06 P.M. at Police Post Uttam Nagar. The Investigation was assigned to SI Satya Prakash (PW-13). Post-mortem examination of the body was conducted. Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against the appellants under Section 304 IPC. They were duly charged and brought to trial. The prosecution examined 13 witnesses. In 313 statements, the appellants pleaded false implication. They did not, however, produce any evidence in defence. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment convicted A-1 to A-3 under Section 325/34 IPC. It is significant to note that State did not challenge appellants acquittal under Section 304 IPC.

3. Appellants' counsel emphasized that the appellants were not author of the injuries to the victim. The Trial Court ignored vital discrepancies and contradictions emerging in the testimonies of the prosecution witnesses without valid reasons. In the post-mortem examination report, visible injuries on body of the deceased were not noticed. He adopted alternative argument that at the most, the appellants could have been held guilty under Section 323/34 IPC only. Learned Additional Public Prosecutor urged that the injuries inflicted to the deceased proved fatal and conviction under Section 325 IPC needs no interference. A quarrel between the parties ensued at 02.00 P.M. and PCR rushed to the spot at about 02.15 P.M. Soon thereafter, the victim was taken to DDU hospital and was declared 'brought dead'. MLC (Ex.PW-3/A) records arrival time at the hospital as 02.55 P.M. DD No.16 (Ex.PW11/A) was recorded at 03.06 P.M. at Police Post East Uttam Nagar. The Investigating Officer after recording Suresh Chand's statement (Ex.PW-2/A) lodged First Information Report by sending rukka (Ex.PW-13/A) at 04.15 P.M. Apparently, there was no delay in lodging the FIR. FIR in a criminal case is a vital and

valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. In the statement (Ex.PW-2/A) Suresh Kumar gave graphic account as to how and under what circumstances, Ramesh Chand was assaulted with fists and kicks. He narrated specific role played by each accused in the occurrence and also assigned motive for that. Since the FIR was lodged promptly, there was least possibility of false story being fabricated in such a short interval.

4. Suresh Chand in his Court statement fully proved the version given to the police at the first instance without any major variation. The victim who was present at his house, left at 01.30 P.M. informing him to go to Jagdamba Lottery Centre to collect Rs. 10,000/-as prize lottery money. Soon thereafter, he received information about beatings given to him and rushed to the spot. He saw that A-1 had caught hold Ramesh Kumar from behind and A-2 and A-3 were giving fists and leg blows on his stomach and private part. When he intervened to separate the victim, he was also pushed. The appellants continued to give beatings as a result of which Ramesh Kumar became unconscious. In the cross-examination, he fairly admitted that he did not sustain any injury during the scuffle. Despite lengthy cross-examination, no material discrepancies emerged to disbelieve his version. Since the quarrel had taken place near his residence, his presence at the spot after hearing the information about the beatings to his brother was quite natural and probable. Specific suggestion was put to him in the cross-examination that A-1 had not caught hold of the victim but was attempting to separate him from the others two giving beatings to him. The accused persons did not deny their presence at the spot. PW-2 (Suresh Chand) was not an interested witness to falsely implicate the innocents and to let the real culprits go scot free. His testimony inspires implicit confidence. PW-8 (Subhash Gulia) though did not support the prosecution in its entirety, nevertheless, deposed that at 01.45 P.M. Ramesh Chand had come to Suresh Kumar's counter. He was having a lottery ticket in his hand and was demanding money from him (A-2) and Vijay Kumar (A-3). An altercation took place and there was scuffle between them. He intervened and asked them not to quarrel at his shop. Thereupon they all left. This independent public witness who

was dealing with sale of lottery tickets by the name of Jagdamba Lottery Centre at Uttam Nagar and had allowed others to have lottery counters at his shop, had no ulterior motive to make false deposition. The Trial Court has given cogent reasons to conclude that the appellants were authors of the injuries and these findings require no interference.

5. I am, however, not convinced that the appellants could be held guilty for committing offence under Section 325 IPC. No visible injuries were noticed on the body of the victim. PW-3 (Dr.Suresh Khurana), who medically examined the patient vide MLC (Ex.PW.3/A) did not record any injury on the victim's body. In the post-mortem examination report (Ex.PW4/A), Dr.L.K.Barua, autopsy Surgeon, did not notice any injury/violence marks on the body on 29.10.1993. The cause of death was heart failure consequent to assault. Apparently, the injuries inflicted to the victim were not the cause of his death. Altercation was the outcome of sudden flare at the spot on the refusal of A-2 and A-3 to part with Rs. 10,000/-claimed as lottery amount by the deceased. The appellants did not anticipate his arrival at the spot and were not armed with any deadly weapons. Since A-1 to A-3 had given beatings in furtherance of their common intention with fists and kick blows on the victim's body, they were responsible for causing simple hurt under Section 323/34 IPC. The conviction is altered from Section 325/34 to Section 323/34.

6. The appellants on their own offered to pay reasonable compensation to the victim's family to escape substantive sentence under Section 323/34 IPC. The victim was aged about 40 years and despite heart ailment, was leading a normal life on the day of incident. He had driven scooter to his brother's residence and was hale and hearty. He had gone to Jagdamba Lottery Centre to collect Rs. 10,000/-as prize money. It appears that A-2 to A-3 did not pay the amount and in an altercation on that issue gave severe beatings with fists and kicks resulting in his death. Though the appellants were not liable for causing culpable homicide/murder, but they were instrumental in accelerating his death. But for this unfortunate incident, God knows, for how many days/ months the victim could have survived. Each day was precious for him and his family. After the episode, Rs. 10,000/- for which the victim lost his life were not offered/paid to his legal heirs. The said amount payable in 1993 had substantial value. The appellants were expected to return the amount voluntarily. The occurrence took place about 20 years back. The

appellants were in custody for some duration before grant of bail under Section 304 IPC. They have voluntarily offered to pay reasonable compensation. Taking into consideration all these mitigating circumstances, no useful purpose will be served to send the appellants to Jail under Section 323 IPC. The sentence order is modified and A-1 to A-3 are sentenced to undergo the period already spent by them in this case under Section 323 IPC. Other terms and conditions of the sentence order are left undisturbed. A-1 shall deposit Rs. 50,000/- and A-2 and A-3, who are primarily responsible for causing beatings, shall deposit Rs. 75,000/ each within 15 days in the Trial Court to be paid as compensation. The Trial Court shall issue notice to the widow to receive the compensation amount and if she is not available, the amount will be disbursed to deceased's children in equal proportion.

7. The appeal stands disposed of in the above terms. Record along with copy of this order be sent back to the Trial Court.

ILR (2013) VI DELHI 4405
W.P.(C)

GURDEV SINGH **....PETITIONER**

VERSUS

UNION OF INDIA THROUGH SECRETARY AND ORS. **....RESPONDENT**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 5684/2012 **DATE OF DECISION: 01.10.2013**

Army Act, 1950—Section 122—Army Rules, 1954—Rule 180—Application of Petitioner challenging order of General Court Martial (GCM) dismissed by Armed Forces Tribunal (AFT)—Order challenged before HC—Plea taken, legal issue of limitation as one of grounds though noticed in order but was not adjudicated upon—Held—It is trite that bar of limitation would certainly interdict trial of Petitioner by GCM if it could be held that same was beyond prescribed period of limitation—Adjudication of this issue was therefore essential in order to decide whether proceedings before GCM were time barred or not—In case, it is held trial itself was barred by limitation there would be no requirement to examine grounds which are on merits of trial and on evidence led by parties before GCM—These grounds are left open for consideration—Impugned order set aside and matter remanded back to AFT for consideration qua objection of petitioner based on Section 122 of Army Act, 1950.

Important Issue Involved: The bar of limitation would certainly interdict the trial of the Petitioner by the General Court Martial if it could be held that the same was beyond the prescribed period of limitation under Section 122 of the Army Act.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Mohan Kumar, Adv.

FOR THE RESPONDENT : Mr. Ankur Chhibber, Adv.

RESULT: Disposed of.

GITA MITTAL, J. (Oral)

1. By way of the present petition, the petitioner has assailed a judgment dated 23rd May, 2011 passed by the Armed Forces Tribunal dismissing the petitioner's TA No. 484/2010. The petitioner also challenges the order dated 26th September, 2011 whereby the Armed Forces Tribunal has dismissed the review petition filed by the petitioner challenging the judgment dated 23rd May, 2011.

2. The two impugned orders have been assailed on several grounds detailed in the writ petition. One of the primary grounds of challenge is

that legal issue of limitation under Section 122 of the Army Act 1950 and violation of Rule 180 of the Army Rules, 1954 as one of the grounds though noticed in the order dated 23rd May, 2011 by Armed Forces Tribunal was not adjudicated upon. We are, therefore, confining the present order for consideration of this issue only.

3. The impugned order has noted that the petitioner had objected to the proceedings for the reason charges against him are barred by limitation provided under Section 122 of the Army Act, 1950. Our attention is drawn to the chargesheet dated 29th January, 1992 issued to the petitioner on which he was subjected to General Court Martial.

4. The charge on which the petitioner was tried relate to different periods between October 1993 to May 1994.

5. The challenge by the petitioner before us to the order impugned is that the learned Tribunal has gravely erred in not deciding this issue which should have been adjudicated upon as it precluded the petitioner's trial by the General Court Martial.

6. Our attention has been drawn by learned counsel for both the parties to the submissions noted in the order dated 23rd May, 2011 by the Armed Forces Tribunal. In para 1 of the said order, the Tribunal has noted the contention of the petitioner that his trial for the alleged offence was barred by limitation in view of the provisions laid under Section 122 of the Army Act. We find that the Tribunal has referred to the submission made on behalf of the petitioner. Unfortunately while disposing of this petition by detailed order dated 26th September, 2011, adjudication of the petitioners objection premised on Section 122 of the Army Act 1950 escaped notice.

7. The petitioner has thereafter filed a Review Petition under Section 14(F) of the Arms Forces Tribunal Act, 2007 on 27th July, 2011.

8. This objection has been detailed in para 8 of the Review application and ground E at page 87 of the impugned petition filed by the petitioner.

9. It is trite that the bar of limitation would certainly interdict the trial of the petitioner by the General Court Martial if it could be held that the same was beyond the prescribed period of limitation under Section 122 of the Army Act. The adjudication of this issue was therefore essential in order to decide whether the proceedings before the General

Court Martial were time barred or not. The petitioner has challenged the order dated 23rd May, 2011 and 26th September, 2011 on several grounds laid before us in the writ petition.

10. In view of the above narration, it is not essential to deal with those grounds which are on the merits of the trial and on the evidence led by the parties before the General Court Martial. In case, it is held that the trial itself was barred by limitation there would be no requirement to examine these several issues. These grounds are left open for consideration.

11. In view of the above, we direct as follows:-

(i) the order dated 23rd May, 2011 and 26th September, 2011 are hereby set aside and quashed and the matter is remanded back to the Armed Forces Tribunal for consideration qua the objection of the petitioner based on Section 122 of the Army Act, 1950.

(ii) We make it clear that we have not opined on the merits of the other objection of the petitioner.

(iii) In case the petitioner is still aggrieved by the adjudication of the Armed Forces Tribunal, it shall be open to the petitioner to assail all orders passed by the Armed Forces Tribunal on all grounds raised in the present writ petition by way of appropriate proceedings as well as all grounds available in law.

(iv) the parties shall appear before the Registrar of the Armed Forces Tribunal on 10th October, 2013 for directions.

12. The writ petition is disposed of in above terms.

Dasti.

ILR (2013) VI DELHI 4409
CRL. A.

PREM CHAND @ RAJU ....APPELLANT

VERSUS

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

(S.P. GARG, J.)

CRL.A. NO. : 290/2001 DATE OF DECISION: 08.10.2013

Indian Penal Code, 1860—Section 326 IPC—Conviction of the appellant u/s 326 IPC challenged inter alia on the ground that the trial court fell into grave error in relying upon the testimony of the complainant against whom a cross case u/s 305 IPc for causing injuries to the appellant, prior in time on the same day was registered vide FIR No. 358/95 PS Kalkaji and further that there was no material before the trial court to ascertain nature of injuries as 'grievous' in nature in the absence of examination of concerned doctors. Held: No delay in lodging the FIR and in the statement given to the police, the victim gave graphic detail of the incident, assigning specific role to the appellant and proved the said version in the trial also without any major variation. Since the FIR was recorded promptly, there was lest possibility of fabricating a false story in such short interval. Medical evidence is in consonance with ocular testimony. MLCs proved by competent doctors who were familiar with the handwriting and signatures of the doctors who had medically examined the victim and therefore it cannot be inferred that there was no material before the trial court to ascertain the nature of injuries. The injuries were not self—Inflicted or accidental in nature. The complainant who sustained 'grievous' injuries on his vital organ is not expected to let the real assailant go scot free and rope in the innocent one. The accused persons could not establish that they were victims at the hands of the complainant or had sustained 'grievous' injuries on their bodies. The proceedings in FIR No. 358/95 PS Kalkaji are not on record and its outcome is unclear. The appellant did not examined any doctor in defence to show that the sustained injuries prior to the said occurrence or was admitted in the hospital. Conviction upheld.

I have considered the submissions of the parties and have examined the record. The occurrence took place at about 01.40 P.M. and Daily Diary (DD) No. 8A (mark 'A') was recorded at 02.25 P.M. at PS Ambedkar Nagar. The injured was taken to AIIMS and the arrival time recorded in the MLC (Ex.PW-7/A) is 02.41 P.M. After recording victim's statement (Ex.PW-1/A), the Investigating Officer lodged First Information Report by making endorsement on the rukka (Ex.PW-10/B) at 03.40 P.M. Apparently, there was no delay in lodging the First Information Report. In the statement (Ex.PW-1/A), the victim gave graphic detail of the incident as to how and under what circumstances, he was stabbed with knife by Prem Chand @ Raju and Darshan Kumar and attributed specific role to each of them. Since the FIR was recorded promptly, there was least possibility of fabricating a false story in such a short interval. While appearing as PW-1, the victim proved the version given to the police at the first instance without major variation and implicated both for inflicting injuries to him by a knife. Specific role was assigned to Prem Chand whereby he gave knife blows on the chest, head and right knee. Despite lengthy cross-examination, no material discrepancies could be elicited to impeach his testimony. PW-2 (Suresh Chand) corroborated his version to the extent that Prem Chand was one of the assailants who had come on a scooter and with whom Manmohan had grappled and sustained knife injuries. Medical evidence is in consonance with ocular testimony. PW-7 (Dr.Padmanabhan) proved the MLC (Ex.PW-7/A) as he was conversant with the

handwriting and signatures of examining doctor Gopesh Modi and deposed that as per the MLC (Ex.PW-7/A) the nature of injuries was 'grievous' caused by sharp object. There were stab wounds on left chest, head, forehead and knee. PW-8 (Dr.Seema) proved the handwriting and signatures of Dr.S.Yadav (Ex.PW-8/A). Since competent doctors who were familiar with the handwriting and signatures of the doctors who medically examined the patient had opined the nature of injuries as 'grievous' by sharp object, it cannot be inferred that there was no material before the Trial Court to ascertain the nature of injuries. The injuries were not self-inflicted or accidental in nature. The complainant who sustained 'grievous' injuries on his vital organ is not expected to let the real assailant go scot free and rope in the innocent one. The accused persons could not establish that they were victims at the hands of the complainant or had sustained 'grievous' injuries on their bodies. The proceedings in FIR No. 358/95 PS Kalkaji are not on record and its outcome is unclear. The appellant did not examine any doctor in defence to show that he sustained injuries prior to the said occurrence or was admitted in the hospital. It is true that PW-3 (Kare Singh) has not opted to support the prosecution and has exonerated the appellant and his associate but that does not dilute the complainant's veracity and his testimony cannot be discredited on that score. The discrepancies and defects highlighted by the appellant's counsel are inconsequential. Injured's testimony which is accorded a special status in law coupled with medical evidence is sufficient to establish the guilt of the appellant. 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."* **(Para 3)**

Important Issue Involved: The testimony of an injured is accorded a special status in law and when the same is coupled with medical evidence, it is sufficient to establish the guilt of an accused, named as the aggressor by the injured.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Ms. Purnima Maheshwari, Advocate with Mr. Manoj Kumar, Advocate along with appellant in person.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, 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.

S.P. GARG, J.

1. Prem Chand @ Raju (the appellant) impugns a judgment dated 11.04.2001in Sessions Case No. 168/1997 arising out of FIR No. 386/1995 PS Ambedkar Nagar by which he was convicted under Section 326

IPC. By an order dated 20.04.2001, he was sentenced to undergo SI for three years with fine Rs. 2,000/-. Allegations against the appellant were that on 22.06.1995 at around 01.40 P.M. near Shop No. C-35, C-block Market, Dakshinpuri, Delhi, he and his associate Darshan Kumar (since acquitted) in furtherance of common intention inflicted injuries to Manmohan with knife on chest. The police machinery came into motion after getting information vide Daily Diary (DD) No.8A (mark 'A') recorded at 02.25 P.M. about stabbing incident at Dakshinpuri. The investigation was assigned to SI Anil Kumar who with Const. Mukesh went to the spot and found Manmohan lying in injured condition. The Investigating Officer recorded Manmohan's statement (Ex.PW-1/A) and lodged First Information Report. Prem Chand and Darshan Kumar were arrested on 10.07.1995. Pursuant to Prem Chand's disclosure statement, knife used in the crime was recovered. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted against Prem Chand @ Raju and Darshan Kumar for committing offence under Sections 307/34 IPC. The prosecution examined ten witnesses. In their 313 Cr.P.C. statements, the accused persons pleaded false implication. Phool Singh appeared in their defence. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted Darshan Kumar of the charges; Prem Chand @ Raju was convicted under Section 326 IPC. The State did not challenge the verdict.

2. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimony of the complainant – Manmohan against whom a cross-case under Section 325 IPC for causing injuries to the Prem Chand and Darshan Kumar prior in time on the said day was registered vide FIR No. 358/95 PS Kalkaji. Complainant was also booked under Sections 107/150 Cr.P.C. There was no material before the Trial Court to ascertain nature of injuries as 'grievous' in nature in the absence of examination of concerned doctors. Knife and blood stained clothes were not sent to Forensic Science Laboratory (FSL). Recovery of knife from the shop of the appellant's father is highly doubtful and the said premises were not in his exclusive possession. Appellant's father had instituted proceedings to get the premises vacated from the complainant (a tenant in the house) and that was the motive to falsely implicate him. Counsel adopted alternative argument to release Prem Chand on probation

of good behaviour as he was of seventeen years of age on the day of occurrence. Learned Addl. Public Prosecutor urged that there are no sound reasons to disbelieve the testimony of victim – Manmohan who received 'grievous' injuries on vital organs.

3. I have considered the submissions of the parties and have examined the record. The occurrence took place at about 01.40 P.M. and Daily Diary (DD) No. 8A (mark 'A') was recorded at 02.25 P.M. at PS Ambedkar Nagar. The injured was taken to AIIMS and the arrival time recorded in the MLC (Ex.PW-7/A) is 02.41 P.M. After recording victim's statement (Ex.PW-1/A), the Investigating Officer lodged First Information Report by making endorsement on the rukka (Ex.PW-10/B) at 03.40 P.M. Apparently, there was no delay in lodging the First Information Report. In the statement (Ex.PW-1/A), the victim gave graphic detail of the incident as to how and under what circumstances, he was stabbed with knife by Prem Chand @ Raju and Darshan Kumar and attributed specific role to each of them. Since the FIR was recorded promptly, there was least possibility of fabricating a false story in such a short interval. While appearing as PW-1, the victim proved the version given to the police at the first instance without major variation and implicated both for inflicting injuries to him by a knife. Specific role was assigned to Prem Chand whereby he gave knife blows on the chest, head and right knee. Despite lengthy cross-examination, no material discrepancies could be elicited to impeach his testimony. PW-2 (Suresh Chand) corroborated his version to the extent that Prem Chand was one of the assailants who had come on a scooter and with whom Manmohan had grappled and sustained knife injuries. Medical evidence is in consonance with ocular testimony. PW-7 (Dr.Padmanabhan) proved the MLC (Ex.PW-7/A) as he was conversant with the handwriting and signatures of examining doctor Gopesh Modi and deposed that as per the MLC (Ex.PW-7/A) the nature of injuries was 'grievous' caused by sharp object. There were stab wounds on left chest, head, forehead and knee. PW-8 (Dr.Seema) proved the handwriting and signatures of Dr.S.Yadav (Ex.PW-8/A). Since competent doctors who were familiar with the handwriting and signatures of the doctors who medically examined the patient had opined the nature of injuries as 'grievous' by sharp object, it cannot be inferred that there was no material before the Trial Court to ascertain the nature of injuries. The injuries were not self-inflicted or accidental in nature. The complainant who sustained 'grievous' injuries on his vital organ is not expected to let

the real assailant go scot free and rope in the innocent one. The accused persons could not establish that they were victims at the hands of the complainant or had sustained 'grievous' injuries on their bodies. The proceedings in FIR No. 358/95 PS Kalkaji are not on record and its outcome is unclear. The appellant did not examine any doctor in defence to show that he sustained injuries prior to the said occurrence or was admitted in the hospital. It is true that PW-3 (Kare Singh) has not opted to support the prosecution and has exonerated the appellant and his associate but that does not dilute the complainant's veracity and his testimony cannot be discredited on that score. The discrepancies and defects highlighted by the appellant's counsel are inconsequential. Injured's testimony which is accorded a special status in law coupled with medical evidence is sufficient to establish the guilt of the appellant. 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."*

4. 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".*

5. The findings of the Trial Court are based upon fair appraisal of the evidence whereby the co-accused Darshan Kumar was given benefit of doubt and was acquitted. The appellant was held guilty under Section 326 IPC only. The findings require no interference. The appellant was sentenced to undergo Simple Imprisonment for three years with fine ' 2,000/-. Nominal roll dated 13.11.2010 reveals that he remained in custody for ten days and not involved in any other criminal case. His overall jail conduct was satisfactory. It further reveals that Prem Chand was aged eighteen years. At the time of addressing arguments on point of sentence, age of the appellant was claimed less than eighteen years. However, no application was ever moved to claim juvenility. Trial Court record reveals that the appellant was a student of B.Com Part-III and was to take examination vide Roll No. 37891 at the Examination Centre Sahid Bhagat Singh College in April, 1999. The complainant was the tenant in the house and appellant's father had instituted eviction proceedings. The complainant was involved in the proceedings under Section 107/150 Cr.P.C. Appellant's father had lodged earlier complaints against him about his conduct and behaviour. The appellant has undergone the agony of the trial/ appeal for about 18 years. He is now married and has small family to take care of. He is doing a private job. No useful purpose will be served to send him to imprisonment. To protect the victim's interest, the appellant can be directed to pay reasonable compensation. Learned Addl. Public Prosecutor has no objection to this course of action. Resultantly, the appellant is sentenced to undergo the period already spent by him in this case. Other terms and conditions of the Sentence order are left undisturbed. In addition, he shall pay Rs. 50,000/- as compensation to the victim and shall deposit it within fifteen days before the Trial Court. The Trial Court shall issue notice to the victim – Manmohan to receive the compensation.

6. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith.

ILR (2013) VI DELHI 4417
CRL. A.

MOHINDER PRATAP ....APPELLANT

VERSUS

THE STATE OF NCT OF DELHI ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 550/2003, 335/2003 DATE OF DECISION: 09.10.2013

Indian Penal Code, 1860—Section 120B/489B/489C IPC—Appellant A-1 convicted for having committed offence punishable u/s 120B/489B/489C IPC and appellant A-2 held guilty only u/s 120B IPC—During the course of arguments, A-1 opted not to challenge his conviction u/s 489B/489C IPC and appellant A-2 challenged his conviction inter alia on the ground that the prosecution could not produce any cogent evidence to establish his complicity with A-1. Held: Admittedly no fake currency was recovered from A-2's possession. He was not present at the time of use of fake notes by A-1 at the shop of the complainant. No overt act was attributed to him in the incident to infer he was also beneficiary. Mere presence of A-2 with A-1 at his residence is inconsequential and mere evidence of association is not sufficient to lead to an inference of conspiracy. Prosecution failed to establish that there was meeting of minds between A-1 and A-2. Hence A-2 acquitted of the charges.

During the course of arguments A-1 opted not to challenge his conviction under Sections 489B/489C IPC and accepted it voluntarily. He however, prayed to take lenient view as he had already remained in incarceration for 39 months and was not a previous offender. A-2 was convicted only for offence under Section 120B IPC. Allegations against him were that he and A-1 were found counting currency notes

on 02.04.2000 at House No. WZ-656, Gali No. 27, Shad Nagar, Shanipura, Palam Colony. The Prosecution however, could not produce any cogent and reliable evidence to establish A-2's complicity in the offence. PW-7 (Munni Lal) merely disclosed that on 02.04.2000, A-1 and A-2 were seen counting notes in the room under tenant of A-1. He did not elaborate if the currency notes being counted were in denomination of ' 50/- and were fake. In the cross-examination, he was fair enough to admit that he was not aware if the currency notes were 100 or 500 and did not know whether those were new or old. He was also unable to tell their denomination. No adverse inference can be drawn from this circumstance as mere counting of currency notes by both A-1 and A-2 does not establish conspiracy to circulate counterfeit currency notes. Admittedly, no fake currency note was recovered from A-2's possession. He was not present at the time of purchase of campa by A-1 from the shop of the complainant. No overt act was attributed to him in the incident to infer that he was also beneficiary. Mere presence of A-2 with A-1 at his residence is inconsequential. The meeting of minds or the element of agreement is the essence of the offence under Section 120 B IPC. Mere evidence of association is not sufficient to lead to a inference of conspiracy. The prosecution must show that A-2 agreed with A-1 that together they would accomplish the unlawful object of the conspiracy. Even if facts relied upon taken at their face value cannot lead to the inference beyond doubt that there was meeting of minds between A-1 and A-2. Addl. Public Prosecutor fairly admitted that the evidence adduced on this aspect is highly scanty and weak. The prosecution has failed to establish its care beyond doubt and A-2's conviction and sentence cannot be sustained and he (A-2) is acquitted of the charge. **(Para 2)**

Important Issue Involved: The essence of an offence u/s 120B IPC is the meeting of minds or the element of agreement and mere evidence of association is not sufficient to lead to an inference of conspiracy.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. V.P.S. Raghav, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

S.P. GARG, J. (OPEN COURT)

1. Mohinder Pratap (A-1) and Pramod Rai (A-2) were arrested in case FIR No. 107/2000 PS Lodhi Colony and sent for trial with the allegations that on 02.04.2000 in between 08.00 to 08.30 P.M. at House No. WZ-656, Gali No. 27, Shad Nagar, Shanipura, Palam Colony, they hatched criminal conspiracy to circulate forged / counterfeit currency notes. It is further alleged that pursuant to the said conspiracy on 04.04.2000 at about 05.30 P.M., A-1 used the counterfeit currency note in the denomination of Rs. 50/- to purchase a campa from the complainant – Satpal Chawla at Shop No.42, Mahender Marg, Lodhi Colony, New Delhi, knowing or having reasons to believe it fake. 32 counterfeit currency notes in the denomination of Rs. 50/-were recovered from his possession. During the course of investigation, statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted in the court in which A-1 and A-2 were duly charged and brought to trial. To prove its case, the prosecution examined twelve witnesses. In their 313 statements, the accused persons claimed themselves innocent and falsely implicated in the case. The Trial Court, by a judgment dated 22.05.2002 in Sessions Case No. 224/2000 held A-1 guilty for committing offences under Sections 120B/489B/489C IPC. A-2 was held guilty under Section 120B IPC Only. By an order dated 30.05.2002, they were given various terms of imprisonment with fine. Being aggrieved, they have preferred appeals.

2. During the course of arguments A-1 opted not to challenge his conviction under Sections 489B/489C IPC and accepted it voluntarily. He however, prayed to take lenient view as he had already remained i incarceration for 39 months and was not a previous offender. A-2 was convicted only for offence under Section 120B IPC. Allegations against him were that he and A-1 were found counting currency notes on 02.04.2000 at House No. WZ-656, Gali No. 27, Shad Nagar, Shanipura, Palam Colony. The Prosecution however, could not produce any cogent

and reliable evidence to establish A-2's complicity in the offence. PW-7 (Munni Lal) merely disclosed that on 02.04.2000, A-1 and A-2 were seen counting notes in the room under tenant of A-1. He did not elaborate if the currency notes being counted were in denomination of ' 50/- and were fake. In the cross-examination, he was fair enough to admit that he was not aware if the currency notes were 100 or 500 and did not know whether those were new or old. He was also unable to tell their denomination. No adverse inference can be drawn from this circumstance as mere counting of currency notes by both A-1 and A-2 does not establish conspiracy to circulate counterfeit currency notes. Admittedly, no fake currency note was recovered from A-2's possession. He was not present at the time of purchase of campa by A-1 from the shop of the complainant. No overt act was attributed to him in the incident to infer that he was also beneficiary. Mere presence of A-2 with A-1 at his residence is inconsequential. The meeting of minds or the element of agreement is the essence of the offence under Section 120 B IPC. Mere evidence of association is not sufficient to lead to a inference of conspiracy. The prosecution must show that A-2 agreed with A-1 that together they would accomplish the unlawful object of the conspiracy. Even if facts relied upon taken at their face value cannot lead to the inference beyond doubt that there was meeting of minds between A-1 and A-2. Addl. Public Prosecutor fairly admitted that the evidence adduced on this aspect is highly scanty and weak. The prosecution has failed to establish its care beyond doubt and A-2's conviction and sentence cannot be sustained and he (A-2) is acquitted of the charge.

3. Since A-1 has opted not to challenge the findings of the Trial Court under Sections 489B/489C IPC and there is ample evidence on record coupled with recovery of fake currency notes, the findings on conviction stands affirmed. As regards sentence, nominal roll shows that he has already remained incarceration for two years, eleven months and twenty seven days as on 10.11.2003. He also earned remission for five months and two days. He has clean antecedents and was not involved in any other criminal activity. After his enlargement on bail and suspension of substantive sentence on 17.11.2003 his involvement in similar crime did not surface. The fine has since been deposited. All these circumstances are sufficient to release A-1 for the period already undergone by him in this case.

4. The Trial Court shall ensure that the fine imposed has since been deposited by A-1.

5. The appeals stand disposed of in the above terms. Trial Court record be sent back immediately.

ILR (2013) VI DELHI 4421
W.P. (C)

S.K. SHAH **....PETITIONER**

VERSUS

UOI AND ORS. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 1016/2012 **DATE OF DECISION: 31.10.2013**

CCS Conduct Rules, 1964—Rule 3 (I) (i & iii), Rule 71 of Central Government Account (Receipt and Payment) Rule 1983—Applicability of provisions—Validity of enquiry proceedings—The petitioner superannuated on 30th November, 2009—Living in accommodation allotted to him in government quarters—The inquiry report was sent on 12th April, 2010 to the petitioner's private address—The enquiry report did not reach him and was unable to submit his representation—Vacated the government quarters and started living in private accommodation on 2nd August, 2010—Received the inquiry report—11th August, 2010, the petitioner sent his representation against the inquiry proceeding to the disciplinary authority—Impugned order dated 17th January, 2011, the disciplinary has noted—Petitioner had failed to submit the representation—within the stipulated period—The case was referred to UPSC for advice and the commission was of the

opinion—That the charges established against the charge officer, constitute grave misconduct on his part—Hence the present petition. Held—The respondents failed also to note that the petitioner informed them of the circumstances in which the inquiry report had not been served upon him—It cannot be denied—The disciplinary officer has to give the petitioner an opportunity to make a representation against the inquiry report of the inquiry officer—It is therefore manifest that the disciplinary authority had accepted the advice of UPSC in toto and imposed the punishment suggested by them—It was therefore incumbent on the disciplinary authority to have forwarded a copy of the advice from UPSC to enable the petitioner to make his representation before relying upon the same—*Union of India & Ors. Vs. S.K. Kapoor*—a copy of the same must be supplied in advance to the concerned employee, otherwise, there will be violation of the principles of natural justice

Important Issue Involved: (A) Disciplinary officer has to give the petitioner an opportunity to make a representation against the inquiry report of the inquiry officer; It is incumbent upon the disciplinary authority to consider the representation when the same is received.

(B) Where the report of the UPSC is relied upon by the disciplinary authority, then a copy of the same must be supplied in advance to the concerned employee, otherwise, there will be violation of the principles of natural justice.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS	**:**	Mr. Padma Kumar S., Advocate.
FOR THE RESPONDENT	**:**	M. Jatan Singh, CGSC and Mr. Soayib Qureshi, Advocate.

CASES REFERRED TO:

1. *Union of India & Ors.* vs. *S.K. Kapoor* Civil Appeal NO.5341 of 2006.
2. *S.N. Narula* vs. *Union of India & Others* Civil Appeal No.642 of 2004.

RESULT: Writ petition is allowed.

GITA MITTAL, J. (Oral)

1. By way of the instant writ petition, the petitioner has assailed the order dated 17th January, 2011 whereby the disciplinary authority accepted the report of the inquiry dated 29th October, 2009 submitted by the inquiry officer on culmination of disciplinary proceedings which were conducted against the petitioner with regard to the charge sheet dated 22nd August, 2007. The disciplinary proceedings were held on the following charges:

ARTICLE I

That the said Shri S.K.Shah, while functioning as Adjutant/ DDO, 24th Bn Gangtok, Sikkim, had intentionally tried evading payment of Income Tax for the Assessment Year 2005-06 w.e.f. 01.04.04 to 31.03.05 by deliberately and wilfully signing his own Income Tax statement Form No.16 reflecting tax payable for the above referred financial year as NIL, with malafide intention and an aim to defraud the Government by projecting and fabricating wrong facts. The said Shri S.K.Shah, has thereby committed an act most unbecoming of the Government Servant of his rank and status which adversely reflects on his integrity thereby violating Rule-3 (I) (i & iii) of the CCS Conduct Rules 1964.

ARTICLE – II

That the said Shri S.K.Shah, while functioning as Adjutant/ DDO, 24th Bn, Gangtok, Sikkim has misused his official position wherein he has deliberately and with ulterior motive fabricated a wrong document thereby committing an act most unbecoming of a government servant of his rank and status thereby violating Rule 3 (I) (i & iii) of the CCS Conduct Rules 1964 and rule 71 of the Central Govt. Account (Receipt and Payments) Rule 1983.

ARTICLE – III

That the said Shri S.K.Shah, while functioning as Adjutant/ DDO, 24th Bn Gangtok, Sikkim, had demanded a sum of Rs.10,000/- projecting an illegal demand of purchasing a Blue Tooth for the Unit Commandant from Sh.Sanjay Das, owner of M/s Bhawani Motor Garage where SSB vehicles were got repaired.

The said Shri Shah has thereby committed an act most unbecoming of a Government Servant of his rank and status, which adversely reflects on his integrity thereby violating rule-3 (I) (i & iii) of the CCS conduct rules 1964.

ARTICLE –IV

That the said Shri S.K.Shah, while functioning as Adjutant/DDO, 24th Bn Gangtok, Sikkim, had taken a sum of Rs.10,000/- from Sh.Sanjay Das, owner of a private Motor Garage named Bhawani Motor Garage, Siliguri in the Officers Mess of SSB Ranidanga on 11.02.05 on account of projecting a illegal demand for purchase of Blue tooth for the commandant, 24th Bn, Gangtok.

The said Shri S.K.Shah, has used the officers mess for a illegal activity and has illegally accepted money thereby committing an act most unbecoming of a Government Servant of his rank and status which adversely reflects on his integrity thereby violating rule 3 (I) (i & iii) of the CCS conduct Rules 1964.

ARTICLE – V

That the said Shri S.K.Shah, while functioning as Adjutant/ DDO, 24th Bn Gangtok, Sikkim, by demanding a sum of Rs.10,000/- from Shri Sanjay Das and having received the said sum of Rs.10,000/- on 11.02.05, has brought disrepute to the Force as well as to Commandant, in a personal capacity, thereby committing an act most unbecoming of a government servant of his rank and status which adversely reflects on his rank and status which adversely reflects on his integrity thereby violating Rule 3 (i & iii) of the CCS Conduct Rules 1964.

2. Amongst others, the petitioner has assailed the said order dated 17th January, 2011 on the ground that the order has been passed without

taking into consideration the representation submitted by the petitioner with regard to the inquiry report. Another ground for challenge in the writ petition by the petitioner before us is that the respondents had referred the case to the Union Public Service Commission (UPSC) for advice, which advice when received was taken into consideration by the disciplinary authority while passing the impugned order and imposing the penalty upon the petitioner. However, the advice which was received by the respondents was not furnished to the petitioner prior to the passing of the order and thereby petitioner was deprived of the opportunity to make a representation in respect of the same.

3. Inasmuch as we propose to dispose of the writ petition on these grounds, we do not deem it necessary to examine the challenge by the petitioner to the proceedings of the inquiry at this stage or the other grounds of challenge.

4. We find from the record that the enquiry officer had submitted his enquiry report dated 29th October, 2009 to the disciplinary authority. The petitioner has contended that he had superannuated on 30th November, 2009 from service and on which date he was living in accommodation allotted to him in government quarters in Sarojini Nagar, New Delhi. The inquiry report was admittedly sent by the respondent on 12th April, 2010 to the petitioner's private address in Dwarka. According to the petitioner, for the reason that he was not residing at the Dwarka flat which was locked at this stage, the enquiry report did not reach him and he was unable to submit his representation. The petitioner vacated the government quarters and started living in private accommodation in Dwarka and on 2nd August, 2010, the guard in the building in Dwarka handed over the envelope wherein the petitioner found the inquiry report.

5. The petitioner states that he promptly reacted and addressed the letter dated 4th August, 2010 under registered post to the respondents informing them that he had received the inquiry report on 2nd August, 2010 and as such was unable to respond thereon. The petitioner applied for grant of 15 days time to file his reply.

6. Shortly thereafter, on 11th August, 2010, the petitioner also sent his representation against the inquiry proceeding to the disciplinary authority. Receipt thereof is not disputed before us. On the contrary, we find that in the impuged order dated 17th January, 2011, the disciplinary authority

has noted in para 11 that the petitioner had failed to submit the representation against the inquiry report "within the stipulated period". It is apparent therefore that even though the representation of the petitioner was received by the respondents before passing of the order dated 17th January, 2011, however, the same was not taken into consideration while passing the impugned order on the ground that the same had not been received within the stipulated period. The respondents failed also to note that the petitioner informed them of the circumstances in which the inquiry report had not been served upon him and that he was actually deprived of the opportunity to make a representation within the stipulated period to the respondents.

In this background, the failure to consider the representation of the petitioner against the inquiry report was certainly erroneous and for reasons which are completely unsustainable.

7. We do not know the view which the disciplinary authority may have taken in the matter after considering the objections taken by the petitioner. The disciplinary authority may have accepted or rejected the petitioner's contentions. However, it cannot be denied that given the fact that the disciplinary officer has to give the petitioner an opportunity to make a representation against the inquiry report of the inquiry officer, it is incumbent upon the disciplinary authority to consider the representation when the same is received. The order dated 17th January, 2011 would not be sustainable for this reason alone.

8. In addition thereto, we find from a reading of the order dated 17th January, 2011 that the disciplinary authority in para 12 notes that the case was referred to UPSC for advice and the commission after taking all factors into account in the light of findings, was of the opinion that the charges established against the charge officer, constitute grave misconduct on his part. The disciplinary authority notes that the UPSC had advised that the ends of justice would be met in this case if the penalty of withholding of 20% of the monthly pension otherwise admissible to the petitioner was imposed on him for a period of five years and further the gratuity admissible to him should be released, if not required in any other case.

9. In para 13 of the order dated 17th January, 2011, the disciplinary authority records that on a consideration of the report of the inquiry

officer as well as the advice of the UPSC, the President has ordered that the ends of justice would be met in this case, if the penalty of withholding of twenty percent of the monthly pension otherwise admissible to the petitioner is imposed on him for a periof of five years. It is therefore manifest that the disciplinary authority had accepted the advice of UPSC in toto and imposed the punishment suggested by them. It was therefore incumbent on the disciplinary authority to have forwarded a copy of the advice received from UPSC to enable the petitioner to make his representation before relying upon the same.

We may note that the order dated 17th January, 2011 records that the copy of the advice received from UPSC is enclosed. It would therefore appear that the respondents have opted to serve a copy of the advice received from UPSC along with the impugned order imposing the penalty upon him and thereby deprived the petitioner of the opportunity to make representation against the advice before its consideration.

10. It has been urged by Mr.Jatan Singh, learned standing counsel for the Central Government that there was no requirement on the part of the respondents under the applicable rules including the Rule 32 of the Central Civil Services (Classification, Control & Appeal) Rules, 1965 which requires the disciplinary authority to serve copy of the UPSC advice upon the charged officer.

11. The requirement to supply the advance copy of the advice received from UPSC has been read into the procedural safeguards by several judicial precedents. In this regard, we may refer to the judgment in Civil Appeal NO.5341 of 2006 **Union of India & Ors. Vs. S.K. Kapoor** in which the Supreme Court has observed that in a case where the report of the UPSC is relied upon by the disciplinary authority, *"then a copy of the same must be supplied in advance to the concerned employee, otherwise, there will be violation of the principles of natural justice."*

The Supreme Court has referred to a view taken on 30th January, 2004 in Civil Appeal No.642 of 2004 in case of **S.N. Narula vs. Union of India & Others.** The principle of Supreme Court would guide the adjudication.

12. The order passed by the disciplinary authority without service of the UPSC advice upon the petitioner is in violation of the principles of natural justice is completely unsustainable. The same must comply

with the requirement of law. Learned counsel for the petitioner also assails the same on the ground of non-application of mind. There is merit in these submissions.

13. In view of the above, we hold and direct as follows:

(i) The order dated 17th January, 2011 is hereby set aside and quashed and the matter is remanded back to the disciplinary authority for consideration afresh of the enquiry report.

(ii) The disciplinary authority shall take into consideration the submissions made by the petitioner in his representation dated 11th August, 2010 against the proceedings which were conducted against him.

(iii) The petitioner is additionally given four weeks time to submit the representation with regard to the advice of the UPSC to the disciplinary authority which representation shall also be considered by it before passing its order.

(iv) The order shall be passed by the disciplinary authority within a period of three months. The order which is to be passed by the disciplinary authority shall be reasoned and speaking, and shall be served upon the petitioner.

(v) If the petitioner is aggrieved by the order which is passed, he shall be at liberty to assail the same by way of appropriate legal proceedings in accordance with law.

14. We make it clear that we have not expressed any opinion on the merits of any of the grounds of the writ petition or petitioner with regard to any inquiry or the merit of the charges which were laid against the petitioner on which inquiry was conducted. It shall be open to the petitioner to raise challenge in future proceedings against such orders.

The writ petition is allowed in the above terms.

Dasti to parties.

ILR (2013) VI DELHI 4429
W.P. (C)

LAJJARAM MAHOR ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 6408/2013 DATE OF DECISION: 31.10.2013

Service Law—Armed Forces—Assured Career Progression Scheme—The petitioner seeks—Restoration of the first financial upgradation as per the Assured Career Progression Scheme ("ACP") w.e.f. 04th January 2004—Completed 12 years of service with Central Industry Security Force (referred as "CISF")—Grant of second financial upgradation as per MACP Scheme w.e.f. 04th January, 2012—as per the ACP scheme other than—Completion of 12 years of continuous service—Completed 12 years form the date of appointment to a post without any promotional financial benefit—Should have also successfully undertaken the promotional cadre course ("PCC")—Granted three chances for successful completion of PCC—Petitioner had completed 12 years of service on 06th January, 2004—Offered two opportunities to undergo PCC—Unfortunately failed in both the attempts—Qualified in the supplementary PCC held on 12.03.2007—Vide RTC Barwaha Letter no. (913) dt. 12.04.2007 of the respondents—Petitioner was granted financial upgradation by the respondents w.e.f. 4th January, 2004—Respondents have issued an order No. SO Pt. I No. 35/20005 dated 01.04.205—Benefit granted to the petitioner w.e.f. 04th January 2004 was cancelled—Due to his failure in the promotion cared course—The respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation form 04th January 2004—Respondents proceeded to re—Grant the ACP upgradation to the petitioner effective from 01.07.2007—The petitioner was thus denied the benefit of the financial upgradation w.e.f. 04th January, 2004 to 30th July, 2007—Hence the present petition. Held—Apparent From the working of the ACP Scheme—Person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity—The completion of the promotional cadre course is akin to completion of the requisite training upon appointment/promotion—Does not change the date of the appointment or the date of his promotion—Petitioner completed twelve years of service on 04th January, 2004—Petitioner cannot be denied of his rightful dues under the financial upgradation—Petitioner has fact cleared the PCC course in the third chance, when he underwent the same.

Important Issue Involved: (A) The completion of the promotional cadre course is akin to completion of the requisite training upon appointment/promotion. It dose not change the date of the appointment or the date of his promotion.

(B) Petitioner cannot be denied of his rightful dues under the financial upgradation schemes if the petitioner fails to complete in the first instance.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Subhasish Mohanty, & Mr. Bala Krishna Behura, Advocate.

FOR THE RESPONDENT : Mr. Saqib Adv. and Mr. Neeraj Chaudhari, CGSC.

CASES REFERRED TO:

1. *Hargovind Singh* vs. *Central Industrial Security Force* W.P. (C)6937/2010.

2. *Bhagwan Singh* vs. *UOI & Ors.* W.P.(C) No.8631/2009.

GITA MITTAL, J. (Oral)

1. The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as "ACP") w.e.f. 04th January 2004 when he completed 12 years of service with Central Industry Security Force (herein after referred as "CISF") and became entitled for grant of second financial upgradation as per MACP Scheme w.e.f. 04th January, 2012.

2. The undisputed facts in the instant case giving rise to the writ petition as are that as per the ACP scheme other than completion of 12 years of continuous service in the post of Constable, an employee of the CISF is required to have completed 12 years from the date of appointment to a post without any promotional financial benefit being made available to him and he should have also successfully undertaken the promotional cadre course (herein after referred to as "PCC").

3. The petitioner has stated that an employee is granted three chances for successful completion of promotional cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

4. Learned counsels for the parties submitted that the petitioner had completed 12 years of service on 06th January, 2004 and was offered two opportunities to undergo PCC pursuant to first offer made on 13.12.2004 and second offer made on 21.03.2005. The petitioner unfortunately failed in both the attempts in the PCC, but qualified in the supplementary PCC held on 12.03.2007 in the 3rd Chance vide RTC Barwaha Letter no. (913) dt. 12.04.2007 of the respondents.

5. It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 4th January, 2004. The record placed before us shows that the petitioner successfully qualified the promotional cadre course within 3 prescribed chances and the result of the same was informed on 12.04.2007 by the respondent.

6. It appears that prior thereto the respondents have issued an order

No. SO Pt.I No. 35/2005 dated 01.04.2005 whereby the ACP benefit granted to the petitioner w.e.f. 04th January 2004 was cancelled due to his failure in the promotion cadre course which was held w.e.f. 13.12.2004 which the petitioner had undertaken as his first chance. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 04th January 2004. The petitioner's representations to respondents were of no avail. The respondents however, proceeded to re-grant the ACP upgradation to the petitioner which was made effective only from 01.07.2007. The petitioner was thus denied the benefit of the financial upgradation w.e.f. 04th January, 2004 to 30th July, 2007, from which date he was granted the first financial upgradation.

7. Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already completed on 04th January 2004. The manner in which the respondents worked the ACP Scheme is that the effective date for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 04th January, 2004 when he completed 12 years of continuous service in the rank of Constable without any opportunity for promotion to the next post of Head Constable being made available to him till 13.12.2004. It is submitted by the learned counsel for the petitioner that as per the Scheme of the respondents, every employee is given three opportunities to complete PCC. As such, the inability to successfully complete the PCC in the first or second attempt would render the petitioner eligible for a third opportunity.

8. So far as withdrawal of financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered

decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme to the date of stoppage of such financial up-gradation. Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is pointed out that the respondents have themselves drawn a distinction between "stoppage" of the financial upgradation and "withdrawal" of the amount given as the benefit thereunder.

9. In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in W.P. (C)6937/2010 **Hargovind Singh v. Central Industrial Security Force**. In this case, the petitioner in this case was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is note-worthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos. 5 and 6 of the judgment which was to the following effect:-

> "5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.
>
> 6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his unwillingness to attend the course on 29.10.2004."

10. This very contention is urged before us. Just as the present case in hand, the petitioner Hargovind Singh also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which was withdrawn. On this aspect, in **Hargovind Singh's** case (supra) the court has ruled on the respondents contention urged before us as well, commented on the responsibility of

the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus:-

> "8. Learned counsel for the respondent would urge that the issue at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 **Bhagwan Singh Vs. UOI & Ors.**
>
> 9. A perusal of the decision in **Bhagwan Singh's** case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.
>
> 10. The Division Bench noted paragraph 10 of the ACP Scheme which reads as under:-
>
> "10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. IN regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribe din the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme

only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course."

14. As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word "unwilling" would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village."

11. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 04th January, 2004 which was actually granted to him. So far his being given an opportunity to

undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on 13.12.2004.

12. Undoubtedly for the reasons recorded in **Hargobind Singh's** case (supra), an employee cannot be deprived of the financial upgradation for the period for which an employee is unable and unwilling to undergo the PCC Course. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in **Hargovind Singh's** case as well as the present case. The completion of the promotional cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

13. On this aspect, we may usefully extract the observations of the Division Bench judgment in **Hargovind Singh's** case (supra) which are in consonance with the facts of the present case.

14. So far as the failure of the petitioner to undertake the promotional cadre course for which he was detailed in December 2004 is concerned, in **Hargovind Singh's** case (supra), this court has deemed the same to be "a technical default". On this aspect it was held as follows :-

> "14 As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word "unwilling" would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.
>
> 15. Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.

16. As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing".

15. The court thus held that the respondents were in greater default for not having detailed the petitioner for the PCC till December, 2004. The petitioner completed twelve years of service on 04th January, 2004 when he was granted the first financial upgradation. The present petitioner was detailed for undertaking PCC on 13.12.2004 & on 21.03.2005 for the 1st and 2nd chances respectively. It is an admitted position that the petitioner accepted both the offers but was unsuccessful. He was offered his third chance and has successfully undertaken the PCC vide RTC Barwaha letter No. (913) dt. 12.04.2007 of the respondents. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes.

16. We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every employee is entitled to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a second, and thereafter, even a third chance to successfully complete the same. This being the position, a person who failed in PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course in the third chance, when he underwent the same.

17. Looked at from any angle, the acts of the respondents in recovering the amount and denying the financial upgradation to the petitioner from 4th January 2004 till 29.07.2007 cannot be justified on any ground at all. The view we have taken is supported by the judgment rendered in **Hargovind Singh's** case (supra).

18. Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows:-

"02 Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground. 04 In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made".

19. We may note that the respondents were conscious of the distinction between "stoppage" of the financial benefit and its "withdrawal" which is evident from bare reading of para 2 of the said circular.

20. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The "stoppage" of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th November, 2003. Furthermore recovery can only be if the respondents have given three chances for undergoing the PCC and the employee is unable to do so or is unsuccessful. Such reading and application of this Circular is in consonance with the above discussion. The respondents could not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003, which has been placed before us.

21. The respondents hold a person entitled to the PCC for the

several years when the employee is not offered an opportunity to undergo the PCC course after completion of the twelve years of service and even though he may be willing and able to do so and he is given the pay uprgadation for the said period. This amount is then recovered as the employee was unsuccessful in the promotion cadre course in the first chance. The respondents have not waited for the petitioner to avail the three available chances for qualifying in PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily.

22. For all the foregoing facts and reasons this writ petition has to be allowed. We hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 04th January 2004. The petitioner is entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

23. In case the petitioner was entitled to the benefit of the second upgradation as per ACP Scheme as well, the respondent shall consider the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

24. The order passed therein shall be conveyed to the petitioner.

25. The amounts falling due and payable in terms of the above shall be released to the petitioner within a period of six weeks thereafter.

This writ petition is allowed in the above terms.

Dasti to learned counsel for the parties.

ILR (2013) VI DELHI 4440
W.P.

JINDAL STEEL & POWER LIMITED & ANR. ....PETITIONERS

VERSUS

RAIL VIKAS NIDAM LTD. ....RESPONDENT

(BADAR DURREZ AHMED AND VIBHU BAKHRU, JJ.)

W.P.(C) NO. : 5179/2013 DATE OF DECISION: 01.11.2013

Constitution of India, 1950—Article 14 & 19—Petitioners filed present writ petitions challenging Technical Experience and Production Capacity clauses of two invitations to tender—Plea taken, impugned clause are arbitrary, unlawful and violative of Articles 14 and 19 of Constitution of India—Once any bidder complies with all standards of production and manufacturing requirements, concerned bidder should be considered eligible to did in tender, as it is quality of rails which ensures overs all safety of passengers and human life community by railway and past experience would be irrelevant—Bid documents have been tailor made to favour SAIL for purpose of procuring rails—Per contra plea, as procurement of rails under Bid Document is be financed partly from loan made available by Asian Development Bank (ADB), tender conditions have been included based on Standard Bidding Document (SBD) provided by ADB—Policy to include past experience criteria is to ensure that bidding is restricted to entities that have capacity to perform contract in question—Held—Terms of invitation to tender are in realm of contracts—Indisputably, respondent has freedom to decide, as with whom and on what terms it should enter into a contract—No citizen has a fundamental right to enter into a contract with state. It is now well

settled that terms of invitation to tender would not be amenable to judicial review unless same have been actuated by malafides or are arbitrary and are such that no reasonable person could possibly accept same as relevant for purposes for which conditions are imposed—Impugned clauses with regard to past experience have been included in bid Document in conformity with requirements of SBD to ensure that manufacturers who bid for contract have requisite capacity and experience of supplying specific section of rails for passenger carrying railway systems—Given afore said explanation, Petitioners have been unable to establish that conditions imposed by impugned clauses are completely irrelevant or not germane to object of procuring quality supplies by respondent—Present petitions and interim applications dismissed.

Important Issue Involved: (A) The terms of invitation to tender would not be amenable to judicial review unless the same have been actuated by malafides or are arbitrary an are such that no reasonable person could possibly accept the same as relevant for the purposes for which the conditions are imposed.

(B) It is not for the Court s to supplant their own views for that of the concerned agency of the state. The scope of judicial review is limited to unreasonable so as to fail so as to fail the test of reasonableness.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Sandeep Sethi, Sr. Adv. With Mr. Rajat Jariwal, Ms. Snehal Kakrania & Ms. Anisha Somal.

FOR THE RESPONDENT : Mr. Parag Tripathi, Sr. Adv. with Mr. Anil Seth & Mr. Arunabh.

CASES REFERRED TO:

1. *Michigan Rubber (India) Ltd.* vs. *State of Karnataka & Ors.*: (2012) 8 SCC 216.
2. *Gharda Chemicals Ltd.* vs. *Central Warehousing Corporation*: 2005 (118) DLT 159.
3. *Association of Registration Plates* vs. *Union of India*: (2005) 1 SCC 679.
4. *Tata Cellular* vs. *Union of India*: (1994) 6 SCC 651.
5. *Rashbihari Panda Etc.* vs. *State of Orissa*: (1969) 1 SCC 414.
6. *Associated Provincial Picture Houses, Limited* vs. *Wednesbury Corporation*: (1948) 1 K.B. 223.

RESULT: Writ Petition Allowed.

VIBHU BAKHRU, J.

1. The Petitioners have filed the present writ petitions challenging clauses 6.2.2 (Technical Experience) and 6.2.3 (Production Capacity) of the two invitations to tender issued on 02.07.2013 as being arbitrary, unlawful and violative of Articles 14 and 19 of the Constitution of India. In W.P.(C) No.5179/2013, the petitioner has challenged the aforesaid clauses of the Invitation of Bid No: RVNL/Rail Procurement/2 of 2013 and in W.P.(C) No.5181/2013 similar clauses of Invitation of Bid No: RVNL/Rail Procurement/1 of 2013 have been challenged. As both the writ petitions involve a challenge to similar clauses of the Invitations to tender, on similar grounds, the same have been taken up together. In order to consider the controversy involved in the present writ petitions, the facts as are relevant to W.P.(C) No.5181/2013 are being referred herein.

2. The respondent company is a Central Public Sector Undertaking and was incorporated on 24.01.2003 with the object to implement rail infrastructure projects. The respondent has undertaken several railroad projects in different regions of India, which include the following projects:

- "Hospet-Tinaighat Doubling
- Daund-Gulbarga Doubling

- Titlagarh-Raipur Doubling
- Sambalpur-Titlagarh Doubling"

3. The Government of India has received loans from the Asian Development Bank (hereinafter referred to as the 'ADB') for investment in the railway sector. A part of the funds available from ADB are to be deployed for execution of the aforementioned projects. The respondent had issued the aforementioned invitations to bid for procuring rails for execution of the various projects in India which were being funded by the loan received from ADB towards cost of the Railway Sector Investment Programme.

4. Admittedly, the respondent as well as the Indian Railways procures rails directly from Steel Authority of India Limited (hereinafter referred to as the 'SAIL') in respect of all their requirements other than those funded from the financial assistance made available by ADB. The allotment orders are made by the Railway Board pursuant to a Memorandum of Understanding signed between Ministry of Railways and SAIL for all the purchases made for the Indian Railways. However, in respect of projects which are implemented from the funds of ADB, the rails are procured by inviting competitive bids from all eligible entities worldwide, as per the guidelines issued by ADB. In the present case, the invitations to tender which are subject matter of the writ petitions are for procurement of rails for the projects which are being implemented from the funds made available by ADB.

5. On 02.07.2013, the respondent issued "Invitation of Bid No: RVNL/Rail Procurement/l of 2013" inviting bids for manufacture and supply of 106600 MT of UIC 60kg/m rails (Grade 880, Class A) conforming to Indian Railway Specifications IRS-T-12-2009 for various railroad projects in different regions of India. The said "Invitation of Bid No: RVNL/Rail Procurement/l of 2013" is hereinafter referred to as the Bid Document.

6. As per sub-clause 6.2.2.1 (Manufacturing Experience) under Section 3 (Evaluation and Qualification Criteria) of the Bid Document, a bidder must have supplied a minimum of 1,60,000 MT (1.5Q) UIC 60 kg/m rails (conforming to the level of hydrogen content given in clause 21 of IRS T12-2009) from April 2006 to March 2011 to passenger carrying railway systems in operation. As per clause 6.2.3 (Production

Capacity) under Section 3 (Evaluation and Qualification Criteria) of the Bid Document, a bidder must have supplied a minimum of 1,06,000 MT (1.5Q/T) of UIC 60 kg/m rails to any of the railway systems in operation in each year during the last three years. The relevant clauses of the Bid Document are extracted hereunder:-

> **"6.2.2 Technical Experience**
>
> **6.2.2.1 Manufacturing Experience**
>
> The manufacturer should have the experience of production of UIC 60 kg/m rails for at least last seven years and should have supplied a minimum of 1,60,000 MT (1.5Q) UIC 60 kg/m rails (conforming to the level of hydrogen content given in clause 21 of IRS T-12-2009) from April 2006 to March 2011 to passenger carrying railway systems in operation. These rails should be in use for more than two years and performance found satisfactory.
>
> xxxx xxxx xxxx xxxx
>
> **6.2.3 Production Capacity**
>
> A minimum of 1,06,000 MT (1.5Q/T) of UIC 60 kg/m rails per annum should have been supplied by the manufacturer to any of the railway systems in operation in each year during the last three years."

7. The petitioner being aggrieved by clauses 6.2.2.1 & 6.2.3 of the Bid Document (hereinafter referred to as the 'impugned clauses') made a representation to the respondent pointing out that there were only two companies in India which could manufacture and supply UIC 60 kg/m rails to the respondent, namely, the petitioner and SAIL. The Research Designs and Standards Organisation had also approved the facilities of the petitioner as well those of SAIL. However, the petitioner would not be eligible to participate in the bids invited by the respondent on account of the "Evaluation and Qualification criteria" which required extensive past experience. And the same was impossible on account of the policy followed by the Indian Railways of acquiring rails directly from SAIL without inviting any offers from other manufacturers. The petitioner also asserted that it had a production capacity of 0.75 million tonnes per annum and that the rails manufactured by the petitioner were qualitatively better than the ones supplied by SAIL. Similar representations were also

made by the petitioner to the Railway Board. The petitioner followed its earlier representation by another representation dated 03.08.2003 wherein it reiterated its grievance with respect to the impugned clauses. However, the grievance voiced by the petitioner was not addressed by the respondent. On the contrary, the respondent sent a letter dated 06.08.2013 whereby it was, inter alia, asserted that the respondent considered it essential that the rails should be manufactured and supplied by an entity which had prior experience of supplying rails under similar conditions.

8. The petitioner being aggrieved with the impugned clauses has preferred the present writ petitions. On 19.08.2013, this Court passed a common interim order in C.M 11649/2013 (in W.P.(C) No.5181/2013) and in C.M No. 11646/2013 (in W.P.(C) No.5179/2013), whereby the respondent was directed to consider the petitioner's bids without insisting upon compliance with the said impugned clauses and the result of the bid was directed to be kept in a sealed cover.

9. It was contented by the petitioners that the impugned clauses are arbitrary, unlawful and violative of Articles 14 and 19 of the Constitution of India. It has been further submitted that the impugned clauses are in contravention of the international best practices. The petitioners have cited instances of various international tenders where the bidders were required to only meet with the prescribed manufacturing standards and prior supply experience has not been insisted upon. It was submitted that once any bidder complies with all standards of production and manufacturing requirements, the concerned bidder should be considered eligible to bid in the tender, as it is the quality of the rails which ensures the overall safety of passengers and human life commuting by railway and the past experience would be irrelevant.

10. It was further contended that the impugned clauses impose onerous and inequitable conditions. Even though the petitioner is technically as well as otherwise competent to bid and participate in the tender process and supply the material if eventually awarded the tender, the petitioner is unable to qualify as a bidder on account of the past experience criteria. The conditions imposed by the impugned clauses are contrary to the principle of free and fair competition as the same, in effect, prevents broad participation of the bidders and consequently has the effect of practically ousting all the genuine bidders and indigenous bidders, like the Petitioner No. 1 herein, from participating in the tender.

11. It is contended on behalf of the petitioner that the impugned clauses have been inserted for the purpose of excluding the petitioner from participating in the tender and with the ulterior object of ensuring that only SAIL is able to participate in the tender. It is contended that the bid documents have been tailor-made to favour SAIL for the purpose of procuring rails. The inclusion of the impugned clauses in the bid document is contended to be *mala fide* and thus, violative of Article 14 of the Constitution of India.

12. It was stated that the Indian Railways has only permitted the petitioner company to supply rails to private sidings. It is contended that there is no difference in technical specification of rails required for private sidings and those for passenger rails, therefore, the petitioner is technically competent to manufacture and supply rails to be used in passenger rail systems. The specification for rails being sourced for private sidings and that used in passenger railroads being the same, the requirement of safety is met by the petitioner company. The petitioner has also relied upon the opinion dated 15.08.2013 given by Mr Sharat Chandra Gupta (Retd. Commissioner of Railway Safety & Railway Technical Consultant), to the same effect.

13. The petitioner had relied upon the decision of the Supreme Court in **Rashbihari Panda Etc. v. State of Orissa:** (1969) 1 SCC 414, in support of his contention that the conditions imposed by the impugned clauses of the Bid Document seek to arbitrarily exclude other entities involved in the trade and such restricted invitations would fall foul of Article 14 of the Constitution of India as being discriminatory, arbitrary and unreasonable and also violative of Article 19(1)(g) of the Constitution of India. The petitioners also relied upon the decision of a Division Bench of this Court in **Gharda Chemicals Ltd. v. Central Warehousing Corporation:** 2005 (118) DLT 159 wherein this Court had held that the pre-qualification condition of manufacturing experience as required in that case was irrational and arbitrary and had no nexus with the stated object of ensuring quality and consistency of supplies. It is contended that in the present case also the condition of experience would have no nexus with the object of ensuring sufficient quality supplies of rails to the respondent.

14. The respondent has contended that the tender conditions with

regard to past experience are not arbitrary or unreasonable. It is submitted that the said tender conditions have been included based on the Standard Bidding Document (hereinafter referred to as the 'SBD') provided by ADB. ADB has issued a Users. Guide for procurement of goods which contains the SBD for procurement of goods and related services. As the procurement of rails under the Bid Document is to be financed partly from the loan made available by ADB, the respondent was obliged to follow a transparent tendering process and was also required to issue the invitations to tender in conformity with the SBD as provided by ADB. Insistence of past experience as a qualification criterion is well accepted. The eligibility criterion of past experience has also been adopted by the respondent for the past several years. It is submitted by the respondent that the policy to include past experience criteria is to ensure that the bidding is restricted to entities that have the capacity to perform the contract in question. And insisting that only bidders who are experienced and have proven credentials participate in the tender ensures that only bidders who have the required capacity to perform are considered for awarding the contract. The learned counsel for the respondent has also drawn our attention to Para (xv) of the counter affidavit filed by the respondent which contains a table indicating the justification for including clauses of the eligibility and qualification criteria in the Bid Document including the impugned clauses.

15. The learned counsel for the respondent has placed reliance on the decision of the Supreme Court in the case of **Tata Cellular v. Union of India:** (1994) 6 SCC 651, in support of his contention that a Government has complete freedom to contract and unless its decision is arbitrary, affected by bias or completely unreasonable, the Courts would not interfere with the same. The learned counsel has also placed reliance on a decision of the Supreme Court in the case of **Michigan Rubber (India) Ltd. v. State of Karnataka & Ors.:** (2012) 8 SCC 216, in support of his contention that Courts would not interfere in the matter of formulating conditions of a tender document unless the same are found to be malicious and a misuse of the statutory powers.

16. We have heard counsel for the parties at length.

17. The terms of invitation to tender are in the realm of contracts. Indisputably, the respondent has the freedom to decide, as with whom

and on what terms it should enter into a contract. No citizen has a fundamental right to enter into a contract with the state. It is now well settled that the terms of invitation to tender would not be amenable to judicial review unless the same have been actuated by malafides or are arbitrary and are such that no reasonable person could possibly accept the same as relevant for the purposes for which the conditions are imposed.

18. Thus, the only controversy that needs to be addressed in the present case is whether the impugned clauses are so patently unreasonable and arbitrary, in the sense that no reasonable person could consider the same germane and relevant for the purposes of procurement of rails which is the subject matter of the invitations to tender. It would also be necessary to consider whether the impugned clauses have been included with the object to tailor-make the bid documents so as to favour only SAIL and exclude all other bidders.

19. Undisputedly, the procurement of rails which is the subject matter of the invitations to tender is funded by the financial assistance received from ADB and thus, the respondent has to follow the bidding procedure as prescribed by ADB. The ADB has published a User Guide for procurement of goods which contains the Standard Bidding Document (hereinafter referred to as SBD). The introduction to the said Users Guide indicates that the SBD have been drafted to:-

> "(a) simplify the Purchaser's preparation of a specific bidding document (BD) for Procurement of Goods and Related Services;
>
> (b) reduce the Bidders, bidding time and effort;
>
> (c) facilitate and simplify the Purchaser's evaluation and comparison of bids and Contract award; and
>
> (d) minimize the ADB's time required for the prior review of the BD."

As per the SBD, a bidder has to possess the qualifications which are considered necessary to indicate his capacity to fulfill the obligation under the contract.

20. The SBD as provided by ADB expressly provides that the qualifications regarding critical aspects of financial, technical, production,

procurement, shipping, installation & other capabilities of the bidder which are necessary to perform the contract may need to be examined. The SBD also indicates the criteria that may be used to specify the critical qualifications of a bidder. The relevant extract from the SBD is quoted below:-

"The following criteria may be used individually or in combination to establish one or several critical qualifications of the Bidder :

Size of Operation

Average annual turnover (converted into US Dollors) defined as the total payments received by the Bidder for contracts completed or under execution over the last three years.

Contractual Experience

Number of contracts successfully completed as main supplier within the last three years. Value, nature, and complexity of these contracts should be comparable to the contract to be let.

Technical Experience

Goods offered have been in production for at least [number] years and a minimum of [number] units of similar capacity have been sold and have been in operation satisfactorily for at least [number] years.

Production Capacity

Minimum supply and/or production capacity required to assure that the Bidder is capable of supplying the type, size, and quantity of the Goods required.

Financial Position

Soundness of the Bidder's financial position showing long-term profitability demonstrated through audited annual financial statements (balance sheet, income statement) for the last three years.

Cashflow Capacity

Availability of or access to liquid assets, lines of credit, and other

finances sufficient to meet any possible cash flow requirement which may arise during the execution of the contract. This should in appropriate cases also take into account the Bidder's commitments for other contracts.

Litigation History

All pending claims, arbitrations, or other litigation shall represent in total not more than [percent] of the Bidder's net worth."

21. It is apparent that the impugned clauses with regard to the past experience have been included in the Bid Document in conformity with the requirements of the SBD. The respondent has contended that the impugned clauses have been included to ensure that the manufacturers who bid for the contract have the requisite capacity and experience of supplying the specific section of rails for passenger carrying railway systems. Clause 6.2.2.1 has been inserted to ensure that the bidders have supplied rails of the desired quality which have performed over a period of time. The condition as imposed under clause 6.2.3 of the bid document has been considered necessary as it is assumed that only 2/3rd of the production capacity would be devoted for supplying rails under the contract and the balance 1/3rd capacity would be utilised by the manufacturer for meeting his other commitments. It has been contended on behalf of the respondent that the contract would entail a supply @ 10740 MT per annum and taking the said supply as 2/3rd of the capacity of a manufacturer, it has been considered apposite to ensure that the manufacturer who bids for the contract has a minimum capacity for producing 16000 MT of rails per annum. According to the respondent, the evidence of this capacity is required to be established by the track record of supplies made by the manufacturer over the past three years.

22. Given the aforesaid explanations, in our view, the petitioners have been unable to establish that the conditions imposed by the impugned clauses are completely irrelevant or not germane to the object of procuring quality supplies by the respondent. It is not for the Courts to supplant their own views for that of the concerned agency of the state. The scope of judicial review is limited to examine whether the decisions of the administrative authorities are arbitrary and unreasonable so as to fail the test of reasonableness as explained by Lord Greene M.R. in **Associated Provincial Picture Houses, Limited v. Wednesbury Corporation:**

(1948) 1 K.B. 223. The question that has to be asked is whether the decision of the concerned authority (in this case the respondent) is so unreasonable that no reasonable person could possibly arrive at such a decision. In our view, the decision of the respondent to include a past experience criteria in the Bid Document does not fall foul of this test of reasonableness. We are, thus, unable to hold that the condition of past experience is completely alien to or has no nexus with the object of procuring quality supplies.

23. We are also unable to accept the contention that the inclusion of the impugned clauses in the Bid Documents is mala fide and is motivated to ensure that only SAIL is qualified to submit bids pursuant to the invitations to tender floated by the respondent. Although, it is quite possible that given the past experience criteria, no other bidder from India qualifies to submit the tender, however, that cannot by itself lead to the conclusion that the impugned clauses have been included only for the purpose of tailor-making the Bid Documents to serve the interest of SAIL and exclude the petitioner company. The past experience criteria cannot be considered as an irrelevant criteria and the respondent has provided cogent justification for the same. In addition, the SBD provided by ADB also requires that suitable qualification criteria be included in the invitations to bid. The respondent has been able to sufficiently explain the reasons for including the impugned clauses. There is no material which can indicate that the inclusion of the impugned clauses is mala fide and only for the purposes of favouring SAIL. It is also relevant to observe that the bids invited by the respondent are open to bidders from 67 different countries and thus, it is not possible for us to come to a conclusion that the impugned clauses have been designed only for the purposes of excluding the petitioner company. In the case of **Association of Registration Plates v. Union of India:** (2005) 1 SCC 679, the Supreme Court considered the case concerning tenders for awarding a contract for ensuring supply of high security registration plates for motor vehicles. In that case, it was contended that the conditions of the tender document resulted in exclusion of all indigenous manufacturers and only those persons who had collaboration with foreign entities could possibly qualify for submitting tenders. It was, thus, contended by the petitioners therein that the tender conditions violated Article 19(1)(g) of Constitution of India. Rejecting the said contention, the Supreme Court held as under:-

"38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and the State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacture is ultimately selected for a region or State, it cannot be said that the State has created a monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19 (1)(g) of the Constitution read with Clause (6) of the said Article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit.

It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs' in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

xxxx xxxx xxxx xxxx xxxx

43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the **Bar** (supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tender in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic

manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

24. In our view, the aforesaid decision in the case of **Association of Registration Plates** (supra) is clearly applicable to the facts of the present case. In this case too, we are unable to hold that the impugned clauses imposing conditions with regard to qualification of bidders are tailor-made to suit SAIL. Since, we are unable to accept that the decision of respondent is actuated by any *mala fides* or is unreasonable, in our view, no interference with the tender process is warranted.

25. The decision of the Supreme Court in the case of **Rashbihari Panda** (supra) would be inapplicable in the facts of the present case. In that case, the State Government had acquired a monopoly in respect of Kendu leaves by virtue of the Orissa Kendu (Control of Trade) Act, 1961. The Government of Orissa made schemes for sale of Kendu leaves which ensured that only the purchasers who had carried out the obligations in the previous year would be entitled to enter into the contracts for Kendu leaves. The Supreme Court held that exclusion of persons interested in the trade, who were not licensees in the previous year, was ex facie arbitrary and did not further the purpose of preventing exploitation of plucker and growers of Kendu leaves. The classification of contractors was found to be unreasonable and bearing no nexus with the object sought to be achieved. It is on this basis that the Supreme Court struck down the schemes framed by the State Government of Orissa. In the case of **Gharda Chemicals Ltd.** (supra) also the court came to the conclusion that the tender condition did not bear any rational nexus with the object of ensuring quality and consistency of supplies. In the present case, we are unable to accept that the inclusion of the impugned clauses does not bear a direct relationship with the object of securing supply of the requisite quantity and quality of rails and therefore, we cannot hold that the impugned clauses violate article 14 or article 19(1)(g) of the Constitution of India.

26. Accordingly, we dismiss the present petitions. The interim applications also stand dismissed. We direct that the bids submitted by the petitioner, which are kept in the sealed cover pursuant to the interim

order dated 19.03.2009, be returned to the petitioner company.

27. The parties are left to bear their own costs.

ILR (2013) VI DELHI 4455
W.P.(C)

MANISH KUMAR **....PETITIONER**

VERSUS

THE CHAIRMAN, RAILWAY BOARD AND ORS. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 7268/2012 & CM NO. : 18727/2012 **DATE OF DECISION: 01.11.2013**

Constitution of India, 1950—Article 226—Recruitment—Petitioner assails the denial of the respondents to undergo the physical efficiency test (PET) consequent upon his successfully undertaking the written examination for the post of sub—Inspector in the Railway Protection Force—Pursuant to the advertisement issued in the employment notice No. 2/2011 in the year 2012—The petitioner did not receive any communication from the respondents informing the place and date of the PET—Approached the Office of Chief Security Commissioner of the Zonal Recruitment Committee, North Central Railway at Allahabad dated 4th of November, 2012—Directed to approach the Zonal Recruitment Committee at Lucknow—The Petitioner made representation dated 5th November, 2012 to the Chairman of the Zonal Recruitment Committee, Chief Security Commissioner of the North Central Railway at Lucknow—Similar representation also to the Chairman of the Zonal Recruitment Committee, Chief Security Commissioner, Allahabad as well as the Director General of the Railway Protection Force, New Delhi—No heed was paid by the respondent—Hence the present Petition. Held—The conduct of the petitioner manifests his vigilance and the grave urgency with which he has acted in the matter—The petitioner had not only physically approached the concerned authorities on the 5th of November, 2012 but had also additionally submitted representation to them—No delay or negligence at all is attributable to the petitioner—Respondents directed to conduct the physical efficiency test and the physical measurement test of the petitioner towards the selection process.

Important Issue Involved: The conduct of the petitioner manifests his vigilance and the grave urgency with which he has acted in the matter by approaching the concerned authorities and additionally submitted representation.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Mr. Ayusha Kumar, Advocate.

FOR THE RESPONDENT : Mr. R.V. Sinha and Mr. R.N. Singh, Advocate.

RESULT: Writ petition is allowed.

GITA MITTAL, J. (Oral)

1. The petitioner in the instant case assails the denial of the respondents to undergo the physical efficiency test consequent upon his successfully undertaking the written examination for the post of Sub-Inspector in the Railway Protection Force pursuant to the advertisement issued in the employment notice No.2/2011 in the year 2012. The respondents had invited applications from eligible candidates for filling up the posts of Sub Inspector in the pay band of Rs.9300-34800/- + Grade

Pay Rs.4200/- in the Railway Protection Force (RPF) including the Railway Protection Special Force (RPSF). The petitioner had applied for the said post as Schedule Caste candidate.

2. For the purpose of the present consideration, the material terms to which our attention has been drawn by Mr. Ayusha Kumar, learned counsel for the petitioner, deserves to be extracted from the advertisement and reads as follows:-

"5. METHOD OF RECRUITMENT:

Recruitment will be made based on the performance of the eligible applicants in a Written Examination, Physical Efficiency Test, Physical Measurement, Viva-Voce Test, Bonus Marks, if any, obtained and Documents Verification. Written Exams will be held first and only those who obtain the prescribed minimum marks will be called for Physical Efficiency Test & physical measurement.

A. WRITTEN EXAMINATION:

(a) xxx xxx xxx

(b) Candidates must bring the Call Letter at the time of written test. Call letter will be sent by post. No one will be allowed to appear in the written examination without a call letter.

(c) xxx xxx xxx

(d) The call letter will contain the date, place, venue and time of the examination and other instructions, if any on this subject.

xxx xxx xxx

B. PHYSICAL EFFICIENCY TEST (PET) AND PHYSICAL MEASUREMENT:

a) Only those applicants who qualify in the Written Examination shall be called for PET and Physical Measurement. The manner in which the candidates are to be called and the number of candidates to be called for PET and Physical Measurement will be decided in such a way that candidates, to be extent of three times the number of notified vacancies in each category, are

selected purely on the basis of merit to appear for viva-voce and documents vertification. b) xxx xxx xxx c) xxx xxx xxx d) PET will be held at a specified place and on a specified date and the applicants will be informed of the same in advance. e) xxx xxx xxx f) The call letter for PET will give further instructions, if any, on this subject." (Emphasis supplied)

3. A reading of the above would show that the scheme of the selection process envisaged a written examination first and only such candidates who qualified in the written examination were required to be called for the PET as well as physical measurement. The advertisement clearly notifies that the number of candidates to be called would be decided by the respondents. The respondents had also not crystallized the place and date of the PET and, as extracted above, the respondents had undertaken that the candidates will be informed of the same in advance.

The scheme of the selection process thus envisaged issuance of an individual call letter for the PET and the service of the individual call letter on the candidate.

4. It is an admitted position before us that the written examination was conducted on the 12th of August, 2011. The petitioner was declared successful in this test. Here we reach the point of diversion in the respective contentions. The petitioner has submitted that he did not receive the call letter for the PET. As the petitioner did not receive any communication from the respondents informing the place and date of the PET, he approached the Office of Chief Security Commissioner of the Zonal Recruitment Committee, North Central Railway at Allahabad on the 4th of November, 2012 where he was informed by the office that he was required to approach the Zonal Recruitment Committee at Lucknow. He therefore, proceeded to Lucknow for this purpose.

5. To support the fact that the petitioner physically visited Allahabad and Lucknow on the above dates, the petitioner has placed on record a copy of the railway tickets relating to his journey to Allahabad on the 4th of November, 2012 and return from Lucknow on 6th of November, 2012. Also on record is the receipt dated 6th November, 2012 of the hotel where the petitioner claims to have stayed at Lucknow on the 5th of November, 2012.

6. It is also the case of the petitioner before us that he had made a representation dated 5th November, 2012 to the Chairman of the Zonal Recruitment Committee, Chief Security Commissioner of the North Central Railway at Lucknow. This was additionally sent by speed post from Lucknow itself. A copy of the representation has also been placed on record along with the writ petition.

We have taken on record during the course of hearing the copy of the postal receipt by which this representation was sent to the said office at Lucknow on the 5th of November, 2012.

7. As a matter of abundant caution, the petitioner sent a similar representation also to the Chairman of the Zonal Recruitment Committee, Chief Security Commissioner, Allahabad as well as the Director General of the Railway Protection Force, New Delhi.

8. On return, the petitioner appears to have sent a letter dated 8th November, 2012 to the Director General of the Railway Protection Force at New Delhi which is supported by the speed post receipt which is on record.

9. The aforesaid representations support the contention of the petitioner that he learnt from the recruitment office that his physical efficiency test had been scheduled on 31st of October, 2012. The petitioner has therefore, brought to the notice of all the concerned authorities the fact that he had not received call letter and was tendering his candidature for undergoing the physical efficiency test.

10. It is an admitted position that no heed was paid to the petitioner's representation, both personal as well as written, no response was sent to the petitioner's representation. In the counter affidavit filed on record, the respondents have gone to the extent of disputing the petitioner's visit or even the receipt of the representation. However, the petitioner is supported in this submission not only by the railway reservation of his journey and hotel receipt but also by the legal presumption which attaches to dispatch of communication which is properly addressed and sent under registered post. Such presumption would attach to the communications sent by the petitioner by virtue of the presumption of service to be drawn in respect of such communication sent to the respondents under the General Clause as well as Evidence Act.

11. Be that as it may, the conduct of the petitioner manifests his vigilance and the grave urgency with which he has acted in the matter. Shortly after sending the representation, the petitioner has also filed the present writ petition on the 20th of November, 2012 before this court pointing out the forgoing facts and seeking a direction to the respondents to allow the petitioner to sit/appear in the next physical efficiency test (PET) and the measurement test on his having successfully cleared the written test in the SC category for appointment to the post of Sub-Inspector in the Railway Protection Force pursuant to the Employment Notice No.02/2011.

12. This writ petition was listed before the Court on the 22nd of November, 2012 when notice was issued and the court also passed an order that any appointment made to the post of Sub-Inspector in the Railway Protection Force would be subject to final decision in the writ petition with respect to one post of Sub-Inspector in the reserve (SC) category.

13. The stand taken by the respondents in the counter affidavit and by Mr. R.V. Sinha, learned counsel appearing for the respondents in court today is to the effect that the call letter to the petitioner for the PET was sent by ordinary post in October, 2012 along with the other call letters against serial no.33296. It is also submitted that the call letter was sent in a self-addressed envelope bearing postal stamp of Rs.5/- which had been submitted by the petitioner. It is further submitted by the respondents that so far as persons/candidates who did not receive call letter are concerned, the respondents had notified in newspapers published in the English and Vernacular languages between the 19th October, 2012 to 23rd October 2012 which clearly informed the candidates of the manner in which candidates were required to proceed if the call letter was not received. Copies of the cuttings of some of the newspapers in this regard have been placed before us.

14. A material assertion in the counter affidavit is the respondents' contention that the petitioner did not appear personally before the Chairman PET at Lucknow to place his grievance on and before 11th November, 2012 i.e., before the last date of PET at Lucknow. Implicit in this pleading is that the petitioner's grievance would have been met by the respondents, had he done so.

15. The perusal of the public notices placed before us also clearly show that the respondents have anticipated the fact that call letters which have been sent by ordinary post, may not reach the candidates who were supposed to receive them. The same may be on account of postal delays or any other reason. The respondents have stated therein that in such eventuality, call letters could be obtained from the website of Railways between 23rd October 2012 to 29th October, 2012. The public notice also suggest that such call letters would be valid only after certification by the authorized officer at the venue of the PET. It is apparent from the above that such call letters had to be downloaded up to 29th October, 2012 and were not available to the candidates thereafter. Additionally, there to nothing on our record before us that the call letter relating to the petitioner was actually available on the website and could have been downloaded.

16. Be that as it may, even after the same had been uploaded and escaped the notice of the petitioner, there is an extremely important fact in the present case which entitles the petitioner to the relief which he had sought herein.

17. We are satisfied that the petitioner actually undertook the journey to Allahabad and Lucknow and that he made the representations on the 8th of November, 2012 to the respondents. The petitioner had not only physically approached the concerned authorities on the 5th of November, 2012 but had also additionally submitted representation to them.

18. Given the stand of the respondents that the petitioner should have approached the respondents before the 11th of November, 2012 and the fact that the PET was actually still going on then, as well as the requirement in the public notice issued by the respondents to the effect that the candidates were required to approach the authorized office at the venue of the PET for certification of any call letter downloaded from the website, there remains no justification at all for the respondents for not permitting the petitioner an opportunity to undertake the PET and the physical measurement test which was still going on the relevant dates.

19. No heed has been paid even by the Director General of the respondents who was approached by the petitioner by way of the representation made on 8th November, 2012, even though the Physical Efficiency Test and physical measurement test were still underway on

that date.

20. In the circumstances we have noted above, no delay or negligence at all is attributable to the petitioner. In fact, the respondents ought to have permitted the petitioner an opportunity to undergo the physical efficiency test and the physical measurement test as per the scheme of the selection process.

21. No delay is attributable to the petitioner in approaching this court as well. This court has also passed an interim order protecting the rights of the petitioner.

22. The respondents have not pointed out any other reason or circumstance which would prohibit the appointment of the petitioner.

23. In view of the above, it is directed that the respondents shall conduct the physical efficiency test and the physical measurement test of the petitioner towards the selection process in terms of the employment notice No.2/2011 for the post of Sub-Inspector within a period of 10 weeks from today. The respondents shall inform the petitioner as well as learned counsel representing him in the present writ petition of the place, date and time of the PET and physical measurement by registered acknowledgment due post. In case the petitioner successfully clears the physical efficiency test and physical measurement test, the respondents shall proceed in the matter for appointment of the petitioner for the post for which he has undergone the selection process.

This writ petition is allowed in the above terms.

CM No.18727/2012

In view of the order recorded in the writ petition, this application does not survive for adjudication and is disposed of as such.

ILR (2013) VI DELHI 4463
W.P. (C)

SANTOSH KUMAR ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 5021/2013 DATE OF DECISION: 06.11.2013

Constitution of India, 1950—Article 226—Disciplinary Proceedings—Petitioner seeking parity with four others charged with identical charges in proceedings—Not informing the department the missing of the rifle and 4 force personnel missing from duty—Hence the present petition. Held—The petitioner deserves to be accorded the same opportunity—The Director General would also take note of the note of the order 23rd August 2011 and 21st December, 2011—On the Issue of penalty which may be imposed upon the petitioner given his admission of guilt as well as apology.

Important Issue Involved: In disciplinary proceedings, a delinquent employee has a constitutional right to claim parity with similarly situated co-delinquents

[Sa Gh]

APPEARANCES:

FOR THE PETITIONERS : Ms. Rekha Palli and Ms. Punam Singh, Advocates.

FOR THE RESPONDENT : Mr. Sachin Datta, CGSC with Mr. Vikram Aditya and Mr. Naryayan, Advocates.

RESULT: The Writ petition is disposed of.

GITA MITTAL, J. (Oral)

1. By way of the instant writ petition the petitioner is seeking parity with the punishment which was imposed upon him with the punishment which was imposed on Ct. Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar who were charged with identical charges in proceedings which were conducted against them as well other CISF personnel totalling fourteen.

2. Before us the factual matrix is not disputed so far as this ground of challenge is concerned. It is also pointed out by the parties that apart from the petitioner, two other personnel namely one H.Ct.Gurnam Singh and Ct.Parvez Ahmed were also similarly charged as the petitioner for the same incident. A challenge was laid by H.Ct.Gurnam Singh by way of W.P.(C) no.5519/2011 and by Ct.Parvez Ahmed who filed W.P.(C) 5502/2011 to the punishment imposed on them. The petitioner has placed before us order dated 23rd August, 2011 of this court accepting the challenge by H.Ct.Gurnam Singh and Ct.Parvez Ahmed.

3. For the sake of convenience, we may note the factual matrix and the directions made by the court in the order dated 23rd August, 2011, the relevant extract whereof is reproduced as follows:

> "1. 14 forced personnel of CISF were charge-sheeted upon different allegations, but pertaining to the same incident and same set of facts.
>
> 2. Under the command of (i) SI Sanat Hasda, (ii) HC Amar Singh (iii) HC Gurnam Singh (iv) HC Parmatma Rai (v) Ct.Krishan Kumar (vi) Ct.Tej Singh (vii) Ct.Shish Ram (viii) Ct.Parvez Ahmed (ix) Ct.Desai Karan (x) Ct.Santosh Kumar (xi) Ct.Sapan Singh (xii) Ct.Shahbad Khan (xiii) Ct.Ram Swaroop and (ix) Ct.Lakhvir Kumar were deputed for security of Mr.S.S.Libra, member of parliament.
>
> 3. They had their post outside the residence of the Hon'ble Member of Parliament.
>
> 4. As per CISF, being the senior most officer, SI Sanat Hasda

was incharge of the group and it was his duty to ensure that the group members performed duties pertaining to the security of the Hon'ble Member of Parliament as also the relevant duty record was maintained. Additionally, it was his duty to ensure that arms issued to the force personnel under his command were secured properly so that arms did not fall in the hands of undesirable elements or got misplaced or were lost.

5. An AK-47 rifle issued to Ct.Krishan Kumar was admittedly recovered from a well on 8.3.2010. Prior thereto it was found missing; there is an issue as to on what date information of the rifle being missing was given to the authority concerned.

6. At a preliminary enquiry, so is the case of the department, it surfaced that Ct.Tej Singh had picked up the AK-47 rifle when it was lying abandoned and it was he who threw the same. Further inquiry revealed that Hon'ble Sh.S.S.Libra had left his residence and had proceeded to Delhi by hiring an escort vehicle from Sukhmandeep Tours and Travels. The inquiry revealed that SI Sanat Hasda was not managing the affairs of the officers under him as per rules. It was found that though he had shown as if he had moved along with Sh.S.S.Libra by way of escort, he was roaming here and there in the State of Punjab and Ct.Krishan Kumar, whose rifle was missing, though shown to be on duty, was roaming in the State of Punjab as also the State of Haryana and that HC Parmatma Rai was in touch with them. Call details of mobile No.9541423060 of the mobile phone used by Ct.Krishan Kumar, mobile No.9370553713 used by SI Sanat Hasda as also mobile No.9032412395 used by HC Parmatma Rai were obtained. Duty register which had interpolations by putting a fluid on the existing writings and over writings thereon were seized and were opined to be the creation of SI Sanat Hasda and HC Parmatma Rai.

7. All 14 persons faced separate departmental enquiries for the reason we are informed that CISF Rules do not have a provision for a joint enquiry. Different charges were framed against all and needless to state save and except SI Sanat Hasda, Ct.Krishan Kumar, HC Parmatma Rai, Ct.Tej Singh and Ct.Shish Ram who

was also found missing, against the rest the charge was of suppressing the truth and not informing the department of the rifle being missing and 4 force personnel missing from duty.

8. All 14 denied the charges. After recording the evidence the Enquiry officer submitted 14 reports indicted all 14 officers. Supplying the report of the enquiry officer and requiring response to be filed, Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar admitted their guilt and sought pardon. Others contested the findings of the enquiry officer.

9. In view of the confession of guilt made by Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar, the disciplinary authority, i.e. the Commandant of the unit took a lenient view and levied a penalty of reduction to the lowest in the time scale for a period of 3 years with permanent effect. The said 4 persons accepted the penalty levied. None of them filed a departmental appeal.

10. Ct.Shish Ram also made a confession before the Commandant i.e. when called upon to respond to the report of the enquiry officer; he admitted the guilt. But since Ct.Shish Ram was found missing from the out-post, he was not treated at par with Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct. Lakhvir Kumar. Penalty of compulsory retirement was levied upon him.

11. As regards the rest, which included the petitioners, they questioned the findings returned by the enquiry officer. Not agreeing with their response and concurring with report of the enquiry officer, penalty of removal from service stands inflicted upon all.

12. It is not in dispute that the role of Ct.Pervez Ahmed and HC Gurnam Singh is at par with that of Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct. Lakhvir Kumar. In that, they did not report the missing of the AK-47 rifle to the superior authority and gave false statements that Ct.Krishan Kumar never left the outpost.

13. The only reason why these two have been inflicted a higher penalty, is that they did not make a clean breast as was done by Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar.

14. Learned counsel for petitioners Ct.Parvez Ahmed and HC Gurnam Singh states that she has been instructed to make a statement that these two personnel are prepared to admit their guilt as was admitted to by Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar and thus prays that the Director General CISF i.e. the revisional authority may be called upon by this Court to reconsider the issue of penalty to be levied upon Ct.Parvez Ahmed and HC Gurnam Singh. Counsel states that upon their making a representation to the revisional authority, in which they would apologize for their mistakes and would admit to the charge against them, Director General, CISF should be directed to consider extending the same leniency to them which was accorded to Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar.

15. Learned counsel for the respondents would urge that HC Amar Singh had also made confession before the appellate authority but was visited with the penalty of compulsory retirement for the reason his confession was belated and he took a chance before the Commandant.

16. HC Amar Singh has not challenged the penalty levied upon him and thus we do not comment upon the proportionality of the penalty levied upon him, but would simply highlight Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar took a chance at an enquiry by denying the charges against them as did the petitioners. All of them including the petitioners are identically situate as regards the indictment. The only difference is that Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar admitted to their guilt after the enquiry officer indicted them, but the petitioners desire to do so now.

17. We render no conclusive opinion on the rival stand taken, but being of the opinion that on the issue of parity with respect

to the penalty levied, the matter needs a reconsideration and thus we dispose of the writ petitions directing that if within 4 weeks from today the petitioners would confess to their guilt and tender an apology for their acts, the Director General CISF, would reconsider the penalty to be levied and while levying the penalty would take note of the penalty levied upon Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar. The Director General CISF, would keep into account that even said five constables took a chance before the enquiry officer as did the petitioners and would highlight, if a different penalty is levied, on what account confession of guilt before the Commandant would render the case of those 5 persons requiring leniency on the quantum of sentence vis-a-vis the petitioners who admit to their guilt now."

4. The present writ petitioner did not assail the penalty which was imposed upon him along with the above two petitioners. However, he has filed the instant writ petition contending that his case was squarely covered by the ratio of the said decision dated 23rd August, 2011. In para 14 of the present writ petition, the petitioner has admitted his mistake and rendered an unconditional apology. Based on this admission and apology, he has sought the relief which was granted to H.Ct.Gurnam Singh and Ct.Parvez Ahmed by the order dated 23rd August, 2011. The petitioner has further explained that he belongs to a very poor family and is the only earning member of the family.

5. The record placed before us shows that the respondents considered the representations received from H.Ct.Gurnam Singh and Ct.Parvez Ahmed in terms of the order of this court dated 23rd August, 2011. We are informed that the IG/APS has passed orders, both dated 21st December, 2011, in the case of H.Ct.Gurnam Singh and Ct.Parvez Ahmed modifying the penalty of "removal from service" imposed upon them to that of "reduction of pay to the lowest stage in the time scale for a period of three years with permanent effect".

6. In the above background, it cannot be disputed that on the issue of parity with respect to the penalty levied upon the petitioner, the matter would need a reconsideration. The petitioner deserves to be accorded the same opportunity as has been accorded to the petitioners in the W.P.(C)

Nos. 5519 and 5502 of 2011. Though the petitioner has pleaded guilty before us, which plea would bind him, however, the petitioner deserves to reiterate this plea and to tender his apology to the respondents who have been put to the task of completing the disciplinary proceedings against him.

7. In view of the above, it shall be open to the petitioner to make a representation to the Director General, CISF confessing his guilt as well as tendering an unconditional apology for the charges against him. Such representation be made within four weeks from today.

In case, the representation is so made, the same shall be reconsidered by the Director General, CISF who may take a view on the penalty to be levied by taking note of the penalty levied upon Ct.Sapan Singh, Ct.Shahbad Khan, Ct.Ram Swaroop and Ct.Lakhvir Kumar. The Director General would also take note of the order dated 23rd August, 2011 by this court in the writ petition Nos.5519 and 5520 of 2011 as well as the order dated 21st December, 2011 passed by the respondents in favour of H.Ct.Gurnam Singh and Ct.Parvez Ahmed on the issue of the penalty which may be imposed upon the petitioner given his admission of guilt as well as apology. Orders in this regard shall be passed within six weeks from the receipt of the representation of the petitioner, and conveyed forthwith thereafter.

The writ petition is disposed of in the above terms.

No orders as to cost.

Dasti.

ILR (2013) VI DELHI 4470
W.P. (C)

SATISH KUMAR ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 6275/2012& CM NOS. :822/2013 **DATE OF DECISION: 08.11.2013**

Constitution of India, 1950—Article 226—Recruitment—Petitioner allied for the post of ASI/Pharmacist in CISF successful in the written examination on 10th October 2010 the petitioner disclosed in the questionnaire that FIR under Section 417 and 419 of the Indian Penal Code (IPC) was registered against him-on charge sheet was issued the petitioner submitted that the case was cleared in April, 2009 no proof to substantial allegation of offence-respondent after examination of the judgment held petitioner unfit for appointment in the CISF and the same communicated to the petitioner on 26th September 2011—Hence the present writ petition. Held—The implication of the petitioner under Section 417 and 419 of the IPC which squarely fall within the prohibition policy dated 1st February 2012—The offences under IPC which are considered as serious offences or involving moral turpitude the serious nature of the offence rendered petitioner unsuitable for recruitment.

Important Issue Involved: (A) The cases falling under IPC are considered as serious offences or involving moral turpitude.

(B) For entry into police acquittal order based on benefit of doubt in a serious case is bound to act as impediment.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. N.L. Bareja, Advocate.

FOR THE RESPONDENTS : Mr. Sunil Kumar and Mr. T.P. Singh, Advocate.

CASE REFERRED TO:

1. *Commissioner of Police, New Delhi and Anr. vs. Mehar Singh* AIR 2013 SC 2861.

RESULT: Writ Petition is dismissed.

GITA MITTAL, J. (Oral)

1. By way of the instant writ petition the petitioner has assailed the order dated 26th September, 2011 and whereby the respondents have held that the petitioner was not suitable for recruitment in the Central Industrial Security Force on account of his implication in a criminal prosecution. The petitioner also assails the order dated 6th January, 2012 passed by the respondents to the legal notice served by the petitioner challenging the above decision.

2. The case of the petitioner is that pursuant to the advertisement issued in September, 2010, he had applied for the direct recruitment to the post of ASI/Pharmacist in CISF as a General Category candidate. He was successful in the written examination conducted by the respondent on 10th October, 2010 whereafter he was required to report to the National Industrial Security Academy (NISA), Ranga Reddy, Hyderabad with original certificates/testimonials for undergoing Physical Standard Test (PST), Basic Vocational Aptitude Test and the Basic Vocational Aptitude Test (BVAT) as well as interview etc.

3. It is undisputed before us that the application form for recruitment to be filled by the petitioner required information to be given with regard to conviction by a court or judicial institution; pendency of a case in

court of law; lodging of FIR and pendency of the case arising therefrom and in addition full details of the FIR; police station; whether charge sheet was submitted or returned; if the case was charge sheeted, then what was the outcome/information in the court, that had to be given in Appendix B to the application form.

4. The respondents have placed the original application form dated 6th September, 2010 which was filled by the petitioner duly signed by him. The petitioner has responded in the negative to all the queries made by the respondents.

5. It is the admitted position that when the petitioner reported to the training institute at Hyderabad, he was required to fill another questionnaire which is dated 19th August, 2011. In this questionnaire, the petitioner disclosed that FIR under Section 417 and 419 of the IPC was registered against him by Police Station Hissar, Haryana. The petitioner, however, did not reveal the number of the case despite a specific query contained in the form. In reply to the query, as to whether he was charge sheeted, the petitioner had endorsed that no charge sheet was issued.

6. The petitioner wrote a representation dated 21st August, 2011 to the Chairman of the Recruitment Board of the CISF at Hyderabad stating that an FIR was registered against him in the year 2005 under Section 417 and 419 of the IPC due to a cheating case in the Haryana Agricultural University (Hissar) under FIR no. 217. The petitioner also submitted that the case was cleared in April, 2009 as the court could not find proof against the petitioner and that he would produce the original copy of the order. The petitioner prayed that the respondents considered his candidature after receipt of the original clearance.

The respondents kept the matter of issuance of offer of appointment to the petitioner in abeyance by a communication dated 25th August, 2011. He was called upon to submit the original documents.

7. After examination of the judgment in the case lodged against the petitioner, the respondents took a decision that the acquittal from the criminal charge was sufficient to render petitioner unfit for appointment in the CISF it being the Central Armed Police Force of the Union which was communicated to the petitioner by the letter dated 26th September, 2011. Aggrieved thereby, the present writ petition has been filed.

8. Before dealing with the contentions relating to the allegations

against the petitioner, it is necessary to note the fact that in Appendix B of the original application form, the petitioner has deliberately concealed the entire information with regard to the case against him which was then pending. As noted above, this form was filled up by him on 6th September, 2010. Even in the questionnaire form which was filled by him at Hyderabad on 19th August, 2011, the petitioner had concealed all material facts which would enable the respondents to take a considered view with regard to the suitability of the petitioner for recruitment in a disciplinary force as the Central Industrial Security Force. FIR no.271 was registered against the petitioner on 9th July, 2005. It is apparent that the case was pending when the questionnaire was filed on 19th August, 2011.

9. In his representation dated 21st August, 2011, the petitioner has again mentioned that the case has been cleared in April, 2009 in order to create an impression that the petitioner was free from the charge before recruitment process. The above narration would show that the concealment on the part of the petitioner was certainly wilful and malafide and he is disentitled to any relief in exercise of our extraordinary jurisdiction under Article 226 of the Constitution of India.

10. There is yet another reason which would disentitle the petitioner to any relief. The respondents have pointed out that the petitioner was charged for commission of an offence punishable under Section 417 and 419 of the IPC. The judgment dated 9th March, 2011 passed by the learned trial court noted the allegations by the complainant which were to the effect that one Dharmender Singh son of Sh.Bhagwan was found impersonating for the petitioner at the time of entrance examination of VLD which was held in the Campus School, CCS HAU, Hissar. Dr.V.K.Madan, the invigilator had appeared as PW1 before the court and had identified the petitioner present in court as the person involved. The trial court disregarded this evidence only on the ground that no other person had been examined to support these allegations and that the prosecution had failed to tender the roll number slip/date sheet etc. in the evidence.

11. Learned Standing Counsel for the respondents has placed before us the copy of policy dated 1st February, 2012 framed by the Ministry of Home Affairs which provides the guidelines for considering cases of candidates for appointments in CAPFs against whom criminal case had

been registered and the effect thereof.

12. Our attention has been drawn to paras II, III (a) and V which read as follows:

> "II. If a candidate does not disclose his/her involvement and/ or arrest in criminal case (s), complaint case (s), preventive proceedings etc. under IPC or any other Act of the Central or State Government in the application form but disclose the same during medical examination/PET and/or in the attestation/ verification form, in writing, the candidature will not be cancelled on this ground alone.
>
> III. The candidate will not be considered for recruitment, if:
>
> (a) Such involvement/case/arrest is concerned with an offence mentioned in Annexure-A;
>
> .....
>
> V. Notwithstanding the provisions of 3(III) above, such candidates against whom chargesheet in a criminal case has been filed in the court and the charges fall in the category of serious offences or moral turpitude, though later on acquitted by extending benefit of doubt or acquitted for the reasons that the witness have turned hostile due to fear of reprisal by the accused person(s), he/she will generally not be considered suitable for appointment in the CAPF. The details of crimes which are serious offences or involve moral turpitude are at Annexure 'A'. However, cases in which the criminal court, while acquitting, has categorically mentioned that the criminal case would not be a bar on appointment in Government Services, the candidate shall be considered for appointment in the concerned CAPF."

13. The respondents have set out in Annexure A the offences under the Indian Penal Code which are considered as serious offences or involving moral turpitude. At sl.no.9, the respondents have specifically included offences under Sections 417 and 419 of the IPC with which the petitioner was charged.

14. We may also refer to a very recent pronouncement of the Supreme Court reported in AIR 2013 SC 2861 **Commissioner of Police,**

New Delhi and Anr. vs. Mehar Singh wherein the issue which has been raised before us was considered by the Supreme Court of India. In this judgment, the court considered acquittal of one of the respondents seeking appointment to the Delhi Police force. The factual narration and observations of the court on the claim of this respondent based on his acquittal deserve to be considered in extenso and read thus:

> "23. So far as respondent - Shani Kumar is concerned, the FIR lodged against him stated that he along with other accused abused and threatened the complainant's brother. They opened fire at him due to which he sustained bullet injuries. Offences under Sections 307, 504 and 506 of the IPC were registered against respondent - Shani Kumar and others. Order dated 14/5/2010 passed by the Sessions Judge, Muzaffarnagar shows that the complainant and the injured person did not support the prosecution case. They were declared hostile. Hence, learned Sessions Judge gave the accused the benefit of doubt and acquitted them. This again is not a clean acquittal. Use of firearms in this manner is a serious matter. For entry in the police force, acquittal order based on benefit of doubt in a serious case of this nature is bound to act as an impediment."

15. In view of the above, the narration in the judgment dated 9th March, 2010 and the ground on which the Trial Court had premised the acquittal of the petitioner, the petitioner cannot claim the benefit of his acquittal in support of the assertion that the implication in the criminal case as well as the trial which the petitioner has faced cannot impact his appointment with the Central Industrial Force.

16. The fact is that the petitioner was implicated in a case under Section 417 and 419 of the IPC which squarely fall within the prohibition under the policy dated 1st February, 2012.

17. Even if it could be argued that the policy would not have any application as the petitioner was being considered for recruitment in the year 2010, however, the principles laid down therein with regard to offences are to be considered as serious offences and/or involving moral turpitude support the view of the respondents that the serious nature of the allegations against the petitioner render him unsuitable for recruitment with them.

18. For all the reasons mentioned above, the writ petition and the applications are dismissed.

ILR (2013) VI DELHI 4476
CRL. A.

DEVENDER SINGH **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(G.S. SISTANI & G.P. MITTAL, JJ.)

CRL.A. NO. : 1327, 1328, 1329/2012 **DATE OF DECISION: 13.11.2013**

Indian Penal Code, 1860—Section 302/201/34 IPC—Appellants convicted for having caused the murder of one Ram Mohan by strangulating him with a leather belt and tying his feet with an electric wire and throwing away his body near a railway track—Prosecution relied upon the testimony of an eye witness to the beatings given to the deceased by the appellants, the recovery of shirt belonging to the deceased, recovery of a red and black PVC electric wire similar to the one with which the feet of the dead body were tied and recovery of a leather belt with which the deceased was stragulated in pursuance of the disclosure statements given by one of the appellants—Conviction challenged inter alia on the ground that none of the recoveries were made in pursuance of the disclosure statement. Held: Though the prosecution has proved beyond reasonable doubt that the appellants had given beatings to the deceased with fists, legs and belt,

there is not shred of evidence to show that the appellants had strangulated the deceased or had disposed off the dead body or that they had the knowledge of the dead body being present near the railway track. Recoveries relied upon by the prosecution cannot be stated to have been made in pursuance of the disclosure statements of the appellants and hence are inadmissible in evidence. Conviction altered to section 323/34 IPC.

Turning to the facts of the instant case, as per the prosecution, the legs of the dead body were tied with an electric wire. PWs 6, 12, 14, 16 and 17 are the witnesses to the recovery of the dead body whereas PWs 10,13 and 17 are the witnesses to the recovery of the red and black wire at the instance of appellant Ramesh Singh Bisht. A perusal of the rukka Ex.PW-1/C written by Inspector Sanjeev Kumar (PW-17), IO of the case shows that the same is curiously silent about the colour of the wire with which the legs of the dead body were tied. In the recovery memo, the colour of the electric wire with which the dead body was tied and which was allegedly deposited in the *malkhana* as mentioned is red, black, yellow and blue. PWs 6, 12 and 14 are silent about the legs of the dead body being tied with any electric wire. However, PW-14 did depose about the seizure of an electric wire and converting it into a packet after sealing it with the seal of 'SK'. So much so, PW-17 also simply deposed about tying of the legs of the dead body with an electric wire and seizure of the wire along with other articles. Thus, he was silent as to the colour of the wire with which the legs of the deceased were tied. **(Para 34)**

May be that the colour of the electric wire with which the deceased's legs were tied at the time of recovery of the dead body was not thought of much importance by the IO and the other witnesses and even if it is believed that the legs of the dead body were indeed tied with a red, black,

yellow and blue electric wire, we have to see whether the recovery of a similar red and black wire can be believed and if so, whether the same is of any consequence. PW-10 HC Dalvir, PW-13 HC Pawan and PW-17 Inspector Sanjeev Kumar, IO are the witnesses regarding the alleged recovery at the instance of appellant Ramesh. PWs 10, 13 and 17 on this aspect deposed about the making of the confessional statement Ex.PW-10/B by appellant Ramesh. **(Para 35)**

Thus, apart from the fact that there is no independent witness to the alleged recovery of the leather belt and red and black PVC wire, the same do not amount to any fact discovered under Section 27 in view of the law laid down in *Pulukuri Kottaya* which has been relied on and referred to with approval by the Supreme Court in its various decisions including **Harivadan Babubhai Patel v. State of Gujarat** (2013) 7 SCC 45 and **Rumi Bora Dutta v. State of Assam** (2013) 7 SCC 417. **(Para 36)**

Hence, we hold that the prosecution has proved beyond all reasonable doubts that the three appellants along with two others (POs) had given beatings to the deceased with fists, legs and belt. But, at the same time, there is no shred of evidence to show that the appellants or any one of them was a party to the strangulation of the deceased. No evidence has been produced to show that the appellants had disposed of the dead body or had any knowledge of the dead body being present near the railway track between ganda nala and road. Thus, the Trial Court fell in grave error in admitting the inadmissible evidence while convicting the appellants for the offence punishable under Sections 302/201/34 IPC, rather than for giving only beatings with a blunt object. The appellants undoubtedly are guilty for the offence punishable under Section 323 read with Section 34 IPC. **(Para 42)**

Important Issue Involved: Recoveries of incriminating articles, which are not made in pursuance of any information provided by an accused, are inadmissible in evidence u/s 27 of the Evidence Act.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Ms. Rakhi Dubey, Advocate, Mr. Avinder Singh, Advocate & Mr. Aditya Vaibhav Singh, Advocate, Anita Abraham, Advocate.

FOR THE RESPONDENT : Ms. Richa Kapoor, Advocate.

CASES REFERRED TO:

1. *Harivadan Babubhai Patel* vs. *State of Gujarat* (2013) 7 SCC 45.
2. *Rumi Bora Dutta* vs. *State of Assam* (2013) 7 SCC 417.
3. *Kishan Chand* vs. *State of Haryana* (2013) 2 SCC 502).
4. *R. Shaji* vs. *State of Kerala,* Criminal Appeal No.1774 of 2010, decided on 04.02.2013.
5. *Bipin Kumar Mondal* vs. *State of West Bengal* (2010) 12 SCC 91.
6. *Namdeo* vs. *State of Maharashtra* (2007) 14 SCC 150.
7. *State of Karnataka* vs. *David Rozario and Anr.* (2002) 7 SCC 728.
8. *State of Maharashtra* vs. *Damu* (2000) 6 SCC 269.
9. *Leela Ram* vs. *State of Haryana* (1999) 9 SCC 525.
10. *Chander Pal* vs. *State* 1998 (47) DRJ (DB).
11. *Pulukuri Kottaya & Ors.* vs. *Emperor* AIR 1947 PC 67.

RESULT: Appeal Disposed of.

G.P. MITTAL J.

1. These three appeals are directed against the judgment dated 23.03.2012 and order on sentence dated 24.03.2012 whereby the Appellants Ramesh Singh Bisht, Devender Singh and Rakesh Kumar Chaudhary were convicted in Sessions Case No.155 of 2009 for the offence punishable under Section 302/201 read with Section 34 of the Indian Penal Code (IPC). They were sentenced to undergo rigorous imprisonment (RI) for life and to pay a fine of Rs. 2,000/- each and in default to undergo RI for a period of six months for the offence punishable under Section 302 read with Section 34 IPC. They were further sentenced to undergo RI for a period of three years and to pay fine of Rs.1,000/- each and in default to undergo RI for a period of three months each for the offence punishable under Section 201 read with Section 34 IPC.

2. We shall first advert to the facts.

3. On 09.02.2008, at about 11:14 a.m., DD No.15-A was recorded in Police Station (PS) Samai Pur Badli (SP Badli) to the effect that a dead body was lying near the railway track between ganda nala and the road. The DD entry was assigned to ASI Sugan Lal. Simultaneously, information was also transmitted to Inspector Sanjeev Kumar (PW-17), SHO of the Police Station. ASI Sugan Lal (PW-14) reached the spot and in the meanwhile Inspector Sanjeev Kumar (PW-17) also reached there and noticed that a naked dead body with its legs tied with a wire, wrapped in a black and gray coloured blanket was lying in a cardboard box. Inspector Sanjeev Kumar made inquiries about the dead body but the deceased could not be identified. Inquest proceedings were held. A rukka was sent to the PS for registration of a case for the offence punishable under Sections 302/201 IPC. Crime team was summoned at the spot. Photographs of the dead body were taken from different angles. Since the dead body could not be identified, it was shifted to the mortuary with a direction to preserve it. After seven days, the dead body was cremated as unidentified.

4. Hue and cry notice was circulated all over Delhi. During the course of investigation, one Raju Kumar (PW-2) came in contact with the police and on interrogation disclosed that he used to work as a waiter with appellant Ramesh who was working as a catering contractor. On

07.02.2008, he along with one Vinod was resting in his room at Badli Extn. At about 10:00 p.m., they heard sounds of maar-peet. They noticed that appellant Ramesh with co-accused Pramod (proclaimed offender) and his own waiters Devender and Rakesh (Appellants herein) were beating Ram Mohan (the deceased) with fists and legs. He was also being given blows with a belt. The cause for extending beatings to the deceased was the demand of his dues amounting to '2,000/- from appellant Ramesh which was not taken kindly by him (appellant Ramesh). PW-2 and the co-waiter Vinod Kumar, who were witnesses to the beatings extended to the deceased were also threatened with similar treatment, if they also asked for settlement of their dues or if they disclosed about the incident to anyone. On the next morning, PW-2 and Vinod heard appellant Ramesh saying that Ram Mohan had died in the night. Vinod Kumar (not produced as a witness in the Court on the ground of being not traceable) further informed the IO that the appellants Ramesh, Rakesh and Devender along with co-accused Amit and Pramod had packed the dead body in a cardboard box and threw the same somewhere at night. After their return, the accused persons threatened PW-2 and Vinod to keep quiet or else to meet the same fate.

5. The three appellants were thereafter arrested at the instance of PW-2 and Vinod on 06.03.2008. The three appellants are alleged to have made a clean breast of their guilt before the IO. The postmortem report opined the cause of death as asphyxia consequent upon ligature strangulation. The blunt injuries found on the person of the deceased were opined to be ante-mortem in nature. After completion of the investigation, a report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) was presented in the Court.

6. On the appellants pleading not guilty to the charge framed under Sections 302/201/34 IPC, the prosecution examined 17 witnesses. PW-2 Raju Kumar, PW-3 Naresh Kumar, PW-6 Constable Gunwant, PW-9 Dr. K. Goel, PW-10 HC Dalbir Singh, PW-11 Satpal Singh, PW-12 Dayashanker, PW-13 HC Pawan Kumar, PW-14 ASI Sugan Lal, PW-16 Constable Surender Negi and PW-17 Inspector Sanjeev Kumar are the important witnesses examined by the prosecution, whereas rest of the witnesses have provided various links in the case.

7. Raju Kumar (PW-2) is the star witness of the prosecution. The success of the prosecution hinges around his testimony. He testified that appellant Ramesh was working as a catering contractor who used to supply labour in marriage parties. Appellants Devender and Rakesh were working with appellant Ramesh. In February 2008, he (Raju Kumar) and Vinod noticed the appellants and one Pramod extending fists, legs and belt blows to Ram Mohan the deceased in a room at Badli. They gave beatings to the deceased as he demanded his dues from Ramesh. Ramesh had also leveled allegations of committing theft of some CDs against the deceased. Appellant Ramesh threatened PW-2 and Vinod that if they or anybody else demanded the money for the work done by them, they would meet the same fate. They were also threatened not to disclose about the incident to anybody. He went on to add that the appellants kept the dead body of Ram Mohan in a carton box and threw the same somewhere in the night. He deposed that the three appellants were arrested on his and Vinod's pointing out. He also pointed out the spot of giving beatings, to the IO.

8. In cross-examination, the witness admitted that he used to reside with his parents and family in a jhuggi. He stated that the place of incident was at a distance of 4-5 kms. from his house. He stated that the appellant Ramesh was residing at House No.C-30, Badli Extn along with 40-50 boys who were working as his labourers. He stated that this house where appellant Ramesh and the boys were staying consisted of six rooms. He denied the suggestion that he was working as a waiter with contractor Vinod. He stated that the room of Vinod was in the corner in the opposite line in the same house. He admitted that there were other houses in the vicinity and the window of the room of appellant Ramesh opened in the street. He denied the suggestion that the distance between the rooms of Ramesh and Vinod was 30-35 steps. He went on to add that the same could be about 8-10 steps and if anything would occur in the room of Ramesh, noise could be heard outside. He admitted that apart from him, there were 20 other boys who witnessed the occurrence. He also admitted that his name as also the names of other waiters were mentioned in an attendance register maintained by appellant Ramesh. He stated that he and some other boys were detained in the Police Station. He denied the suggestion that he was beaten by the police and was made to confess that he had committed the offence. He clarified that the fact

of throwing of the dead body of the deceased after putting it in a carton box was told to him by Vinod. (Thus, hearsay evidence). He further admitted that Vinod had a mobile phone with him. He (Vinod) did not inform the police about the incident through his mobile. He denied the suggestion that he was never threatened by the accused persons or that he was not asked to keep quiet.

9. Naresh Kumar (PW-3) is the landlord of House No.C-30, Badli Extn. He stated that appellant Ramesh used to work as a contractor to supply labour during marriage parties. He used to charge a sum of Rs. 4,000/- per month as rent from Ramesh for the rooms in which Ramesh and other workers used to reside. He stated that there was no written lease agreement with Ramesh. He did not issue any rent receipts to him. In cross-examination, PW-3 deposed that it was appellant Ramesh only who was the tenant in the house and other persons were his labourers. He admitted that police did not take any documentary evidence with regard to his ownership of House No.C-30, Badli Extn.

10. Constable Gunwant (PW-6) handed over DD No.15-A (Ex.PW-1/A) to ASI Sugan Lal on 09.02.2008. Thereafter he accompanied ASI Sugan Lal to the spot and where the dead body was lying. He deposed about the recovery of the dead body which was lying wrapped in a blanket. He testified about having taken rukka to the PS for registration of the FIR.

11. Daya Shanker (PW-12), ASI Sugan Lal (PW-14) (SI on the date of recording of his statement) and Constable Surender Negi (PW-16) are other witnesses regarding recovery of the dead body from near the railway line near ganda nala. PW-14 ASI Sugan Lal also deposed about seizure of the cardboard box, blanket, plastic rope and an electric wire (with which the legs of the dead body were tied).

12. Dr. K.Goel (PW-9) conducted the autopsy on the unidentified dead body on 18.02.2008. He noticed the following external and internal injuries:-

"External injuries:-

1. Ligature Mark – There was diffuse, slightly, depressed pinkish

pressure mark running transversely all around the neck just on and below apple of adam of width 2 cms. to 3 cms. all around. The skin above and below the ligature mark was more blackish.

2. Diffused bruises coalesced all over front, lateral and back of left arm (clot were present underneath the skin), lateral aspect of right arm and scattered at places over back of chest, diffuse.

3. Grazing were seen in vertical fashion 5 cms x 3 cms on front of right wrist and lower side of right forearm.

Internal examination:-

On reflection of skin of neck, there was subcutaneous and platysmal bruising all over front and sides of neck. Deeper neck muscles also bruised signs of decomposition were also seen. There was vertical fracture of body of thyroid cartilage with massive bruising and clots around. All the chest and abdominal viscera were showing signs of early to moderate decomposition changes."

13. He opined the cause of death to be asphyxia consequent upon ligature strangulation. He testified that all the injuries were ante-mortem in nature and injury no.1 was sufficient to cause death in the ordinary course of nature. He stated that injury no.2 was caused by impact of a blunt object during assault, whereas injury no.3 was caused by friction against a blunt rough surface. He opined the time since death to be 10-11 days.

14. HC Dalvir (PW-10) testified having joined investigation of the case with Inspector Sanjeev Kumar on 06.03.2008. He deposed that they met public witnesses Vinod and Raju. The IO showed them the photographs of the deceased which they identified to be those of Ram Mohan. The witnesses were given assurance of their safety and security. They disclosed about the incident of giving beatings to the deceased by the appellants along with one Amit and one Pramod. He stated that the three appellants were arrested from C-30, Badli Extn. on identification by Vinod and Raju. The three appellants confessed to their guilt. However, the confession to the police officer is not admissible in evidence. The IO recorded their

disclosure statements Ex.PW-10/A, Ex.PW-10/B and Ex.PW-10/C. They pointed out the place where they had thrown the dead body of Ram Mohan vide pointing out memos Ex.PW-10/D and PW-10/E. This is inadmissible, as the place of recovery of dead body was already known to the police and other witnesses. He deposed that the three appellants pointed out the place where they committed the murder of deceased Ram Mohan vide pointing out memo Ex.PW-10/F which was signed by him at point A. Again this is inadmissible in evidence being a confession to the police officer. In cross-examination, the witness denied the suggestion that Vinod and Raju were already detained by the police at PS for about five days prior to 06.03.2008. He testified that there were several rooms in C-30, Badli Extn. including one hall and some rooms on the ground floor. He testified that he had called the owner of the house. He added that proof of ownership of the building was not collected by the IO in his presence. He stated that the documents regarding arrest of the appellants were prepared in the PS and not at the spot.

15. SI Satpal Singh (PW-11) was the in-charge of the crime team who reached the spot on 09.02.2008 at 11:40 a.m. He deposed about the recovery of the dead body, inspection of the spot and getting the spot photographed from various angles through Constable Dalvir Singh.

16. HC Pawan Kumar (PW-13) deposed about the recovery of a leather belt with brass buckle and a red and black electric wire at the instance of appellant Ramesh. This statement is not of much consequence, to which we shall advert a little later.

17. Inspector Sanjeev Kumar (PW-17) is the investigating officer in this case. He deposed about the recovery of the dead body on 09.02.2008 from near railway line in between *ganda nala* and the road. He testified about preparation of *rukka* Ex.PW-17/A and sending it to the PS for registration of the case. He deposed that on 06.03.2008, he along with other police officials was present in Street No.9, Badli Exn. They were intensively interrogating various persons as they had information that the labourers similar to the deceased were residing in the locality. They met two persons, namely, Raju Kumar and Vinod Kumar. When they were questioned, they got frightened. On taking them in confidence, they disclosed about the beatings given by the three appellants along with Pramod and Amit to the deceased. They also disclosed about the deceased

being strangulated by the appellant Ramesh resulting in his death and disposal of the dead body by the appellants. (This part of the testimony of PW-17 is again inadmissible being hearsay evidence). This witness then deposed about the arrest of the three appellants and making of the confessional statements by them. He deposed that appellant Ramesh got recovered a belt of black colour with brass buckle and a red and black electric PVC wire, apparently whose portion was used to tie the legs of the deceased. He also stated about recovery of a shirt of the deceased at the instance of appellant Ramesh and its seizure. He testified that the articles recovered at the instance of the appellant Ramesh were sealed. He testified that the witness Vinod was untraceable despite of best efforts being made by the police. In cross-examination, the witness admitted having not noticed any bloodstains on the belt and the shirt of the deceased. He denied the suggestion that the shirt did not belong to the deceased. At the same time, no evidence has been collected or produced by the IO to show that the shirt did belong to the deceased.

18. On close of the prosecution evidence, in order to afford them an opportunity to explain the incriminating evidence appearing against them, the appellants were examined under Section 313 Cr.P.C. Appellants Ramesh and Rakesh denied the prosecution's allegation and stated that they were lifted from Badli Chowk on 02.03.2008 by the police officials. They were illegally confined at the PS, beaten mercilessly and then implicated in the case falsely. Similarly, appellant Devender stated that he had nothing to do with the alleged incident. He was illegally arrested on 03.03.2008 and was wrongfully confined and mercilessly beaten in the PS and later falsely implicated in the case. He stated that he used to reside in a jhuggi at railway crossing Badli. The appellants did not produce any evidence in defence.

19. While appreciating the evidence adduced by the prosecution and relying on **Leela Ram v. State of Haryana** (1999) 9 SCC 525, the Trial Court observed that some discrepancies are bound to occur in the testimony of the witnesses. The Trial Court observed that *"the corroboration of evidence with mathematical niceties cannot be expected in criminal cases*."

20. Relying on the testimony of PW-2, the Trial Court held that the

identity of the three appellants and the factum of giving beatings by them was fully established. The Trial Court rejected the plea of the appellants of being removed on 02.03.2008/03.03.2008 by police and held their plea of being mercilessly beaten to be an afterthought as the same was not put to PW-2 or other prosecution witnesses. Further, relying on the recovery of the red and black electric PVC wire by appellant Ramesh, which tallied with the red and black wire with which the legs of the dead body were tied, the Trial Court held the appellants to be connected with the murder of the deceased and thus, the three appellants were convicted and sentenced as aforesaid.

21. We have heard Ms. Rakhi Dubey, Mr. Avinder Singh and Ms. Anita Abraham, learned counsels for the appellants and Ms. Richa Kapoor, learned APP for the State and have perused the record.

22. In order to bring home the appellants' guilt, the prosecution relied on direct evidence in the shape of testimony of PW-2 who is an eye witness to the beatings being extended to the deceased by the appellants and two others (POs). The prosecution further relies on the circumstantial evidence, that is, recovery of a shirt Ex.P-2 purported to be belonging to the deceased, recovery of a red and black PVC electric wire Ex.P-4 alleged to be similar to the one with which the feet of the dead body were tied and recovery of a leather belt Ex.P-3 with which the deceased was allegedly strangulated, in pursuance of a disclosure statement Ex.PW-10/B, purported to have been made by the appellant Ramesh Singh Bisht.

23. On examination of the disclosure statement, it is clear that since the recovery of the wire was not in pursuance of any information provided by the appellants, the same was not admissible in evidence as held by a Division Bench of this Court in **Chander Pal v. State** 1998 (47) DRJ (DB) where it was observed as under:-

> "It may also be appreciated that as far as the joint recovery of muffler vide memo Ex.PW-4/D is concerned, it has no basis inasmuch as the recovery of muffler Ex.P-8 vide recovery memo Ex.PW-4/D is not preceded by any discovery statement of the accused persons either singly or jointly. It need hardly be said that recovery of a Mudda Mal property stated to have been produced by the accused persons must be first shown to have

> voluntarily disclosed/express willingness to point out and produce the incriminating article and for that a statement by the accused person stating that he had concealed or kept an article at a particular place and that he wants/desires to produce the same willingly. It is only thereafter that the accused leads the IO and the attesting witnesses to the place where he has stated to have kept and/or concealed the incriminating article and thereafter the article taken out and produced by the accused in presence of the witnesses and that is how the recovery of the incriminating article is to be affected so as to be legal and admissible in law. Thus, the recovery must have the basis of a disclosure statement voluntarily made by the accused person desirous of producing the article kept/concealed by him from certain place. In the instant case the basis, namely, a voluntary disclosure statement of Chander Pal stating that he has kept a muffler (Ex.P-8) at a particular place and that he desires to/is willing to produce the same is non-existant. So on that score also the recovery of the muffler Ex.P-9 cannot be said to be legal and valid besides other infirmities from which it suffers.
>
> For the reasons aforestated the circumstance of recovery of piece of muffler and the clothes cannot be taken into consideration."

24. Similarly in **State of Karnataka v. David Rozario and Anr.** (2002) 7 SCC 728, the Supreme Court held that the statement which is admissible under Section 27 is the one which is the information leading to the discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. Relevant para of the report in David Rozario is extracted hereunder:-

> "5..... The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands, in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in the custody of the police. The requirement of police

custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and the prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of a fact envisaged in the section. Decision of the Privy Council in **Pulukuri Kottaya v. Emperor** AIR 1947 PC 67 is the most-quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (See **State of Maharashtra v. Damu** (2000) 6 SCC 269. No doubt, the information permitted

to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given"

25. Since the PVC electric wire was not recovered in pursuance of any information provided by the appellants, this was no information which could be admissible as evidence.

26. It is urged by the learned counsels for the appellants that PW-2 is unworthy of reliance. He was coerced by the police to make a statement in as much as he admitted having been confined by the police for five days before his statement was recorded by the police. It is urged that PW-2 admitted in cross-examination that there were around twenty other boys who also witnessed the incident. He had also admitted that the police had made inquiries from at least 15 of these boys. Consequently, non-production of those 15 boys is fatal to the prosecution and, therefore, PW-2 cannot be believed with regard to the beatings alleged to be given by the appellants.

27. It is contended that PW-3 Naresh Kumar did not produce any document to show that appellant Ramesh was a tenant under him in respect of House No.C-30, Badli Extn. No documentary evidence was collected by the prosecution to prove that Naresh Kumar was actually the owner of the earlier said house. It is contended that the appellants were lifted from Badli Chowk, kept in wrongful confinement, mercilessly beaten up along with PW-2 and then falsely implicated in the case by the police.

28. With regard to the alleged recovery, the learned counsels for the appellants Devender and Rakesh contend that no discovery was affected and no fact was discovered in pursuance of the confessional statement alleged to have been made by these appellants. The confession and the recovery, if any, made at the instance of appellant Ramesh Singh Bisht was not admissible against them. The learned counsel for appellant Ramesh Singh Bisht submits that no independent witness was joined by

the police at the time of the alleged recovery affected in pursuance of the confessional statement Ex.PW-10/B. Section 27 of the Indian Evidence Act, 1872 (the Evidence Act) admits only so much of the information given by an accused which distinctly relates to the facts discovered in pursuance of the information. The learned counsel for appellant Ramesh Singh Bisht contends that recovery of an object has to be distinguished from the fact thereby discovered. Referring to a celebrated judgment of the Privy Council in **Pulukuri Kottaya & Ors. v. Emperor** AIR 1947 PC 67, the learned counsel urges that in pursuance of the information provided, if any fact is discovered which connects the accused with the commission of the offence, then only the fact discovered becomes relevant. In the instant case, the alleged recovery of the articles does not become a fact discovered as the articles allegedly recovered do not indicate that the appellant was a perpetrator of the crime or that he had any role to play in the same.

29. We shall deal with the recovery of the three articles, that is, shirt, belt and red and black colour PVC electric wire one by one to see whether the same connects any of the appellants with the commission of the offence so as to amount to a fact discovered within the scope of Section 27 of the Evidence Act, 1872.

30. First of all, a perusal of the confessional statement Ex.PW-10/B shows that the appellant Ramesh Singh Bisht disclosed that he had kept the clothes of the deceased in his room at C-30, Badli Extn.

31. It is highly improbable that an accused after committing a gruesome crime of murdering a person would keep the clothes of the deceased in his own room so as to be easily caught by the police. When a person/persons could dispose of the dead body, he/they could also easily dispose of or even destroy the shirt. Moreover, as per the recovery memo Ex.PW-13/A, a brown and grey colour shirt allegedly belonging to the deceased was got recovered by appellant Ramesh Singh Bisht. PW-17 IO of the case did state that the shirt belonged to the deceased. He has, however, not given the source of this information. The IO himself was not related to the accused. No evidence whatsoever was collected by the police to prove that the shirt Ex.P-2 allegedly recovered at the instance of appellant Ramesh Singh Bisht actually belonged to the deceased.

Thus, the alleged recovery of the shirt does not amount to a fact discovered within the meaning of Section 27 of the Evidence Act and consequently, it is of no consequence.

32. Now we turn to the recovery of the red and black PVC electric wire and the leather belt. Section 25 of the Evidence Act takes any confession made to a police officer out of the purview of consideration. Similarly, Section 26 of the Evidence Act bars admissibility of any confession made by a person to any person while he is in police custody unless it is made in the immediate presence of a Magistrate. The purpose of imposing a ban upon the admissibility of confessions made to a police officer or made to any other person while the accused is in police custody, is because of the fact that the legislature thought that a person under police influence might be induced to confess his guilt by undue pressure or coercion. The proviso in the shape of Section 27 has been provided because discovery of a fact pursuant to a confessional statement provides an assurance about the genuineness of the information or confession made by an accused.

33. In **Pulukuri Kottaya,** the Privy Council very vividly brought forward the distinction between the object discovered and discovery of a fact in pursuance of an information provided by a person accused of an offence while he is in police custody. Their Lordships observed as under:-

> "Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a Police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The section seems to be based on the view that if a fact is actually discovered in cones quence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but clearly the extent of the information admissible must depend on the exact nature of the fact discovered

to which such information is required to relate. Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw, for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the

offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informent."

34. Turning to the facts of the instant case, as per the prosecution, the legs of the dead body were tied with an electric wire. PWs 6, 12, 14, 16 and 17 are the witnesses to the recovery of the dead body whereas PWs 10,13 and 17 are the witnesses to the recovery of the red and black wire at the instance of appellant Ramesh Singh Bisht. A perusal of the rukka Ex.PW-1/C written by Inspector Sanjeev Kumar (PW-17), IO of the case shows that the same is curiously silent about the colour of the wire with which the legs of the dead body were tied. In the recovery memo, the colour of the electric wire with which the dead body was tied and which was allegedly deposited in the *malkhana* as mentioned is red, black, yellow and blue. PWs 6, 12 and 14 are silent about the legs of the dead body being tied with any electric wire. However, PW-14 did depose about the seizure of an electric wire and converting it into a packet after sealing it with the seal of 'SK'. So much so, PW-17 also simply deposed about tying of the legs of the dead body with an electric wire and seizure of the wire along with other articles. Thus, he was silent as to the colour of the wire with which the legs of the deceased were tied.

35. May be that the colour of the electric wire with which the deceased's legs were tied at the time of recovery of the dead body was not thought of much importance by the IO and the other witnesses and even if it is believed that the legs of the dead body were indeed tied with a red, black, yellow and blue electric wire, we have to see whether the recovery of a similar red and black wire can be believed and if so, whether the same is of any consequence. PW-10 HC Dalvir, PW-13 HC Pawan and PW-17 Inspector Sanjeev Kumar, IO are the witnesses regarding the alleged recovery at the instance of appellant Ramesh. PWs 10, 13 and 17 on this aspect deposed about the making of the confessional statement Ex.PW-10/B by appellant Ramesh.

36. Thus, apart from the fact that there is no independent witness to the alleged recovery of the leather belt and red and black PVC wire, the same do not amount to any fact discovered under Section 27 in view

of the law laid down in *Pulukuri Kottaya* which has been relied on and referred to with approval by the Supreme Court in its various decisions including **Harivadan Babubhai Patel v. State of Gujarat** (2013) 7 SCC 45 and **Rumi Bora Dutta v. State of Assam** (2013) 7 SCC 417.

37. The leather belt Ex.P-3 was an ordinary leather belt. It was not even shown to PW-9 (Dr. K. Goel) who conducted postmortem examination of the dead body to determine as to whether the ligature mark corresponded to that leather belt Ex.P-3 or that the same was used to strangulate the deceased. Even if it would have been opined to be so by the autopsy surgeon, at the most, it could have been used only as a corroborative piece of evidence. Similarly, as stated earlier, the colour of the PVC electric wire with which the legs of the dead body were tied was not mentioned in the rukka. Recovery memo Ex.PW-14/B which states about the dead body and the articles recovered from the dead body reveals that it was a red, black, yellow and blue electric wire which was seized from the dead body, whereas the PVC electric wire which was got recovered in pursuance of the alleged confessional statement made by appellant Ramesh Singh Bisht was only a red and black electric PVC wire. The wire recovered as also the one used to tie the legs of the dead body are ordinary electric wires. Merely the recovery of a red and black PVC wire, on the authority of Pulukuri Kottaya, does not amount to discovery of a fact and thus the same is also of no consequence.

38. Now we turn to the oral evidence with regard to the place of incident and extending of beatings to the deceased by the three appellants and the POs. Statement of PW-2 Raju Kumar with regard to the beatings extended by the appellants is extracted hereunder:-

> "..... In the month of February 2008 all the accused persons namely Ramesh, Parmod, Devinder & Rakesh were giving beatings with fist, legs & belt blows to Ram Mohan (since deceased) at Badli in a room. The accused persons gave beatings to Ram Mohan as he demanded a sum of Rupees from Ramesh Thekedar. Ramesh Thekedar had also levelled allegations against Ram Mohan that Ram Mohan had committed the theft of CDs. When we saw while beating the deceased by the accused persons Vinod Kumar was also with me. The accused Ramesh threatened me and Vinod Kumar that if myself and anybody else will demand the money for the work done by them, in that case the labourer who demands the money will be having the similar fate as of Ram Mohan and Ramesh also threatened us that we should not disclose about the incident to anybody. Due to the fear I did not disclose the occurrence to anybody...."

39. It is true that in cross-examination PW-2 admitted that about fifteen other boys along with him were questioned by the police with regard to the incident. He was candid enough to admit that he and other boys were detained in PS S.P. Badli for 3-4 days for inquiry. The police did cite another eye witness to the incident in addition to PW-2. The police is not expected to cite a large number of witnesses to prove a particular fact. The discretion of the investigating officer in merely citing two witnesses, in the circumstances of the case, cannot be faulted. PW-2 boldly stood the test of cross-examination. He denied the suggestion that he was beaten by the police officials or was made to confess his guilt. He admitted, which in fact is the case of the prosecution that the arrest memos in respect of the three appellants were signed in the PS. PW-2 was dependant for his bread and butter on appellant Ramesh. Moreover, he had seen the fate of the deceased Ram Mohan and therefore, there was nothing unusual in him not disclosing the factum of the beatings by the appellants to the police. PW-2 gave vivid details of the beatings. In cross-examination, he gave detailed description of the rooms and how he saw the appellants and two others giving beatings to the deceased. Unfortunately, the other eye witness (Vinod) could not be produced being untraceable. In view of PW-2 having successfully stood the test of cross-examination, we see no reason to disbelieve his testimony with regard to appellants giving fists, legs and belt blows on the person of the deceased Ram Mohan. These injuries are further corroborated by the postmortem report vide injury no.2 which stated *"diffused bruises coalesced all over front, lateral and back of left arm (clots were present underneath the skin), lateral aspect of right arm and scattered at places over back of chest, diffuse."*

40. Presence of PW-2 at the place of incident, that is, C-30, Badli Extn., to some extent stands corroborated by the testimony of PW-3 who was the landlord of the house. It is true that the prosecution did not collect any evidence to prove that PW-3 was the actual owner of the

house or that appellant Ramesh was actually a tenant under him in respect of House No.C-30, Badli Extn. At the same time, it has to be borne in mind that many of the landlords, particularly, in unauthorised colonies do not enter into any written agreement of tenancy. People do not even possess evidence of ownership in respect of a house located in unauthorised colonies. In such cases, the court has to see the value to be attached to the testimony of such witnesses. PW-3 categorically deposed that the house was let out to appellant Ramesh and he along with his labourers used to stay in the house. He was candid enough to admit that he was unable to identify the two other appellants or the other labourers who were staying in the house let out to appellant Ramesh. There is a ring of truth in the testimony of PW-3. PW-3's statement with regard to the house being taken on rent by appellant Ramesh is corroborated by PW-2. Therefore, I see no reason to disbelieve the evidence of PWs 2 and 3 that appellant Ramesh had taken House No.C-30, Badli Extn. on rent, which was being used for the purpose of housing the labourers working with him.

41. It has been consistently held by the Supreme Court that in the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence which is important, as there is no requirement in the law of evidence that a particular number of witnesses must be examined in order to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise. The legal system has laid emphasis on the value of the evidence provided by each witness, as opposed to the multiplicity or plurality of witnesses. It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been provided by Section 134 of the Evidence Act. (**R. Shaji v. State of Kerala,** Criminal Appeal No.1774 of 2010, decided on 04.02.2013; **Namdeo v. State of Maharashtra** (2007) 14 SCC 150; **Bipin Kumar Mondal v. State of West Bengal** (2010) 12 SCC 91 and **Kishan Chand v. State of Haryana** (2013) 2 SCC 502).

42. Hence, we hold that the prosecution has proved beyond all reasonable doubts that the three appellants along with two others (POs) had given beatings to the deceased with fists, legs and belt. But, at the same time, there is no shred of evidence to show that the appellants or any one of them was a party to the strangulation of the deceased. No evidence has been produced to show that the appellants had disposed of the dead body or had any knowledge of the dead body being present near the railway track between ganda nala and road. Thus, the Trial Court fell in grave error in admitting the inadmissible evidence while convicting the appellants for the offence punishable under Sections 302/201/34 IPC, rather than for giving only beatings with a blunt object. The appellants undoubtedly are guilty for the offence punishable under Section 323 read with Section 34 IPC.

43. Thus, the appeals are liable to be allowed. The appellants' conviction for the offence punishable under Sections 302/201/34 IPC is hereby set aside and on the other hand, the appellants are convicted for the offence punishable under Section 323 read with Section 34 IPC. The appellants are sentenced to undergo RI for a period of one year each and to pay fine of Rs. 1,000/- each or in default of payment of fine to undergo SI for a period of three months.

44. The appellants are in custody for over a period of six years. Thus, they have already undergone the sentence including the sentence in default. They shall be released forthwith, if not required in any other case.

45. Pending applications, if any, also stand disposed of.

46. Copy of the order be sent to the Superintendent of Jail for information.

ILR (2013) VI DELHI 4499
W.P. (C)

VINOD KUMAR GUPTA .....PETITIONER

VERSUS

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

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P,(C) NO. : 6878/2013 DATE OF DECISION: 19.11.2013
CM. NO. : 14901/2013

Service Law—Armed Forces—Deputation—Petitioners sent on deputation to NSG for 3 years subject to pre-mature repatriation on unsuitability—By way of impugned orders, petitioners were repatriated to their parent department—Repatriation challenged by petitioners merely on the ground that deputation of three other doctors was extended to 5 years, so petitioners are also entitled to the same relaxation—Held, since indisputably the petitioners accepted the deputation that contained specific stipulation of 3 years tenure and the extension granted to the other three doctors was in terms in with a policy then existing and not applicable to the petitioners as the same was reviewed, petitioners cannot claim to have been discriminated against as no person has right to proceed of remain on deputation.

An attempt has been made to press the plea of discrimination given the extension of the tenure to the three doctors noted above. However, we noted above that the extension was granted to them under the then extant policy. The petitioners unfortunately cannot fault this extension as it was in terms of the policy which was thereafter reviewed. **(Para 13)**

It is trite that no person has a right to proceed or remain on deputation. In this regard reference can be made to the pronouncement of the Supreme Court in (2005) 8 SCC 394 **Union of India through Government of Pondicherry & Anr. Vs. V. Ramakrishnan & Ors.** **(Para 15)**

The petitioners proceeded on deputation fully knowing that they were so proceeding only for a period of three years. Their unconditional acceptance of the offer of appointment binds them and they are estopped from claiming a right to any extension thereof. **(Para 16)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Shruti Agarwal, Advocate .

FOR THE RESPONDENTS : Mr. C.M. Goyal, Adv. with Mr. Ravichandran, Team Commander, NSG.

CASE REFERRED TO:

1. *Union of India through Government of Pondicherry & Anr.* vs. *V. Ramakrishnan & Ors.* (2005) 8 SCC 394.

RESULT: Writ Petition Dismissed.

GITA MITTAL, J (Oral)

1. Counter affidavits have been placed on record. Learned counsel for the petitioner submits that no rejoinder is necessary.

2. With the consent of both the parties, matter has been heard.

3. The issue raised in these two writ petitions are identical and therefore are taken together for consideration. Both the petitioners have challenged their repatriation. The petitioners complain that they have been discriminated against by the orders of repatriation to their parent department whereby termination of their deputation has been effected after expiry of three years instead of five years and without any justified reason, whereas the three other medical officers of the Assam Rifles have been permitted

a deputation term of five years.

4. The facts giving rise to the present petitions to the extent necessary are briefly noticed hereafter. Both the petitioners were commissioned as Medical Officers with Assam Rifles. Dr.Vinod Kumar Gupta (the petitioner in W.P.(C) No.6878/2013) was sent on deputation to the National Security Guard (NSG) pursuant to order dated 21st December, 2010 wherein it was clearly stipulated that the period of his deputation in the NSG shall be for a period of three years subject to premature repatriation on unsuitability, indiscipline, exigencies of service as well as if any other unforeseen factors so demand. Dr.Satish Kumar (the petitioner in W.P.(C) No.7085/2013) was offered deputation with an identical stipulation. It is undisputed that so far as the first writ petitioner is concerned, his tenure of deputation of three years would come to an end on 30th November, 2013 and in case of second petitioner, the tenure of deputation will expire in January, 2014.

5. It appears that by identical orders made on 24th August, 2012, the NSG informed the authorities of Assam Rifles that the deputation of the petitioners would end on expiry of three years tenure whereupon they would be relieved. It is communicated in the same order that the Ministry of Home Affairs had passed an order dated 26th July, 2012 approving the proposal of the NSG to grant relaxation to Dr.Shailendra Kumar, Dr.Rajesh Kumar and Dr.Bipin Kumar to complete the tenure of five years deputation with the NSG. The petitioners contend that as these three doctors have been permitted to complete the period of five years, the petitioners are also entitled to relaxation for completion of tenure of five years granted to the other three doctors. It is contended that they are also medical officers with the Assam Rifles who proceeded on deputation with NSG in identical circumstances.

6. The respondents have filed counter affidavits before this court explaining not only the policy which governs appointment of persons on deputation with the NSG but also the circumstances in which the three medical officers were permitted a deputation tenure of five years. It is explained that the NSG is the Federal Contingency Force with the Union of India and is 100% deputation force. The personnel are taken from the feeder organizations which consists of the Army, Central Armed Police Forces like CRPF, BSF, CISF, ITBP, SSB and Assam Rifle etc. On the

request of NSG, the feeder organizations sponsor their candidates who are interviewed, trained and inducted for a specified tenure of three years and five years as per the policy of the feeder organization, subject to agreement thereon by the Ministry of Home Affairs. Reference is made to the power of NSG to premature repatriation of an official on grounds of unsuitability, indiscipline and exigency of service etc. given the 'highest standard of discipline' which is required by this organisation.

7. It is undisputed that the petitioners as well as the three other doctors noticed above were selected on deputation to serve with the NSG as Team Commander (Medical). The tenure of stipulation of three years has been mentioned in the offer of appointment made to the petitioners. It is undisputed that the offer of appointment was unconditionally accepted and the officers have so served with the NSG.

8. So far as the policy which governs the deputation tenure is concerned, it is pointed out that the notification in this regard was issued vide HQ NSG L/No.E.305/43/2010/NSG/5997 dated 21st December, 2010 which stipulated the deputation tenure as three years which had been fixed by the Ministry of Home Affairs, the controlling ministry vide their UO No.I-21022/4/2007 Pers-II dated 24th July, 2008.

9. A request was made by the NSG for increasing the deputation tenure of medical officers of the Assam Rifles from the stipulated period of three years to five years. This request was favourably considered by the Ministry of Home Affairs. By a common communication dated 14th October, 2011, the Ministry directed that the deputation tenure of medical officers of Assam Rifles with the NSG would be increased from three years to five years.

10. So far as Dr.Shailendra Kumar, Dr.Rajesh Kumar and Dr.Bipin Kumar are concerned, their deputation period of three years was coming to an end on 31st December, 2011 and 31st January, 2012 respectively. It was during the currency of the policy declaration dated 14th October, 2011 that the extension of their deputation tenure from three years to five years was directed by the NSG enabling these three doctors to complete the period of five years tenure on deputation. It has rightly not been disputed before us that on 31st December, 2011 and 31st January, 2012 when the tenure of these three doctors was coming to an end, the policy

dated 14th October, 2011 was invoked.

11. We are informed that the Assam Rifles had objected to the tenure of the deputation increase to five years from three years of the medical officers. It is also a fact that the deputation period had been increased without consulting the department of Assam Rifles. The matter thus had to be reconsidered by the respondents. On a review of the issue, an order dated 19th March, 2012 was issued by the Ministry of Home Affairs. As such with the approval of the competent authority, the decision was taken by NSG to reduce the deputation tenure of medical officers of Assam Rifles in the NSG from five years to three years. The order specifically notes that the deputation tenure of Assam Rifles' personnel other than the medical officers in the NSG would remain the same.

12. This order dated 19th March, 2012 was applicable to the case of the petitioners. The respondents therefore took the decision to repatriate the present petitioners on expiry of the period of three years. In these circumstances, the decision to repatriate the petitioners cannot be faulted on any legally tenable grounds.

13. An attempt has been made to press the plea of discrimination given the extension of the tenure to the three doctors noted above. However, we noted above that the extension was granted to them under the then extant policy. The petitioners unfortunately cannot fault this extension as it was in terms of the policy which was thereafter reviewed.

14. It is urged by Ms.Shruti Agarwal, learned counsel for the petitioners that they had sent representations to the respondents which should have been favourably considered. The respondents have rejected the same by a communication dated 19th March, 2012 dealing at length with every contention raised by the petitioner. The respondents have also explained the circumstances in which the policy stipulation with regard to deputation tenure so far as medical officers of the Assam Rifles were concerned, was given.

15. It is trite that no person has a right to proceed or remain on deputation. In this regard reference can be made to the pronouncement of the Supreme Court in (2005) 8 SCC 394 **Union of India through Government of Pondicherry & Anr. Vs. V. Ramakrishnan & Ors.**

16. The petitioners proceeded on deputation fully knowing that they were so proceeding only for a period of three years. Their unconditional acceptance of the offer of appointment binds them and they are estopped from claiming a right to any extension thereof.

17. For all these reasons, we find no merit in these writ petitions, which are hereby, dismissed.