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INDIAN LAW REPORTS
DELHI SERIES
2013

(Containing cases determined by the High Court of Delhi)

VOLUME-6, PART-II

(CONTAINS GENERAL INDEX)

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

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

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

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Controller of Publications
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Fax.: 23817876

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

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— Article 226—Demand-cum-allotment Letter (DAL) was received by Petitioner after a delay of three months as she was away to America on account of illness of her father for a few months—Petitioner made entire demanded payment in 3 instalments and last instalment was paid with a delay of 418 days—Petitioner applied for conversion of flat from hire purchase to cash down basis—A sum of Rs. 6,50,000 as demanded by DDA was duly paid and balance payment of Rs. 1,373 was also made by Petitioner—By impugned letter, request for restoration of allotment was cancelled in spite of fact that Petitioner had paid restoration charges as demanded by DDA—As representations of Petitioner were rejected, present Writ Petitioner was filed in HC—Plea taken by DDA, since Petitioner failed to make payment in terms of DAL, allotment stood cancelled automatically is permissible if delay in payment is less than three years—Since Petitioner's case is not covered under policy, delay was not condoned—Held—There was a delay of only one year and two months in making payment—Payment of instalments was not made as Petitioner had made a request for conversion of allotment from conversion of allotment from hire purchase to cash down payment, which admittedly was being processed by DDA and amount as demanded including interest was deposited by Petitioner—In a number of cases, delay of even upto three years has been condoned but DDA not given any defence as to way case of Petitioner could not similarly considered—As per policy of DDA, VC was competent to condone delay in making payment upto three years in deserving case—It is not case of DDA that Petitioner's case was not found to be deserving—Thus, act of DDA in declining to condone delay in making payment is arbitrary and cannot be sustained—Writ of mandamus issued directing DDA to forthwith restore allotment and handover possession of flat in question a period of eight weeks from today—In case, this already allotted to some other person, DDA is directed to allot and deliver possession of another flat with similar area on ground floor in Sector 14, Dwarka, New Delhi Within a period of 12 weeks from today.

V.P. Sunita v. *DDA* *4837*

DELHI DEVELOPMENT AUTHORITY (DISPOSAL OF DEVELOPED NAZUL LAND) RULES, 1981—Rule 4, 5, 8 and 20—Cases of Petitioner for allotment of a site for running a nursery school was cleared by Planning Department of DDA and a site was earmarked in Kondli—For want of a clear approach to site, it was not feasible to establish and run a nursery school at said site—On representation of Petitioner alternative site was identified and in meanwhile Master Plan 2012 came into effect whereby it was laid down that nursery schools may function only as a part of Primary School /Secondary School / Senior Secondary School wherever needed—Practice of providing dedicated nursery school plots in layout plan was discontinued and hence alternative site was refused to Petitioner—Writ Petition filed challenging action of DDA—Plea taken, since Petitioner had applied of a plot for running a nursery school in year, 1997, it's eligibility school be considered on date of application and since plot was identified in year, 2004, Respondent DDA is under obligation to allot same to Petitioner in accordance with provisions of Master Plan in existence at relevant time—Per contra plea taken, since allotment of plot had not yet been made, there was no vested right in Petitioner for allotment of a site for running a nursery school—Held—On account of noting in files, no vested right was created in favour of Petitioner as to allotment of any plot of land for running a nursery school—On coming force of Master Plan—2021, neither Petitioner nor anybody else entitled to allotment of any land from DDA for running a nursery school—Writ Petition accordingly dismissed.

Rishabh Educational Society v. *Delhi Development Authority & Ors.* *4829*

— Delhi Development Authority—Allotment—Petitioner purchased LIG Flat from open market—Petitioner's mother applied for allotment of a plot under Rohini LIG Scheme and was allotted registration in 1981—Petitioner's mother expired in 1994—Petitioner applied for transfer of the said registration in his favour in the year 2000—After some communication in 2003, transfer application of petitioner rejected by DDA on the grounds that

Commodities), with necessary opportunity to present its case or claim that it is real and true owner or beneficial owner of proceeds (or amounts) under seven pay orders, before income tax authorities—That was, in fact, done in this case—M/s. Bansal Commodities clearly had recourse to Section 132 (11), which they took advantage of, though ultimately their view was rejected by income tax authorities in accordance with statutory discretion vested in it—Thus, Section 293 clearly comes into operation in this case—Order u/s 132 effecting a deemed seizure of pay orders as against tax dues of RKA continues to operate till date, having never been set aside in any writ proceeding before this court or Special Leave Petition before SC—Therefore, effect of Present suit would be that order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits present action—Impugned judgment of Learned Single Judge that ownership of seven pay orders lies with M/s. Bansal Commodities and order of CIT i.e. that seven pay Orders are to be utilized as against tax dues of RKA, can't stand together—Writ proceedings u/s 132 having been initiated in 1989 and having attained finality in terms of procedure within that provision being complied with, Section 293 mandates that jurisdiction of civil court with respect to present suit is barred—As far as question of applicability of Section 14 of Limitation Act is concerned, there is sufficient material on record disclosing that plaintiff had been pursuing its remedies under IT Act diligently and Division Bench recorded that proper forum to agitate disputed questions about ownership of seven pay order would be civil court—There has been indeed no lack of bonafides on part of Respondent in filing suit, after said order—In facts of this case, view taken by this judgment will operate harshly on plaintiff—Therefore, liberty granted to said plaintiffs to seek leave to revive writ petition previously disposed off through appropriate application—Appeals allowed subject to liberty reserved to respondents.

Rakesh Kumar Agarwal v. *Bansal Commodities & Ors.* *4579*

INDIAN PENAL CODE, 1860—341/304II IPC—Appellants convicted for having assaulted one Ajay with fists and kicks and thereby causing his death. Conviction challenged inter alia on the grounds that the appellants could not have been convicted of causing death of the victim for neither were they armed with any deadly weapon nor were any repeated blows inflicted on the vital organs of the victim and that the cause of death was opined to be cirrohosis of liver. Held: The injuries found on the body of the deceased were neither sufficient in the ordinary course of nature to result in death nor were they likely to cause death. The death did not take place as a result of the injuries received by him but took place due to the shock consequent to cirrohosis of liver and jaundice after about ten days of the incident. The appellants can therefore, only be held guilty of hurt under Section 323 IPC and not under Section 304 Part—II IPC. Appeal allowed.

Mahender v. *The State (NCT of Delhi)* *4635*

— Ss. 394, 397, 411 120B/392—Held, it is highly unbelievable that witness who had fleeting glance at the driver of the scooter would be able to recognize him after a long time—Accused justified to decline to participate in TIP as they were admittedly shown to the prosecution witnesses in the police station. Also held, that out of Rs.3.28 lacs robbed, only Rs. 25,000/- recovered after three months of incident—Highly unbelievable that accused would retain robbed case intact with their bank slips on it and would not change it—No independent associated at the time of recovery of cash—Money allegedly recovered not in exclusively possession of accused. Also held that when original record was not available and the re-constructed record was incomplete and does not contain statement of accused U/s.313 and statement of defence witnesses, benefit must go to the accused.

Manish v. *State* *4650*

— Sec. 161, Prevention of Corruption Act, 1988—Sec. 5(1)(d)—Held, In the light of conflicting versions and suspicious features on crucial aspects, complainant's version does not appear to be wholly reliable—Neither the demand nor the acceptance

alone is sufficient to establish the offence—Mere recovery of tainted money divorced form the circumstances under which it was paid is not sufficient to convict the accused—The complainant's testimony is lacking to prove that A-1 accepted the bribe amount with the tacit approval of A-2. No other independent public witness was associated in the investigation from the office of the accused where the alleged transaction took place. The prosecution was unable to establish that A-1 and A-2 shared common intention to demand and accept the bribe amount from the complainant. Conviction of the appellants cannot be founded on the basis of inference.

Om Parkash v. *State NCT of Delhi* *4668*

— Section 397/392/34 IPC and 25 Arms Act and under Section 392/34 IPC respectively—In their 313 statements, the appellants admitted their presence in the TSR on the date and time disclosed by the complainant. They also admitted their apprehension by the police soon after the occurrence. They pleaded that an altercation/quarrel had taken place with the complainant over sharing of fare. It did not find favour and was outrightly rejected by the Trial Court with cogent reasons. The assailants were named at the first instance by the complainant in the statement (Ex.PW-3/A) and role played by each of them was described with detailed account. The assailants were apprehended by the police on the pointing our of the complainant soon after the incident and the robbed articles were recovered from their possession.—FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. Early reporting of the occurrence by the informant with all its vivid details gives an assurance truth of the version.—The complainant Narinder had no prior acquaintance with the assailants and did not nurture any ill-will or grievance to falsely implicate them in the incident.—In my view these discrepancies highlighted by the counsel are not significant to away the cogent and trustworthy testimony of complainant—Narinder Singh who had no ulterior motive to fake the incident of robbery. Non-lifting of finger prints from the knife is not fatal A-1 did not explain the purpose to keep

with him a 'deadly weapon prohibited under Arms Act. He further failed to explain the purpose of his presence in the TSR at that odd hours. Robbed currency notes were recovered from the possession of Kanti Giri who is no more. The Trial Court has dealt with all the relevant contentions A-1 and has given cogent reasons to discard them. I find no sufficient or good reasons to deviate from the findings which are based on fair appraisal of the evidence. Admittedly, A-2 was a TSR driver who drove TSR No. DL-IR-2454 in which the incident of robbery took place.—There are no allegations that he in any manner assisted robbed article or weapon was recovered from his possession at the time of his apprehension. His presence in the TSR being a driver was natural and probable and that per se cannot be a factor to held him vicariously liable for the acts of other assailants—No adverse inference can be drawn that A-2 being a TSR driver was in hand and glove with other assailants and in any manner facilitated the commission of crime. Since the other assailants and in any manner facilitated the commission of crime. Since the other assailants were armed with knives possibility of A-2 not to intervene due to fear cannot be ruled out. Sine A-2 did not participate in the commission of crime and no over act was attributed to him and in the absence of any recovery of weapon or robbed article from his possession, his conviction under Section 392 IPC cannot be sustained and he deserves benefit of doubt—The appeal filed by A-2 (Crl.A. No. ; 262/2000) is accepted and his conviction and sentence are set aside. Appeal preferred by A-1 (Crl.A. No. : 288/2000) is unmerited and is dismissed. A-1 (Pramod Kumar) is directed to surrender and serve the remaining period of sentence.—The appeal stand disposed of.

Pramod Kumar v. *State* *4505*

— Sections 307, 324, 323 & 34—The case of the prosecution as projected in the charge-sheet was that on 13.06.1999 at 04.30 P.M. in front of House No. 17/113, Geeta colony, the appellants with their associates in furtherance of common intention inflicted injuries to Ram Saran Dass, Shyam Sunder and Kishan Malik in an murder them. Daily (DD) No. 25A (Ex.PW-6/C)

was recorded at 04.50. P.M. at PS Geeta Colony on getting information about a serious quarrel at House No.17/113. Geeta Colony.—After completion of the investigation, a charge-sheet was filed in the Court. A-1 and A-2 were duly charged and brought to trial. In order to establish their guilt, the prosecution examined fifteen witnesses and produced medical. In their 313 statement, the appellants denied their complicity in the crime and alleged false implication. The trial resulted in their conviction for the offences mentioned previously giving rise to the filing of the present appeal.—Learned Senior Counsel for the appellants 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 testimonies of interested witnessed without independent corroboration. No specific role in the occurrence was attributed to A-1. Vital discrepancies and improvement in the evidence were ignored without sound reasons. The complainant had attempted to implicate the appellants' father but during investigation his role could not be ascertained and no charge-Sheet was filed against him. Learned Addl. Public prosecutor urged that the injured persons have given consistent version and had no ulterior motive to falsely implicate the accused.—On scrutinizing the testimonies of the witnesses, it stands established that A-1 and A-2 were among the assailants who caused injuries with iron and hockey to PW-1 (Ram Saran Dass) and PW-2 (Shyam Sunder). Both the victims have proved their involvement in the incident beyond reasonable doubt. Despite searching and lengthy cross-examination, their testimonies could not be shattered by extracting material inconsistencies or discrepancies. The victims had no prior ill-will or enmity to falsely implicate the appellants. Nothing emerged on record if there was any political rivalry forcing the injured to spare the real culprits and to falsely rope in the appellants.—The fact that PW-1 and Pw-2 sustained injuries at the time and place of occurrence, lends support to their testimony that they were present during the occurrence of history of hostile relations, on valid reason exists to discard the testimony of injured witnesses which is accorded a special status in law.—Recover of crime weapons iron rod (Ex.P-2)

and hockey (Ex.P-3) is an incriminating circumstance. Minor contradictions, improvements and discrepancies, highlighted by the learned Senior Counsel are not of serious magnitude to affect the core of the prosecution case and to discard their testimonies in its entirety. When such kind of sudden incident happens and injuries are inflicted with quick succession in short time, it is too much to expect from a witness to narrate the exact injuries caused on a particular location of the victim/injured. Mere marginal variations in the statements cannot be dubbed as improvements—A-1's nominal roll reveals that the suffered incarceration for two years and four days besides earning remission of seven months and three days as on 14.07.2002 before enlargement on bail on 12.11.2002. He was not involved in any other criminal case and his jail conduct was satisfactory. He was aged about nineteen years on the day of occurrence. Considering his role in the incident and other mitigating factors, the period already spent by him in custody is taken as substantive sentence. He, however, will have to pay Rs. 50,000/- (Fifty Thousand Rupees) as compensation to the victim Shyam Sunder. A-2's nominal roll reveals that before his substantive sentence was suspended on 21.03.2003, he had undergone three and a half years including remission in custody. A-2 is the main assailant who inflicted head injuries to PW-2 which were 'dangerous' in nature. The initial confrontation had taken place with his brother A-1 when PW-1 (Ram Saran Dass) objected his conduct to pass comments upon ladies. Without ascertaining the true facts, he (A-2) rushed to the spot with him and inflicted injuries to PW-1 (Ram Saran Dass). PW-2 (Shyam Sunder) who had no fault at all and had not even intervened at the time of initial altercation/confrontation was not spared and caused head injuries by iron rod putting his life in danger. The offence was intentional and deliberate and for that reason, A-2 deserves no leniency. His conviction and sentence are maintained. The appeal preferred by him is dismissed. He shall surrender before the Trial Court on 03.12.2013 to serve the remaining period of sentence. A-1 shall deposit compensation of Rs. 50,000/- in the Trial Court within fifteen days besides depositing the fine imposed by the Trial Court (if unpaid) and it

on the ground that the dying declaration was not genuine and that the victim had not complained to any authority earlier about the harassment or torture allegedly caused to her by the appellant. Held: No evidence has come on record that the dying declaration was the result of any tutoring, prompting or imagination. There are no sound reasons to disbelieve the testimony of the SDM who being an independent witness holding high position, had no reason to do anything which was not proper. The appellant also has no foundation/basis to doubt the mental disposition of the victim to make statement as neither he nor any of his family members accompanied her to the hospital or remained with her till death. Merely because the deceased had not told close friends about the dowry or harassment or had not complained about the same to any authority, does not positively prove the absence of demand or dowry. The evidence regarding demand of dowry is established in he dying declaration which is cogent and reliable. Appeal is unmerited and dismissed.

Ashok Kumar v. *State* *4618*

— Section 454-392-394-397-34 Arms Act—Section 25—Statements of witnesses recorded prior to apprehension of culprits, but none of the three witnesses named the culprit as suspect and they did not describe broad physical features/description of assailant even though A1 was close relation of complainant and his family members—Even though the incident was narrated minutely, but the named of accused not mentioned—Complainant had direct confrontation with the culprits for sufficient duration and had sufficient and clear opportunity to see them—A2 to A5 also residing in the locality/vicinity since long—One of the witnesses did not identify any of the accused in the Court—Inconsistent version given by the prosecution witnesses as to apprehension of one of the accused and recovery—TIP could not take place because IO did not bring similar property to be mixed with the case property—Adverse inference to be drawn. Held, the FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. There object of insisting upon

prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consulations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

Kamlesh Kumar @ K.K. v. *The State (Govt. of N.C.T. of Delhi)* *4704*

— Section 397—For attracting the provision Under Section 397 IPC the individual role of the accused has to be considered in relation to the use or carrying of a weapon at the time of robbery.

Mukesh Kumar v. *State Govt. of N.C.T. of Delhi* ... *4712*

— Sec. 376—Sentence—Sentencing for any offence has a social goal—Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed—It serves as a deterrent—The principle of proportionality between an offence committed and the penalty imposed are to be kept in view it is obligatory on the part of the Court see the impact of the offence on the society as a whole and its ramifications as well as its repercussions on the victim.

— Rape is one of the most heinous crimes committed against a woman—It insults womanhood—It dwarfs her personality and reduces her confidence level—It violates her right to life guaranteed under Article 21 of the Constitution of India.

— A minimum of seven years sentence is provided under Section 376(1) of the Indian Penal code (IPC—Sentence for a term of less than seven years can be imposed by a court only after

tax authorities—That was, in fact, done in this case—M/s. Bansal Commodities clearly had recourse to Section 132 (11), which they took advantage of, though ultimately their view was rejected by income tax authorities in accordance with statutory discretion vested in it—Thus, Section 293 clearly comes into operation in this case—Order u/s 132 effecting a deemed seizure of pay orders as against tax dues of RKA continues to operate till date, having never been set aside in any writ proceeding before this court or Special Leave Petition before SC—Therefore, effect of Present suit would be that order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits present action—Impugned judgment of Learned Single Judge that ownership of seven pay orders lies with M/s. Bansal Commodities and order of CIT i.e. that seven pay Orders are to be utilized as against tax dues of RKA, can't stand together—Writ proceedings u/s 132 having been initiated in 1989 and having attained finality in terms of procedure within that provision being complied with, Section 293 mandates that jurisdiction of civil court with respect to present suit is barred—As far as question of applicability of Section 14 of Limitation Act is concerned, there is sufficient material on record disclosing that plaintiff had been pursuing its remedies under IT Act diligently and Division Bench recorded that proper forum to agitate disputed questions about ownership of seven pay order would be civil court—There has been indeed no lack of bonafides on part of Respondent in filing suit, after said order—In facts of this case, view taken by this judgment will operate harshly on plaintiff—Therefore, liberty granted to said plaintiffs to seek leave to revive writ petition previously disposed off through appropriate application—Appeals allowed subject to liberty reserved to respondents.

Rakesh Kumar Agarwal v. *Bansal Commodities & Ors.* *4579*

MOTOR ACCIDENT CLAIM—Claimant was working as Hawaldar in Indian Army—The Claims Tribunal awarded compensation of Rs.12,34,260/- —Both sides filed appeals i.e. the claimant claiming that compensation was less and the

insurance company claiming that the compensation excessive. The Claimant was liable to be discharged from his service on completion of 24 years of service—The same was however extendable by 2 years by the Screening Committee—Thus the claimant was entitled to an extension of 2 years if he had not suffered the injury resulting in placing him in low medical category—Held, claimant would be entitled to loss of income for two years. Despite opportunities the claimant did not produce reliable evidence to prove extent of his functional disability suffered by him even after grant of opportunity to lead additional evidence—From the disability certificate seen that there was shortening of left leg by 1.5 cm—Functional disability of claimant taken to be 30%, as after his retirement he could have got an employment as a Security Supervisor or a Similar job in any security agency or private sector.

Tek Bahadur v. *Ram Bharose & Ors.* *4804*

PREVENTION OF CORRUPTION ACT, 1988—Section 13 (2), 13 (1) (d)—Framing of Charge—Prosecution case that, Mansarowar Co-operative Group Housing Ltd. was fraudulently managed by Madhu Aggarwal and her husband G.C. Aggarwal, the accused, on strength of forged documents and fake members—Bisht, dealing assistant, Man Singh, AR and Devakar, RCS all co-accused conspired with Madhu Aggarwal and G.C. Aggarwal and orders without making proper verification regarding existence of society and its office bearers/ members and approved list of fictitious/non-existing members of the society—Address of the society belonged to accused/ petitioner Ajit Singh who confirmed having received communication from DDA—Trial Court framed charges u/s 419, 420, 467, 468, 471, r.w. S. 120B IPC and S. 13 (2), 13 (1) (d) of P.C. Act—Held, well settled that charge cannot be framed merely on suspicion against accused however, at stage of framing charge, court is only to take a tentative view on the basis of material on record—If court of view that accused might have committed offence, it would be justified in framing charge against the accused—On facts held, material collected raises strong suspicion that petitioner part of conspiracy to obtain

allotment of land by main accused G.C. Aggarwal—Special Judge fully Justified in framing charges— Petition dismissed.

Ajit Singh v. *CBI* *4552*

— Sec. 5(1)(d)—Held, In the light of conflicting versions and suspicious features on crucial aspects, complainant's version does not appear to be wholly reliable—Neither the demand nor the acceptance alone is sufficient to establish the offence—Mere recovery of tainted money divorced form the circumstances under which it was paid is not sufficient to convict the accused—The complainant's testimony is lacking to prove that A-1 accepted the bribe amount with the tacit approval of A-2. No other independent public witness was associated in the investigation from the office of the accused where the alleged transaction took place. The prosecution was unable to establish that A-1 and A-2 shared common intention to demand and accept the bribe amount from the complainant. Conviction of the appellants cannot be founded on the basis of inference.

Om Parkash v. *State NCT of Delhi* *4668*

— State has come in appeal to question the correctness of a judgment—By which the respondent—Devender Singh was acquitted of the charges. The respondent has contested the appeal.—On 29.03.2001, Ram Kumar lodged a complaint in Anti Corruption Bureau alleging demanded of Rs.11,000/- as bribe by Mr. Panwar, AE, DDA to clear payment for execution of work order in the sum of Rs. 21.950/-, The complainant was able to arrange Rs. 6,000/- for payment. Insp.N.S.Minhas carried out pre-raid formalities and associated Rs. Chopra as panch witness. Statement of the witnesses conversant with the fact were recorded. After completion of investigation, a charge-Sheet under Section 7/13 POC Act and 120 B IPC was submitted in the Court in Which both Devender Singh and Harpal Singh were Charge-sheeted. During the proceedings, Harpal Singh expired and proceedings against him were dropped as abated. The prosecution examined fifteen witnesses to prove the charges. In 313 statement, the appellant pleaded false implication. After appreciation of evidence and considering the

rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted the appellant as the prosecution was not able to establish the charges beyond reasonable doubt.—The moot question before the Trial Court was if complainant—Ram Kumar was entitled to receive Rs.21,950/- from DDA for execution of work order for the payment of which demand of Rs. 11,000/- was allegedly made as illegal gratification. The burden was heavily upon the prosecution to establish that it was legal remuneration which the complainant—Ram Kumar was entitled to receive and the respondent or his associate—Harpal Singh was legally competent in their official capacity to sanction or clear the payment. In the complaint (Ex.PW-13/A) Complainant did not give detailed information as to when the work order for boring a tube-well was awarded to him, when it was executed. PW-2 (R.K. Bhandari), who accorded section under 19, POC Act for Devender Singh's prosecution admitted in the cross-examination that he had not seen examined if any work was entrusted to the complainant or it was executed by him. He revealed that some documents were on record to show that no work was entrusted or executed by the complainant. PW-6 (Mam Chand), So, Horticulture from October, 1994 to 17.04.2000/- Rs.700/-.—The work for which payment was being claimed by the complainant had already been done by other contractor—Ved Prakash. Apparently, there was no cogent and worthwhile evidence on record to establish if pursuant to work order (Ex.PW-10/A) dated 04.01.2001 any work was carried out by the complainant to claim payment of Rs.21,950/-.—No doubt, a public officer has no right to demand any bribe; but when he is hauled up to answer a charge of having taken illegal gratification, the question whether any motive, for payment or acceptance of bribe at all existed is certainly relevant and material fact for consideration. It is an important factor bearing on the question as to whether the accused had received the gratification as a motive or reward for doing or forbearing to do any official act or for showing any favour or disfavour in the exercise of his official functions.—The prosecution witnesses have given divergent version as to when and by whom

the bribe amount was demanded.—The delay in claiming the payment and lodging the report has remained unexplained. Complainant,s statement could not be corroborated by any independent public witness as PW-13 (Ram Swaroop Chopra) joined as panch witness expired before he could be cross-examined by the appellant.—In the absence of demand of bribe which the prosecution could not establish beyond reasonable doubt, there was no cogent material to base conviction under Section 7/13 POC Act. The demanded and acceptance of the money for doing a favour in discharge of official duties is sine qua to the conviction. Mere recovery of tainted money from the accused by itself is not enough in the absence of substantive of the demand and acceptance. It is also acceptance. It is also settled in law that statutory presumption under Section 20 of the Act can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that the money was accepted other then the motive or reward as stipulated under Section 7 of the Act. It is obligatory on the part of the Court to consider the explanation offered the accused under Section 20 of the explanation has to be on the anvil of preponderance of probability. It is not to be proved all reasonable doubt. From the very inception, the defence of the appellant was that the money was thrusted in the pocket and was not meant as bribe for clearance of the bill. Appeal against the acquittal is considered on slightly different parameters to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this court is cautious in taking away that right. The presumption of innocence of the accused is further strengthened by his acquittal after a full trial, which assumes critical importance in our jurisprudence. The Court have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, should be adopted.—The appeal is unmerited and is consequently dismissed.

State (NCT of Delhi) v. *Devender Singh* *4511*

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTREST ACT, 2002—Section 14(2)—Petitioner sought quashing of orders passed by ACMM under Section 14(2) of the Act directing the receiver to take possession of the petitioner's land—Petitioner claimed that the land in question is agricultural land so the provision of SARFAESI Act not applicable—Respondent contended that the impugned order is amenable to appeal under Section 17 of the Act—Held, since no agricultural activity is being carried out on the land in question and rather a banquet hall has been constructed on the land and commercial activity being done, It ceases to be land under Section 31 (i) of the Act, so provisions of the Act are applicable—Further Held, in view availability of alternative efficacious remedy, the writ petition is not maintainable.

Bijender Kr Gupta v. *Corporation Bank of India*.... *4730*

SERVICE LAW—Selection Process—Rejection of candidature to the post of Naik GD in the Indian Coast Guard on the medical grounds—Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorari and direction to quash the order dated 12th February, 2013 passed by respondent No. 3/Recruiting Officer Coast Guard whereby the candidature of the petitioner for the post of Naik GD in the Indian Coast Guard pursuant to a Selection Process conducted in 2012 was rejected on the medical grounds—Being aggrieved, the petitioner assails the result of the medical examination conducted at INS Chilka, Nivarani Hospital on 12th February, 2013 whereby he was found medically unfit for enrolment on the ground that he was suffering form 'NYSTAGMUS'—Petitioner placed reliance on reports of his medical fitness—He also complains of failure of the respondents to grant review to him—Court directed the petitioner to appear before the Commandant, Army Hospital (Research and Referral), Delhi Cantt pertaining to his medical examination with all records in his possession—Pursuant to the above directions, the petitioner was medically examined by the Board of officers of the Army Hospital, (Research and Referral)—Board examined the candidate and findings are as

follows:—(a) His neurological evaluation shows normal visual acuity and colour vision. (b) His pupils are bilaterally equal and reacting to light with normal accommodation reflex. His extra ocular movements are full. (c) There is no esotropic or exotropic eye defect. His saccades and pursuits are normal. There is no primary of gaze evoked nystagmoid movements. There is no motor, sensory or cerebellar bysfunction—Opinion of the Bord of officers:—(a) A case of nystagmus (Inv)—NAD (b) he is fit for nystagmus".

— Held—It is manifest from the above that no abnormality detected and the petitioner did not have the problem of nystagmus—In view of the above, no objection remains to petitioner's recruitment to the post of Navik GD in the Indian Coasts Guard—In view of thereof, order dated 12th February, 2013 passed by respondent No. 3 cancelling the petitioner's candidature to the post of Navik GD in the Indian Coast Guard is hereby set aside and quashed—Respondents are directed to proceed in the matter of petitioner's recruitment in accordance with prescribed procedure and to pass appropriate orders in this regard within a period of two weeks from today—Respondents shall ensure that full opportunity of training is facilitated to the petitioner and he is permitted to complete his training at the earliest—Petitioner shall be entitled to notional seniority and he shall be placed above his batch mate who was immediately below him in the order of merit list that was prepared at the time of original recruitment—Petitioner shall be entitled to the benefit of seniority for his pay fixation—Petitioner shall not be entitled to back wages—Orders in this regard shall be passed within four weeks and communicated to the petitioner—Writ petition is allowed in the above terms.

Satish v. *Union of India & Ors.* *4561*

— Armed Forces—Assured Career Progression Scheme—Failure to grant benefits form the date of completion of 12 years of regular service without promotion—Brief Facts—Petitioner who was appointed as Constable on the 3rd of August, 1983 with the respondents completed 12 years of service in the year

1995. ACP Scheme was introduced on 9th August, 1999 by the respondents, benefit whereof were extended to the CISF personnel effectuating the recommendations of the Fifth Central Pay Commission—The same becomes applicable for the CISF personnel pursuant to CISF Cricular No.ESTT—I/16/2000 dated 18th February, 2000 Disciplinary proceedings against the petitioner culminated in passing of the order dated 16th June, 2000 imposing the penalty on the petitioner for dismissal from service—Petitioner invoked the writ jurisdiction of the Madras High Court wherein the orders passed by the disciplinary authority, appellate authority and the revisional authority were set aside and quashed—Respondents were directed to reinstate the petitioner in service forthwith "with back-wages, continuity of service and all order attendant benefits"—Because of the intervention of this order of dismissal, petitioner was prevented from undergoing the promotion cadre course—While the disciplinary proceedings were on by an order dated 24th April, 2000, the respondents made an offer to the petitioner to undergo the promotion cadre course for the first time to which petitioner showed his unwillingness—After resumption of duties, the respondents made a second offer to the petitioner to participate in the promotion cadre course being conducted from 21st May, 2007 to 7th July, 2007—Petitioner undertook the course but was unsuccessful in the drill and weapon training and consequently was declared failed—The last and final opportunity available to the petitioner to undertake the promotion cadre course was successfully availed by the petitioner between 24th June, 2008 to 27th June, 2008—Case of the petitioner was considered by the Screening Committee and he was given the first financial upgradation under the ACP Scheme vide order dated 7th February, 2009 with effect from 27th January, 2009—Petitioner is primarily aggrieved by the fact that the respondents failed to grant him the benefit of ACP Scheme with effect from 9th August, 1999 when it was promulgated and when the petitioner had already completed all eligibility conditions—On 19th May, 2009, the modified ACP Scheme was promulgated with effect from 1st of September, 2008

which was also extended to the personnel of the CISF—Screening Committee considered the case of the petitioner on 24th February, 2010 but found him unfit for grant of MACP benefit due to deferment of his first financial upgradation for the period between 9th August, 1999 to 1st September, 2008, i.e., for a period of 9 years and 23 days. Held—Petitioner was eligible for PCC on the 9th of August, 1999 when the ACP Scheme came into force and on 18th February, 2000 when it became applicable to the CISF—No circumstance has been pointed out which would render the Petitioner ineligible to grant of the benefit with effect from 18th February, 2000 and as such the benefit thereof has to be given to the petitioner from that date—So far as petitioner's unwillingness in undertaking the PCC on 24th April, 2000 is concerned, for the reasons recorded in WP(C)No.6937/2010 *Hargovind Singh v. Central Industrial Security Force* the same would not be a disqualification to grant of such benefit to the petitioner—The same reasons would apply upon the failure of the petitioner to successfully complete the PCC in the second opportunity given to him between 21st May, 2007 to 7th July, 2007—Petitioner has Successfully completed the PCC in the third attempt between 24th June, 2008 to 14th July, 2008—Petitioner has therefore, satisfied all essential conditions which were notified by the respondents under the ACP Scheme which entitles him to the continuation of the benefits—By the judgement dated 12th December, 2006, the Madras High Court directed reinstatement of the petitioner in service with all benefits which included backwages, continuity of service and all other attendant benefits—It has also to be held that grant of ACP Scheme from the relevant date is an integral part of the relief which had been granted by the court to the petitioner—Impugned order date 12th March, 2011 passed by the respondent no.3 and 3rd August, 2011 by the respondent no.2 are not sustainable and are hereby set aside and quashed—Petitioner is entitled to the benefits of ACP Scheme with effect from 18th February, 2000 as applicable to the CISF—Writ petition is allowed in the above terms.

— Armed Forces—Assured career Progression Scheme——Article 226—Petitioner had completed 12 years of service on 28th February, 2004 and was offered opportunity to undergo PCC Pursuant to offer made only in January, 2006—Petitioner was compelled to express his unwillingness to undergo PCC, as he was to proceed to his native place on leave due to some domestic problems of serious nature—Petitioner qualified PCC in second chance and result of same was informed on June, 2006 by respondent—Petitioner was granted financial upgradation by respondents w.e.f. 22.08.2006— Petitioner's representation for grant of first financial upgradation w.e.f. 28.02.2004 to respondents were of no avail—Petitioner approached HC for restoration of first financial upgradation as per Assured Career Progression Scheme w.e.f. 28th February, 2004—Plea taken, effective date for consideration of person for entitlement of grant of financial upgradation is date on which he acquires requisite number of years of service in a post without any promotional opportunities being made available to him—Completion of actual PCC would have no effect on effective date of grant of financial benefits inasmuch as all employees undergo PCC only after having become eligible for grant of ACP Scheme and are given three chances to complete PCC—Held—A person is entitled to financial benefit on date he completes required twelve years of service without a promotional opportunity—Completion of PCC is akin to completion of requisite training upon appointment/promotion—It does not change date of appointment or date of his promotion—Unwillingness certificate was restricted to Petitioner's inability to undergo PCC which commenced in January, 2006—Petitioner was offered his second chance and has successfully undertaken PCC commencing w.e.f. 05.06.2006 to 22.07.2006—In this background, Petitioner can't be denied of his rightful dues till date—As per Scheme, every employee is entitled to three chances to complete PCC—In case, Petitioner had undertaken PCC course when he was first offered same but had failed to course, respondents would not have then deprived him of benefits of financial upgradation but would have offered him a second; and thereafter, even a third chance to

jurisdiction of principal Bench at New Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Order challenged before HC—Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held —A bare reading of Rule 6 would show that Sub—Rule 1 (ii) of Rule, in fact confers discretion upon a retired force person to file petition before a bench within whose Jurisdiction he is ordinarily residing at time of filing of application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before bench within whose jurisdiction cause of action wholly or in part has arisen—In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Wing Commander E.K. Vijayan (Retd.) v. *Union of India & Ors.* *4763*

— Armed Forces—Armed Forces Tribunal (Procedure) Rules, 2008—Rule 6 (1) (ii) and (2)—Original Application of Petitioner challenging amendment to his Pension Payment Orders (PPOs) rejected by Armed Forces Tribunal (AFT) on ground that Petitioner was not residing within jurisdiction of Principal Bench at New Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Order challenged before HC—Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held—A bare reading of Rule 6 would show that Sub-Rule 1 (ii) of Rule, in fact, confers discretion upon a retired force person to file petition before a bench within whose jurisdiction he is ordinarily residing at time of filing a application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before Bench within whose jurisdiction cause of action wholly or in part has arisen—

In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Wing Commander J. Ramani (Retd.) v. *Union of India & Ors.* *4768*

— Armed Forces—Constitution of India, 1950—Aggrieved petitioner for rejection of his candidature in selection process undertaken by respondent no. 1 preferred writ petition—It was urged that petitioner qualified physical endurance test, written examination as well as medical examination tests—At time of interview, petitioner relied upon OBC certificate which was rejected by respondent No.1 as not being in requisite format—According to respondent, certificate produced was beyond cut off date prescribed Held:— An OBC certificate beyond cut off date did not meet with requisite stipulations. Creamy layers have to be excluded, thus, there being a requirement of OBC certificates to be issued within 3 years prior on date of receipt of applications.

Anil Kumar v. *State Selection Commission (North Region) and Anr.* *4773*

— Armed Forces—Constitution of India, 1950—Petition Regulation for Army Act, 1961—Regulations 72 & 197—Petitioner filed petition challenging order passed by Armed Forces Tribunal rejecting his prayer for direction to respondent to pay invalid pension to him from date of his release from service along with arrears and interest thereon—Also, respondent to add period of leave pending retirement for 108 days with 12% interest thereon—According to petitioner, he had served for more than 15 ½ years, therefore, was entitled to invalid pension which was applicable to all ranks on completion of 10 years of service under Regulation 12 and other circulars issued by Ministry of Defence—As per respondent, petitioner was not invalidated out of service because of exigency of service or low medical category—On the contrary, he had

ILR (2013) VI DELHI 4505
CRL. A.

PRAMOD KUMAR ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 288/2000, DATE OF DECISION: 24.10.2013
CRL.A. NO. : 262/2000

Indian Penal Code, 1860—Section 397/392/34 IPC and 25 Arms Act and under Section 392/34 IPC respectively—In their 313 statements, the appellants admitted their presence in the TSR on the date and time disclosed by the complainant. They also admitted their apprehension by the police soon after the occurrence. They pleaded that an altercation/quarrel had taken place with the complainant over sharing of fare. It did not find favour and was outrightly rejected by the Trial Court with cogent reasons. The assailants were named at the first instance by the complainant in the statement (Ex.PW-3/A) and role played by each of them was described with detailed account. The assailants were apprehended by the police on the pointing our of the complainant soon after the incident and the robbed articles were recovered from their possession.—FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. Early reporting of the occurrence by the informant with all its vivid details gives an assurance truth of the version.—The complainant Narinder had no prior acquaintance with the assailants and did not nurture any ill-will or grievance to falsely implicate them in the incident.—In my view these discrepancies highlighted

by the counsel are not significant to away the cogent and trustworthy testimony of complainant—Narinder Singh who had no ulterior motive to fake the incident of robbery. Non-lifting of finger prints from the knife is not fatal A-1 did not explain the purpose to keep with him a 'deadly weapon prohibited under Arms Act. He further failed to explain the purpose of his presence in the TSR at that odd hours. Robbed currency notes were recovered from the possession of Kanti Giri who is no more. The Trial Court has dealt with all the relevant contentions A-1 and has given cogent reasons to discard them. I find no sufficient or good reasons to deviate from the findings which are based on fair appraisal of the evidence. Admittedly, A-2 was a TSR driver who drove TSR No. DL-IR-2454 in which the incident of robbery took place.—There are no allegations that he in any manner assisted robbed article or weapon was recovered from his possession at the time of his apprehension. His presence in the TSR being a driver was natural and probable and that per se cannot be a factor to held him vicariously liable for the acts of other assailants—No adverse inference can be drawn that A-2 being a TSR driver was in hand and glove with other assailants and in any manner facilitated the commission of crime. Since the other assailants and in any manner facilitated the commission of crime. Since the other assailants were armed with knives possibility of A-2 not to intervene due to fear cannot be ruled out. Sine A-2 did not participate in the commission of crime and no over act was attributed to him and in the absence of any recovery of weapon or robbed article from his possession, his conviction under Section 392 IPC cannot be sustained and he deserves benefit of doubt—The appeal filed by A-2 (Crl.A. No. ; 262/2000) is accepted and his conviction and sentence are set aside. Appeal preferred by A-1 (Crl.A. No. : 288/2000) is unmerited and is dismissed. A-1 (Pramod Kumar) is directed to surrender and serve

the remaining period of sentence.—The appeal stand disposed of.

Important Issue Involved: FIR in a criminal case is a vital and valuable piece of evidence for the evidence for the purpose of appreciating the evidence lead at the trial. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version.

Where an accused did not participate in the commission of crime and overt and no overt act was attributed to him and in the absence of any recover of weapon or robbed article from his possession, he cannot be convicted and deserves benefit of doubt.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. Atul Verma, Advocate

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP for State.

CASE REFERRED TO:

1. *Jail Prakash Singh* vs. *State of Bihar & Anr.* 2012 CRI.L.J.2101.

RESULT: CRL.A. 262/2000 is Accepted.

CRL.A. 288/2000 is Dismissed.

S.P. GARG, J.

1. Pramod Kumar (A-1) and Kamal (A-2) impugn a judgment dated 28.02.2000 of learned Additional Sessions Judge in Sessions Case No.138/91, 45/92 & 146/91 arising out of FIR No.149/91 registered at Police Station Badarpur by which A-1 and A-2 were held guilty for committing offences under Sections 397/392/34 IPC and 25 Arms Act and under Section 392/34 IPC respectively. By an order dated 29.02.2000, A-1 and A-2 were awarded Rigorous Imprisonment for seven years with fine Rs. 6,000/-and Rigorous Imprisonment for five years with fine Rs.3,000/ respectively. The facts emerging from the record of the case are as

under:

2. On 28.05.1991 Narinder Singh was robbed of a purse containing Rs. 142/-, DTC all-route pass, HMT watch and some papers at about 11.30 P.M. at knife point when he was travelling in TSR No.DL-IR2454 driven by A-2. A-1 and Kanta Giri @ Kanti Giri (since expired) who were made to sit in the said TSR with active connivance of A-2 robbed the complainant. After the incident, the complainant was thrown/pushed out of the TSR and the assailants fled the spot. A police Gypsy happened to reach after about 5/10 minutes and the complainant narrated the incident to police officials on patrolling duty who were able to apprehend the assailants at some distance at his pointing out and recover robbed articles, TSR and knives from their possession. The Investigating Officer recorded Narinder Singh's statement (Ex.PW-3/A) and lodged First Information Report by making endorsement (Ex.PW4/F) thereon. During investigation, statements of the witnesses conversant with the facts were recorded. After completion of investigation the Crl.A.Nos.288/2000 & 262/2000 Page 2 of 8 assailants were charge-sheeted and brought to trial. The prosecution examined four witnesses to establish the appellants' guilt. In their 313 statements they pleaded false implication. The trial resulted in conviction of the appellants for offences mentioned previously. Proceedings against Kanta Giri @ Kanti Giri were dropped as abated due to his death.

3. I have heard the learned Additional Public Prosecutor and the learned counsel for the appellants and have examined the record. In their 313 statements, the appellants admitted their presence in the TSR on the date and time disclosed by the complainant. They also admitted their apprehension by the police soon after the occurrence. They pleaded that an altercation/quarrel had taken place with the complainant over sharing of fare. It did not find favour and was outrightly rejected by the Trial Court with cogent reasons. The assailants were named at the first instance by the complainant in the statement (Ex.PW-3/A) and role played by each of them was described with detailed account. The assailants were apprehended by the police on the pointing out of the complainant soon after the incident and the robbed articles were recovered from their possession. The First Information Report was lodged at 12.30 A.M. promptly without delay after the occurrence at 11.30 P.M. FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding

truth of the version. In the case of **Jail Prakash Singh v. State of Bihar & Anr.** 2012 CRI.L.J.2101 the Supreme Court held:

> "The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."

4. The complainant Narinder had no prior acquaintance with the assailants and did not nurture any ill-will or grievance to falsely implicate them in the incident. In his court statement as PW-3 he identified the assailants and proved the version given to the police at the earliest opportunity without major improvement or variation. He stood the test of cross-examination and no discrepancy whatsoever could be elicited to disbelieve/discredit his version. In the cross-examination he revealed that due to fear he left the job and went to his native village in Rajasthan. There are no sound reasons to suspect victim/complainant's statement who was not going to be benefited by false implication of the appellants. He was fair enough not to attribute any overt act to A-2. PW-4 (SI Ran Singh and PW-2 (SI Pratap Singh) who succeeded to apprehend the assailants while on patrolling duty corroborated the complainant's version in its entirety.

5. Counsel for the appellant-Pramod Kumar urged that the prosecution case cannot be believed as no independent public witness was associated in the investigation and finger prints on the knife were not lifted. He also pointed out that PW-2 (SI Pratap Singh) falsely claimed recovery of a Rs. 50/-currency note from Kanti Giri's possession. In my view these discrepancies highlighted by the counsel are not significant to throw

away the cogent and trustworthy testimony of complainant-Narinder Singh who had no ulterior motive to fake the incident of robbery. Non-lifting of finger prints from the knife is not fatal. A-1 did not explain the purpose to keep with him a 'deadly weapon prohibited under Arms Act. He further failed to explain the purpose of his presence in the TSR at that odd hours. Robbed currency notes were recovered from the possession of Kanti Giri who is no more. The Trial Court has dealt with all the relevant contentions of A-1 and has given cogent reasons to discard them. I find no sufficient or good reasons to deviate from the findings which are based on fair appraisal of the evidence.

6. Admittedly, A-2 was a TSR driver who drove TSR No.DLIR-2454 in which the incident of robbery took place. He was implicated in the incident because the two assailants sitting in the TSR had robbed the complainant by using knives. Learned Additional Public Prosecutor urged that A-2 being TSR driver facilitated the commission of crime by the other assailants as he stopped the TSR on the way. This circumstance itself, in my view, is not sufficient to connect Kamal (A-2) with the commission of crime and to hold that he shared common intention with the other two assailants to rob the complainant. No overt act was attributed/ assigned by the complainant to him. There are no allegations that he in any manner assisted the other assailants to rob the complainant or exhorted them to commit the crime. Admittedly, no robbed article or weapon was recovered from his possession at the time of his apprehension. His presence in the TSR being a driver was natural and probable and that per se cannot be a factor to held him vicariously liable for the acts of other assailants. The Investigating Officer did not collect any evidence during investigation, if A-2 had association with the other assailants prior to the incident. It is not unusual for a TSR driver to allow more passengers to travel to earn more fare. The complainant had not objected to the TSR driver allowing the other passengers to sit in the TSR. PW-3 (Narinder Singh) has given somewhat inconsistent version on this aspect. In the statement (Ex.PW-3/A), he disclosed that when he took the TSR on hire, three boys including the driver were already sitting in it. The said two assailants sat on his left and right sides. However, in the Court Statement, he informed that two boys were made to sit on the driver's seat. A-2's personal search did not yield recovery of any incriminating article. No adverse inference can be drawn that A-2 being a TSR driver was in hand and glove with other assailants and in any manner facilitated the commission

of crime. Since the other assailants were armed with knives possibility of A-2 not to intervene due to fear cannot be ruled out. Since A-2 did not participate in the commission of crime and no overt act was attributed to him and in the absence of any recovery of weapon or robbed article from his possession, his conviction under Section 392/34 IPC cannot be sustained and he deserves benefit of doubt.

7. In the light of the above discussion, the appeal filed by A-2 (Crl.A.No.262/2000) is accepted and his conviction and sentence are set aside. Appeal preferred by A-1 (Crl.A.No.288/2000) is unmerited and is dismissed. A-1 (Pramod Kumar) is directed to surrender and serve the remaining period of sentence. For this purpose, he shall appear before the Trial Court on 6th November, 2013. The Registry shall transmit the Trial Court records forthwith.

8. The appeals stand disposed of in the above terms.

ILR (2013) VI DELHI 4511
CRL. A.

STATE (NCT OF DELHI) ...APPELLANT

VERSUS

DEVENDER SINGH ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 70/2012 DATE OF DECISION: 25.10.2013

Prevention of Corruption Act, 1988—Sec, 7 & 13—State has come in appeal to question the correctness of a judgment—By which the respondent—Devender Singh was acquitted of the charges. The respondent has contested the appeal.—On 29.03.2001, Ram Kumar lodged a complaint in Anti Corruption Bureau alleging demanded of Rs.11,000/- as bribe by Mr. Panwar, AE,

DDA to clear payment for execution of work order in the sum of Rs. 21.950/-, The complainant was able to arrange Rs. 6,000/- for payment. Insp.N.S.Minhas carried out pre-raid formalities and associated Rs. Chopra as panch witness. Statement of the witnesses conversant with the fact were recorded. After completion of investigation, a charge-Sheet under Section 7/13 POC Act and 120 B IPC was submitted in the Court in Which both Devender Singh and Harpal Singh were Charge-sheeted. During the proceedings, Harpal Singh expired and proceedings against him were dropped as abated. The prosecution examined fifteen witnesses to prove the charges. In 313 statement, the appellant pleaded false implication. After appreciation of evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted the appellant as the prosecution was not able to establish the charges beyond reasonable doubt.—The moot question before the Trial Court was if complainant—Ram Kumar was entitled to receive Rs.21,950/- from DDA for execution of work order for the payment of which demand of Rs. 11,000/- was allegedly made as illegal gratification. The burden was heavily upon the prosecution to establish that it was legal remuneration which the complainant—Ram Kumar was entitled to receive and the respondent or his associate—Harpal Singh was legally competent in their official capacity to sanction or clear the payment. In the complaint (Ex.PW-13/A) Complainant did not give detailed information as to when the work order for boring a tube-well was awarded to him, when it was executed. PW-2 (R.K. Bhandari), who accorded section under 19, POC Act for Devender Singh's prosecution admitted in the cross-examination that he had not seen examined if any work was entrusted to the complainant or it was executed by him. He revealed that some documents were on record to show that no work was entrusted or executed by the complainant. PW-6 (Mam Chand), So,

Horticulture from October, 1994 to 17.04.2000/- Rs.700/-.—The work for which payment was being claimed by the complainant had already been done by other contractor—Ved Prakash. Apparently, there was no cogent and worthwhile evidence on record to establish if pursuant to work order (Ex.PW-10/A) dated 04.01.2001 any work was carried out by the complainant to claim payment of Rs.21,950/-.—No doubt, a public officer has no right to demand any bribe; but when he is hauled up to answer a charge of having taken illegal gratification, the question whether any motive, for payment or acceptance of bribe at all existed is certainly relevant and material fact for consideration. It is an important factor bearing on the question as to whether the accused had received the gratification as a motive or reward for doing or forbearing to do any official act or for showing any favour or disfavour in the exercise of his official functions.—The prosecution witnesses have given divergent version as to when and by whom the bribe amount was demanded.—The delay in claiming the payment and lodging the report has remained unexplained. Complainant's statement could not be corroborated by any independent public witness as PW-13 (Ram Swaroop Chopra) joined as panch witness expired before he could be cross-examined by the appellant.—In the absence of demand of bribe which the prosecution could not establish beyond reasonable doubt, there was no cogent material to base conviction under Section 7/13 POC Act. The demanded and acceptance of the money for doing a favour in discharge of official duties is sine qua to the conviction. Mere recovery of tainted money from the accused by itself is not enough in the absence of substantive of the demand and acceptance. It is also acceptance. It is also settled in law that statutory presumption under Section 20 of the Act can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that the

money was accepted other then the motive or reward as stipulated under Section 7 of the Act. It is obligatory on the part of the Court to consider the explanation offered the accused under Section 20 of the explanation has to be on the anvil of preponderance of probability. It is not to be proved all reasonable doubt. From the very inception, the defence of the appellant was that the money was thrusted in the pocket and was not meant as bribe for clearance of the bill. Appeal against the acquittal is considered on slightly different parameters to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this court is cautious in taking away that right. The presumption of innocence of the accused is further strengthened by his acquittal after a full trial, which assumes critical importance in our jurisprudence. The Court have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, should be adopted.—The appeal is unmerited and is consequently dismissed.

Important Issue Involved: No doubt, a public officer has no right to demand any bribe; but when he is hauled up to answer a charge of having taken illegal gratification, the question whether any motive, for payment or acceptance of bribe at all existed is certainly relevant fact for consideration. It is an important factor bearing on the question as to whether the accused had received the gratification as a motive or reward for doing or forbearing to go any official act for showing any favour or disfavour in the exercise of his official functions.

The demands and acceptance of the money for doing a favour in discharge of official duties is sine qua non to the conviction. Mere recovery of tainted money from the accused by itself is enough in the absence of substantive evidence of the demand and acceptance. It is also settled in law that statutory presumption under Section 20 of the Act can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that the money was accepted other than the motive or reward as stipulated under Section 7 of The Act. It is obligatory on the court to consider the explanation offered by the accused under Section 20 of the Act and the consideration of the explanation has to be on the anvil of preponderance of probability. It is not to be proven beyond all reasonable doubt.

Appeal against the acquittal is considered on slightly different parameters to an ordinary appeal preferred to this court. When an accused is acquitted of a criminal charge, a right vests in him to be free citizen and this Court is taking away that right. The presumption of innocence of the accused is further strengthened by his acquittal after a full trial, which assumes critical importance in our jurisprudence. The Courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, should be adopted.

[Ch Sh]

APPEARANCES:

FOR THE APPELLANT : Mr. M.N. Dudeja, APP.

FOR THE RESPONDENTS : Mr. Mohd. Shamikh, Advocate.

RESULT: Dismissed.

S.P. GARG, J.

1. State has come in appeal to question the correctness of a judgment dated 29.10.2010 of learned Special Judge (P.C. Act)-06, Tis Hazari Courts, Delhi, by which the respondent – Devender Singh was acquitted of the charges. The respondent has contested the appeal.

2. On 29.03.2001, Ram Kumar lodged a complaint in Anti Corruption Bureau alleging demand of Rs. 11,000/-as bribe by Mr.Panwar, AE, DDA to clear payment for execution of work order in the sum of Rs. 21,950/-. The complainant was able to arrange Rs. 6,000/-for payment. Insp.N.S.Minhas carried out pre-raid formalities and associated R.S.Chopra as panch witness. Allegations were that Rs. 6,000/-were paid as bribe to Devender Singh (the appellant) on the directions of Harpal Singh (since expired). Rs. 6,000/-were recovered from the possession of the appellant. Post-raid formalities were carried out. Both, Devender Singh and Harpal Singh were arrested. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet under Sections 7/13 POC Act and 120 B IPC was submitted in the Court in which both Devender Singh and Harpal Singh were charge-sheeted. During the pendency of the proceedings, Harpal Singh expired and proceedings against him were dropped as abated. The prosecution examined fifteen witnesses to prove the charges. In 313 statement, the appellant pleaded false implication. After appreciation of evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted the appellant as the prosecution was not able to establish the charges beyond reasonable doubt.

3. I have heard the learned counsel for the parties and have examined the record. The moot question before the Trial Court was if complainant – Ram Kumar was entitled to receive Rs. 21,950/-from DDA for execution of work order for the payment of which demand of Rs.11,000/-was allegedly made as illegal gratification. The burden was heavily upon the prosecution to establish that it was the legal remuneration which the complainant – Ram Kumar was entitled to receive and the respondent or his associate – Harpal Singh was legally competent in their official capacity to sanction or clear the payment. In the complaint (Ex.PW-13/A) complainant did not give detailed information as to when the work order for boring a tube-well was awarded to him, when it was executed. PW-2 (R.K.Bhandari), who accorded sanction under Section 19, POC Act for Devender Singh's prosecution admitted in the cross-examination that he had not seen or examined if any work was entrusted to the complainant or it was executed by him. He revealed that some documents were on record to show that no work was entrusted or executed by the complainant. PW-6 (Mam Chand), SO, Horticulture from October, 1994 to 17.04.2000 stated that he had got bored one hand-pump in June, 2000

from one Ved Prakash and he was paid Rs. 600/-/ 700/-. In the cross-examination, he denied having any acquaintance with the complainant – Ram Kumar. He was not aware if any work was ever assigned to Ram Kumar by DDA. PW-3 (Naginder Parshad Singh) also corroborated his testimony and deposed that Ved Prakash, contractor, was given material to install the pump and the boring work was done by him. He also denied any acquaintance with Ram Kumar. PW-10 (Latoor Hasan), Deputy Director, Horticulture Division in DDA in 2001 proved work order (Ex.PW-10/A) provided to M/s. Ram Kumar on 04.01.2001. He however, deposed that no work was done regarding the said work order. On 05.02.2002, he, Ved Prakash, Ram Kumar and Investigating Officer visited the alleged spot where the work order was to be executed. However, Ram Kumar was unable to specify the area where the work was done by him. In the cross-examination, he was categorical to state that complainant – Ram Kumar had not done any work and no bill was raised by him. The work for which payment was being claimed by the complainant had already been done by other contractor – Ved Prakash. Apparently, there was no cogent and worthwhile evidence on record to establish if pursuant to work order (Ex.PW-10/A) dated 04.01.2001 any work was carried out by the complainant to claim payment of ' 21,950/-. In his statement as PW-14, Ram Kumar, admitted that he was working with one contractor – Ved Prakash for boring of tube-wells in the year 2001. Relations between them became strained subsequently. In the cross-examination, the complainant revealed that tube-well was bored in the year 2000 with the assistance of Ved Prakash and he owed him a sum of Rs. 28,000/-. He further admitted that he did the boring jointly with Ved Prakash. Ved Prakash was not examined during investigation to ascertain execution of work order. The Raid Officer, Insp. N.S.Minhas, admitted in the cross-examination that the correctness of the complaint was not verified. He did not verify whether any payment was due to the complainant from DDA office. PW-11 (Insp. M.S.Sanga), Investigating Officer, admitted that he had made enquiries from the complainant for asking money for work which was not done by him. The complainant did not institute any civil proceedings for recovery of his dues. He did not lodge any complaint with the senior officers for non-payment of the legal remuneration. It is unclear as to when & whom he submitted the bills for payment. It is again not clear as to who was the concerned Officer to clear the bills. For release of a paltry amount Rs. 21,950/-a huge demand of Rs. 11,000/-as illegal gratification cannot be expected to be made or paid. In the complaint (Ex.PW-13/A), the complainant did not specifically name Devender Singh or Harpal Singh to have demanded illegal gratification from him. In his Court statement, he attributed demand of bribe to both Devender and Harpal Singh and for that he was duly confronted with the statement made to the police. No doubt, a public officer has no right to demand any bribe; but when he is hauled up to answer a charge of having taken illegal gratification, the question whether any motive, for payment or acceptance of bribe at all existed is certainly relevant and a material fact for consideration. It is an important factor bearing on the question as to whether the accused had received the gratification as a motive or reward for doing or forbearing to do any official act or for showing any favour or disfavour in the exercise of his official functions. In the instant case, DDA was not legally liable to pay Rs. 21,950/-to the complainant – Ram Kumar as he could not prove execution of any work pursuant to the work order awarded to him. The appellant – Devender Singh and his associate Harpal Singh were not capable to sanction any such unauthorised payment.

4. The prosecution witnesses have given divergent version as to when and by whom the bribe amount was demanded. The complainant allegedly executed the work awarded to him in February, 2000 for which work order was issued to him on 04.01.2001. The complaint was lodged on 29.03.2001. The delay in claiming the payment and lodging the report has remained unexplained. Complainant's statement could not be corroborated by any independent public witness as PW-13 (Ram Swaroop Chopra) joined as panch witness expired before he could be cross-examined by the appellant. Even if examination-in-chief recorded on 03.07.2007 is considered, it does not substantiate the complainant's version regarding demand of bribe prior to the lodging of the complaint on 29.03.2001. PW-13 did not depose if the complainant had named the appellant Devender to have demanded bribe. He was not categorical as to which of the accused Devender Singh and Harpal Singh had demanded illegal gratification in the office. On scrutinising his testimony, it appears that the demand was raised for the first time on the day of incident. Both panch witnesses and the complainant have given inconsistent version about the arrival of Harpal Singh at the spot. In the absence of demand of bribe which the prosecution could not establish beyond reasonable doubt, there was no cogent material to base conviction under Sections

7/13 POC Act. The demand and acceptance of the money for doing a favour in discharge of official duties is sine qua non to the conviction. Mere recovery of tainted money from the accused by itself is not enough in the absence of substantive evidence of the demand and acceptance. It is also settled in law that statutory presumption under Section 20 of the Act can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that the money was accepted other than the motive or reward as stipulated under Section 7 of the Act. It is obligatory on the part of the Court to consider the explanation offered by the accused under Section 20 of the Act and the consideration of the explanation has to be on the anvil of preponderance of probability. It is not to be proven beyond all reasonable doubt. From the very inception, the defence of the appellant was that the money was thrusted in the pocket and was not meant as bribe for clearance of the bill. Appeal against the acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is cautious in taking away that right. The presumption of innocence of the accused is further strengthened by his acquittal after a full trial, which assumes critical importance in our jurisprudence. The Courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, should be adopted.

5. In the light of above discussion, I approve the findings of the Trial Court and find that the prosecution failed to prove its case beyond reasonable doubt. Considering all the facts and the circumstances of the case, I find no infirmity in the impugned judgment. The appeal is unmerited and is consequently dismissed. Trial Court record be sent back forthwith.

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MOHD. ILYAS & ANR. ....APPELLANT

VERSUS

THE STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 450/2000 DATE OF DECISION: 26.11.2013

Indian Penal Code, 1860—Sections 307, 324, 323 & 34—The case of the prosecution as projected in the charge-sheet was that on 13.06.1999 at 04.30 P.M. in front of House No. 17/113, Geeta colony, the appellants with their associates in furtherance of common intention inflicted injuries to Ram Saran Dass, Shyam Sunder and Kishan Malik in an murder them. Daily (DD) No. 25A (Ex.PW-6/C) was recorded at 04.50. P.M. at PS Geeta Colony on getting information about a serious quarrel at House No.17/113. Geeta Colony.—After completion of the investigation, a charge-sheet was filed in the Court. A-1 and A-2 were duly charged and brought to trial. In order to establish their guilt, the prosecution examined fifteen witnesses and produced medical. In their 313 statement, the appellants denied their complicity in the crime and alleged false implication. The trial resulted in their conviction for the offences mentioned previously giving rise to the filing of the present appeal.—Learned Senior Counsel for the appellants 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 testimonies of interested witnessed without independent corroboration. No specific role in the occurrence was attributed to A-1. Vital discrepancies

and improvement in the evidence were ignored without sound reasons. The complainant had attempted to implicate the appellants' father but during investigation his role could not be ascertained and no charge-Sheet was filed against him. Learned Addl. Public prosecutor urged that the injured persons have given consistent version and had no ulterior motive to falsely implicate the accused.—On scrutinizing the testimonies of the witnesses, it stands established that A-1 and A-2 were among the assailants who caused injuries with iron and hockey to PW-1 (Ram Saran Dass) and PW-2 (Shyam Sunder). Both the victims have proved their involvement in the incident beyond reasonable doubt. Despite searching and lengthy cross-examination, their testimonies could not be shattered by extracting material inconsistencies or discrepancies. The victims had no prior ill-will or enmity to falsely implicate the appellants. Nothing emerged on record if there was any political rivalry forcing the injured to spare the real culprits and to falsely rope in the appellants.—The fact that PW-1 and Pw-2 sustained injuries at the time and place of occurrence, lends support to their testimony that they were present during the occurrence of history of hostile relations, on valid reason exists to discard the testimony of injured witnesses which is accorded a special status in law.—Recover of crime weapons iron rod (Ex.P-2) and hockey (Ex.P-3) is an incriminating circumstance. Minor contradictions, improvements and discrepancies, highlighted by the learned Senior Counsel are not of serious magnitude to affect the core of the prosecution case and to discard their testimonies in its entirety. When such kind of sudden incident happens and injuries are inflicted with quick succession in short time, it is too much to expect from a witness to narrate the exact injuries caused on a particular location of the victim/injured. Mere marginal variations in the statements cannot be dubbed as

improvements—A-1's nominal roll reveals that the suffered incarceration for two years and four days besides earning remission of seven months and three days as on 14.07.2002 before enlargement on bail on 12.11.2002. He was not involved in any other criminal case and his jail conduct was satisfactory. He was aged about nineteen years on the day of occurrence. Considering his role in the incident and other mitigating factors, the period already spent by him in custody is taken as substantive sentence. He, however, will have to pay Rs. 50,000/- (Fifty Thousand Rupees) as compensation to the victim Shyam Sunder. A-2's nominal roll reveals that before his substantive sentence was suspended on 21.03.2003, he had undergone three and a half years including remission in custody. A-2 is the main assailant who inflicted head injuries to PW-2 which were 'dangerous' in nature. The initial confrontation had taken place with his brother A-1 when PW-1 (Ram Saran Dass) objected his conduct to pass comments upon ladies. Without ascertaining the true facts, he (A-2) rushed to the spot with him and inflicted injuries to PW-1 (Ram Saran Dass). PW-2 (Shyam Sunder) who had no fault at all and had not even intervened at the time of initial altercation/confrontation was not spared and caused head injuries by iron rod putting his life in danger. The offence was intentional and deliberate and for that reason, A-2 deserves no leniency. His conviction and sentence are maintained. The appeal preferred by him is dismissed. He shall surrender before the Trial Court on 03.12.2013 to serve the remaining period of sentence. A-1 shall deposit compensation of Rs. 50,000/- in the Trial Court within fifteen days besides depositing the fine imposed by the Trial Court (if unpaid) and it will be released to PW-2 (Shyam Sunder) after notice. Disposed of.

Important Issue Involved: In the absence if any history of hostile relations, no valid reason exists to discard the testimony of injured witnesses which is accorded a special status in law.

Minor contradictions, improvements and discrepancies, which are not of serious magnitude will not effect the core of the prosecution case and to discard their testimonies in its entirety.

[Ch Sh]

APPEARANCES:

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

FOR THE RESPONDENTS : Mr. Lovkesh Sawhney, APP.

CASES REFERRED TO:

1. *Md. Ishaque and Ors.* vs. *State of West Bengal and Ors.,* 2013 (6) SCALE 523.
2. *Virendra Singh* vs. *State of Madhya Pradesh',* 2010 (8) SCC 407.
3. *Hari Obula Reddy and Ors.* vs. *The State of Andhra Pradesh* : (1981) 3 SCC 675.

RESULT: Disposed of.

S.P. GARG, J.

1. Mohd. Ilyas (A-1) and Mohd.Afzal (A-2) challenge the legality and correctness of a judgment dated 17.07.2000 in Sessions Case No. 19/2000 arising out of FIR No. 110/99 PS Geeta Colony convicting them under Sections 307/324/323/34 IPC. By an order dated 19.07.2000, they were sentenced to under RI for five years with fine Rs. 200/-, each under Section 307/34 IPC; RI for one year with fine Rs. 100/-, each under Section 324/34 IPC and SI for two months under Section 323/34 IPC. All the sentences were directed to operate concurrently.

2. The case of the prosecution as projected in the charge-sheet was that on 13.06.1999 at 04.30 P.M. in front of House No. 17/113, Geeta

Colony, the appellants with their associates in furtherance of common intention inflicted injuries to Ram Saran Dass, Shyam Sunder and Kishan Malik in an attempt to murder them. Daily Diary (DD) No. 25A (Ex.PW6/C) was recorded at 04.50 P.M. at PS Geeta Colony on getting information about a serious quarrel at House No. 17/113, Geeta Colony. SI Mohan Singh who was directed to investigate went to the spot with Const. Srijan and shifted injured in PCR van to SDN Hospital. The Investigating Officer collected their MLCs and lodged First Information Report after recording Ram Saran Dass's statement (Ex.PW-1/A). During investigation, statements of the witnesses conversant with the facts were recorded. After completion of the investigation, a charge-sheet was filed in the Court. A-1 and A-2 were duly charged and brought to trial. In order to establish their guilt, the prosecution examined fifteen witnesses and produced medical evidence. In their 313 statements, the appellants denied their complicity in the crime and alleged false implication. The trial resulted in their conviction for the offences mentioned previously giving rise to the filing of the present appeal.

3. Learned Senior Counsel for the appellants 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 testimonies of interested witnessed without independent corroboration. No specific role in the occurrence was attributed to A-1. Vital discrepancies and improvement in the evidence were ignored without sound reasons. The complainant had attempted to implicate the appellants' father but during investigation his role could not be ascertained and no charge-sheet was filed against him. Learned Addl. Public Prosecutor urged that the injured persons have given consistent version and had no ulterior motive to falsely implicate the accused.

4. The First Information Report was lodged in quite promptitude, after recording victims' statement and rukka was sent at 07.45 P.M. by making endorsement (Ex.PW-6/B) over Ex.PW-8/A. In the complaint Ram Saran Dass gave graphic detail of the incident as to how and under what circumstances, he, his sons Shyam Sunder and Kishan Malik were assaulted and injured by the appellants and their associates. He also disclosed genesis of the incident. The occurrence took place at 04.30 P.M. and the First Information Report was lodged at 07.45 P.M. Prior to that Daily Diary (DD) No. 25A (Ex.PW-6/C) was recorded at PS Geeta Colony at 04.50 P.M. MLCs (Ex.PW-9/A and Ex.PW-14/A) reveal

that the victims were taken to hospital soon after the occurrence in between 05.00 to 06.00 P.M. There was least possibility of the complainant to concoct a false story implicating the appellants in such a short interval. In the complaint (Ex.PW-1/A), the appellants were named for the injuries inflicted and specific / definite role was assigned to them. While appearing as PW-1 (Ram Saran Dass), complainant, proved the version given to the police at the earliest available opportunity without major variations or improvements. He identified A-1 and A-2 in the Court and attributed specific role in causing injuries first to him and thereafter, to his sons Shyam Sunder and Kishan Malik. He deposed that his objection to A-1 for passing comments on ladies while sitting on his scooter parked outside their STD booth, resented him and he brought A-2 and his companions for assault. Despite lengthy cross-examination, no material discrepancies could be elicited to suspect the version given by the witness or to shatter his testimony. He fairly admitted that there was no previous enmity with the appellants and no quarrel had taken place earlier. He reasserted that A-1 had a hockey and A-2 carried an iron rod with which they were injured. PCR reached the spot within 5 to 10 minutes and took them to the hospital. He denied that PW-2 (Shyam Sunder) received injuries due to fall. PW-2 (Shyam Sunder), another injured, supported the prosecution and corroborated PW-1's testimony on all relevant and material facts. He also implicated both A-1 and A-2 who were armed with hockey and iron rod respectively for causing injuries to them. In the cross-examination, he was unable to tell as to what was the real cause of quarrel between his father and the assailants. He explained that, at the time, he was sitting in the STD booth. He categorically denied that injuries were caused to him by someone else and the accused persons were implicated due to political rivalry. He also denied that they had beaten A-1 when he came to fetch milk from the booth near their house and when the public persons intervened to save him, they sustained injuries. PW-4 (Jai Kishan Malik) though turned hostile and did not implicate the accused, nevertheless, deposed that he had taken the injured Shyam Sunder to Anand Hospital and admitted there. He also took Kishan Malik to the hospital. PW-5 (Kishan Malik) merely deposed that someone gave a panch on his face in the quarrel but he was not aware, who was the assailant.

5. On scrutinising the testimonies of the witnesses referred above, it stands established that A-1 and A-2 were among the assailants who caused injuries with iron rod and hockey to PW-1 (Ram Saran Dass) and

PW-2 (Shyam Sunder). Both the victims have proved their involvement in the incident beyond reasonable doubt. Despite searching and lengthy cross-examination, their testimonies could not be shattered by extracting material inconsistencies or discrepancies. The victims had no prior ill-will or enmity to falsely implicate the appellants. Nothing emerged on record if there was any political rivalry forcing the injured to spare the real culprits and to falsely rope in the appellants. The occurrence had taken place when PW-1 (Ram Saran Dass) had objected to the lewd comments made by A-1 on the ladies while sitting on the scooter in front of his STD booth. The rebuke given by PW-1 (Ram Saran Dass) annoyed A-1 and soon after 5 or 10 minutes, he brought his associates including A2 and inflicted injuries to PW-1 at first instance. When they saw PW-2 in the STD booth, they barged into it after breaking open the glasses and dragged him out of the cabin and caused head injuries. A-2 was apprehended at the spot. The appellants have given conflicting suggestions regarding the injuries sustained by PW-1 and PW-2. They did not examine any witness in defence to prove plea of 'alibi'. A-2 did not explain the circumstances of his apprehension at the place of occurrence. The fact that PW-1 and PW-2 sustained injuries at the time and place of occurrence, lends support to their testimony that they were present during the occurrence. In the absence of any history of hostile relations, no valid reason exists to discard the testimony of injured witnesses which is accorded a special status in law.

6. In **'Md. Ishaque and Ors. vs. State of West Bengal and Ors.',** 2013 (6) SCALE 523, the Supreme Court observed :

> "11. We also fully endorse the view of the High Court that the mere fact that some of the witnesses are interested witnesses, that by itself is not a ground to discard their evidence, the evidence taken as a whole supports the case of the prosecution. In **Hari Obula Reddy and Ors. v. The State of Andhra Pradesh :** (1981) 3 SCC 675, this Court laid down certain broad guidelines to be borne in mind, while scrutinising the evidence of the eye-witnesses, in para 13 of the judgment, this Court held as follows:
>
> But it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can

never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any other source. Since perfection in this imperfect world is seldom to be found, and the evidence of a witness, more so of an interested witness, is generally fringed with embellishment and exaggerations, however true in the main, the court may look for some assurance, the nature and extent of which will vary according to the circumstances of the particular case, from independent evidence, circumstantial or direct, before finding the accused guilty on the basis of his interested testimony. We may again emphasise that these are only broad guidelines which may often be useful in assessing interested testimony, and are not iron-cased rules uniformly applicable in all situations."

7. Medical evidence is entirely in consonance with ocular testimony. PW-15 (Dr.Richa Malvia) examined PW-2 (Shyam Sunder) (brought by Jai Kishan Malik) for medical examination with the alleged history of head injuries with an iron rod by eight people on 13.06.1999 at 04.30 P.M. in front of House No. 17/113, Geeta Colony. The patient was unconscious for five minutes and had vertigo. He was transferred to ICU

and MLC (Ex.PW-14/A) was prepared. PW-14 (Dr.Mohd. Mehtab) opined the nature of injuries suffered by him 'dangerous' (Ex.PW-14/B). He explained that there was head injury and cut marks on the forehead of the size of 4 inches long. The patient was unconscious on arrival at the hospital. PW-9 (Dr.Santosh Kumar) proved Kishan Malik's MLC (Ex.PW-9/A) whereby he sustained injuries simple in nature by blunt object. The accused persons did not produce any evidence to show that they were given beatings by the complainant and his sons in any quarrel.

8. Recovery of crime weapons iron rod (Ex.P-2) and hockey (Ex.P-3) is an incriminating circumstance. Minor contradictions, improvements and discrepancies, highlighted by the learned Senior Counsel are not of serious magnitude to affect the core of the prosecution case and to discard their testimonies in its entirety. When such kind of sudden incident happens and injuries are inflicted with quick succession in short time, it is too much to expect from a witness to narrate the exact injuries caused on a particular location of the victim / injured. Mere marginal variations in the statements cannot be dubbed as improvements. Exaggerations per se do not render the evidence brittle. The fact is that A1 and A-2 participated in the crime and were instrumental in inflicting injuries to the victims. A-1 had brought A-2 and his associates at the spot after he was scolded by PW-1 (Ram Saran Dass) for passing comments upon girls. They had come prepared to cause injuries to the victims and were armed with weapons. Not only they confronted PW-1 outside the STD booth, they broke open the glasses of the STD booth and entered inside it to beat Shyam Sunder after dragging him out. Apparently, they shared common intention to cause injuries. In **'Virendra Singh vs. State of Madhya Pradesh',** 2010 (8) SCC 407, the Supreme Court observed :

> "47. Section 34 IPC does not create any distinct offence, but it lays down the principle of constructive liability. Section 34 IPC stipulates that the act must have been done in furtherance of the common intention. In order to incur joint liability for an offence there must be a pre-arranged and pre-meditated concert between the accused persons for doing the act actually done, though there might not be long interval between the act and the pre-meditation and though the plan may be formed suddenly. In order that Section 34 IPC may apply, it is not necessary that the prosecution must prove that the act was done by a particular or a specified person. In fact, the section is intended to cover a

case where a number of persons act together and on the facts of the case it is not possible for the prosecution to prove as to which of the persons who acted together actually committed the crime. Little or no distinction exists between a charge for an offence under a particular section and a charge under that section read with Section 34."

9. PW-2 (Shyam Sunder) sustained head injuries which were opined 'dangerous' in nature. If a man deliberately strikes another on the head (a vital organ) with a heavy iron rod so as to inflict dangerous injuries, he must, in the absence of any circumstances negativing the presumption, be deemed to have intended to cause such bodily injury as was sufficient to cause death. All the relevant contentions have been dealt with in the impugned judgment which is based upon fair appraisal of the evidence and warrants no interference. The conviction of the appellants for the offences mentioned above is maintained.

10. A-1's nominal roll reveals that he suffered incarceration for two years and four days besides earning remission of seven months and three days as on 14.07.2002 before enlargement on bail on 12.11.2002. He was not involved in any other criminal case and his jail conduct was satisfactory. He was aged about nineteen years on the day of occurrence. Considering his role in the incident and other mitigating factors, the period already spent by him in custody is taken as substantive sentence. He, however, will have to pay Rs. 50,000/-(Fifty Thousand Rupees) as compensation to the victim Shyam Sunder.

11. A-2's nominal roll reveals that before his substantive sentence was suspended on 21.03.2003, he had undergone three and a half years including remission in custody. A-2 is the main assailant who inflicted head injuries to PW-2 which were 'dangerous' in nature. The initial confrontation had taken place with his brother A-1 when PW-1 (Ram Saran Dass) objected his conduct to pass comments upon ladies. Without ascertaining the true facts, he (A-2) rushed to the spot with him and inflicted injuries to PW-1 (Ram Saran Dass). PW-2 (Shyam Sunder) who had no fault at all and had not even intervened at the time of initial altercation / confrontation was not spared and caused head injuries by iron rod putting his life in danger. The offence was intentional and deliberate and for that reason, A-2 deserves no leniency. His conviction and sentence are maintained. The appeal preferred by him is dismissed.

He shall surrender before the Trial Court on 03.12.2013 to serve the remaining period of sentence.

12. A-1 shall deposit compensation of Rs. 50,000/-in the Trial Court within fifteen days besides depositing the fine imposed by the Trial Court (if unpaid) and it will be released to PW-2 (Shyam Sunder) after notice. The appeal preferred by A-1 stands disposed of in the above terms.

13. Trial Court record be sent back with the copy of the order.

ILR (2013) VI DELHI 4530
CRL. A.

RAJ BALLABH **....APPELLANT**

VERSUS

STATE (GNCT) DELHI **....RESPONDENT**

(SUNITA GUPTA, J.)

CRL.A. NO. : 476/0224 **DATE OF DECISION: 24.07.2013**

Indian Penal Code, 1860—Sections 307, 84—Appellant challenged his conviction U/s 307 of Code claiming that at time of commission of offence he was insane—Offence may had been committed under delusional disorder. Held:— To claim defence of insanity, mental status of the accused at the time of doing act complained of has to be considered.

The law afore-noted has come to be known as the Mc Naughten's Principles. A person laboring under a delusion or a psychological or a psychiatric ailment would not be entitled to be acquitted on the ground of insanity unless it is established that at the time when the crime was committed he was suffering the delusion, psychological or psychiatric

condition and was incapable of knowing the nature of his act or that he was not knowing that what he was doing was wrong or contrary to law. **(Para 18)**

Important Issue Involved: To claim defence of insanity, mental status of the accused at the time of doing act complained of has to be considered.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. Manoj Singh, Advocate.

FOR THE RESPONDENT : Ms. Fizani Husain, APP

CASES REFERRED TO:

1. *Radhey Shyam* vs. *State,* 2011 Cr.L.J 250.
2. *Shrikant Anandrao Bhosale* vs. *State of Maharashtra,* 2002 Legal Eagle (SC) 823.
3. *Dayabhai Chhaganbhai Thakker* vs. *State of Gujarat,* (1964) 7 SCR 361.
4. *R* vs. *Daniel Mc Naughten,* 1843 RR 59: 8ER 718 (HL).

RESULT: Appeal dismissed.

SUNITA GUPTA, J.

1. Insanity of the appellant, at the time of commission of offence, is the main plea that has been urged for reversing the conviction and sentence in question.

2. The appeal against the conviction and sentence has been filed by the appellant Raj Bhallabh in Sessions Case No. 83/2003 arising out of FIR 62/2003 under Section 307, PS Darya Ganj, in which he has been convicted for offence under Section 307 of the Indian Penal Code (for short 'IPC.) and has been sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.500/-, in default of payment of fine to further undergo rigorous imprisonment for three months.

3. The findings of guilt has been returned on the basis of testimony of PW1, Amit Goyal who unfolded that on 18th February, 2003, he had

gone to Rajghat, Delhi in his car bearing Registration No. DL-3CK-8662. Sushil Kumar was driving the said car. He parked the car near bus stand. He alighted the car and was going towards Shakti Sthala via service lane. When he proceeded ahead up to a distance of 20 meters, then accused-appellant came there having a 'gandasa'(DAU) in his hand. He started blowing 'gandasa' blows on his head. In order to save himself, he ward off his hand and sustained injuries on his right hand. Middle finger of his hand was cut and it was hanging with the help of skin. He raised alarm for help and his driver Sushil Kumar along with some other persons came for rescue. On seeing them, the assailant ran towards road on outer side. The accused was overpowered. Sushil Kumar, driver of Amit Goyal corroborated the facts narrated by Sh. Amit Goyal. He testified that on 18th February, 2003, they reached Rajghat and he parked the car on one side and Sh. Amit Goyal became busy in his morning walk. At about 6:20 a.m. he heard his cries for help. He rushed in that direction and noticed that the accused was wielding blows on the person of Amit Goyal with 'dao' Ex.P-1. Amit Goyal sustained injuries over his head as well as his right hand.

4. Head Constable Ram Singh (PW4) was on patrolling duty from 6.00a.m. to 9.00a.m. at Rajghat on 18th February, 2003. Constable Prakash Chand (PW5) was on picket duty when he received information about injuries received by Amit Goyal. He rushed towards the spot and noted that accused Raj Bhallabh was running from there having a 'gandasa' in his hand. The crowd had collected at the spot. Accused was overpowered and 'gandasa' was seized from his possession. His shirt was blood stained, which was taken into possession. Constable Rohtash (PW12) gave confirmation to the facts narrated by Constable Prakash Chand.

5. On receipt of DD 6A, Ex.PW-3/A, SI Mahender Singh (PW-13) went to public gate, Raj Ghat, Delhi along with Constable Johar Singh (PW10) where Constable Prakash and Constable Rohtash met him. They produced accused Raj Ballabh and the weapon of offence 'dao'. He came to know that injured has already been removed to JPN Hospital. As such, SI Mahinder Singh went to JPN Hospital and collected MLC of Amit Goyal, who was opined unfit for statement. Sushil Kumar met him in the hospital. His statement Ex.PW-7/A was recorded on the basis of which FIR (carbon copy Ex. PW2/B) was recorded by HC Anita (PW2). Sketch of 'dao' was prepared which was sealed with the seal of MS and was taken into possession vide memo Ex.PW-7/B. Blood stained shirt of the

accused was taken into possession vide memo Ex.PW-5/C. Trousers of the injured was also taken into possession vide memo Ex.PW13/B. Two air pistols were recovered from the possession of accused Raj Ballabh which was also taken into possession vide memo Ex.PW5/B. Accused was arrested and his personal search was taken vide memo Ex.PW5/E.

6. Amit Goyal was examined by Dr. Amit Sharma (PW11) who prepared his MLC, Ex.PW11/A, and opined that injury sustained by him were grievous in nature.

7. Blood stained shirt of accused and trousers of the victim were sent to FSL for analysis. Report Ex.PB highlights that there was human blood of A-group on the shirt of accused and trousers of the victim also had the same human blood of A-group. These facts make it clear that there was blood of the victim over the shirt of the accused.

8. The only plea taken by learned counsel for the appellant is that there was no motive to commit crime inasmuch as, injured was stranger to the accused. It is settled law that when the testimony of eye witness is reliable, cogent and inspire confidence, absence of motive pales into insignificance. Absolutely no enmity, ill-will or grudge has been alleged either against Amit Goyal or Sushil Kumar or the police officials for which reason they will falsely implicate the appellant in this case. Moreover, the appellant was apprehended at the spot and the weapon of offence was recovered from his possession. Not only that, the medical and scientific evidence also substantially corroborate the ocular testimony of the prosecution witnesses. Under the circumstances, it was rightly observed by the learned Additional Sessions Judge that the prosecution had established its case beyond reasonable doubt against the appellant. The appellant had chosen head of Amit Goyal for causing injuries and successive blows were given on his person. In order to save himself, Amit ward off his hand and sustained injuries on his right hand which proved to be grievous and it has come in his testimony that now on account of the injuries received on his right hand, same has become impaired and he cannot write anything with his right hand. These circumstances, coupled with the ocular testimony of Amit Goyal and Sushil Kumar that the accused has caused injuries on the person of Amit Goyal knowing that those injuries were likely to cause death of the victim, the appellant was rightly convicted of the offence under Section 307 IPC and was sentenced as noted above. The finding of learned

Additional Sessions Judge does not suffer from any infirmity which calls for interference.

9. In fact conviction of the appellant on merits of the case has not even been challenged during the course of arguments, inasmuch as, the appellant has already served the sentence imposed upon him. However, it was emphasised that appellant was suffering from insanity at the time of alleged offence and, was, thus, entitled to benefit of general exception contained in Section 84 of IPC.

10. Learned counsel for appellant referred to a literature with regard to delusional disorder and also relied upon **Shrikant Anandrao Bhosale Vs. State of Maharashtra,** 2002 Legal Eagle (SC) 823 and **Radhey Shyam Vs. State,** 2011 Cr.L.J 250 for contending that the petitioner was suffering from delusional disorder that he was incarnation of Mahatma Gandhi and always used to believe that somebody is going to kill him. Under that delusion, the offence may have been committed. As such, he is entitled to the benefit of Section 84 of IPC and deserves to be acquitted of the offence alleged against him.

11. Learned Public Prosecutor for the State, on the other hand, has referred to the answers given by the appellant when his statement under Section 313 Cr. P.C. was recorded wherein in pursuance to the specific question, as to whether he had to say anything else, he replied, "I am innocent. I was sent to mental hospital by the orders of MM and there I was treated. As such, prosecution claims that I am an insane person. In such a situation how it can be claimed that I had committed an offence with knowledge and intention." It was submitted that the manner of giving the answer itself is reflective of the fact that the appellant was not insane and was giving coherent answers. She further referred to the statement of DW-1 Dr. R.K. Srivastava, who was examined by the appellant in his defence who had deposed that the appellant was admitted in the Institute of Human Behaviour and Allied Sciences and remained indoor patient till 29th July, 1999. Again, he was admitted in the aforesaid institute on 13th April, 2001 and remained an indoor patient till 9th July, 2001. Thereafter, he never visited the hospital. In cross-examination, he deposed that during his stay in the Institute, a medical board was constituted and he was found fit to stand trial. It was submitted that the incident has taken place in the year, 2003. There is nothing to show that on the date of incident or thereafter, the appellant was suffering from any

delusion. As such, he is not entitled to benefit of Section 84 IPC. The appeal is bereft of merit and is liable to be dismissed.

12. The defence of insanity is recognized in India by virtue of Section 84 of the IPC which reads as under:

> "Section 84: Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

13. A bare reading of Section 84 IPC reveals that the mental status of the accused has to be considered at the time of the doing of the act complained of. Thus, it would be useless evidence to simply prove that the accused suffered from schizophrenia or any other psychiatric or psychological disorder.

14. The second facet which emerges from a bare reading of Section 84 IPC is the proof of the fact that by reason of unsoundness of mind, at the time of commission of the offending act, the offender was either incapable of knowing the nature of the act or was incapable of knowing that what he is doing is wrong or contrary to law.

15. There is a distinction between medical insanity and legal insanity. From a doctor's point of view a patient of schizophrenia would be treated as a mentally sick person. But for the purposes of Section 84 IPC such a person would escape being classified as a normal person and to be treated insane vis-a-vis the offence only on proof of the cognitive faculties being impaired at the relevant time i.e. at the time the crime was committed.

16. Historical evolution of the law pertaining to the defence of insanity at a criminal trial may be traced to the celebrated decision reported as **R v. Daniel Mc Naughten,** 1843 RR 59: 8ER 718 (HL). The defence of insanity in said case was set up on the evidence that the accused suffered from an insane delusion that the Prime Minister Sir Robert Peel had injured him. Mistaking the deceased for Sir Robert Peel, the accused killed him by shooting him. The jury returned the verdict of not guilty on the ground of insanity. The question of law pertaining to insanity was referred to the House of Lords. Five questions were posed to the House of Lords, as enunciated below:

1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

2. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

3. In what terms ought the question. to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

4. If a person under an insane delusion, as to existing facts, commits an offence in consequence thereof, is he thereby excused?

5. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting, contrary to law, or whether he was labouring under any and what delusion at the time.

17. Lord Chief Justice Tindal expressed opinion upon the above said terms of reference as follows:

Opinion upon Question 1

"...In answer to which question, assuming that your Lordships' inquiries are confined to those persons who, labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion,

of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land...."

Opinion upon Question 2 and 3

"...These two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between, right and wrong: which mode, though rarely; if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put, generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course

we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require...."

Opinion on Question 4

"...The answer must of course depend on the nature of the delusion: but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self- defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment...."

Opinion on Question 5

"...In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right...."

18. The law afore-noted has come to be known as the Mc Naughten's Principles. A person laboring under a delusion or a psychological or a psychiatric ailment would not be entitled to be acquitted on the ground of insanity unless it is established that at the time when the crime was committed he was suffering the delusion, psychological or psychiatric condition and was incapable of knowing the nature of his act or that he was not knowing that what he was doing was wrong or contrary to law.

19. The leading decision of the Supreme Court on the aspect of the defence of insanity is **Dayabhai Chhaganbhai Thakker Vs. State of Gujarat,** (1964) 7 SCR 361 where it was held that the burden to prove that the appellant was of unsound mind and as a result thereof, he was incapable of knowing the consequences of his acts, is on the defence under Section 105 of the Indian Evidence Act. Under the said section, the Court shall presume the absence of such circumstances. Illustration (a) to Section 105 is as follows:-

> "(A) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A."

20. Later, the Court rules thus:

> "The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttal presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the court all the relevant evidence—oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings.(3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged."

21. It was further observed:

> "When a plea of legal insanity is set up, the court has to consider whether at the time of commission of the offence the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime."

22. In the instant case, the appellant did not enter the plea of insanity at any time when the prosecution witnesses were examined and it was only when his statement was recorded under Section 313 Cr. P.C that for the first time, he took this plea and then examined DW-1 Dr. R.K. Srivastava.

23. There is no evidence pertaining to the conduct of the appellant prior to and after the crime. Neither his acts or utterances save and except the witnesses speaking that he used a 'dao' to assault the deceased have surfaced. The story of the defence that at the time of commission of offence, the appellant was not mentally fit to understand his action, is not believable. Had it been so, as suggested by the learned counsel for the appellants, then, he would not have made an attempt to flee towards road on outer side as deposed by the witnesses. The attempt of the accused/appellant to escape from the scene of occurrence after arrival of Sushil Kumar and police official further throws a flood of light on this aspect of the matter that he was mentally in a fit condition and he was capable to understand what is wrong and what is right and, therefore, he is not entitled to get the benefit of Section 84 of the IPC.

24. Even Dr. R.K. Srivastava(DW-1), who had examined the appellant, has deposed that the appellant was a patient of delusional disorder till 9th July, 2001, inasmuch as, according to him, he was admitted in the Institute of Human Behaviour and Allied Sciences on 22nd December, 1998 and remained as indoor patient till 29th July, 1999 and, thereafter, he was admitted on 13th April, 2001 and remained as indoor patient till 9th July, 2001. Thereafter, he never visited the hospital for either treatment or any advice. The Medical Board was constituted and he was diagnosed to be a patient of delusional disorder. Except the delusion on a particular point that he is incarnation of Mahatma Gandhi, he understands what he is doing and what is happening around him. In cross-examination, he reiterated that except the delusion that he is

incarnation of Mahatma Gandhi, he understands each and everything. Even during his stay in the Institute, a medical board was constituted and he was found fit to stand trial. Under the circumstances, there is no evidence available on record to show that after 2001 till the date when incident took place on 18th November, 2003, the appellant continued to suffer from delusional disorder or what was his conduct thereafter. Thus, the evidence pertaining to the mental health of the appellant brought on record during the trial is insufficient evidence from where it can be said that the appellant was insane at the time when he committed the crime.

25. There is yet another reason to repel the arguments of learned counsel for the appellant about the unsoundness of mind of the accused/appellant, inasmuch as, in such cases, a separate chapter XXV Cr. P.C. is provided where specific provisions have been made under Section 326 to 339. Had it been a truth that the appellant was of unsound mind then, the accused/appellant or his counsel ought to have made an application for deciding the trial by following the procedure provided for trial of an accused person of unsound mind as provided in the aforesaid provision of Cr. P.C. No such plea was taken during the entire trial of the case and only for the first time when his statement was recorded under Section 313 Cr. P.C., it was alleged that according to the prosecution he was insane and if that is so, how could he commit the offence. Even in this statement, there was no categorical assertion that he was of unsound mind and that being so, he was not capable of understanding what he was doing when the act was committed. After this plea was taken in statement under Section 313 Cr.P.C., he examined a doctor. The learned Sessions Judge has rightly rejected the evidence led by the appellant after analytical discussion of oral and documentary evidence on record, which do not call for interference.

26. The authorities relied upon by the learned counsel for the appellant has no application to the facts of the case in hand. In **Radhey Shyam** (supra), the appellant was acquitted not on the ground of insanity but because of the fact that the prosecution had failed to establish its case beyond reasonable doubt. In **Shrikant Anandrao Bhosale** (Supra), the appellant, a police constable killed his wife by hitting her on her head with a grinding stone. Case history and other proved medical record showed that the appellant was suffering from paranoid schizophrenia and was under regular medical treatment. Within short span after the incident

he was taken 25 times to the hospital for treatment. Even after killing his wife, there was no attempt to hide or run away. Thus, from the circumstances, it was inferred that he was under a delusion at the relevant time and was granted benefit of Section 84 of IPC. However, as seen above, the facts of the present case are entirely different where neither there is any medical evidence to show as to what was his condition when the crime was committed and thereafter. Rather the action of the appellant in trying to run away after committing the crime itself is suggestive of the fact that he understood the consequences of his acts. That being so, he is not entitled to get the benefit of Section 84 of IPC.

27. The net result is that there is no merit in the appeal, same is accordingly dismissed.

28. Trial court record be sent back.

ILR (2013) VI DELHI 4542
CRL. A.

KHAIRATI RAM **....APPELLANT**

VERSUS

THE STATE **.....RESPONDENT**

(SUNITA GUPTA, J.)

CRL.A. NO. : 103/2003 **DATE OF DECISION: 26.07.2013**

Indian Penal Code, 1860—Sections 328/379/468/471/34—Appellant challenged conviction U/s 328/379/468/471/34 of Code urging principal accused did not prefer any appeal and served sentence—Whereas appellant had no role in entire sequence of events and even otherwise remained in jail for more than a period for which he was awarded sentence. Held:—Appellant correctly identified during test identification

proceedings as well as in court. No animosity, ill—Will or grudge has been alleged for false implication. The connivance of the appellant and other accused manifestly established. Sentence modified to the period already undergone as under trial prison.

Aforesaid evidence led by the prosecution amply proves the role played by the accused, inasmuch as, it was he who had gone for booking of the truck on 31st March, 1996 and paid a sum of Rs.200/- as advance towards transportation charges. On his instructions, the truck was sent by PW1 Manmohan Singh through his driver Munna and helper Sanjay. It has come in the examination of this witness that Khairati Ram was not known to him prior to the booking of the truck. He duly identified him during test identification proceedings conducted by Metropolitan Magistrate at Tihar Jail on 10th April 1997. There is no reason as to why he will falsely depose regarding the booking of the truck by this accused and would correctly identify him, not only during the test identification proceedings but also in Court. In pursuance to the booking of the truck by appellant, truck was sent by Manmohan Singh. According to Munna Lal, accused Kanshi Ram met him at Libaspur petrol pump Jhandewalan and asked him and Sanjay to take tea and egg bhujia. After taking the same, they became unconscious and when they gained consciousness they found themselves at GTK Road, Kundli. He correctly identified Kanshi Ram, not only during test identification proceedings but also in the Court. No animosity, ill-will or grudge has been alleged against him for which reason he will falsely implicate him. **(Para 16)**

Thereafter, on the basis of secret information, both the accused were arrested and in pursuance to their disclosure statement, truck bearing fake number plate, the case property of this case was got recovered from Baldev Singh to whom it was sold. The accused Khairati Ram was also known to Baldev Singh for the last 30 years and they were having good relation. It was Khairati Ram who persuaded Baldev Singh to purchase the truck by introducing Kanshi Ram as

his friend and as owner of truck No. HR-26-7761. The mere fact that the payment was made to Kanshi Ram does not lessen the liability of Khairati Ram because had he not persuaded Baldev Singh to purchase the truck, he would not have purchased the truck with forged number plate. **(Para 17)**

Important Issue Involved: Appellant correctly identified during test identification proceedings as well in court. No animosity, ill—Will or grudge has been alleged for false implication. The connivance of the appellant and other accused manifestly established. Sentence modified to the period already undergone as under trial prison.

[Sh Ka]

APPEARANCES:

FOR THE APPELLANT : Mr. D.P. Chopra, Advocate.

FOR THE RESPONDENT : Ms. Fizani Husain, APP for the State.

RESULT: Appeal partly allowed.

SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 27th January, 2003 and the order of sentence dated 28th January, 2003 arising out of Sessions Case No. 160/97 in case FIR No. 246/96 under Sections 328/379/468/471/34 of Indian Penal Code, 1860 (hereinafter, in short 'IPC') registered at Police Station Samaipur Badli, whereby the appellant along with his co-accused was held guilty of the aforesaid offences and was sentenced to undergo as under:

(i) For offence under Sections 328/34 IPC, he was sentenced to undergo simple imprisonment for five years and also to pay fine of Rs.500/-, in default of fine to undergo simple imprisonment for ten days;

(ii) For offence under Sections 379/34 IPC, he was sentenced to undergo simple imprisonment for two years;

(iii) For offence under Sections 468/34 IPC, sentenced to

undergo simple imprisonment for five years and a fine of Rs.500/-, in default of payment of fine to undergo simple imprisonment of ten days;

(iv) For offence under Sections 471/34 IPC, sentenced to undergo simple imprisonment for five years and a fine of Rs.500, in default of payment of fine with simple imprisonment for ten days.

2. The prosecution's case as revealed from the report under Section 173 of the Code of Criminal Procedure is that on 1st April, 1996 Sh. Munna lodged a complaint with the police to the effect that he was working as a driver for last 5-6 months with New Delhi Ghaziabad Transport, 646 Shivaji Road, Azad Market on truck No. URB 1320. The owner of the truck, namely, Sh. Manmohan Singh had sent him with the aforesaid truck along with a helper-Sanjay with the instructions to reach Libaspur petrol pump, Jhandewalan and that one person who has booked the truck will meet him and the goods have to be taken from Libaspur to Ghaziabad. Accordingly, he reached Jhandewalan petrol pump, GTK road Libaspur at 10:15 p.m. where one person aged about 40 years having dark complexion met him and told him that he has booked the truck. He made him and the conductor-Sanjay to eat and drink tea and eggs bhujia. Thereafter, they fell asleep. At about 4.50 a.m. when he gained consciousness, he found himself and Sanjay at GTK Road, Kundli. He informed the owner of the truck. On the basis of this complaint, a case was registered under Sections 326/379 IPC. Twice the case was sent untraced. Ultimately, the case was transferred to the crime branch. On 6th April, 1997 on the basis of secret information, Khairati Ram and Kanshi Ram were arrested. They made disclosure statement about the commission of theft of this case as well as of five other cases wherein they committed theft after administering intoxicating substance to the victims. Test identification parade of both the accused persons was conducted where they were correctly identified by the witnesses. In pursuance to the disclosure statement of the accused, a truck bearing a fake number plate was recovered from Baldev Singh. After completion of investigation, charge sheet was submitted against both the accused persons. Charge for offences under Sections 328/379/468/471/34 IPC was framed against both the accused, to which they pleaded not guilty and claimed trial.

3. Prosecution examined 16 witnesses to substantiate its case. All the incriminating evidence was put to both the accused while recording their statement under Section 313 Cr.P.C. wherein they denied the case of the prosecution. According to them, they were innocent and falsely implicated in this case.

4. Accused Khairati Ram examined DW1-Chatar Pal Sharma who deposed that accused was picked up from his house on 3.4.1997. Vide judgment and order, as referred above, both the accused were convicted and sentenced separately. Feeling aggrieved by the aforesaid judgment, only accused Khairati Ram has preferred the present appeal.

5. I have heard Sh. D. P. Chopra, learned counsel for the appellant and Ms. Fizani Hussain, learned Additional Public Prosecutor for the State and have perused the record.

6. It was submitted by learned counsel for the appellant that Kanshi Ram was the principal accused and he did not prefer any appeal and served the sentence. The appellant has no role in the entire sequence of events. He was nowhere in the picture. He was neither present at the time of booking of the truck nor when the truck reached Jhandawalan Petrol Pump. Kanshi Ram had booked the truck. Thereafter also when the truck was sold, the payment was also made to Kanshi Ram. Under the circumstances, the appellant has been wrongly convicted in the case. Even otherwise, the appellant has remained in jail for more than the period for which he was awarded sentence. As such, he be sentenced to the period during which he remained as under trial in this case.

7. Refuting the contention of learned counsel for the appellant, it was submitted by learned APP for the State that it was the appellant who had gone for booking of the truck. He was correctly identified in test identification proceedings. Moreover, after committing theft of truck belonging to Manmohan Singh, it was Khairati Ram who induced PW8-Baldev Singh to purchase the truck. In consequence thereof, the truck was purchased by him. Thereafter, at the instance of both the accused, the truck with forged number plate was got recovered. It was submitted that neither Manmohan Singh nor Munna had any animosity with the accused for which reason they will falsely depose against him and identify him. Even Baldev Singh was on friendly terms with the accused- appellant as he was known to him for last 30 years. The accused had gone to his house for condolence as the wife of this witness had expired and at that

time he asked him to purchase the truck and thereafter he took Baldev Singh to the place where the truck was parked and then the payment was made to Kanshi Ram. When the accused was arrested and his personal search was taken, tablets Serepax was recovered from his possession as well as from the co-accused. As per the testimony of the pharmacist, PW14 Rajbir Singh, Serepax is a sedative group tablet and is taken for sleep. If it is taken in large quantity then one can become unconscious. It was submitted that these tablets were given to Munna and Sanjay after mixing it with tea and egg bhujia, as a result, they become unconscious and then theft of truck was committed, which later on was recovered. Under the circumstances, it was submitted that the appellant and the co-accused were rightly convicted by the learned trial Court and the impugned order does not suffer from any irregularity/infirmity which calls for interference, as such the appeal is liable to be dismissed.

8. PW1 Manmohan Singh was the owner of truck No. URB 1320. As per the record brought by Sh. S.P. Gupta, Sr. Assistant, ARTO Office, Ghaziabad, U.P.(PW12), the truck was registered in the name of Manmohan, s/o Mahinder Singh on 13th December, 1995. On 31st March, 1996 also it was in the name of Manmohan. PW1-Manmohan Singh unfolded that on 31st March, 1996 accused Kharati Ram came to his office at about 12 noon and he represented him that he was working as an orderly in some office in DESU and that a truck was needed to transport the goods from Delhi to Ghaziabad by a officer. A sum of Rs.200/- was paid by him as advance out of the transportation charges of Rs.1,000/-. He also instructed that the truck should be sent to petrol pump, Libaspur at 10 p.m. on the same day. As such, he sent truck No. URB-1320 at Libaspur petrol pump as per the instructions. He sent driver Munna and conductor Sanjay. Next day morning, he received a telephone call from his driver stating that he was given some intoxicating substance in tea and when he lost his consciousness, he was thrown on the road and the truck was taken away by the person who had booked the truck. He also informed that the same person who came for booking met at Libaspur petrol pump. He identified Kharati Ram in Tihar Jail on 10th April, 1997 during test identification proceedings.

9. PW2 Munna deposed that he was working as driver in New Delhi-Ghaziabad Transport situated at Shivaji Road, Azad Market. On 31st March, he was instructed by his owner to take truck of Manmohan Singh having registration No. URB 1320 at Libaspur petrol pump. Helper

Sanjay accompanied him. His employer also instructed him that one person would meet him who had booked the truck for Ghaziabad to transport the goods. At about 10:30 p.m. he reached at Jhandewalan where he met a person who resembled as accused Kanshi Ram who was having bilty of the company. He brought tea and egg bhujia. After taking the same when he asked to proceed, Kanshi Ram replied that he will bring labour to load the goods in the truck. By the time, Kanshi Ram returned after about 10 minutes, he and Sanjay became unconscious. At about 5 a.m. when he and Sanjay regained consciousness, they found themselves lying on the road near GTK road, Kundli. He was also having injuries on his head and face. He found that the truck was missing. He then informed his employer Manmohan Singh who came there and then they went to the police station where his statement was recorded. He identified Kanshi Ram during test identification proceedings.

10. Munna and Sanjay were taken to H.R. Hospital where they were examined by Dr. A.Pathak-PW5 who deposed that they were brought with alleged history of consuming something and becoming unconscious. They were referred to EMO(M). He prepared MLC of both of them which is Ex.PW5/A and PW5/B.

11. On receipt of DD No. 11A, Ex.PW9/A SI Gurnam Singh reached Jhandewalan petrol pump at Libaspur where he met complainant Munna and recorded his statement Ex.PW2/A and got an FIR registered. He also got the factum of booking of the truck verified from the office of transport at Bara Hindu Rao. Since the accused could not be traced, as such the case was sent untraced.

12. Investigation of the case was transferred to Inspector Kharak Singh (PW16). He has deposed that on 6th April, 1997, on receipt of secret information, he organised a raiding party comprising of Inspector Chander Das, HC Dilbagh Singh, HC Surender and other staff and the secret informer. On the pointing out of informer, both the accused Khairati Ram and Kanshi Ram were apprehended. They were arrested. From the personal search of accused Kanshi Ram, one HMT wrist watch, three tablets Serepax 30 besides his personal items were recovered. Similarly, from the personal search of accused Khairati Ram, one wrist watch and five tablets of Serepax, which were used by them for committing crime, were recovered. Both the accused persons made disclosure statement Ex.PW10/A and PW10/B and got recovered two

trucks which was the case property of other cases. Proceedings for getting their identification was conducted and they were correctly identified by the witnesses during the test identification proceedings. Thereafter, they were taken on police remand. They took the police party to P.S. Geedar Bha. HC Sukhdev of Punjab Police was joined in the investigation. Then they took the police party to the house of Baldev Singh to whom the truck No. URB 1320 with changed number plate of HR-26-7761 was sold. The truck was produced by Baldev Singh which he had purchased for a sum of Rs.1,60,000/- from the accused. It was taken into possession vide memo Ex.PW8/A. They also got recovered a jeep which was the case property of some other case. Owner of the truck produced the papers. After completion of investigation he submitted the challan. PW10 HC Surinder Singh, PW13 HC Sukhdev Singh, PW15 Dilbagh Singh were the members of the raiding party in whose presence recovery of the truck was got effected by the accused persons.

13. PW8 Baldev Singh purchased the truck in question and has deposed that Khairati Ram was known to him for last 30 years. Earlier, he used to ply a truck from Giddarwaha which he sold subsequently. Khairati Ram was also having a truck and he shifted to Delhi about 30 years ago. In January, 1996 his wife expired and after about one month Khairati Ram came for condolence and inquired about his truck and when he informed him that he has already sold the truck, he informed him that there was a dispute between two brothers who intend to sell a truck and he can get the same purchased very cheap. But he declined his offer then Khairati Ram left. After 5-7 days, Khairati Ram again came and took him to Dubwali to show the truck about which he had discussed earlier. Kanshi Ram was also present at Dubwali and he was introduced to him by Khairati Ram by stating that he was his friend and resident of Gurgaon. Khairati Ram also told him that he was one of the owner of the truck No. HR 26 7761. He purchased the truck for Rs. 1,60,000/- . A sum of Rs.1,10,000/- was paid after 2-4 days after selling land to Kanshi Ram and agreement Ex. PW6/B was executed with Kanshi Ram regarding purchase of truck which was witnessed by Gurditta Singh and Harish Kumar. Balance sum of Rs.50,000/- was to be paid at the time of handing over the ownership documents of the truck after it was transferred in his name. He contacted both the accused persons number of times for handing over the documents and to receive the balance payment but they did not hand over the same to him. In the meantime,

the police came and seized the truck from him at the instance of both the accused persons who were arrested by the police. The truck was seized by the police vide recovery memo Ex.PW8/A. The agreement Ex.PW6/B was also seized by the police vide memo Ex.PW8/B.

14. PW7-Sardar Gurditta Singh identified his thumb impression on the document Ex.PW6/B vide which Baldev Singh had purchased the truck from Kanshi Ram in persuasion of Khairati Ram for Rs. 1,10,000/-.

15. PW6 Harish Kumar was working as a stamp vendor and deed writer. He had sold the stamp paper Ex.PW6/B to Baldev Singh and typed the same on 9th April, 1996.

16. Aforesaid evidence led by the prosecution amply proves the role played by the accused, inasmuch as, it was he who had gone for booking of the truck on 31st March, 1996 and paid a sum of Rs.200/- as advance towards transportation charges. On his instructions, the truck was sent by PW1 Manmohan Singh through his driver Munna and helper Sanjay. It has come in the examination of this witness that Khairati Ram was not known to him prior to the booking of the truck. He duly identified him during test identification proceedings conducted by Metropolitan Magistrate at Tihar Jail on 10th April 1997. There is no reason as to why he will falsely depose regarding the booking of the truck by this accused and would correctly identify him, not only during the test identification proceedings but also in Court. In pursuance to the booking of the truck by appellant, truck was sent by Manmohan Singh. According to Munna Lal, accused Kanshi Ram met him at Libaspur petrol pump Jhandewalan and asked him and Sanjay to take tea and egg bhujia. After taking the same, they became unconscious and when they gained consciousness they found themselves at GTK Road, Kundli. He correctly identified Kanshi Ram, not only during test identification proceedings but also in the Court. No animosity, ill-will or grudge has been alleged against him for which reason he will falsely implicate him.

17. Thereafter, on the basis of secret information, both the accused were arrested and in pursuance to their disclosure statement, truck bearing fake number plate, the case property of this case was got recovered from Baldev Singh to whom it was sold. The accused Khairati Ram was also known to Baldev Singh for the last 30 years and they were having good relation. It was Khairati Ram who persuaded Baldev Singh to purchase

the truck by introducing Kanshi Ram as his friend and as owner of truck No. HR-26-7761. The mere fact that the payment was made to Kanshi Ram does not lessen the liability of Khairati Ram because had he not persuaded Baldev Singh to purchase the truck, he would not have purchased the truck with forged number plate.

18. The connivance of both the accused is manifest from the evidence on record. Not only in this case was the vehicle stolen after administering stupefying substances, when they were arrested they were found in possession of number of Serepax tablets which according to pharmacist Rajbir Singh, if taken in large quantity, can cause unconsciousness. The entire evidence was correctly appreciated by learned Additional Sessions Judge and the appellants were rightly convicted for the offences against them. The impugned order dated 27th January, 2003 does not suffer from any infirmity which calls for any interference.

19. Coming to the quantum of sentence, although for all the offences the appellant has been convicted separately, but vide order dated 29th January, 2003, it was clarified that the substantive sentence of imprisonment were to run concurrently. That being so, the maximum imprisonment awarded to the appellant was of 5 years and fine. It is the submission of learned counsel for the appellant that he has remained in custody for more than the period which was awarded to him and therefore he be sentenced to the period during which he remained as under-trial in this case.

20. Although this submission is not fortified by the material on record, but perusal of nominal roll goes on to show that the appellant remained in jail from 26th April, 1997 to 15th January, 2001 i.e. 4 years and 10 days. Keeping in view the fact that the case pertains to the year 1996 and the appellant has suffered rigours of trial for more than 17 years and he has already spent a period of 4 years and 10 days in jail, ends of justice will be met if he is sentenced to the period during which he remained as under trial in this case. He is, however, directed to deposit the fine, if not already deposited, with the learned trial Court within a period of two weeks and place on record a copy of the receipt.

21. With the aforesaid observations the appeal stands disposed of. Trial court record be sent along with copy of order.

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CRL. M.C.

AJIT SINGH .....PETITIONER

VERSUS

CBI ....RESPONDENT

(G.P. MITTAL, J.)

CRL. M.C. NO. : 4187/2011 DATE OF DECISION: 29.07.2013

Code of Criminal Procedure, 1973—Section 482—Indian Penal Code, 1860—Section 419, 420, 467, 468, 471 & 120B—Prevention of Corruption Act, 1988—Section 13 (2), 13 (1) (d)—Framing of Charge—Prosecution case that, Mansarowar Co-operative Group Housing Ltd. was fraudulently managed by Madhu Aggarwal and her husband G.C. Aggarwal, the accused, on strength of forged documents and fake members—Bisht, dealing assistant, Man Singh, AR and Devakar, RCS all co-accused conspired with Madhu Aggarwal and G.C. Aggarwal and orders without making proper verification regarding existence of society and its office bearers/ members and approved list of fictitious/non-existing members of the society—Address of the society belonged to accused/petitioner Ajit Singh who confirmed having received communication from DDA—Trial Court framed charges u/s 419, 420, 467, 468, 471, r.w. S. 120B IPC and S. 13 (2), 13 (1) (d) of P.C. Act—Held, well settled that charge cannot be framed merely on suspicion against accused however, at stage of framing charge, court is only to take a tentative view on the basis of material on record—If court of view that accused might have committed offence, it would be justified in framing charge against the accused—On facts held, material collected raises strong

suspicion that petitioner part of conspiracy to obtain allotment of land by main accused G.C. Aggarwal—Special Judge fully Justified in framing charges—Petition dismissed.

[Ad Ch]

APPEARANCES:

FOR THE PETITIONER : Mr. Dinesh Mathur, Sr. Advocate with Mr. Amish Dabas, Advocate.

FOR THE RESPONDENT : Ms. Sonia Marhur, Standing Counsel.

CASES REFERRED TO:

1. *Sheoraj Singh Ahlawat & Ors.* vs. *State of Uttar Pradesh & Anr.* 2012 (11) SCALE 107.
2. *CBI* vs. *K. Narayana Rao,* (2012) 9 SCC 512.
3. *Sherimon* vs. *State of Kerala,* (2011) 10 SCC 768.
4. *Onkar Nath Mishra* vs. *State (NCT of Delhi),* (2008) 2 SCC 561.
5. *Esher Singh* vs. *State of Andhra Pradesh,* AIR 2004 SC 3030).
6. *State of M.P.* vs. *Mohanlal Soni,* 2000 Crl.L.J. 3504.
7. *Union of India* vs. *Prafulla Kumar Samal* (1979) 3 SCC 4.
8. *Onkar Nath Mishra* vs. *State (NCT of Delhi)* (2008) 2 SCC 561.
9. *State of M.P.* vs. *Mohanlal Soni* 2000 Cri.LJ 3504.
10. *State of Maharashtra* vs. *Som Nath Thapa* 1996 Cri.LJ 2448.
11. *Union of India* vs. *Prafulla Kumar Samal* (1979) 3 SCC 4.
12. *State of Karnataka* vs. *L. Muniswamy* 1977 Cri.LJ 1125.

RESULT: Petition Dismissed.

G.P. MITTAL, J.

1. By virtue of this Petition under Section 482 of the Code of Criminal Procedure read with Article 227 of the Constitution of India, the Petitioner seeks to challenge an order dated 08.11.2011 passed by the learned Special Judge whereby charges for the offence punishable under Section 120-B read with Sections 419/420/467/468/471 IPC and Section 13(2) read with Section 13(1)(d) of P.C. Act, 1988(the P.C. Act) was ordered to be framed against the Petitioner.

2. The prosecution was launched against the Petitioner on the basis of allegations, which can be culled out from paras 1 and 2 of the impugned order hereunder:

> "1. The case of the CBI, in brief, is that Mansarovar Cooperative Group Housing Society (CGHS) Ltd. was registered on 07.12.1983 with Registrar of Cooperative Societies(RCS), New Delhi vide registration No.1005-H on application of P.N. Pandey, the then Secretary of the society, with its 75 members. The society was having its address at 70, Church Road, Bhogal, Jangpura, New Delhi. The Freeze strength of the society became 116 members. Smt. Madhu Aggarwal, the President of the society, is wife of accused Gokul Chand Aggarwal who had played a vital role in revival of many other co-operative Group Housing Societies. The society in question was fraudulently managed/controlled by Smt. Madhu Aggarwal and her husband accused Gokul Chand Aggarwal on the strength of forged documents and fake members. Accused Gopal Singh Bisht, the dealing assistant, accused Man Singh, the then AR(South) and accused Narayan Diwakar, the then RCS, conspired with Smt. Madhu Aggarwal, accused Gokul Chand Aggarwal and others without making proper verification regarding the existence of the society and its office bearers/members and approved the list of fictitious and non-existing members of the society. Thereafter the same was submitted to DDA for allotment of land.
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> 2. Accused Gokul Chand Aggarwal purchased the documents of the society for rs.60,000/- from accused Subhash Choudhary, formerly Secretary and promoter members of the society. Subsequently, accused Gokul Chand Aggarwal suo-moto filed forged registration of 20 promoter members of the society by

ante-dating the same to 25.05.1990 and enrolled 20 fictitious members in the society. On 23.02.2003, the General Body Meeting of the society was held which was chaired by accused Subhash Choudhary and purportedly attended by 27 members. In this meeting a resolution was passed for shifting the office of society from 70, Church Road, Jangpura, Bhogal, New Delhi, to 86, 2nd Floor, Vinoba Puri, Lajpat Nagar, New Delhi. Accused Gokul Chand Aggarwal impersonated himself as R.P. Saxena and the Secretary of the society sent a letter to AR (South) on 20.05.2003 which was processed by accused Gopal Singh Bisht, the then Dealing Assistant, who recorded a note dated 23.05.2003 that an approved list of 116 members as on 31.07.1985 had been forwarded to DDA for allotment of land after necessary verifications. Accused Gopal Singh Bisht recommended that no further verification was required since list of members had already been approved by RCS. Thereafter the file was submitted to accused Rakesh Bhatnagar, the then JR, through accused Man Singh, the then AR, who recorded noted dated 26.05.2003 detailing that enrollment and resignation of members had not been verified by the RCS and, therefore, society may be directed to submit their audit and election report within 15 days. Accused P.K. Thirwani, the Sr. Auditor, was appointed by J.S. Sharma, the then AR (Audit), to undertake the audit of the society for the period 1990-2003. However, accused P.K. Thirwani did not visit the office of society and prepared an audit report thereby he violated provisions of Delhi Cooperative Societies Act, 1972(hereinafter referred to as 'the DCS Act') and the Rules framed thereunder. The minutes of General Body Meeting, Management Committee Meeting. Resignation and enrollment of members and balance sheet for the period 1990-2003, receipts and payments etc. were prepared at the instance of accused Gokul Chand Aggarwal and accused Ashwani Sharma. Accused Narayan Diwakar without looking into the fact that out of 20 members who had been shown as resigned in General Body Meeting relied upon recommendation made by accused Gopal Singh Bisht and accused Man Singh, the then AR, and approved fresh list of 116 members on 01.08.2003 which was forwarded to DDa for allotment of land. The DDA sent a letter dated 31.10.2003/03.11.2003 and another dated 10.12.2003 to the

society in which address of the society was given as 206, 2nd Floor, New Delhi House, Barakhamba Road, New Delhi and the said address belonged to accused Ajit Singh who confirmed having received the aforesaid letters."

3. It is urged by the learned senior counsel for the Petitioner that as per the case of the prosecution, a letter dated 31.10.2003/03.11.2003 and another letter dated 10.12.2003 addressed to the Secretary/President of Mansarover Cooperative Group Housing Society Ltd. was sent at the address 206, 2nd Floor, New Delhi House, Barakhamba Road which was the address of another society, namely, Vishrantika CGHS Ltd. of which the Petitioner was the President. It is urged that according to the prosecution, scrutiny of bank accounts of M/s. Baltic Construction Pvt. Ltd., a partnership concern, whereof Petitioner was one of the partners, showed that a cheque for Rs. 12 lakh was issued on 07.09.2004 in favour of M/s. Purnima Projects (P) Ltd., a partnership concern of co-accused Gokul Chand Agarwal and Madhu Agarwal. It is urged that this by itself was not sufficient to show the Petitioner's nexus or complicity in forging the list of members allegedly forwarded to the DDA or allotment of the land to Mansarover Cooperative Group Housing Society Ltd. at a subsidized rate.

4. The learned counsel urges that to prove charge of conspiracy, the prosecution has to establish that there was an agreement between the accused to do or caused to be done an illegal act or an act which is not illegal by illegal means. It is urged that the allotment of the land was done even before the issuance of the alleged cheque by the partnership concern M/s. Baltic Construction Pvt. Ltd.(of the Petitioner) to M/s. Purnima Projects (P) Ltd. (of the co-accused) and the said circumstance cannot be taken into account by the prosecution to show that the Petitioner conspired with the co-accused, particularly Gokul Chand Agarwal and Smt. Madhu Agarwal to get the allotment of the land from DDA. Therefore, it is urged that there is no direct or circumstantial evidence to connect the petitioner with the conspiracy. The Petitioner, according to the learned counsel, is, therefore, entitled to be discharged. (**CBI v. K. Narayana Rao,** (2012) 9 SCC 512, **Sherimon v. State of Kerala,** (2011) 10 SCC 768 and **Esher Singh v. State of Andhra Pradesh,** AIR 2004 SC 3030).

5. On the other hand, the learned Standing Counsel for the CBI

urges that at the stage of framing of the charge, the evidence is not to be meticulously examined and if on the basis of material collected by the prosecution the Trial Court forms an opinion regarding existence of the factual ingredients constituting the offence alleged, the Trial Court would be justified in framing the charges against the accused. It is urged that writing of the letters dated 31.10.2003/03.11.2003 and 10.12.2003 addressed to the Secretary/President of Mansarover CGHS Ltd. at the address of the Petitioner clearly established his complicity unless he(the Petitioner) offers an explanation with regard to the same.

6. It is not in dispute that 206, 2nd Floor, New Delhi House, Barakhamba Road, New Delhi was the address of Vishrantika CGHS Ltd. of which the Petitioner was the President. The prosecution relies on the letter dated 31.10.2003/03.11.2003 received by Smt. Neeru Gupta, employed in the office of the Petitioner. The receipt of the letter shows the stamp of the Vishrantika CGHS Ltd. Statement of Smt. Neeru Gupta further shows that the said letter was handed over to one Shri Rajan Sareen who was working in the office of Ajit Singh and who used to handle all the correspondents pertaining to the Housing Society. Vishrantika CGHS Ltd. belonged to Petitioner Ajit Singh and receipt of this letter at this address and its response by Mansarover CGHS Ltd. would be sufficient to raise a strong suspicion against the Petitioner. The fact that a cheque for Rs.12 lakh was later on issued on 07.09.2004 from the account of M/s. Baltic Construction Pvt. Ltd., a partnership concern belonging to the Petitioner in favour of M/s. Purnima Projects (P) Ltd., a partnership concern of Gokul Chand Agarwal and his wife and co-accused Smt. Madhu Agarwal and its subsequent return by the co-accused is only corroborative evidence.

7. It is well settled that a charge cannot be framed merely on suspicion against the accused. But at the same time at the stage of framing the charge the court is only to take a tentative view on the basis of material on record. If the court is of the view that the accused might have committed the offence it would be justified in framing the charge against the accused. In **Sheoraj Singh Ahlawat & Ors. v. State of Uttar Pradesh & Anr.** 2012 (11) SCALE 107, the Supreme Court relied on its various earlier decisions in **Onkar Nath Mishra v. State (NCT of Delhi),** (2008) 2 SCC 561, **State of Karnataka v. L. Muniswamy,** 1977 Crl.L.J. 1125, **State of Maharashtra v. Som Nath Thapa** (supra), **State of M.P. v. Mohanlal Soni,** 2000 Crl.L.J. 3504 and **Union of**

India v. Prafulla Kumar Samal (1979) 3 SCC 4 and observed as under:-

> "11. In **Onkar Nath Mishra v. State (NCT of Delhi)** (2008) 2 SCC 561... This Court explained the legal position and the approach to be adopted by the Court at the stage of framing of charges or directing discharge in the following words:-
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> > "11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence." (emphasis supplied)
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> 12. Support for the above view was drawn by this Court from earlier decisions rendered in **State of Karnataka v. L. Muniswamy** 1977 Cri.LJ 1125, **State of Maharashtra v. Som Nath Thapa** 1996 Cri.LJ 2448 and **State of M.P. v. Mohanlal Soni** 2000 Cri.LJ 3504. In **Som Nath's** case (supra) the legal position was summed up as under:-
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> > "if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone

into; the materials brought on record by the prosecution has to be accepted as true at that stage." (emphasis supplied)

13. So also in **Mohanlal's** case (supra) this Court referred to several previous decisions and held that the judicial opinion regarding the approach to be adopted for framing of charge is that such charges should be framed if the Court prima facie finds that there is sufficient ground for proceeding against the accused. The Court is not required to appreciate evidence as if to determine whether the material produced was sufficient to convict the accused. The following passage from the decision in **Mohanlal's** case (supra) is in this regard apposite:

> "8. The crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

x x x x x x x x x x

16. To the same effect is the decision of this Court in **Union of India v. Prafulla Kumar Samal** (1979) 3 SCC 4, where this Court was examining a similar question in the context of Section 227 of the Code of Criminal Procedure. The legal position was summed up as under:

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

8. The material collected does raise strong suspicion that the Petitioner was part of the conspiracy to obtain allotment of the land by the main accused (Gokul Chand Aggarwal). **K. Narayana Rao** and **Esher Singh** relied upon by the learned Senior Counsel do not help the Petitioner. Thus the learned Special Judge was fully justified in framing the charge against the Petitioner.

9. In view of the above discussion, I do not find any ground to interfere in the impugned order. The Petition is without any merit; the same is accordingly dismissed.

ILR (2013) VI DELHI 4561
W.P. (C)

SATISH **.....PETITIONER**

VERSUS

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

(GITA MITTAL & DEEPA SHARMA, J.)

W.P. (C) NO. : 2917/2013 **DATE OF DECISION: 14.08.2013**

Service Law—Selection Process—Rejection of candidature to the post of Naik GD in the Indian Coast Guard on the medical grounds—Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorari and direction to quash the order dated 12th February, 2013 passed by respondent No. 3/Recruiting Officer Coast Guard whereby the candidature of the petitioner for the post of Naik GD in the Indian Coast Guard pursuant to a Selection Process conducted in 2012 was rejected on the medical grounds—Being aggrieved, the petitioner assails the result of the medical examination conducted at INS Chilka, Nivarani Hospital on 12th February, 2013 whereby he was found medically unfit for enrolment on the ground that he was suffering form 'NYSTAGMUS'—Petitioner placed reliance on reports of his medical fitness—He also complains of failure of the respondents to grant review to him—Court directed the petitioner to appear before the Commandant, Army Hospital (Research and Referral), Delhi Cantt pertaining to his medical examination with all records in his possession—Pursuant to the above directions, the petitioner was medically examined by the Board of officers of the Army Hospital, (Research and Referral)—Board examined the candidate and findings are as follows:—(a) His neurological evaluation shows normal visual acuity and colour vision. (b) His pupils are bilaterally equal and reacting to light with normal accommodation reflex. His extra ocular movements are full. (c) There is no esotropic or exotropic eye defect. His saccades and pursuits are normal. There is no primary of gaze evoked nystagmoid movements. There is no motor, sensory or cerebellar bysfunction—Opinion of the Bord of officers:—(a) A case of nystagmus (Inv)—NAD (b) he is fit for nystagmus".

Held—It is manifest from the above that no abnormality detected and the petitioner did not have the problem of nystagmus—In view of the above, no objection remains to petitioner's recruitment to the post of Navik GD in the Indian Coasts Guard—In view of thereof, order dated 12th February, 2013 passed by respondent No. 3 cancelling the petitioner's candidature to the post of Navik GD in the Indian Coast Guard is hereby set aside and quashed—Respondents are directed to proceed in the matter of petitioner's recruitment in accordance with prescribed procedure and to pass appropriate orders in this regard within a period of two weeks from today—Respondents shall ensure that full opportunity of training is facilitated to the petitioner and he is permitted to complete his training at the earliest—Petitioner shall be entitled to notional seniority and he shall be placed above his batch mate who was immediately below him in the order of merit list that was prepared at the time of original recruitment—Petitioner shall be entitled to the benefit of seniority for his pay fixation—Petitioner shall not be entitled to back wages—Orders in this regard shall be passed within four weeks and communicated to the petitioner—Writ petition is allowed in the above terms.

It is manifest from the above that no abnormality was detected and the petitioner did not have the problem of nystagmus. In view of the above, no objection remains to

petitioner's recruitment to the post of Navik GD in the Indian Coasts Guard.

In view of thereof, we direct as follows:-

(i) The order dated 12th February, 2013 passed by respondent No. 3 cancelling the petitioner's candidature to the post of Navik GD in the Indian Coast Guard is hereby set aside and quashed.

(ii) The respondents are directed to proceed in the matter of petitioner's recruitment in accordance with prescribed procedure and to pass appropriate orders in this regard within a period of two weeks from today.

(iii) The respondents shall ensure that full opportunity of training is facilitated to the petitioner and he is permitted to complete his training at the earliest.

(iv) The petitioner shall be entitled to notional seniority and he shall be placed above his batch mate who was immediately below him in the order of merit list that was prepared at the time of original recruitment. The petitioner shall be entitled to the benefit of seniority for his pay fixation.

(v) The petitioner shall not be entitled to back wages.

(vi) Orders in this regard shall be passed within four weeks and communicated to the petitioner. **(Para 5)**

Important Issue Involved: Selection Process—Rejection of candidature—Petitioner found medically unfit enrolment on the ground that he was suffering form 'NYSTAGMUS—Pursuant to the direction, petitioner was medically examined by the Board and no abnormality was detected and he did not have the problem of nystagmus—No objection remains to petitioner's recruitment and therefore order passed by respondent No. 3 cancelling the petitioner's candidature to the post of Navik GD in the Indian Coast Guard is hereby set aside and quashed.

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. Ajit Kakkar, Adv.

FOR THE RESPONDENT : Ms. Barkha Babbar, Adv. for UOI.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

1. The writ petition has been preferred by the petitioner under Article 226 of the Constitution of India for issuance of writ of certiorari and direction to quash the order dated 12th February, 2013 passed by respondent No. 3/Recruiting Officer Coast Guard whereby the candidature of the petitioner for the post of Naik GD in the Indian Coast Guard pursuant to a Selection Process conducted in 2012 was rejected on the medical grounds. Being aggrieved, the petitioner assails the result of the medical examination conducted at INS Chilka, Nivarani Hospital on 12th February, 2013 whereby he was found medically unfit for enrolment on the ground that he was suffering from **'NYSTAGMUS'**.

2. The petitioner placed reliance on reports of his medical fitness. He also complains of failure of the respondents to grant review to him. Given the urgency of this matter as it is concerned with recruitment and to obviate any further dispute we had passed an order dated 6th May, 2013, directing the petitioner to appear before the Commandant, Army Hospital (Research and Referral), Delhi Cantt on 14th May, 2013 pertaining to his medical examination with all records in his possession.

3. The Commandant, Army Hospital (Research and Referral), Delhi was also directed to constitute a Board of Specialists/Experts to conduct appropriate medication examination of the petitioner. The Board so constituted was directed to take an independent view in the matter uninfluenced by the previous reports produced by both the parties.

4. Pursuant to the above directions, the petitioner was medically examined by the Board of officers of the Army Hospital, (Research and Referral). The respondents have filed an Affidavit dated 30th July, 2013 enclosing therewith a copy of the report dated 16th May, 2013 of the petitioner's medical examination. The relevant extract of this report reads as under:-

"3. The board examined the candidate and findings are as follows:-

(a) His neurological evaluation shows normal visual acuity and colour vision.

(b) His pupils are bilaterally equal and reacting to light with normal accommodation reflex. His extra ocular movements are full.

(c) There is no esotropic or exotropic eye defect. His saccades and pursuits are normal. There is no primary of gaze evoked nystagmoid movements. There is no motor, sensory or cerebellar dysfunction.

4 Opinion of the Board of officers:-

(a) A case of nystagmus(Inv)- NAD

(b) He is fit for nystagmus".

5. It is manifest from the above that no abnormality was detected and the petitioner did not have the problem of nystagmus. In view of the above, no objection remains to petitioner's recruitment to the post of Navik GD in the Indian Coasts Guard.

In view of thereof, we direct as follows:-

(i) The order dated 12th February, 2013 passed by respondent No. 3 cancelling the petitioner's candidature to the post of Navik GD in the Indian Coast Guard is hereby set aside and quashed.

(ii) The respondents are directed to proceed in the matter of petitioner's recruitment in accordance with prescribed procedure and to pass appropriate orders in this regard within a period of two weeks from today.

(iii) The respondents shall ensure that full opportunity of training is facilitated to the petitioner and he is permitted to complete his training at the earliest.

(iv) The petitioner shall be entitled to notional seniority and he shall be placed above his batch mate who was immediately below him in the order of merit list that was prepared at the time of original recruitment. The petitioner shall be entitled to the benefit

of seniority for his pay fixation.

(v) The petitioner shall not be entitled to back wages.

(vi) Orders in this regard shall be passed within four weeks and communicated to the petitioner.

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

ILR (2013) VI DELHI 4566
W.P. (C)

B. PADMAIAH ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA MITTAL, J.)

W.P. (C) NO. : 2640/2012 DATE OF DECISION: 27.08.2013

Service Law—Armed Forces—Assured Career Progression Scheme—Failure to grant benefits form the date of completion of 12 years of regular service without promotion—Brief Facts—Petitioner who was appointed as Constable on the 3rd of August, 1983 with the respondents completed 12 years of service in the year 1995. ACP Scheme was introduced on 9th August, 1999 by the respondents, benefit whereof were extended to the CISF personnel effectuating the recommendations of the Fifth Central Pay Commission—The same becomes applicable for the CISF personnel pursuant to CISF Cricular No.ESTT—I/16/2000 dated 18th February, 2000 Disciplinary proceedings against the petitioner culminated in passing of the order dated 16th June, 2000 imposing the penalty on the petitioner for dismissal from

service—Petitioner invoked the writ jurisdiction of the Madras High Court wherein the orders passed by the disciplinary authority, appellate authority and the revisional authority were set aside and quashed—Respondents were directed to reinstate the petitioner in service forthwith "with back-wages, continuity of service and all order attendant benefits"—Because of the intervention of this order of dismissal, petitioner was prevented from undergoing the promotion cadre course—While the disciplinary proceedings were on by an order dated 24th April, 2000, the respondents made an offer to the petitioner to undergo the promotion cadre course for the first time to which petitioner showed his unwillingness—After resumption of duties, the respondents made a second offer to the petitioner to participate in the promotion cadre course being conducted from 21st May, 2007 to 7th July, 2007—Petitioner undertook the course but was unsuccessful in the drill and weapon training and consequently was declared failed—The last and final opportunity available to the petitioner to undertake the promotion cadre course was successfully availed by the petitioner between 24th June, 2008 to 27th June, 2008—Case of the petitioner was considered by the Screening Committee and he was given the first financial upgradation under the ACP Scheme vide order dated 7th February, 2009 with effect from 27th January, 2009—Petitioner is primarily aggrieved by the fact that the respondents failed to grant him the benefit of ACP Scheme with effect from 9th August, 1999 when it was promulgated and when the petitioner had already completed all eligibility conditions—On 19th May, 2009, the modified ACP Scheme was promulgated with effect from 1st of September, 2008 which was also extended to the personnel of the CISF—Screening Committee considered the case of the petitioner on 24th February, 2010 but found him unfit for grant of MACP benefit due to deferment of

his first financial upgradation for the period between 9th August, 1999 to 1st September, 2008, i.e., for a period of 9 years and 23 days. Held—Petitioner was eligible for PCC on the 9th of August, 1999 when the ACP Scheme came into force and on 18th February, 2000 when it became applicable to the CISF—No circumstance has been pointed out which would render the Petitioner ineligible to grant of the benefit with effect from 18th February, 2000 and as such the benefit thereof has to be given to the petitioner from that date—So far as petitioner's unwillingness in undertaking the PCC on 24th April, 2000 is concerned, for the reasons recorded in WP(C)No.6937/2010 *Hargovind Singh v. Central Industrial Security Force* the same would not be a disqualification to grant of such benefit to the petitioner—The same reasons would apply upon the failure of the petitioner to successfully complete the PCC in the second opportunity given to him between 21st May, 2007 to 7th July, 2007—Petitioner has Successfully completed the PCC in the third attempt between 24th June, 2008 to 14th July, 2008—Petitioner has therefore, satisfied all essential conditions which were notified by the respondents under the ACP Scheme which entitles him to the continuation of the benefits—By the judgement dated 12th December, 2006, the Madras High Court directed reinstatement of the petitioner in service with all benefits which included backwages, continuity of service and all other attendant benefits—It has also to be held that grant of ACP Scheme from the relevant date is an integral part of the relief which had been granted by the court to the petitioner—Impugned order date 12th March, 2011 passed by the respondent no.3 and 3rd August, 2011 by the respondent no.2 are not sustainable and are hereby set aside and quashed—Petitioner is entitled to the benefits of ACP Scheme with effect from 18th February, 2000 as applicable to the CISF—Writ petition is allowed in the above terms.

As noted above, the petitioner before us was eligible for PCC on the 9th of August, 1999 when the ACP Scheme came into force and on 18th February, 2000 when it became applicable to the CISF. No circumstance has been pointed out which would render the petitioner ineligible to grant of the benefit with effect from 18th February, 2000 and as such the benefit thereof has to be given to the petitioner from that date. So far as petitioner's unwillingness in undertaking the PCC on 24th April, 2000 is concerned, for the reasons recorded in the **Hargovind Singh** (Supra), we are of the view that the same would not be a disqualification to grant of such benefit to the petitioner.

(Para 23)

The same reasons would apply upon the failure of the petitioner to successfully complete the PCC in the second opportunity given to him between 21st May, 2007 to 7th July, 2007. The petitioner has successfully completed the PCC in the third attempt between 24 June, 2008 to 14 July, 2008. The petitioner has therefore, satisfied all essential conditions which were notified by the respondents under the ACP Scheme which entitles him to the continuation of the benefits. **(Para 24)**

Important Issue Involved: Assured Career Progression Scheme—Failure to grant benefits from the date of completion of 12 years of regular service without promotion—Petitioner having successfully completed the PCC in the third attempt, satisfied all essential conditions which were notified by the respondents under the ACP Scheme which entitles him to the continuation of the benefits—By the Judgement, the Madras High Court directed reintatement of the petitioner in service with all benefits which included backwages, continuity of service and all other attendant benefits—Grant of ACP Scheme from the relevant date is an integral part of the relief which had been granted by the court to the petitioner

[Sa Gh]

APPEARANCES:

FOR THE PETITIONER : Mr. S. Beno Bencigar, Adv.

FOR THE RESPONDENTS : Mr. B.V. Niren and Mr. Prasouk Jain, Advs.

CASES REFERRED TO:

1. *R.S. Rathore* vs. *Union of India & Another* WP(C)No.1506/2012.
2. *Hargovind Singh* vs. *Central Industrial Security Force* WP(C)No.6937/2010.
3. *Bhagwan Singh* vs. *UOI & Ors.* W.P.(C) No.8631/2009.
4. *S. Ravi & Others* vs. *Union of India & Others* W.P.No.22111/2004.

RESULT: Petition Allowed.

GITA MITTAL, J. (Oral)

1. The petitioner in this case is aggrieved by the failure of the respondents to grant him the benefits of Assured Career Progression Scheme ('ACP' Scheme hereafter) from the date of completion of 12 years of regular service without promotion. The petitioner also assails the order dated 12th March, 2011 passed by the Deputy Inspector, Central Industrial Security Force ('CISF' hereafter) denying the benefit of the ACP Scheme to the petitioner as well as the order dated 3rd August, 2011 passed by the Director General, CISF confirming the order of the Deputy Inspector.

2. The factual narration by the petitioner is undisputed by the respondents. The petitioner who was appointed as Constable on the 3rd of August, 1983 with the respondents completed 12 years of service in the year 1995. The ACP Scheme was introduced on 9th August, 1999 by the respondents, benefit whereof were extended to the CISF personnel effectuating the recommendations of the Fifth Central Pay Commission in its report for the Central Government's employee to deal with the problem of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues. The same becomes applicable for the CISF personnel pursuant to CISF Circular No.ESTT-I/16/2000

dated 18th February, 2000.

3. The respondents have drawn our attention to para 6 of Annexure I of the Scheme which prescribes the conditions which render an employee eligible for grant of benefit of this scheme. The same is as under:

> "6. Fulfilment of normal promotion norms (benchmark, departmental examination, seniority-cumfitness in the case of Group 'D' employees, etc.) for grant of financial up-gradation, performance of such duties as are entrusted to the employees together with retention of old designations, financial up-gradation as personal to the incumbent for the stated purposes and restriction of the ACP Scheme for financial and certain other benefits (House Building Advance, allotment of Government accommodation, advances, etc) only without conferring any privileges related to higher status (e.g. invitation to ceremonial functions, deputation to higher posts, etc) shall be ensured for grant of benefits under the ACP Scheme."

4. The controversy in the instant case rests on the requirement of a person successfully completing the prescribed Promotion Cadre Course (PCC) which would render him eligible for promotion. It appears that the petitioner was served with the charge sheet dated 28th March, 1998 under Rule 34 of the CISF Rules. The disciplinary proceedings against the petitioner culminated in passing of the order dated 16th June, 2000 imposing the penalty on the petitioner for dismissal from service. The petitioner's appeal came to be rejected by an order dated 27th November, 2000 while an order dated 31st March, 2001 was passed by the revisional authority dismissing his revision petition. Aggrieved by these orders in the disciplinary proceedings and in the challenge thereof, the petitioner invoked the writ jurisdiction of the Madras High Court by way of WP(C)No.22574/2001. This writ petition came to be allowed by the judgment of the Division Bench of High Court of Judicature at Madras dated 12th December, 2006 wherein the orders passed by the disciplinary authority, appellate authority and the revisional authority were set aside and quashed. The respondents were directed to reinstate the petitioner in service forthwith *"with backwages, continuity of service and all other attendant benefits"*.

5. The writ petitioner had been removed from service with the CISF with effect from the 23rd of June, 2000. It is because of the

intervention of this order of dismissal that the petitioner was prevented from undergoing the promotion cadre course.

6. While the disciplinary proceedings were on by an order dated 24th April, 2000, the respondents made an offer to the petitioner to undergo the promotion cadre course for the first time to which petitioner showed his unwillingness. After resumption of duties, the respondents made a second offer to the petitioner to participate in the promotion cadre course being conducted from 21st May, 2007 to 7th July, 2007. The petitioner undertook the course but was unsuccessful in the drill and weapon training and consequently was declared failed. The last and final opportunity available to the petitioner to undertake the promotion cadre course was successfully availed by the petitioner between 24th June, 2008 to 27th June, 2008 and he was declared qualified vide service order PT-II No.80/2008 dated 17th July, 2008.

7. The respondents acted only after the petitioner successfully completed the promotion cadre course. The case of the petitioner was considered by the Screening Committee and he was given the first financial upgradation under the ACP Scheme vide order dated 7th February, 2009 with effect from 27th January, 2009.

8. The petitioner is primarily aggrieved by the fact that the respondents failed to grant him the benefit of ACP Scheme with effect from 9th August, 1999 when it was promulgated and when the petitioner had already completed all eligibility conditions. 9. Some additional facts subsequent to the grant of benefit of ACP Scheme with effect from 27th January, 2009 also deserve to be considered. We are informed that on 19th May, 2009, the modified ACP Scheme was promulgated with effect from 1st of September, 2008 which was also extended to the personnel of the CISF.

10. The Screening Committee considered the case of the petitioner on 24th February, 2010 but found him unfit for grant of MACP benefit due to deferment of his first financial upgradation for the period between 9th August, 1999 to 1st September, 2008, i.e., for a period of 9 years and 23 days.

11. Under the MACP Scheme, a personnel of the force becomes eligible for the benefit on completion of 10 years of service as against the 12 years prescribed under the 1999 scheme. On 7th October, 2010,

the first ACP benefit granted to the petitioner was converted into the "FIRST" MACP benefit with effect from 1st September, 2008. The respondents relied upon this order to urge that the ACP benefit was therefore, being given to the petitioner from the date earlier to 27 January, 2009 which had been ordered earlier.

12. The petitioner made a representation dated 7March, 2011 to the Inspector General of the CISF for grant of second financial upgradation. The same did not find favour and was rejected by respondent no.3 by an order passed on 12th March, 2011. The second representation dated 27th March, 2011 made to the Director General of the CISF was rejected by a reply dated 3rd August, 2011. The petitioner has contended that, in these circumstances, he has been wrongly deprived of the benefits of MACP for the period between 9th August, 1999 till 1st September, 2008.

13. We have heard learned counsel for the parties. The respondent's opposition to the writ petition lies on the fact that the petitioner was given an opportunity to undergo the PCC on the 24th of April, 2000 but he had shown unwillingness and consequently he was not entitled to the benefits of PCC till he successfully cleared the promotion cadre course.

14. The salient features of the ACP scheme as well as the criteria and procedure for its implementation in the CISF are detailed in the Circular dated 18th February, 2000. The respondents have set down the categories of the CISF employees to whom the ACP scheme is applicable in para 3(a) which reads as follows:-

> **"A) CATEGORIES OF CISF EMPLOYEES TO WHOM THE ACP SCHEME IS APPLICABLE**
>
> The ACP scheme covers all such Group "B", "C" & "D" employees of the CISF who for reasons of no promotional avenues at all or due to limited promotional avenues, have not availed any regular promotion for 12 years from the date of their direct appointment to any post or if availed one promotion but have not got the opportunity for second promotion till the completion of 24 years of regular service isolated posts in Group "A", "B", "C" and "D" categories which have no promotional avenues shall also qualify for similar benefits on the pattern indicated above."

15. It is apparent from the above reading that the scheme is applicable to all employees of the CISF who, though eligible, for reasons of no promotional avenues at all or due to limited promotional avenues, have not availed any regular promotion for 12 years from the date of their direct appointment to any posts. Such personnel would be entitled to the benefit under the Scheme. The date on which the person has to be considered for the benefit of the ACP is obviously the date on which they complete 12 years of service.

16. In the instant case, the petitioner has completed 12 years of service in the year 1995 on which date the Scheme was not vogue. Therefore, even if the effective date of the applicability of the scheme was construed as 18th February, 2000 when the scheme became applicable to the employees of the CISF, the petitioner was eligible under para 3(A) for consideration and, therefore, the contention that he should have been considered and granted benefit of ACP Scheme as on 18th February, 2000 is not without merit.

17. So far as the submission of learned counsel for the respondents that petitioner could claim benefit of the ACP Scheme only from such date when he successfully completed promotion cadre course is concerned, this question has been raised and answered in several cases.

18. The grant of the benefit of the ACP Scheme to the petitioner is opposed on the ground that he has refused the first opportunity to undergo the promotion cadre course.

19. Learned counsel for the petitioner has placed reliance on Circular No.39/1993 dated 23rd/28th November, 1993 whereby the decision of the CISF to grant three opportunities in various ranks between Constable to Inspector to complete the promotion cadre course was permitted. This circular also shows that the decision had been taken that third chance will be accorded to those personnel who have not been able to clear the promotion cadre course after availing of the second chance and such opportunity would be given only by the Inspector General/Headquarter at Force Headquarter on special recommendation from the concerned DIGs. However, DIGs will have to justify the reasons for such recommendation.

20. Mr. S. Beno Bencigar, learned counsel for the petitioner has drawn our attention to the pronouncement dated 4th December. 2006 passed by the Division Bench of the High Court of Judicature at Madras in W.P.No.22111/2004 **S. Ravi & Others v. Union of India & Others** filed in similar circumstances. The above circular was relied upon by the

petitioner to contend that the petitioners are entitled to three attempts to pass the promotion cadre course and therefore respondents cannot deny the benefits of PCC upon failure of a person succeeding in the PCC course on the first and second attempts. This submission found favour with the Madras High Court which quashed the decision of the respondents withdrawing the benefits of PCC to persons who had either not undertaken the PCC or had failed in first and second chance and the benefits of PCC were restored to such person.

21. Learned counsel for the petitioner has also placed reliance on the pronouncements of this court dated 15th February, 2011 in WP(C)No.6937/2010 **Hargovind Singh v. Central Industrial Security Force** and the judgment dated 21st May, 2013 in WP(C)No.1506/2012 **R.S. Rathore v. Union of India & Another** wherein also the respondents had withdrawn the benefit of PCC to the petitioners on the same ground as in the case of the present petitioner. The respondents had even initiated recovery proceedings.

22. We may usefully extract the relevant portion of the pronouncement of **Hargovind Singh** (Supra) wherein the respondents contention has been overruled by the court 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."

23. As noted above, the petitioner before us was eligible for PCC on the 9th of August, 1999 when the ACP Scheme came into force and on 18th February, 2000 when it became applicable to the CISF. No circumstance has been pointed out which would render the petitioner ineligible to grant of the benefit with effect from 18th February, 2000 and as such the benefit thereof has to be given to the petitioner from that date. So far as petitioner's unwillingness in undertaking the PCC on 24th April, 2000 is concerned, for the reasons recorded in the **Hargovind Singh** (Supra), we are of the view that the same would not be a disqualification to grant of such benefit to the petitioner.

24. The same reasons would apply upon the failure of the petitioner to successfully complete the PCC in the second opportunity given to him between 21st May, 2007 to 7th July, 2007. The petitioner has successfully completed the PCC in the third attempt between 24 June, 2008 to 14 July, 2008. The petitioner has therefore, satisfied all essential conditions which were notified by the respondents under the ACP Scheme which entitles him to the continuation of the benefits.

25. By the judgement dated 12th December, 2006, the Madras High Court directed reinstatement of the petitioner in service with all benefits which included backwages, continuity of service and all other attendant benefits. It has also to be held that grant of ACP Scheme from the relevant date is an integral part of the relief which had been granted by the court to the petitioner. In view of the above, we direct as follows:

(i) The impugned order dated 12th March, 2011 passed by the respondent no.3 and 3rd August, 2011 by the respondent no.2 are not sustainable and are hereby set aside and quashed.

(ii) The petitioner is entitled to the benefits of ACP Scheme with effect from 18th February, 2000 as applicable to the CISF.

(iii) A direction is issued to the respondents to compute the benefits of ACP Scheme which enure to the petitioner with effect from 18th February, 2000 till the date the same are actually granted to him.

(iv) The orders in this regard with the calculations thereof shall be duly communicated to the petitioner within a period of eight weeks from today.

(v) As a result of the above, the respondents shall also consider the entitlement of the petitioner for grant of benefit of MACP if any and pass order in this regard as well.

This writ petition is allowed in the above terms.

Dasti to parties.

ILR (2013) VI DELHI 4579
RFA (OS)

RAKESH KUMAR AGARWAL ....APPELLANT

VERSUS

BANSAL COMMODITIES & ORS. ...RESPONDENTS

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

RFA (OS) NO. : 92/2009, 17/2010 CM. APP. 15171/2009 & 3608/2010 CM. APPL. NO. : 3611/2010

DATE OF DECISION: 10.09.2013

Income Tax Act, 1961—Section 132(1) (5), (11) and (12), 245C (1), 245D(1) and 293—Benami Transactions (Prohibition Act), 1988—Limitation Act, 1963—Section 14—Constitution of India, 1950—Article 226—Duly authorized Income Tax Officer carried out search and seizure operations at residential and business premises of Respondent No. 1 Seven pay orders for Rs. 50.40 Lakhs prepared from accounts were found—Income Tax officials issued a demand seizure order with respect to seven pay orders and served it upon Manager, PNB—Original pay orders were in control and possession of Respondent No. 1 who approached Income Tax Authorities with respect to same—Efforts of Respondent No. 1 at securing release from income tax authorities ended with order by CIT rejecting their application u/s 132 (11)—Writ petition challenging order dismissed relegating Respondent No. 1 to a civil court for its remedies by way of a suit through a consent order—Suit filed by Respondent No. 1 was decreed ex parte, in full—Judgment challenged in appeal—Plea taken, suit was barred u/s 293 of Income Tax Act and there was no ground to give benefit of Section 14 of Limitation Act—Held—There can be no dispute that

question of liability itself, as a matter of a contractual agreement between parties, is a matter properly reserved for jurisdiction of civil court—Question, here, however does not concern private remedies that lie between two parties in this case, but whether, ownership seven pay orders seized by income tax authorities u/s 132, can be subject matter of present suit—Section 132 (11) provides third person (in this case M/s Bansal Commodities), with necessary opportunity to present its case or claim that it is real and true owner or beneficial owner of proceeds (or amounts) under seven pay orders, before income tax authorities—That was, in fact, done in this case—M/s. Bansal Commodities clearly had recourse to Section 132 (11), which they took advantage of, though ultimately their view was rejected by income tax authorities in accordance with statutory discretion vested in it—Thus, Section 293 clearly comes into operation in this case—Order u/s 132 effecting a deemed seizure of pay orders as against tax dues of RKA continues to operate till date, having never been set aside in any writ proceeding before this court or Special Leave Petition before SC—Therefore, effect of Present suit would be that order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits present action—Impugned judgment of Learned Single Judge that ownership of seven pay orders lies with M/s. Bansal Commodities and order of CIT i.e. that seven pay Orders are to be utilized as against tax dues of RKA, can't stand together—Writ proceedings u/s 132 having been initiated in 1989 and having attained finality in terms of procedure within that provision being complied with, Section 293 mandates that jurisdiction of civil court with respect to present suit is barred—As far as question of applicability of Section 14 of Limitation Act is concerned, there is sufficient material on record disclosing that plaintiff had been pursuing its remedies

under IT Act diligently and Division Bench recorded that proper forum to agitate disputed questions about ownership of seven pay order would be civil court—There has been indeed no lack of bonafides on part of Respondent in filing suit, after said order—In facts of this case, view taken by this judgment will operate harshly on plaintiff—Therefore, liberty granted to said plaintiffs to seek leave to revive writ petition previously disposed off through appropriate application—Appeals allowed subject to liberty reserved to respondents.

Important Issue Involved: Once proceedings under Section 132 of Income Tax Act attain finality in terms of the procedure within that provision being complied with, Section 293 mandates that jurisdiction of the civil court is barred.

[Ar Bh]

APPEARANCES:

THROUGH : Sh. Sanjeev Rajpal, Advocate [for Resp. No. 2 in Item No. 6 and for appellant in Item No. 7.] Sh. V.N. Jha and Sh. Shashwat Bajpai, Advocates (Item Nos. 6 and 7) Sh. Sandeep Sethi, Sr. Advocate with Sh. Mahendra Rana, Advocates.

CASES REFERRED TO:

1. *Prem Kumar and Sons (HUF)* vs. *Union of India and Ors.,* [2006] 280 ITR 152 (Delhi).
2. *Harshad Chimanlal Modi* vs. *DLF Universal Ltd. & Anr.* (2005) 7 SCC 791).
3. *Union of India and Ors.* vs. *West Coast Paper Mills Ltd.* (2004) 3 SCC 458.
4. *Commission of Income Tax, Bhubaneswar and Anr.* vs. *Parmeshwari Devi Sultania,* (1998) 3 SCC 481.
5. *Chiranjilal Shrilal Goenka* vs. *Jasjit Singh & Ors.* 1993 (2) SCC 507.

6. *Secretary of State for India* vs. *Mask & Company* (1966 (1) SCR 64).
7. *Raghunath Das* vs. *Gokal Chand* AIR 1958 SC 827.
8. *Nrityamani Dassi* vs. *L. Chandra Sen* AIR 1916 PC 96.
9. *Ledgard* vs. *Bull* (1886) L.R. 13A. 134).
10. *Union of India* vs. *Natwerlal M. Badiani* 250 ITR 641.

RESULT: Allowed.

S. RAVINDRA BHAT, J.

C.M. APPL.3608/2010 (for condonation of delay in filing) IN RFA(OS) 17/2010

For the reasons mentioned in the application, C.M. Appl. 3608/2010 is allowed.

RFA(OS) 92/2009, C.M. APPL.15171/2009

RFA(OS) 17/2010, C.M. APPL.3611/2010

1. These two are appeals by the Commissioner of Income Tax (CIT) and Rakesh Agrawal (hereafter called by his name) against the ex parte decree of a Learned Single Judge in CS (OS) No. 1128/2004. The suit claimed a money decree for Rs. 50.40 lakhs, with interest at 18% per annum from 28th April, 1989 till the date of payment. The money is currently in the possession of the Appellant in RFA(OS) 17/2010 (hereafter called "the CIT"), in the form of seven Pay Orders.

2. The dispute in this case arose from interaction of three parties: the Revenue authorities (CIT), M/s. Bansal Commodities, Sh. Puranmal Bansal and Sh. Suresh Bansal (the latter two being partners of M/s. Bansal Commodities, respondents in both sets of appeals as well as original plaintiffs in the suit, collectively referred to as "Bansal Commodities"), and Rakesh Kumar Agrawal, the fourth respondent in the CIT's appeal, and Appellant in RFA(OS) 92/2009, a defendant in the original suit.

3. The facts are that on 27.04.1989, the Income Tax Department conducted a search and seizure operation under Section 132 of the Income Tax Act at the residential and business premises of Sh. Rakesh Kumar Agrawal. As a result of this operation, seven Pay Orders dated

25.04.1989 for a total amount of Rs. 50.40 lakhs debited to the account of one Sh. Surinder Kumar, issued to one M/s Hindustan Copper Ltd. were discovered. Under Section 132(1), the Income Tax authorities issued an order of deemed seizure of the seven Pay Orders as against Surinder Kumar, (presenting the Pay Orders to the Manager, Punjab National Bank) and under Section 132(5), the Asst. Commissioner of Income Tax (ACIT) passed an order recording the seizure as against the tax dues of Surinder Kumar. The pay orders remained in the possession of the Bansal Commodities, who did not present them for payment, but instead, approached the Income Tax authorities.

4. On 30.01.1990, CIT issued an order under Section 132 (12) holding that since a regular assessment had been made in the case of Surinder Kumar, and the entire bank deposits were recoverable against tax levied on him, M/s. Bansal Commodities' application was infructuous. Consequently, on 28.08.1990, M/s. Bansal Commodities filed a writ petition before this Court, W.P.(C) 1253/1990, challenging the orders of the CIT. That writ petition was dismissed by the Court. However, the Supreme Court subsequently set aside the orders of this Court and the CIT and remitted the matter back to the CIT for fresh consideration.

5. In these fresh proceedings, by an order of 04.06.1992, the CIT dismissed the petition filed by M/s. Bansal Commodities under Section 132(11) and held that the money represented by the seven Pay Orders belonged to Surinder Kumar. In the meanwhile, Rakesh Kumar Agrawal – on 04.09.1990 and 08.10.1990 –filed a Settlement Petition under Section 245C(1) before the Income Tax Settlement Commission ("ITSC") for settlement of his case for the Assessment Years 1985-86 to 1990-91. On 15.03.1993, the ITSC admitted the Settlement Petition through an order passed under Section 245D(1), and on 29.06.1999, held – contrary to the CIT's finding, (after the matter was remitted by the Supreme Court) – that the money represented by the seven Pay Orders belonged to Bansal Commodities, and not Surinder Kumar. Against this, Rakesh Kumar Agrawal, the first defendant, in the suit, filed a writ petition, W.P.(C) 5082/1999, before this Court. Likewise, aggrieved by the CIT's denial (for the second time) of its petition, Bansal Commodities had filed a writ petition, W.P.(C) 3738/1994, before this Court, questioning that order. In W.P.(C) 5082/1999, this Court – on 15.11.2000 – remitted the matter back to the ITSC to take a fresh look with regard to the question of ownership of the amount of Rs. 50.40 lakhs represented by the seven

Pay Orders. Accordingly, on a fresh consideration of the matter, on 06.08.2002, the Income Tax Settlement Commission passed an order under Section 245D(4) and held that the money represented by the seven Pay Orders belonged to Rakesh Kumar Agrawal. As far as W.P.(C) 3738/1994 was concerned, this Court disposed off the petition. The Court left the matter for adjudication by the civil Court, waiving the limitation period.

6. The relevant portion of the order dated 20.05.2004 is as under:

"XXXXXX XXXXXX XXXXXX

After hearing the matter at some length, the counsel for the petitioner as well as the Revenue has fairly stated that the Court need not express any opinion on the merits of the case and the parties be relegated to the Civil Court to sort out their disputes. A request was also made that the amount which is lying with the Income Tax Department may not be released for a period of eight weeks.

On behalf of the original assessed, it was contended that the writ petition should be dismissed.

Since we are not expressing any opinion and we are relegating the petitioner to the Civil Court, in the subject matter before us, we dispose of this petition with a direction to the Revenue not to disburse the amount for a period of eight weeks. It goes without saying that the party was agitating the cause before this Court under a bona fide belief that the Court will pass an appropriate relief but as the parties are now being relegated to the Civil Court, the question of limitation should not arise. It goes without saying that if the petitioner approaches the Civil Court, the observations made by the Income Tax Department or the Settlement Commission with regard to the title over the said seven pay orders will not bind the parties and will be decided by the Civil Court independently.

With these directions, the writ petition is disposed of."

7. The Defendant No. 1, Rakesh Kumar Agrawal had filed Special Leave Petition (against the order dated 20.05.2004 in W.P.(C) 3738/1994) before the Supreme Court. By order dated 18.08.2005, the SLP

was dismissed holding that the order did not affect the rights of the Defendant No. 1 as he was not made a party. The order of the Supreme Court dated 18.08.2005 is as follows:

> "Since the petitioner was not made a party to the proceedings before the impugned order was passed, we do not entertain this petition as the order does not affect his rights. The special leave petition is dismissed.

8. It was in these circumstances that M/s. Bansal Commodities filed Suit No. 1128/2004 for recovery of damages, declaration and permanent and mandatory injunction against Sh. Rakesh Kumar Agrawal, as also the Revenue. Although the Revenue had filed a written statement in those proceedings, on 28.07.2006, it was proceeded against ex parte. Rakesh Kumar Agrawal, too was set down ex-parte. M/s. Bansal Commodities filed an affidavit by way of evidence, which was tendered before the Court on 26.03.2009. Finally, on 04.09.2009, the Learned Single Judge by the impugned judgment decreed the suit against the Revenue as well as Rakesh Kumar Agrawal. Based on this decree, the plaintiffs filed an Execution Petition No. 267/2009.

Appellants' contentions

9. The CIT claims in its appeal that it became aware of the ex parte decree only upon receipt of the Notice issued by this Court in the Execution Petition on 20.11.2009, whereupon permission was sought from the Learned Single Judge to move an application to set aside the ex parte decree. In the meanwhile, Rakesh Kumar Agrawal preferred an appeal, RFA (OS) 92/2009 (after having had an application for setting aside of the ex parte decree dismissed in default), which was admitted on 18.01.2010 and when, operation of the order of the Learned Single Judge was stayed.

10. Though the litigation history has been described above, it is also important – at this stage – to mention the factual background of the underlying dispute, i.e. to whom does the money represented by the seven pay orders belong.

11. M/s. Bansal Commodities is a registered partnership firm in which Mr. Puranmal Bansal and Mr. Suresh Bansal are partners. It was involved in the business of trading non-ferrous alloys, a business Rakesh Kumar Agrawal was also involved in through various concerns (M/s.

Popular Industries, M/s. Prominent Enterprises, M/s. Manoj Metal Industries and M/s. Jasoria Industries). Laying their claim to the amount represented by the seven pay orders, M/s. Bansal Commodities, in the words of the Learned Single Judge claimed as follows:

> "1. .....that in or about January, 1989 the plaintiffs desired to purchase 58 metric tonnes of copper alloy and negotiations ensued with the defendant No.1 who agreed to sell the same to the plaintiffs for a total price of Rs 49.03 lacs; that the plaintiffs at the asking of the defendant No.1 got issued pay orders for a total sum of Rs 49.03 lacs in the aforesaid four names in which the defendant No.1 was carrying on business; that the defendant No.1 assured delivery of copper alloy within 30 days and also agreed to pay interest on the amount received by him @ of 18% per annum.; that the defendant No.1 however failed to deliver copper alloy to the plaintiffs though confirmed the monies received from the plaintiffs in his accounts for the period ending 31st March, 1989; that on 26th April, 1989, the defendant No.1 handed 7 pay orders to the plaintiffs for aggregate sum of Rs 50.40 lacs issued by Punjab National Bank, Mal Road Branch, Delhi i.e., Rs 49.03 lacs received together with interest due till then ù the said pay orders were drawn in favour of M/s Hindustan Copper Limited;, the plaintiffs were to approach Hindustan Copper Limited with the said pay orders and collect the base metal copper which could be converted into copper alloy."

12. The absence of representation on behalf of CIT and Rakesh Kumar Agrawal resulted in no issues being framed by the Court. In the proceedings that led to the impugned order, arguments put forward by Rakesh Kumar Agrawal were confined to the aspect of limitation (paragraph 7 of the Impugned Order). On this question of limitation, alongside the suit, M/s. Bansal Commodities had filed an application, I.A. No. 7753/2004, under Section 14 of the Limitation Act. In its order dated 18.04.2006, the Court noted that this question could only be decided after evidence, and thus, while considering the question of whether the suit was within time or not, the Section 14 application would also be considered.

13. The learned Single Judge by the impugned judgment considered

two questions: first, on liability, and secondly, on limitation. On liability, the learned Single Judge noted that – in view of the materials presented by M/s. Bansal Commodities, and the evidence on record – the liability for the amount represented by the seven Pay Orders from Rakesh Kumar Agrawal to M/s. Bansal Commodities was clear. The learned Single Judge noted, at paragraph 9 of the Impugned judgment that:

> "9. The evidence of the said witness of the plaintiffs qua the transaction aforesaid with the defendant No.1 remains unrebutted. Thus the same is to be believed and the plaintiffs would be entitled to the decree for recovery of money against the defendant No.1 save for the aspect of limitation. This court while considering the application of the defendant No.1 for setting aside of the ex parte had also as aforesaid on September, 2008 examined the defendant No. 1. From the said examination also, the liability of the Defendant No. 1 for the money claimed is established."

On the question of limitation, the Learned Single Judge – after a thorough examination of the history of the case and rulings of the Supreme Court – concluded that M/s. Bansal Commodities' claim to the money in question was not barred by time.

Appellants' contentions

14. In the present proceedings, the CIT, as well as Rakesh Kumar Agrawal question the impugned Order on two grounds: that the suit is barred by Section 293 of the Income Tax Act and in the alternative, dispute Rakesh Kumar Agarwal's liability and the version of the facts presents by M/s. Bansal Commodities, on various grounds, i.e. unexplained relationship with Mr. Kumar, failure to present any documentary evidence of an agreement between M/s. Bansal Commodities and Rakesh Kumar Agrawal as to the sale of copper etc., allegations of collusion between the two parties, M/s. Bansal Commodities and its constituent partners not being "holders" or "holders in due course" of the seven pay orders, and thus, not having any right, title or interest in them and that the action is barred by the Benami Transactions (Prohibition Act), 1988).

15. The Appellants submit that in the writ petition that led to the litigation before the civil court, i.e. W.P.(C) 3738/1994, challenging the order of the CIT dated 04.06.1992, there was no claim challenging the validity of the said order and indeed, there could not have been such a

challenge. This, the Appellant argues, is because such a challenge would fall foul of Section 293. Even otherwise, the Appellant argues that no claim to set aside the CIT order was made, and thus, the said order attained finality. The further argument is, that the only remedy available to a person (when property is alleged to be belonging to him/her, but seized for the income tax dues of another), is to move an appropriate application under Section 132(11). In this case, such an application was moved but rejected, and thus, the order of the CIT attained finality.

16. The Appellants, Rakesh Kumar Agrawal and the CIT, submitted that the suit modified the order made under Section 132, through the wrongful interference of the civil Court, which is prohibited by Section 293. Moreover, it is argued that the scope of Section 293 is wide enough to include any proceedings under the Income Tax Act and the provision does not admit any ambiguity for exceptions to be read into it. Thus, if ultimately a suit is to result in a decree or order made under the Act, it (the suit) would not be maintainable. Moreover, the Appellants argue that the bar under Section 293 is a statutory one, incapable of waiver, either by the consent of parties or otherwise, and thus, the finding in the impugned judgment that by consenting to the order by the Division Bench in W.P.(C) 3738/1994, dated 20.05.2004, the Appellant herein waived its right is incorrect.

17. It is submitted that the learned Single Judge could not have gone into the factual material and relied on so-called inconsistencies of statements recorded in the course of Income Tax proceedings. It was submitted that quite apart from the issue of jurisdiction, the facts of the case also revealed that the amount which was sought to be recovered, i.e. '50.40 lakhs had been directly dealt with by the revenue (income tax authorities) and adjusted against the liabilities of Rakesh Kumar Agrawal. In these circumstances, the Court's decree amounted to varying the order of the CIT, contrary to Section 293. Counsel for the appellants relied on the judgment of the Supreme Court reported as **Commissioner of Income Tax Bhubaneswar and Anr., v. Parmeshwari Devi Sultania,** (1998) 3 SCC 481 in support of the argument about the Court's lack of jurisdiction to deal with the subject matter.

Contentions of the Respondent M/s. Bansal Commodities

18. It is argued by the plaintiff, M/s. Bansal Commodities that the

appellants are estopped from objecting to the jurisdiction of the civil Court. Heavy reliance is placed on the order dated 20.05.2004 of this Court, in W.P.(C) 3738/1994, where the revenue (CIT's) consent to the trial of disputed facts, by the civil Court, was recorded. It was submitted that having acquiesced to the Civil Court's jurisdiction, there can be now no objection by the appellant in that regard.

19. The respondents argue that the unrebutted materials on the record of the suit, i.e. the testimony of witnesses of the plaintiffs who proved various documents, viz. (Ex-PW1/47, PW1/48, PW1/20, PW1/49 to 58, PW1/36, statements/correspondence) in which Rakesh Kumar Agrawal) unambiguously admitted M/s. Bansal Commodities' claim with respect to the transaction with the said defendant. The respondent, M/s. Bansal Commodities also rely upon the order dated 29th June,1999 (PW1/62) of the Settlement Commission *inter alia* recording that the seven pay orders belonged to them and could not be treated as an asset of or belonging to Rakesh Kumar Agrawal and allowing their deduction as liability. It was stated that no infirmity could be found with the conclusions and decree of the learned Single Judge.

20. Learned senior counsel for the respondent/plaintiff also distinguished the Supreme Court ruling in **Parmeshwari Devi** (supra) and submitted that it was rendered on an entirely different set of facts and circumstances. Counsel highlighted the fact that the judgment arose in the context of a claim for movables, in family partition proceedings, and the observations of the Court could not be given the wide import that the appellants are seeking to give in the present case. It was submitted that the jurisdiction of the civil Court to decide complicated issues of fact, in the context of rival claims to property could not be precluded by any provision of the Income Tax Act. It was argued further in this context that the right to a full trial with opportunity to cross-examine witnesses could not be substituted by adjudication of a statutory adjudicator, with little or no training to render decisions in complex civil disputes, involving analysis of facts and law. The provisions of the Income Tax Act, especially Section 132 indicated dispute resolution in a summary manner, which was but a poor substitute for trial by an independent and impartial judge, trained in the law, and applying the law relating to evidence and Civil Procedure. It was submitted that the plaintiff was entitled to the benefit of Section 14 of the Limitation Act. In this regard, reliance was placed on the rulings reported as **Raghunath Das**

v. Gokal Chand AIR 1958 SC 827; **Union of India and Ors. v. West Coast Paper Mills Ltd.** (2004) 3 SCC 458 and **Nrityamani Dassi v. L. Chandra Sen** AIR 1916 PC 96.

21. Learned senior counsel for the respondents also relied upon the decision reported as State of Kerala v Ramaswami Iyer & Sons AIR 1966 SC 1738, where it was observed that:

> "12. It is true that even if the jurisdiction of the civil court is excluded, where the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the civil courts have jurisdiction to examine those cases : **Secretary of State for India v. Mask & Company** (1966 (1) SCR 64). Counsel for the respondents urged that the case of the respondents fall within that exception, since the Sales-tax Officer in imposing tax-liability acted in defiance of the mandatory provisions of the Act and in support of the argument he placed reliance upon r. 7 of the Rules framed under the Act and the definition of "turnover" under the Act. Under the Act sales-tax is charged for the year at the prescribed rates on the total turnover of the dealer....."

Analysis and Findings

22. As noticed, the facts are that duly authorized Income Tax Officers carried out search and seizure operations at the residential and business premises of M/s. Bansal Commodities on 27th April, 1989. During these, seven Pay Orders for Rs.50.40 lakhs, prepared from the accounts on 26th April, 1989 were found. The Income Tax officials, on 28th April, 1989 issued a deemed seizure order with respect to the 7 pay orders for Rs.50.40 lakhs and served it upon the Manager, Punjab National Bank. The original pay orders were in the control and possession of the plaintiffs, M/s. Bansal Commodities. The plaintiffs, resultantly did not present the pay orders for payment and approached Income Tax Authorities with respect the same. Income tax proceedings then onward rambled on. Finally, the plaintiff's efforts at securing release from the Income tax authorities ended, with an order by the CIT, rejecting their application under Section 132 (11). They approached this Court, challenging that order, under Article 226 of the Constitution of India. On 20th May, 2004, that writ petition was dismissed, relegating M/s. Bansal

Commodities to a civil Court for its remedies by way of a suit, through a consent order. The suit, filed later, was decreed in full, by the impugned judgment. The first objection to the impugned judgment is that it was barred by Section 293 of the Income Tax Act; the second argument of the appellants is that the learned Single Judge should not have entertained the suit since no ground to give the benefit of Section 14 of the Limitation Act, had been made out.

23. The issue presented before the Court is whether the present proceedings are barred by Section 293 of the Income Tax Act. The section reads:

> "293. Bar of suits in Civil Courts. No suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act; and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything in good faith done or intended to be done under this Act."

24. The fact that the assessment conducted as against Rakesh Kumar Agrawal was closed, and proceedings under Section 132 – along with the objections presented under Section 132 (10), which were considered and rejected under Section 123 (12) – were carried out is clear in this case. The Section 132 proceedings and the deemed seizure of the seven pay orders (and the representative amount) as against Mr. Kumar's tax dues were conducted and finalized in accordance with the procedure under that provision, and to that action, there is no dispute in this case. The question, then, is whether the present suit – deciding the liability of Rakesh Kumar Agrawal to M/s. Bansal Commodities – is barred. There can be no dispute that the question of liability itself, as a matter of a contractual agreement between the parties, is a matter properly reserved for the jurisdiction of the civil court. The question, here, however, does not concern the private remedies that lie between the two parties in this case, but whether, the ownership of the seven pay orders – seized by the income tax authorities under Section 132 -can be subject matter of the present suit.

25. This very question was considered by the Supreme Court in **Commission of Income Tax, Bhubaneswar and Anr. v. Parmeshwari Devi Sultania,** (1998) 3 SCC 481. The issue which the Court was concerned with was partition of certain gold ornaments that had been the

subject of search and seizure under Section 132. In deciding that the suit – insofar as it concerned the ownership of the gold ornaments – was barred, the Court noted at paragraph 9 as follows:

> "9. "It (the High Court) failed to consider the effect of the decree if passed in the suit on the order under Section 132(5) of the Act or other proceedings under Section 132B of the Act. When Section 293 originally stood, it (sic) provided that "no suit shall be brought in any Civil Court to set aside or modify any assessment or order made under this Act". The word "assessment" was omitted and the words "proceeding taken" were inserted in its place. This made the section more comprehensive in nature. Direct effect of the decree in the suit would be that the gold ornaments, subject matter of this suit, would be taken out of the order of the Income Tax Officer under Section 132(5) of the Act and would not be available to be applied in proceedings under Section 132B of the Act."

26. As in this case, the Revenue may not adjudicate on the question of liability of Mr. Agrawal to Bansal Commodities, just as in Parmeshwari, the Supreme Court held that:

> "[i]t (was) not the case of the Revenue that Income Tax Authority can grant decree for partition."

Neither is it true that such a construction of Section 293 leaves third parties without a remedy. Section 132(11) provides the third person, (in this case M/s. Bansal Commodities), with the necessary opportunity to present its case or claim that it is the real and true owner or the beneficial owner of the proceeds (or amounts) under the seven pay orders, before the Income Tax authorities. That was, in fact, done in this case. The result of the present suit being held to be maintainable and the judgment of the Learned Single Judge allowed to operate, would be, in the words of the Supreme Court:

> "the direct effect of getting that order of the Income-tax Officer under Section 132(5) of the Act set aside or modified to that extent. This Section 293 does not permit..."

Equally, the Supreme Court noted that:

> "Section 293 is quite specific and does not admit of any ambiguity

if ultimately a suit is to result in a decree or order which sets aside or modifies any proceeding taken or order made under the Act, that suit would not be maintainable. We are not concerned with the frame of the suit as such but to see the ultimate result to which the suit as such but to see the ultimate result to which the suit would lead to.".

27. Similarly, this question was also considered by this Court in **Prem Kumar and Sons (HUF) v. Union of India and Ors.,** [2006] 280 ITR 152 (Delhi), where the Income Tax authorities proceeded under Section 132 to seize certain assets alleged to belong to the Hindu Joint Family from the appellant assessee. The appellant had also filed a suit against the Income Tax authorities for recovery of a certain amount as for financial loss the plaintiff had suffered as a result of loss of interest on the maturity value of the financial assets seized. In that proceeding, the Single Judge Court dismissed the suit given the provisions of Section 293, and on appeal, the Court noted that where a specific remedy is available under Section 132 (in that case the remedy lay in the provisions on payment of interest under Section 132B), the jurisdiction of the Civil Court remains barred. In this case, M/s. Bansal Commodities clearly had recourse to Section 132(11), which they took advantage of, though ultimately their view was rejected by the Income Tax authorities in accordance with the statutory discretion vested in it. Thus, Section 293 clearly comes into operation in this case. This Court further notices that in **Union of India v. Natwerlal M. Badiani** 250 ITR 641, a Full Bench of the Gujarat High Court, in the context of the submission regarding a ban of suits in civil Courts under Section 293 of the Income-tax Act, 1961, held that:

"22. In the case at hand, Civil Suits have been filed and entertained against the public officers while they were acting under the warrant of authorisation under section 132 of the Income-tax Act, 1961, read with Rule 112(1) of the Income-tax Rules and ex parte ad interim order was passed. Section 293 of the Income-Tax Act in terms creates a bar of suits in Civil Court in such matters against action of the public officer under warrant of authorisation under section 132 of the Income-tax Act and it is certainly a proceeding taken or order made under the Income-tax Act and section 293 in terms says that no prosecution, suit or other proceeding shall lie against the Government or any officer

of the Government for anything in good faith done or intended to be done under the Act. In the case of CIT v. Parmeshwari Devi Sultania , the Supreme Court held that the substance and not the form of the suit is to be seen and where a certain asset was seized during search and rejecting the assesse's plea that the same included the shares of his brothers and sisters, the Income-tax Officer passed an order under section 132(5) determining the tax liabilities and directing the asset to be retained by the Department and the suit filed at the instance of the assessee for partition of that very asset was held not to be maintainable. It is, therefore, clear that in the facts of the present case also the suits were clearly barred by the provisions of section 293 of the Income-Tax Act and the civil court had no jurisdiction to entertain the suit against the proceedings for search and seizure, which were being taken under section 132 of the Income-tax Act, 1961, read with rule 112 (1) of the Income-tax Rules, 1962."

28. Significantly, the order under Section 132 effecting a deemed seizure of the pay orders as against the tax dues of Rakesh Kumar Agrawal continues to operate till date, having never been set aside in any writ proceeding before this Court or the Special Leave Petition before the Supreme Court. Therefore, the effect of the present suit – with the form not being determination, but rather the substance of the relief claimed – would be that the order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits the present action. The impugned judgment of the Learned Single Judge – that the ownership of the seven pay orders lies with M/s. Bansal Commodities – and the order of the CIT, i.e. that the seven pay orders are to be utilized as against the tax dues of Mr. Kumar – cannot stand together. With proceedings under Section 132 having been initiated in 1989 and having attained finality in terms of the procedure within that provision being complied with, Section 293 mandates that the jurisdiction of the civil court with respect to the present suit is barred.

29. As far as the question of applicability of Section 14 of the Limitation Act is concerned, this Court is of opinion that the issue had to be decided in favour of M/s. Bansal Commodities, the plaintiff. There is sufficient material on the record disclosing that the said plaintiff had been pursuing its remedies under the Income Tax Act diligently, because its applications before the CIT were considered on the merit; it felt

aggrieved, and had to approach this Court twice, under Article 226 of the Constitution of India. It was in those proceedings, that on 20.05.2004, that the Division Bench recorded that the proper forum to agitate disputed questions about the ownership of the seven pay orders would be the Civil Court. There has indeed been no lack of bona fides on the part of the respondent in filing the suit, after the said order. In these circumstances, the benefit of Section 14 would be available. This finding is rendered because arguments on this score were made by the parties.

30. The plaintiff (Bansal Commodities) had urged during the proceedings that the consent recorded on 20th May 2004 precluded the CIT from urging the ground of lack of jurisdiction. The decision of the Privy Council in the case of **Ledgard vs. Bull** ((1886) L.R. 13A. 134) is an authority for the proposition that consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. In that case, the suit had been instituted in the Court of the Subordinate Judge, who was incompetent to try it. By consent of' the parties, the case was transferred to the Court of the District Judge for convenience of trial. It was held by the Privy Council that as the Court in the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was a nullity because consent of parties could not operate to confer jurisdiction on a Court which was incompetent to try the suit. This finds support in subsequent decisions (**Chiranjilal Shrilal Goenka v Jasjit Singh & Ors.** 1993 (2) SCC 507; **Harshad Chimanlal Modi v. DLF Universal Ltd. & Anr.** (2005) 7 SCC 791). Accordingly, the CIT's alleged consent does not, under any case, operate to confer jurisdiction on a civil court that is barred by statute.

31. In the light of the above discussion, it is held that Section 293 of the Income Tax barred the suit filed by M/s. Bansal Commodities. We are conscious that in the facts of this case, the view taken by this judgment will operate harshly on the plaintiff. The Court, therefore, grants liberty to the said plaintiffs to seek leave to revive the writ petition previously disposed off on 20th May, 2004 [W.P.(C) 3738/1994], through an appropriate application. This course is, in the opinion of this Court, essential because the said order was not made on the merits of the writ petition, but on an assumption that such disputes can indeed be the subject matter of adjudication by the civil courts. If such application is made, we would request the Division Bench to consider expeditious

disposal of the same.

32. The appeals are, therefore allowed; however subject to the liberty reserved to the respondents, M/s Bansal Commodities, in terms of the preceding paragraph. There shall be no order as to costs.

ILR (2013) VI DELHI 4596
CRL. A.

LAXMAN & ANR. ....APPELLANTS

VERSUS

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

(SUNITA GUPTA, J.)

CRL.A. NO. : 426/2001 DATE OF DECISION: 03.10.2013

Indian Penal Code, 1860—307/34—Delay of 14 days in lodging of FIR—No satisfactory explanation given. Held, "that the object of insisting upon prompt lodging to the F.I.R. is to obtain the earliest information regarding the circumstances in which the crime was committed. Delay in lodging the F.I.R. often results in embellishments, which is a creature of an afterthought. On account of delay, the F.I.R. not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story." Relied upon, *Sajjad Ali Khan @ Sanjay Vs. State of Delhi* 2000 (1) JCC (Delhi) 109 In the initial statement by the injured and his father, no allegations levelled against anybody and it was claimed that injuries were sustained in an accident fall. Subsequently, after 14 days statement against accused given implicating them. Held, that the very fact that the two sets of evidence are forthcoming makes it

clear that prosecution has not proved the guilt of accused beyond reasonable doubt.

Important Issue Involved: It is settled principle of law that when on the basis of evidence on record, two views possible—One in favour of accused and other against him—The view in favour of accused Should be accepted.

[Di Vi]

APPEARANCES:

FOR THE APPELLANTS : Mr. S.C. Phogat, Advocate.

FOR THE RESPONDENT : Ms. Fizani Husain, APP for the State.

CASES REFERRED TO:

1. *K.P. Thimmappa Gowda* vs. *State of Karnataka,* AIR 2011 SC 2564.
2. *State of Uttar Pradesh* vs. *Nandu Vishwakarma,* 2009(4) JCC 2525.
3. *Kanhai Mishra alias Kanhaiya Misra* vs. *State of Bihar,* 2001(2)JCC(SC)5.
4. *Sajjad Ali Khan @ Sanjay @ Sajjan* vs. *State of Delhi,* 2000(1) JCC(Delhi) 109.
5. *State* vs. *Ramesh,* 1998(1) JCC (Delhi) 130.

RESULT: Appeal allowed.

SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 10.05.2001 and the order of sentence dated 14.05.2001 vide which the appellants were convicted for offence punishable u/s 307/34 IPC and sentenced to undergo simple imprisonment for 3 years and fine of Rs.5,000/- each, in default of payment of fine, to undergo simple imprisonment for 5 months.

2. The prosecution case as revealed from report u/s 173 of the Cr.P.C, 1973 is that on 15.11.1995, on receipt of DD No.82B dated 01.11.1995, SI Surender Kumar Guliya reached Maharaja Agrasen Hospital

where Kamal Kumar was found admitted in the hospital. He gave a statement, inter alia, to the effect that he is doing white washing and painting work. For last one month he was working with Contractor Laxman and his brother Tejpal, resident of DDA Flats, Ranjit Nagar, near Satyam cinema. In the month of October 1995, he was doing white washing work at Ranjit Nagar, DDA Flats on the asking of the aforesaid contractors. On 29.10.1995, he demanded his dues of Rs.1,400/-. However, they told him to pay the amount whenever the same will be available, as such he did not go for work on 30/31.10.1995. On 01.11.1995, both the brothers came to his house and told him that they will settle his dues and as such he should report there for work. He along with his associate Surender Kumar Yadav who used to reside in his house and was also doing white wash work went along with the Contractors to DDA flats, Ranjit Nagar. At about 5 p.m he demanded his payment, then they asked him to paint the *garder*. However, he told them that since the duty hours are over, therefore, he will finish the work on the next day. But they insisted, on which he told them that in order to paint the garder, there is need of stairs otherwise it will be dangerous. However, Laxman insisted him to do the painting work by holding the railing. Despite his refusal, they did not agree and under compulsion, he started doing the painting work. At about 6 p.m, Tejpal gave a kick blow on the railing as a result of which he lost his balance. Saria of the railing got broken as a result of which, he fell down from the third floor and became unconscious. On the basis of this statement, FIR u/s 288/337 IPC was registered.

3. During the course of investigation, both the accused were arrested and a charge-sheet was submitted u/s 288/338/307 IPC. Charge for offence u/s 307/34 IPC was framed against both the appellants to which they pleaded not guilty and claimed trial.

4. In order to substantiate its case, prosecution examined seven witnesses. All the incriminating evidence appearing against the accused was put to them. They pleaded their innocence and alleged that due to strained relations, this false case has been foisted upon them. They have examined two witnesses in support of their defence. After hearing learned counsel for the parties, vide impugned judgment, both the appellants were convicted for offence u/s 307/34 IPC and sentenced as stated above. Feeling aggrieved by the same, the present appeal has been preferred by them.

5. I have heard Mr.S.C.Phogat, learned counsel for the petitioner and Ms. Fizani Hussain, learned APP for the State and have perused the record. Learned counsel for the appellant submitted that although the incident is alleged to have taken place on 01.11.1995, however, the FIR has been registered only on 15.11.1995. No satisfactory explanation has come on record for delay in lodging the FIR. It was submitted that Ex.PW6/DA and Ex.PW6/DB are the first statement of injured and his father wherein they have stated that while painting the garder, accidentally, his leg slipped as a result of which Kamal fell down and sustained injuries. Therefore, when on receipt of information, the SI went to the hospital, he recorded in DD No.91B that the incident had taken place accidentally and the DD was kept pending. After 15 days of deliberation, a fresh statement was given by the injured implicating the appellants. No reliance can be placed on the testimony of PW3 Surender Kumar Yadav who is a planted witness. He was not present at the spot. In fact he is the tenant of father of injured and at his behest he has given the statement, that too on 16.11.1995. It was further submitted that the statements, Ex. PW6/DA and Ex.PW6/DB were intentionally suppressed and were not supplied to the accused while supplying copies of the documents u/s 207 Cr.P.C. It was only during cross examination of PW6 that these documents could be placed on record from police file. The father of the injured who had taken the injured to hospital has not been examined by the prosecution. The accused are related to the injured and the relations between them are strained, as such, in order to take revenge and to extort money from them, they have been falsely implicated in this case after 15 days of the incident. Furthermore, as regards accused Laxman is concerned it was submitted that Section 34 IPC has no applicability, inasmuch as the allegations, at best, are that he was present at the spot but no overt act is attributed to this accused as the allegations are confined to Tejpal that he gave a kick blow on the railing as a result of which he lost his balance and the sariah got broken and he fell down, as such, he otherwise could not have been convicted u/s 307 IPC with the aid of Section 34 IPC. As such, it was submitted that the impugned judgment is liable to be set aside and both the appellants are entitled to be acquitted. Reliance was placed on **State v. Ramesh,** 1998(1) JCC (Delhi) 130; **Sajjad Ali Khan @ Sanjay @ Sajjan v. State of Delhi,** 2000(1) JCC(Delhi) 109 and **Kanhai Mishra alias Kanhaiya Misra v. State of Bihar,** 2001(2)JCC(SC)5.

6. Learned Public Prosecutor on the other hand supported the judgment of the learned Trial court and submitted that there is no infirmity in the impugned order which calls for interference and as such, appeal is liable to be dismissed.

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

8. PW2 Kamal Kumar is the star witness of prosecution. He unfolded that he is related to the accused persons who are phoofas of his wife. In October 1995, he started working with them. He was doing white washing work while they were Contractors. In the month of October, he demanded his balance amount of Rs.1,400/- which they refused on the pretext that whenever the amount will be available, they will pay the same. Therefore, on 30.10.1995 and 31.10.1995, he did not go for his work. On 01.11.1995, both the accused came to his house and assured him to settle his dues. Therefore, he along with Surender Yadav, went to House No.411, Ranjit Nagar belonging to Sh. Ashok Talwar for doing white washing. After finishing his work, he demanded his dues at about 5 p.m but they told him that they will make the payment after he paints the iron garder which was in the balcony. He told them that since duty hours are over, therefore, he will do work on the next day but they insisted that they will make the payment only when he will finish the work. He expressed his inability to paint the garder without stairs. But accused Laxman asked him to paint the garder after holding the railing. As such, at their insistence, he started painting the garder while standing on the railing. When he again insisted for stairs then they started abusing him. Under their threat he started painting the garder. At about 6 p.m, accused Tejpal asked him to finish the work quickly and gave a kick blow on the railing as a result of which the saria of the railing got broken and he fell down as a result of which he sustained injuries. Laxman brought him to his house. His father took him to the hospital. Accused Tejpal also came and they did not allow him to get admitted in RML hospital. He was taken to AIIMS by Inspector Surender. He was made to sign certain blank papers on the pretext that they will get him admitted in AIIMS. However, the hospital authorities at AIIMS did not admit him. Thereafter he went to Safdarjung hospital where after giving first aid he was discharged. Then he got himself admitted in Maharaja Agrasen hospital, Punjabi Bagh. Thereafter he narrated the entire incident to his family members who informed the police. Police came and recorded his statement

Ex.PW2/A. Due to sustaining injuries, he has become 90% handicapped. He made a complaint against Insp.Surender Kumar Gulia. In cross examination he denied that he was got admitted in AIIMS by his father or that he was inquired by the duty constable in the hospital as to how he sustained injuries and then he informed duty constable Amin Mehek that he fell down accidently while doing white washing or that his father also confirmed this fact to the duty constable. He also denied that on receipt of information from Duty Constable, SI Surender Kumar Gulia and Ct. Rajesh came from P.S. Patel Nagar or that SI Gulia sought the information from the Doctor regarding his fitness for making the statement and thereafter his statement was recorded. He admitted his signatures at Point A on the statement dated 01.11.1995, Ex.PW-2/DA and went on stating that his signatures were obtained on blank paper. According to him he was taken to RML hospital by contactor Laxman and his father. He denied the suggestion that since he informed the official at RML hospital that he had sustained injuries by falling accidentally from a height, therefore, his MLC was not prepared at RML hospital. He admitted that he was taken to AIIMS. However, he denied that any inquiry was made by the Doctor at AIIMS as to how he sustained injuries. He also denied that inquires were also made from his father by the doctor, who also reported that due to fall from stairs he accidentally sustained injuries. He admitted that since no bed was available at AIIMS, as such he was shifted to Safdarjung hospital. He denied the suggestion that he lodged the complaint on 15.11.1995 under the pressure of Labour Union or that in order to take revenge from the accused persons, he got them falsely implicated in this case.

9. PW3 Surender Kumar Yadav has deposed that on 01.11.1995, he along with Kamal Kumar had gone to the house of Sh.Ashok Talwar at New Ranjit Nagar for doing white washing along with contractors Laxman and Tejpal. After finishing duty hours, Kamal demanded payment but Laxman insisted that he paint the garder first. Kamal declined by saying that neither staircase nor jhula was available and, therefore, it will not be possible to paint the garder but Tejpal abused and threatened to throw him from upstairs. Under pressure Kamal started painting the garder. Tejpal gave a kick blow as a result of which saria got broken and due to imbalance Kamal fell down and became unconscious. He provided milk to Kamal, then he gained consciousness. By that time Tejpal had left the spot. He with the help of Laxman removed Kamal to a private hospital.

Police came and he informed about the incident. In cross examination he admitted that he was residing as a tenant with the father of the injured at the time of incident. He admitted that after the incident he neither informed the police at 100 no. nor called the PCR nor went to the police station to lodge the report.

10. PW4 Dr. D.N.Bhardwaj proved the MLC Ex.PW-4/A of injured Kamal Kumar dated 01.11.1995 prepared by Dr. Elengo. In cross examination he admitted that whatever is told about the cause of injury either by the patient or by the person bringing him is recorded in the MLC. He admitted that in the MLC Ex.PW 4/A, the cause of injury is written as "history of fall from a height around 6 p.m today". He also certified the opinion, Ex.PW4/B given by the doctor declaring Kamal Kumar to be "fit for statement".

11. PW5 Dr.Prem Kumar from AIIMS has deposed that as per the casualty card Kamal Kumar was brought to the casualty of AIIMS with a history of fall from height around 6 p.m on 01.11.995. The patient was advised admission in Ortho in the emergency ward. Because of non-availability of vacant bed in the said ward, the case was referred to Safdarjung hospital.

12. PW-6 SI Manoj Kumar was handed over the investigation of the case on 01.12.1996. He recorded the supplementary statement of Kamal Kumar and Surender Kumar Yadav. Thereafter, he prepared the charge-sheet. In cross examination, he deposed that original signed statement of mark B and Ex.PW2/A were not handed over by the Investigating Office SI Surender Kumar Guliya when the investigation was handed over to him. Although he denied the suggestion that original statement of these witnesses was in the police file, however, on seeing the police file, he admitted that original statement of Kamal Kumar and Kanhiya Lal were available which were exhibited as PW 6/DA and Ex.PW6/DB. He denied the suggestion that deliberately he did not place on record these documents as these were favourable to the accused. He admitted that in DD Ex.PW6/DD it is mentioned that the statement of injured Kamal Kumar as well as his father were recorded and both of them had stated that injured had fallen due to slip of his foot while doing white washing.

13. PW7 SI Surender Kumar Guliya is the first Investigating Officer of the case. He has deposed that on 01.11.1995, on receipt of DD No.82B, he along with Constable Rajesh went to AIIMS where injured

Kamal Kumar was found admitted in the hospital and his father Kanhaiya Lal was also present there. He made enquiries and recorded statement of Kamal Kumar and Kanhiya Lal, Ex.PW6/DA and Ex.PW 6/DB respectively to the effect that while doing white washing at Ranjit Nagar, Kamal Kumar fell down from the second floor due to slip of his foot, as such the DD entry was kept for enquiry. On 14.11.1995 Kanhiya Lal came to the Duty Officer and got recorded the DD entry wherein he told that his son was admitted in Maharaja Agrasen hospital and he wanted to give his second statement as his son had not fallen accidentally but had been pushed while white washing. On 15.11.1995, he went to Maharaja Agrasen hospital and recorded the statement of Kamal Kumar, Ex.PW2/A and then made endorsement Ex.PW7/A for registration of case u/s 288/337 IPC and got the case registered. Thereafter he along with Surender Kumar Yadav went to Ranjit Nagar and at his instance, prepared the site plan Ex.PW7/B. He arrested both the accused. On the instructions of SHO on 09.01.1996, he added Section 307 IPC and further investigation was handed over to SI Manoj Kumar. In cross examination, he admitted that vide DD No.82B dated 01.11.995, P.S. Patel Nagar, Ex.PW6/DC, Duty Constable Amin Ul Haq from AIIMS had informed P.S. Patel Nagar that son of Kanhiya Lal had fallen from a height while doing white washing and had been admitted by his father. He admitted that this information was recorded at 11.30 p.m and the DD was marked to him, as such, he along with Ct. Rajesh Kumar went to hospital. He collected MLC of injured Kamal Kumar. He made a request vide Ex.PW 4/B seeking permission of the doctor to record the statement of injured Kamal Kumar and the doctor declared the injured fit for statement. Thereafter he recorded statement of Kamal Kumar PW 6/DA and his father Ex. PW6/DB. In view of the statement of the injured and his father, since the injuries had been sustained by Kamal Kumar accidentally and no one was at fault, therefore, he made a noting *"Mamla Itfakiya Payaa Jaata Hain"*. He admitted that from 02.11.1995 to 15.11.1995, he did not receive any intimation from the authorities of Maharaja Agrasen hospital or the Duty Constable of the said hospital regarding admission of injured Kamal Kumar and his subsequent treatment.

14. Accused Tejpal in his statement recorded u/s 313 Cr.P.C has denied the case of prosecution. According to him, he never undertook any job at flat No.419, Ranjit Nagar and is unconnected with the said site. Sh. Bal Kishan, father-in-law of injured Kamal Kumar is his brother-

in-law. He was a mediator in getting Kamal Kumar married with Gita, daughter of Balkishan. Gita was harassed by her husband Kamal Kumar and her father-in-law Kanhiya Lal. He advised injured Kamal Kumar and his father not to harass Gita on account of demand of money, on which he was advised by Kamal Kumar and his father not to visit them. He and his brother were falsely implicated in this case due to enmity.

15. Accused Laxman also took the same plea that due to inimical relations, he has been falsely implicated in this case. He further stated that he is a daily wager and used to sit at Shankar Road Chowk. He along with injured Kamal Kumar was engaged in the morning on 01.11.1995 from Shankar Road Chowk as daily wage earner by one Ashok K. Talwar for white washing his house. He worked till 5 p.m. After taking his wages from Ashok Talwar he went to his house. At about 5.45/6 p.m, one person came to his house and informed him that his relative had fallen while white washing the house. He rushed to the said flat of Ashok Talwar and found Kamal Kumar sitting on the ground floor below the flat and Ashok Talwar was also standing there. Ashok Talwar informed that Kamal Kumar had fallen while white washing and he should take Kamal Kumar to his house. He took Kamal Kumar in a taxi to the house of Kanhaiya Lal where Kamal Kumar informed his father that he had fallen while doing white washing as his foot had slipped. Kanhiya Lal asked him to accompany him to Wellingdon hospital. Kanhiya Lal took the injured inside R.M.L.Hospital. Thereafter Kamal Kumar was taken to AIIMS by Kanhiya Lal. Thereafter Kanhaiya Lal came out and informed that since there was no bed available, as such Kamal Kumar was to be shifted to Safdarjung hospital. After Kamal Kumar was taken to Safdarjung hospital he returned back to his house. He has been falsely implicated in this case at the instance of Kanhiya Lal, Kamal Kumar and Labour Union.

16. They examined DW1 Jaswant Singh, Record Clerk from RML hospital who brought the record pertaining to Kamal Kumar with the alleged history of fall and, therefore, it was a non-MLC case. DW2 J.B.Bhardwaj, Medical Record Technician from Safdarjung hospital also brought the register. At sl.no.21071 dated 01.11.1995, Kamal was brought for treatment in the hospital and there is a mention that the patient was brought with history of fall from first floor.

17. The aforesaid evidence coming on record clearly reflects that two sets of evidence are forthcoming, inasmuch as after Kamal Kumar

sustained injuries initially he was taken to R.M.L.hospital. However as deposed by DW1 it was a case of non-MLC as the patient was brought to the hospital with history of fall only. Thereafter the injured was taken to AIIMS where vide DD No.82B Ex.PW6/DC Duty Constable Amin Ul Haq informed P.S. Patel Nagar that one Kamal Kumar, son of Kanhaiya Lal had fallen from a height while doing white washing and had been admitted by his father. On receipt of this information, DD No.82B was recorded and assigned to SI Surender Kumar Guliya who went to AIIMS where he found injured Kamal Kumar admitted in the hospital and he also met his father Kanhaiya Lal. SI Surender Kumar collected MLC of injured Kamal Kumar. At the same time in order to record statement of injured, he moved an application Ex.PW 4/B seeking permission of the doctor to record his statement. After the doctor declared the injured fit for statement, he recorded statement of injured Kamal Kumar Ex.PW6/DA wherein he stated that while doing white washing work, he accidentally fell from top and sustained injuries. Similar statement was made by his father Kanhiya Lal, Ex.PW6/DB. Since nobody was found at fault, therefore, the DD was kept pending. Since no bed was available in AIIMS, as such, as deposed by Dr. Prem Kumar PW5, the injured was referred to Safdarjung hospital. It is the case of injured himself that after giving first aid and putting plaster, he was discharged from Safdarjung hospital. Therefore, he got himself admitted in Maharaja Agrasen hospital, Punjabi Bagh. During the period 02.11.1995 till 14.11.1995, no information was given to the police station regarding admission of Kamal Kumar in Maharaja Agrasen hospital. It was only on 14.11.1995 Kanhaiya Lal went to police station and informed the Duty Officer regarding admission of his son in Maharaja Agrasen hospital and that he wanted to give another statement then SI Surender Kumar Guliya went to Maharaja Agrasen hospital and recorded statement of Kamal Kumar, Ex.PW 2/A where for the first time he levelled allegations against the accused persons to be responsible for his fall from third floor. As such, there is substantial delay in lodging the FIR.

18. In **Sajjad Ali Khan** (supra), reference was made to **Mehraj Singh v. State of M.P,** 1994 SCC(Crl.)1390 where it was held:

> "that the object of insisting upon prompt lodging to the F.I.R is to obtain the earliest information regarding the circumstances in which the crime was committed. Delay in lodging the F.I.R often results in embellishments, which is a creature of an afterthought. On account of delay, the F.I.R not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story".

19. Relying upon this authority, in **Sajjad Ali Khan** (supra), delay of one day in lodging the FIR was considered to be fatal in the absence of furnishing any explanation by prosecution about the delay in lodging the FIR. It was observed that this circumstance to a great extent probablises the case of defence that FIR was lodged after due deliberation. In **State v Ramesh** (supra), delay of 13 hours in lodging the FIR was considered to be fatal by observing that possibility of lodging FIR after consultation cannot be brushed aside. Similarly in **Kanhai Mishra** (supra), delay of two hours in lodging FIR was considered to be an inordinate delay which was fatal to the prosecution case.

20. In the instant case, there is delay of about 14 days in lodging the FIR for which no satisfactory explanation is given. Learned Trial Court observed that since as per the deposition of injured Kamal Kumar, he was satisfied with the treatment in Maharaja Agrasen hospital, therefore, lodging of FIR at that stage cannot be considered to be fatal. The mere fact that the injured was satisfied with the treatment cannot be made a ground for not lodging the complaint at the earliest available opportunity, more particularly when, it is not the case of the injured that he was not fit for making statement prior thereto. Rather it has come on record that on the day of incident itself the patient was fit for statement and, therefore, SI Surender Kumar Guliya recorded his statement after obtaining the requisite certificate from the doctor wherein he stated that due to accidental fall from a height he sustained injuries and nobody was at fault. Similar statement to this effect was made by his father. Although a plea has been tried to be taken by the injured that his signatures were obtained on blank paper but there is nothing on record to show that at the earliest available opportunity any complaint was made either by the injured or his father that their signatures were obtained on blank paper by the Investigating Officer of the case. As such, possibility of the delay of 14 days in lodging the FIR after due deliberation cannot be ruled out. The plea of the accused that the same was due to inimical relations between the injured and the accused cannot be brushed aside. It is not in dispute that the injured and the accused persons are distantly related to each other. In fact, accused Laxman was mediator to the marriage of Kamal Kumar with Gita who was the daughter of Bal Kishan, his brother-in-law.

According to the accused, since Gita used to be harassed by Kamal Kumar and his father Kanhaiya Lal, therefore, he had advised them not to harass Gita whereupon Kamal and his father asked him to not visit their house again. This has been attributed as the reason for false implication of the accused in this case. The fact that after making the initial statement Ex.PW6/DA and PW 6/DB wherein, neither the injured nor his father levelled any allegations against the appellant and it was only after 14 days of the incident that their names figured in the statement Ex.PW2/A which culminated in registration of FIR against the accused persons, possibility of manipulation and embellishment cannot be ruled out.

21. As regards testimony of PW3 Surender Kumar, same does not inspire confidence inasmuch as, according to this witness, he was present along with Kamal Kumar on the day of the incident. However, admittedly, neither he informed the police nor went to police station to lodge any report. In fact till 15.11.1995 he did not give statement to the police. It is not in dispute that he was a tenant in the house of Kanhaiya Lal, father of the injured and even on the day when he came to depose before the Court he had come with Kanhiya Lal only. That being so, his presence at the spot is not proved beyond reasonable doubt. Father of injured Kanhiyalal whose statement Ex.PW6/DB was recorded by the Investigating Officer of the case and who took his son to hospital, has not been examined by prosecution for reasons best known to them.

22. In fact two sets of evidence are forthcoming. One is the initial statement made by the injured and his father where they did not level any allegations against anybody and in fact alleged that it was an accidental fall due to which reason, the DD was kept pending. On the other hand, after a gap of 14 days, the injured gave a statement implicating the accused persons. The very fact that two sets of evidence are forthcoming makes it clear that prosecution has not proved the guilt of accused beyond reasonable doubt and the accused is entitled to get benefit of the same. It is the settled principle of criminal jurisprudence that the burden of proving the guilt of accused is squarely upon the prosecution and in case of any doubt, accused is entitled to get benefit of the same.

23. In **State of Uttar Pradesh vs. Nandu Vishwakarma,** 2009(4) JCC 2525, Supreme Court held:

> "23. It is settled principle of law that when on the basis of evidence on record two views could be taken- one in favour of the accused and the other against the accused- the one favouring the accused should always be accepted."

24. Similar view was taken in **K.P.Thimmappa Gowda v. State of Karnataka,** AIR 2011 SC 2564, where it was held that in criminal case, the rule is that the accused is entitled to the benefit of doubt. If the Court is of the opinion that on the evidence two views are possible, one that the appellant is guilty, and the other that he is innocent, then the benefit of doubt goes in favour of the accused.

25. In view of the aforesaid legal position, since in the instant case, two views are possible, one favouring the appellant and another against them, as such, in view of the established principles of criminal jurisprudence, the appellants are entitled to the benefit of doubt.

26. The submission of learned counsel for appellant that accused Laxman, even otherwise, could not have been convicted u/s 307 IPC with aid of Section 34 IPC has force in as much as no overt act has been attributed to him. If accused Tejpal gave a kick blow to the railing, resulting in saria to be broken and falling of injured from top, this accused cannot be said to share common intention with co-accused Tejpal. Therefore, he could not have been convicted u/s 307/34 IPC.

27. In any case, since in the instant case, prosecution cannot be said to have established its case beyond shadow of doubt, both the accused are entitled to benefit of doubt. That being so, the appeal is allowed. The impugned order of conviction u/s 307/34 IPC and the sentence imposed upon them for that offence is set aside. The appellants are acquitted of the offence alleged against them. Their bail bonds are discharged. Fine, if paid, shall be refunded to them. Copy of this order along with trial Court record be sent back.

ILR (2013) VI DELHI 4609
CRL. A.

MOHD. IQBAL **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(S.P. GARG, J.)

CRL.A. NO. : 781/2001 **DATE OF DECISION: 04.10.2013**

Indian Penal Code, 1860—Section 392/34—Appellant convicted of having robbed alongwith his associates (not arrested), the complainant of cash, gold chain, gold ring and wristwatch while he was travelling in the TSR being driven by the appellant—Conviction challenged inter alia on the ground that the brother of the complainant posted in Delhi Police was instrumental in falsely implicating and that it has not been proved that the appellant was driving the TSR or that robbed articles were recovered form him and further that the identity of the other assailants could not be established and delay in lodging the FIR was not explained. Held: Conviction of the appellant based upon fair appreciation of the evidence and requires no interference. Testimony of the owner of the TSR that the appellant was in possession of the date of the incident not challenged. Deposition of the complainant giving vivid description of the incident and identifying the appellant, not shaken during cross—Examination. No ulterior motive was assigned to the complainant to falsely implicate the appellant in the incident and adverse inference is also to be drawn against the appellant for refusing to participate in TIP and it makes no difference if after the said proceedings he was identified in the police station by the complainant. In his u/s 313 Cr. PC statement, the appellant could

not give plausible explanation to the incriminating circumstances proved against him. Non recovery of robbed articles not material. Delay in lodging the FIR has been explained. It has come on record that the complainant's brother had no role to play to influence the investigation. He was not going to be benefited by false implication as no robbed article was even recovered from the appellant.

Important Issue Involved: An adverse inference can be drawn against an accused who refuses to participate in Test Identification Proceedings even if after the said proceedings the accused during police remand is identified by the complainant.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Deepak Tyagi, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

RESULT: Appeal Disposed of.

S.P. GARG, J.

1. Mohd. Iqbal (the appellant) challenges correctness of a judgment dated 09.10.2001 in Sessions Case No. 3/2000 arising out of FIR No.108/2000 PS Tilak Marg by which he was held guilty for committing offence punishable under Section 392/34 IPC. By an order dated 10.10.2001, he was awarded RI for four years.

2. Allegations against the appellant were that on the night intervening 25/26.02.2000 at about 01.45 A.M. he and his associates (not arrested) robbed Nahar Singh of Rs. 15,215/-, gold chain, gold ring and wrist watch when he was travelling in TSR No. DL-1R-1351 driven by him. The police machinery was set in motion when Daily Diary (DD) No. 23A (Ex.PW-2/A) was recorded at PS Lajpat Nagar on information that 4 or 5 boys had fled after robbing an individual from TSR No. DL-1R-1351. The investigation was assigned to HC Gopi Chand who with Const.Mahesh went to the spot and found the complainant and PCR officials present

there. The complainant – Nahar Singh gave detailed account of the incident. HC Gopi Chand recorded DD No. 24A (Ex.PW1/ C) and sent the complainant to PS Tilak Marg in whose jurisdiction the incident had taken place. PW-8 (Ravinder Malik) took over the investigation. PW-1 (Harvinder Singh) was found to be the registered owner of the vehicle which he had been given to Mohd. Iqbal on hire. It lead to Mohd.Iqbal's arrest. Application for Test Identification Proceedings was moved and Mohd. Iqbal declined to participate in it. The Investigating Officer recorded statements of the witnesses conversant with the facts. Attempts were made to find out the appellant's associates but in vain. After completion of investigation, a charge-sheet was filed in the Court against the appellant. He was duly charged and brought to trial. In his 313 statement, he pleaded false implication. 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 offence mentioned previously.

3. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. The appellant was falsely implicated on suspicion and was not driving the TSR at the time of incident. There was no occasion for the complainant to have substantial cash with him on his first trip to Delhi to meet his brother in Delhi Police. The Trial Court did not appreciate that robbed article were not recovered from the appellant and the identity of the other assailants could not be established. Mohd. Iqbal was not kept in muffled face at the time of arrest and was justified to decline to participate in Test Identification Proceedings and was shown to the witness before he was produced in the Court. The delay in lodging the FIR was not explained. Complainant's brother who was posted in Delhi Police was instrumental in implicating him. Learned Addl. Public Prosecutor urged that the complainant had no prior animosity with the appellant to falsely implicate him in the case. PW-1 (Harvinder Singh) has corroborated his version.

4. I have heard the submissions of the parties and have examined the record. Complainant – Nahar Singh who was coming to Delhi for the first time to take exam of Delhi Police where his brother was a constable in Delhi Police is not expected to fake a false incident of robbery. Daily Diary (DD) No. 23A (Ex.PW-2/A) was recorded at 01.40 A.M. at PS Lajpat Nagar. It records the incident of robbery in TSR No. DL-1R-1351 by 4 or 5 boys. This DD was assigned to PW-2 (HC Gopi Chand) who

with Const.Mahesh went near Tara Taxi Stand and met Nahar Singh, the complainant there. Statement of the complainant (Ex.PW-1/B) was recorded and Nahar Singh was brought to the Police Station. It transpired that the occurrence had taken place within the jurisdiction of Police Station Tilak Marg. DD No. 24A (Ex.PW-1/C) was recorded at 03.30 A.M. (night) and the complainant was sent to Police Station Tilak Marg. The contents of both the DD entries lend credence to the complainant's version that he was robbed by 4 or 5 boys when he was travelling in TSR No. DL-1R-1351. The investigation was taken over by PW-8 (SI Ravinder Malik, PS Tilak Marg). He lodged First Information Record on making endorsement (Ex.PW-3/A). Attempts were made to find out the registered owner of TSR whose number was disclosed by the complainant at the first instance and it revealed that Harvinder Singh S/o R.D.Ahuja was its registered owner. PW-1 (Harvinder Singh) in his Court statement revealed that the TSR No. DL-1R-1351 was given on hire in the month of February, 2000 to the appellant and he used to pay ' 90/-per day. Mohd. Iqbal used to park the scooter at his house and it was seized from there. The testimony of PW-1 (Harvinder Singh) remains unchallenged. No suggestion was put to him that on that night Mohd. Iqbal was not having the possession of the TSR. There is no denial that the appellant did not use to ply TSR on hire. Subsequently, this TSR was released on superdari to the registered owner Harvinder Singh.

5. Complainant – Nahar Singh in his statement (Ex.PW-1/A) made to the police at the first instance narrated vivid description of the incident and disclosed as to how and under what circumstances, he was robbed of cash and gold articles when he was travelling in TSR No. DL1R-1351. He claimed to identify the assailants. While appearing in the Court he fully proved the version given to the police without any major variation. He identified Mohd.Iqbal to be an individual who was among the assailants and was driving the TSR. He ascribed a specific role to him about pushing him. Despite searching cross-examination, the appellant was unable to elicit any material discrepancy/contradiction in his version to disbelieve him. No ulterior motive was assigned to the complainant to falsely implicate him in the incident. He explained that Mohd. Iqbal was seen by him, firstly, on the day of incident, secondly in the Police Station on 04.03.2000 and thereafter, in the Court on the date of his examination. Prosecution examined PW-6 (Sh.G.S.Gupta, MM) who conducted Test Identification Proceedings. Application (Ex.PW-6/A) reveals that the

appellant was produced in muffled face before the Magistrate but he declined to participate in the Test Identification Proceedings (Ex.PW6/B). The appellant did not offer reasonable explanation for not participating in the Test Identification Proceedings. The application for holding TIP was moved on 29.02.2000 before the Magistrate soon after his arrest on 28.02.2000 and was produced in muffled face. It makes no difference that after the police got his police remand, on 04.03.2000, he was identified in the Police Station by the complainant. An adverse inference is to be drawn against the appellant for refusing to participate in Test Identification Proceedings. In his 313 statement, the appellant could not give plausible explanation to the incriminating circumstance proved against him. He did not controvert that the TSR No. DL-1R-1351was not hired by him from PW-1 (Harvinder Singh). It is not believable that PW-1 (Harvinder Singh) would falsely claim that this TSR was on hire with the appellant on the night of incident. There is no substance in the appellant's plea that TSR number was noted on guess basis. He did not examine any witness from his family or in the neighbourhood to show his presence at any other specific place at the time of incident. Non-recovery of robbed articles is not material as the appellant alone could be arrested on 28.02.2000. Delay in lodging the FIR has been explained. The complainant had approached the police soon after the incident and DD No. 23A (Ex.PW-2/A) was recorded at 01.40 A.M. itself. Since there was some controversy as to the jurisdiction, lodging of FIR was delayed. There is no substance in the plea that complainant's brother had influenced the investigation and falsely implicated him. It has come on record that complainant's brother was a constable in Delhi Police and apparently, had no role to play to influence the investigation. He had no prior acquaintance or animosity with the appellant to drag him in a false case. The complainant's brother was not going to be benefited by false implication as no robbed article was even recovered from the appellant. The conviction of the appellant is based upon fair appreciation of the evidence and requires no interference.

6. Appellant's counsel in the alternative adopted an argument to release him on probation as he has remained in custody for about six months and has clean antecedents. The facts and circumstances of the case show that the crime committed by the appellant is serious and grave. An innocent visitor to Delhi for the first time was robbed not only of his valuable articles and cash but educational certificates. The complainant was to appear in an exam on the next day. Court can well

understand his mental condition after the incident. The appellant who was a TSR driver betrayed the trust of the passenger. His associates could not be identified/ arrested to bring them to justice. Taking into consideration the period of detention already undergone by the appellant, his age and previous antecedents and the fact that the occurrence took place about thirteen years before, Sentence order is modified to the extent that substantive sentence under Section 392/34 IPC RI for four years is reduced to RI for two years.

7. The appellant – Mohd.Iqbal is directed to surrender before the Trial Court on 14th October, 2013 to serve the remainder of his sentence. The Registry shall transmit the Trial Court record forthwith to ensure compliance with the judgment. The appeal stands disposed of in the above terms.

ILR (2013) VI DELHI 4614
W.P. (C)

SUDHIR KUMAR KAPOOR ....PETITIONER

VERSUS

UOI AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 6297/2013 DATE OF DECISION: 04.10.2013

Constitution of India, 1950—Article 226—Petitioner is a promotee officer working as Superintendent BR Grade—II with Border Road Organization (BRO)—BRO implemented recommendations of 5th Central Pay Commission w.e.f. 1st January, 1996 and started paying a higher salary to Overseers and Superintendents BR Grade—II who were direct recruits and possessed either a diploma or a degree in applicable filed i.e. Electrical or Mechanical; depending upon Stream—

This was denied to promotee officers who joined as Masons, Carpenters etc. and earned promotion—Writ Petition filed praying to pay salary in same pay scale/ pay band with grade pay as was paid to Ghan Shyam Viswakarma pursuant to a decision passed by Gauhati High Court (Aizwal Branch) in WP (C) No. 51/2009—Held—Issue raised in present writ petition has arisen in several petitions decided earlier—Action of respondents was held discriminatory and quashed—Mandamus was issued that same scale of pay benefit, as recommended by pay commission, be awarded to such officers for reason that Pay Commission did not draw any such distinction while marking their recommendations—Despite repeated directions, respondents are granting benefits only to such persons who approached Court which is legally impermissible—In spite of directions that decision has to be implemented in rem, no action has been taken by respondents and persons as petitioners are being compelled to approach this Court for same relief—Writ allowed directing that Petitioner working as Superintendent BR Grade—II with BRO be accorded benefit of recommendations made by 5th and 6th Central Pay Commissions as was awarded to Ghan Shyam Viswakarma.

Important Issue Involved: Granting benefit of a Judgment only to those who approached the Court, in spite of specific directions that the decision has to be implemented in rem, is legally impermissible.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Amit Kumar, Advocate.

FOR THE RESPONDENTS : Ms. Archana Gaur, Advocate.

CASES REFERRED TO:

1. *Narendra Kumar & Ors.* vs. *Union of India & Ors.* WP(C)No.3820/2013.
2. *Prabhdial Singh & Ors.* vs. *Union of India & Ors.* WP(C)No.5040/2012.

RESULT: Allowed with cost quantified at Rs. 10,000/-

GITA MITTAL, J. (Oral)

1. Admit.

Ms. Archana Gaur, Advocate accepts notice of admission on behalf of respondents.

2. The issue raised in the present writ petition has arisen in several petitions already decided. With the consent of parties, the writ petition is taken up for consideration and disposal.

3. The petitioner in the instant writ petition is a promotee officer working as Superintendent BR Grade II with the Border Road Organization. This petition has been filed by the petitioner praying to pay salary in the same pay scale/pay band with grade pay as was paid to Ghan Shyam Vishwakarma pursuant to the decision passed by the Gauhati High Court (Aizawl Bench) in W.P.(C)No.51/2009.

4. The Border Road Organization implemented the recommendations of the 5th Central Pay Commission with effect from January 1, 1996 and started paying a higher salary to Overseers and Superintendents BR Grade-II who were direct recruits and possessed either a diploma or a degree in the applicable field i.e. Electrical or Mechanical; depending upon the stream. This was denied to promotee officers who joined as Masons, Carpenters etc. and earned promotion. The reason for denying the parity in pay-scale was by drawing a distinction between Officers holding a diploma or a degree and those not holding a diploma or a degree. This action was held to be discriminatory and was quashed. Mandamus was issued that same scale of pay benefit, as recommended by the Pay Commissions, be accorded to such officers for the reason that the Pay Commissions did not draw any such distinction while making their recommendations.

5. The decision of the Aizawl Bench of the Gauhati High Court was unsuccessfully challenged before the Supreme Court. Qua Ghan Shyam Vishwakarma, the same has been implemented as also many more who filed similar petitions.

6. Despite repeated directions, the respondents are granting benefits only to such persons who approached the court which is legally impermissible.

7. In view of the above, writ petitions have been filed by several other persons claiming the same benefits as have been granted by the Aizawl Bench of the Gauhati High Court aforenoticed. The decision in the instant case relates to application of policy decision. This court in several orders including the order dated 17th December, 2012 passed in WP(C)No.5040/2012, **Prabhdial Singh & Ors. v. Union of India & Ors.** has specifically directed that the decision has to be implemented in rem. No action has been taken by the respondents and persons as the petitioners are being compelled to approach this court for the same relief.

8. Learned counsel for the petitioner has placed on record also the order dated 31st July, 2013 passed in WP(C)No.3820/2013, **Narendra Kumar & Ors. v. Union of India & Ors.** passed by us in the above circumstances.

9. We accordingly allow this writ petition directing that the petitioner working as Superintendent BR Grade II with the Border Road Organization be accorded the benefit of recommendations made by the 5th and 6th Central Pay Commissions as was accorded to Ghan Shyam Vishwakarma.

10. Arrears, if any, would be disbursed within a period of 12 weeks from today.

11. The petitioner shall be entitled to costs which are quantified at Rs.10,000/-.

ILR (2013) VI DELHI 4618

CRL. A.

ASHOK KUMAR ....APPELLANT

VERSUS

STATE ....RESPONDENT

(S.P. GARG, J.)

CRL.A. NO. : 354/2001 DATE OF DECISION: 07.10.2013

Indian Penal Code, 1860—Section 498A/304B IPC—Conviction of appellant for the offences punishable u/s 498A/304B IPC challenged inter alia on the ground that the dying declaration was not genuine and that the victim had not complained to any authority earlier about the harassment or torture allegedly caused to her by the appellant. Held: No evidence has come on record that the dying declaration was the result of any tutoring, prompting or imagination. There are no sound reasons to disbelieve the testimony of the SDM who being an independent witness holding high position, had no reason to do anything which was not proper. The appellant also has no foundation/basis to doubt the mental disposition of the victim to make statement as neither he nor any of his family members accompanied her to the hospital or remained with her till death. Merely because the deceased had not told close friends about the dowry or harassment or had not complained about the same to any authority, does not positively prove the absence of demand or dowry. The evidence regarding demand of dowry is established in he dying declaration which is cogent and reliable. Appeal is unmerited and dismissed.

I have heard the learned counsel for the parties and have examined the record. It is not disputed that Suman's death

occurred at the matrimonial home due to burn injuries sustained by her within seven years of her marriage. In her statement (Ex.PW-10/A), Suman Sharma categorically disclosed to SDM that her husband used to ask to bring money or else to stay at her parents' house. She further revealed that on 18.06.1997 in the evening, her husband had a quarrel with her over demand of money and she poured kerosene in anger. Her husband, mother-in-law and father-in-law who were present there did not restrain her from doing so and continued to witness the 'scene'. Her husband exhorted her to die 'Tu Mar Ja'. She further informed that her husband and mother-in-law used to harass her. Appellant's counsel urged that version narrated by the victim (Ex.PW-10/A) cannot be believed as she was not in a fit state of mind to make the statement and no prior permission was sought from the doctor to record her statement. I find no substance in the plea. The burning incident occurred in the evening and immediately, she was taken to RML Hospital at 08.10 P.M. MLC (Ex.PW-12/A) reveals that she was conscious and oriented that time and extent of burns were 30 – 35%. The MLC (Ex.PW-12/A) contains endorsement (Ex.DX1) whereby she was declared 'fit for statement' on 18.06.1997. Again, she was certified fit to record statement at 11.55 P.M. and 0010 hours as per endorsements at point (DX2) and (Ex.PW-15/A). PW-10 (H.P.S.Saran, SDM) deposed that he recorded victim's statement (Ex.PW-10/A) in his own handwriting in question-answer form after Dr.Ratna Kumar declared her physically and mentally well-oriented to give statement. In the cross-examination, he elaborated that no relative of the patient was present near her bed at that time. Dr.Ratna Kumar had declared the injured fit for statement before and after the recording of the statement vide endorsement (Ex.PW-10/A) at Ex.DX1 and Ex.DX2. There are no sound reasons to disbelieve the testimony of an independent official witness who had no ulterior motive to fabricate the statement. He being independent witness holding high position had no reason to do anything which was not proper. The

genuineness of the dying declaration cannot be doubted as it was recorded promptly without any delay. PW-6 (Rajender Kumar Sharma), also deposed that, the victim had disclosed him that Ashok and Pushpa used to demand money from her and she poured kerosene on her body. PW-15 (Jagbir Singh), Record Clerk, RML Hospital identified and recognised Dr.Ratna Kumar's signatures on Ex.PW-15/A, DX3 on Ex.PW-10/A whereby the victim was declared fit for statement. The appellant has no foundation/basis to doubt her mental disposition to make statement as neither he nor any of his family members accompanied her to the hospital or remained with her till death. PW-8 (ASI Anupama), CAW Cell testified that on her visit to RML Hospital on 20.06.1997, she directed Rajender Kumar Sharma to inform her the whereabouts of the husband and in-laws of Suman. When she visited House No. 472/27, Gali Chisti Chaman, Kishan Ganj, it was found locked and from the neighbourers, she came to know that Suman's in-laws were absconding from the day Suman was admitted in the hospital due to fear. Appellant's conduct in not taking the victim/his wife to hospital for treatment is unreasonable and can be considered an incriminating circumstance. The victim was fair enough to admit that after she sustained burn injuries, her husband threw two or three glasses of water on her body to extinguish the fire. She was also fair to say that she was not aware as to who set her on fire. No evidence has come on record that the statement (Ex.PW-10/A) was result of any tutoring, prompting or imagination. The SDM has categorically stated that there was none else with her when he recorded the statement of the victim. The Dying Declaration was made at the earliest opportunity without any influence being brought on the dying person. There is absolutely no reason to doubt it. The statement has to be accepted as the relevant and truthful one, revealing the circumstances which resulted in her death. The victim and her parents had no ulterior motive to falsely implicate the appellant. The victim gave graphic details as to how and under what circumstances she was harassed and subjected to cruelty on account of demand of

money. The appellant used to compel her to bring cash from her parents and squander it in lottery. PW-6 (Rajender Kumar Sharma) has corroborated her version on material aspects and deposed that after eight months of the marriage Ashok and his mother started demanding dowry and cash from Suman. Ashok used to spend entire earnings on liquor and lottery and beat Suman for not bringing cash for him. Whenever, Suman came and asked for money, he gave her. He paid Rs. 4,000 and Rs. 5,000/- to Ashok through her daughter Suman. Ashok sold all the dowry articles except one diwan. In the cross-examination, he denied that ' 4,000 or Rs. 5,000/- given to Suman were customary payments from time to time on various festivals/ occasions. The appellant's contention that since PW-6 had no financial capacity there was no possibility of demand of dowry/cash from him is devoid of merits. Both the parties belonged to poor strata of society. Even Rs. 4,000 or Rs. 5,000/- in 1997 had substantial value for the poor father of the victim. In her dying declaration (Ex.PW-10/A), there is specific mention regarding demand of cash and harassment on account of its non-payment by the appellant soon before her death. Even on the day of incident, a quarrel had taken place over demand of money and had forced the victim to pour kerosene on her body. The victim had no other compelling reason to take the extreme step. The appellant did not adduce any evidence to prove that Suman had suicidal tendencies or used to extend threat to commit suicide. No such treatment, at any time, was made available to the victim to cure the alleged suicidal tendencies (if any). The contention is not sufficient to discredit her statement. It makes no difference that before the incident the victim had not lodged any complaint with the authorities against the appellant and his family members for harassment on account of dowry demands. In a tradition and custom bound Indian society, no conservative woman would like to disclose family discords before a person, however close he or she may be. Merely because the deceased had not told close friends about the demand of dowry or harassment that does not positively

prove the absence of demand of dowry. If the evidence regarding demand of dowry is established in the dying declaration (Ex.PW-10/A) and the statement is cogent and reliable, merely because the victim had not stated before some authority earlier about the harassment or torture that would be really of no consequence. The dying declaration is worthy of acceptance. It is truthful & voluntary, without influence or rancour and can form the foundation for a conviction. **(Para 3)**

Important Issue Involved: A truthful and voluntary dying declaration, without influence or rancour can form the sole foundation for a conviction u/s 498A/304B IPC.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. Sumeet Verma, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

RESULT: Appeal Dismissed.

S.P. GARG, J.

1. Ashok Kumar (the appellant) impugns a judgment dated 09.11.2000 of learned Addl. Sessions Judge in Sessions Case No. 233/97 arising out of FIR No. 161/97 PS Pratap Nagar by which he was convicted for committing offences punishable under Sections 498A/304 B IPC. By an order dated 10.11.2000, he was sentenced to undergo RI for seven years under Section 304B and RI for three years with fine ' 500/- under Section 498A IPC.

2. Ashok Kumar was married to Suman on 26.09.1993. After the marriage, she lived at House No. 472/27, Gali Chisti Chaman, Kishan Ganj and was blessed with two daughters. On 18.06.1997, she sustained burn injuries in the matrimonial home and was admitted at RML Hospital. She succumbed to the injuries on 26.06.1997. Post-mortem examination of body was conducted. Statements of the witnesses conversant with the facts were recorded. In her statement recorded on the night intervening 18/19.06.1997 by Sh. H.P.S.Saran, Sub-Divisional Magistrate (in short

SDM) she implicated her husband and mother-in-law for harassing her on account of dowry demands. SDM directed the Investigating Officer to lodge First Information Report under relevant offences. After completion of investigation, a charge-sheet was filed against Ashok Kumar and his mother – Pushpa Devi in the Court. The prosecution examined fifteen witnesses to substantiate the charges. In his 313 statement, Ashok Kumar pleaded false implication without producing any evidence in defence. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, held Ashok Kumar guilty for the offences mentioned previously. Pushpa Devi was convicted under Section 498A IPC only. State did not challenge her acquittal under Section 304B IPC.

3. I have heard the learned counsel for the parties and have examined the record. It is not disputed that Suman's death occurred at the matrimonial home due to burn injuries sustained by her within seven years of her marriage. In her statement (Ex.PW-10/A), Suman Sharma categorically disclosed to SDM that her husband used to ask to bring money or else to stay at her parents' house. She further revealed that on 18.06.1997 in the evening, her husband had a quarrel with her over demand of money and she poured kerosene in anger. Her husband, mother-in-law and father-in-law who were present there did not restrain her from doing so and continued to witness the 'scene'. Her husband exhorted her to die 'Tu Mar Ja'. She further informed that her husband and mother-in-law used to harass her. Appellant's counsel urged that version narrated by the victim (Ex.PW-10/A) cannot be believed as she was not in a fit state of mind to make the statement and no prior permission was sought from the doctor to record her statement. I find no substance in the plea. The burning incident occurred in the evening and immediately, she was taken to RML Hospital at 08.10 P.M. MLC (Ex.PW-12/A) reveals that she was conscious and oriented that time and extent of burns were 30 – 35%. The MLC (Ex.PW-12/A) contains endorsement (Ex.DX1) whereby she was declared 'fit for statement' on 18.06.1997. Again, she was certified fit to record statement at 11.55 P.M. and 0010 hours as per endorsements at point (DX2) and (Ex.PW-15/A). PW-10 (H.P.S.Saran, SDM) deposed that he recorded victim's statement (Ex.PW-10/A) in his own handwriting in question-answer form after Dr.Ratna Kumar declared her physically and mentally well-oriented to give statement. In the cross-examination, he elaborated that no relative

of the patient was present near her bed at that time. Dr.Ratna Kumar had declared the injured fit for statement before and after the recording of the statement vide endorsement (Ex.PW-10/A) at Ex.DX1 and Ex.DX2. There are no sound reasons to disbelieve the testimony of an independent official witness who had no ulterior motive to fabricate the statement. He being independent witness holding high position had no reason to do anything which was not proper. The genuineness of the dying declaration cannot be doubted as it was recorded promptly without any delay. PW-6 (Rajender Kumar Sharma), also deposed that, the victim had disclosed him that Ashok and Pushpa used to demand money from her and she poured kerosene on her body. PW-15 (Jagbir Singh), Record Clerk, RML Hospital identified and recognised Dr.Ratna Kumar's signatures on Ex.PW-15/A, DX3 on Ex.PW-10/A whereby the victim was declared fit for statement. The appellant has no foundation/basis to doubt her mental disposition to make statement as neither he nor any of his family members accompanied her to the hospital or remained with her till death. PW-8 (ASI Anupama), CAW Cell testified that on her visit to RML Hospital on 20.06.1997, she directed Rajender Kumar Sharma to inform her the whereabouts of the husband and in-laws of Suman. When she visited House No. 472/27, Gali Chisti Chaman, Kishan Ganj, it was found locked and from the neighbourers, she came to know that Suman's in-laws were absconding from the day Suman was admitted in the hospital due to fear. Appellant's conduct in not taking the victim/his wife to hospital for treatment is unreasonable and can be considered an incriminating circumstance. The victim was fair enough to admit that after she sustained burn injuries, her husband threw two or three glasses of water on her body to extinguish the fire. She was also fair to say that she was not aware as to who set her on fire. No evidence has come on record that the statement (Ex.PW-10/A) was result of any tutoring, prompting or imagination. The SDM has categorically stated that there was none else with her when he recorded the statement of the victim. The Dying Declaration was made at the earliest opportunity without any influence being brought on the dying person. There is absolutely no reason to doubt it. The statement has to be accepted as the relevant and truthful one, revealing the circumstances which resulted in her death. The victim and her parents had no ulterior motive to falsely implicate the appellant. The victim gave graphic details as to how and under what circumstances she was harassed and subjected to cruelty on account of demand of money. The appellant used to compel her to bring cash from her parents

and squander it in lottery. PW-6 (Rajender Kumar Sharma) has corroborated her version on material aspects and deposed that after eight months of the marriage Ashok and his mother started demanding dowry and cash from Suman. Ashok used to spend entire earnings on liquor and lottery and beat Suman for not bringing cash for him. Whenever, Suman came and asked for money, he gave her. He paid Rs. 4,000 and Rs. 5,000/-to Ashok through her daughter Suman. Ashok sold all the dowry articles except one diwan. In the cross-examination, he denied that Rs. 4,000 or Rs. 5,000/- given to Suman were customary payments from time to time on various festivals/ occasions. The appellant's contention that since PW-6 had no financial capacity there was no possibility of demand of dowry/cash from him is devoid of merits. Both the parties belonged to poor strata of society. Even Rs. 4,000 or Rs. 5,000/- in 1997 had substantial value for the poor father of the victim. In her dying declaration (Ex.PW-10/A), there is specific mention regarding demand of cash and harassment on account of its non-payment by the appellant soon before her death. Even on the day of incident, a quarrel had taken place over demand of money and had forced the victim to pour kerosene on her body. The victim had no other compelling reason to take the extreme step. The appellant did not adduce any evidence to prove that Suman had suicidal tendencies or used to extend threat to commit suicide. No such treatment, at any time, was made available to the victim to cure the alleged suicidal tendencies (if any). The contention is not sufficient to discredit her statement. It makes no difference that before the incident the victim had not lodged any complaint with the authorities against the appellant and his family members for harassment on account of dowry demands. In a tradition and custom bound Indian society, no conservative woman would like to disclose family discords before a person, however close he or she may be. Merely because the deceased had not told close friends about the demand of dowry or harassment that does not positively prove the absence of demand of dowry. If the evidence regarding demand of dowry is established in the dying declaration (Ex.PW-10/A) and the statement is cogent and reliable, merely because the victim had not stated before some authority earlier about the harassment or torture that would be really of no consequence. The dying declaration is worthy of acceptance. It is truthful & voluntary, without influence or rancour and can form the foundation for a conviction.

4. PW-6 (Rajender Kumar Sharma)'s statement (Ex.PW-6/A) was recorded by Sh. H.P.S.Saran, SDM next day of incident at his office at Tis Hazari. Despite lengthy cross-examination, the appellant could not elicit any material discrepancies or contradictions to disbelieve the version in its entirety. No ulterior motive was assigned to him for falsely implicating the appellant in the incident. There is no ambiguity or irregularity as far as the dying declaration is concerned and it has been stated in clear and simple language that the victim had been treated with both mental and physical cruelty. The victim stated that when she poured kerosene on her body in anger, the appellant and his family members did not intervene. They did not explain as to who set her on fire. Instead of taking the victim to hospital directly, she was taken at her parents' house and from there, her mother took her to the hospital. PW-6 (Rajender Kumar Sharma), deposed that demand of dowry continued unabated and the victim was unable to further bear torture or harassment. Continuous taunting and teasing led her to such a situation where she had been disgusted and went to the extent of pouring kerosene on herself.

5. All the relevant contentions of the appellant have been dealt with in the impugned judgment which is based upon fair appraisal of the evidence and requires no interference. The appeal is unmerited and is dismissed. The conviction and sentence of the appellant are maintained. The appellant – Ashok Kumar is directed to surrender before the Trial 21st Court on October, 2013 to serve the remainder of sentence. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment.

ILR (2013) VI DELHI 4627
W.P. (C)

DEVINDER SINGH SAINI ....PETITIONER

VERSUS

D.D.A. ....RESPONDENT

(G.P. MITTAL, J.)

W.P.(C) NO. : 3884/2012 DATE OF DECISION: 09.10.2013

Constitution of India, 1950—Article 226—Petitioner applied for allotment of a flat under 'DDA Housing Scheme, 2010' and was declared successful in draw of lots held by DDA—As per terms of allotment contained in brochure issued by DDA, allottee was liable to make payment of price of flat within 90 days from date of issue of demand letter, without interest—Thereafter, allottee was liable to deposit amount within a further period of 90 days alongwith interest @ 15% per annum compounded on 31st March—When Petitioner visited area after allotment of flat, he found construction was still going on and flats were not ready for handing over possession—Writ petition filed before HC for directions to DDA to complete construction and repairs of flats and surrounding area specially of flat allotted to Petitioner and for staying operation of impugned demand—Plea taken, payment in respect of 484 other flats in Vasant Kunj 217 flats in Dwarka was deferred by DDA, payment in respect of flat allotted to Petitioner was not deferred and thus he was discriminated—Payment of balance amount was made by Petitioner within stipulated period, but he had to pay interest in terms of allotment letters—As essential amenities were not available, it was illegal and unjust on part of DDA to have issued demand letter granting him only 90 days time to make payment and no payment being made thereafter, asking him to pay interest on delayed payment—Held—Additional affidavit of DDA stated that some of basic amenities were likely to be completed by 30.09.2012—If that were so, it was unjust on part of DDA to have required Petitioner to deposit price of flat on issuance of demand letter latest by 28.06.2012 and charging him interest if payment is made thereafter—Since essential amenities were likely to be provided only by 30.09.2012 and possession could have been delivered to Petitioner only thereafter, he could not have been asked to make payment of entire price of flat by 28.06.2012 and charging him interest—Interest paid by Petitioner while depositing amount on 21.09.2012 is liable to be refunded to him—Writ Petition is disposed of with directions to DDA to refund interest amounting to Rs. 1,29,787/- paid by Petitioner within a period of three months, failing which Petitioner shall be entitled to interest @ 12%p.a. from date of order till amount is refunded.

Important Issue Involved: If basic amenities were likely to be completed only by 30.09.2012, it was unjust on the part of the DDA to have required the Petitioner to deposit the price of the flat on issuance of the demand letter latest by 28.06.2012 and charging him interest if payment is made thereafter.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Ms. Richa Kapoor, Advocate with Ms. Sahila Lamba, Advocate.

FOR THE RESPONDENT : Ms. Manika Tripathi Pandey, Advocate with Mr. Ashutosh Kaushik, Advocate.

RESULT: Allowed.

G.P. MITTAL, J.

1. The Petitioner who was allotted Flat No.1, Ground Floor, Yamuna Block-7, Pocket D-6, Vasant Kunj, New Delhi has approached this court with a petition under Article 226 of the Constitution of India with the prayer which is extracted hereunder:-

> "(a) Issue writ, order or direction directing the respondent/DDA to complete the construction and repairs of the flats and surrounding area at the Yamuna Complex Block-7, Pocket D-6 flats at Vasant Kunj and specially of flat allotted to the petitioner bearing flat no.1, ground floor, Yamua Block-7, Pocket D-6, Vasant Kunj; and
>
> (b) Pass further order, writ or direction directing respondent to provide basic amenities in the said flat so as to make it habitable and complete construction and repairs in the said complex consisting of two Blocks i.e. Ganga and Yamuna having common boundary wall;
>
> (c) Pass an order staying the operation of the impugned demand letter dated 30.3.2012 (annexure P-5) directing DDA to defer the payment of the demanded amount vide demand-cum-allotment letter of DDA dated 30.3.2012 till basic amenities are provided and complete construction and repairs are carried out in the flat allotted to the petitioner and the surrounding Yamuna/Ganga Complex.
>
> (d) Pass further order, writ or direction directing DDA to pay the interest on the registration amount deposited by the petitioner till basic amenities are provided and complete construction and repairs are carried out."

2. The Delhi Development Authority (the DDA) floated *'DDA Housing Scheme, 2010'*. The scheme closed on 24.12.2010. The Petitioner applied for allotment of an LIG flat under the aforesaid scheme and deposited the registration amount of Rs. 1.50 lacs. His joy knew no bounds when he was declared successful in the draw of lots held by the DDA on 18.04.2011 and he was allotted a flat bearing No.1, Yamuna Block-7, Pocket D-6, Vasant Kunj, New Delhi. As per the terms of allotment contained in the brochure issued by the DDA, an allottee was liable to make the payment of the price of the flat within 90 days from

the date of issue of the demand letter, without interest. Thereafter, the allottee was liable to deposit the amount within a further period of 90 days along with interest @ 15% p.a. compounded on 31st March. It was provided in the brochure that if the payment was not made within 180 days including the interest from the date of issuance of the demand letter, the allotment of the flat was liable to be cancelled automatically. The possession letter was to be issued within a period of 45 days of making the payment.

3. Clause 17 of the brochure further provided that the allottee was entitled to take delivery of the possession only after making full payment. There was a further obligation to take the possession of the flat within a period of three months from the date of issuance of possession letter. Clause 17(i) is extracted hereunder:-

> "17. (i) The allottees shall be entitled to take delivery of possession only after he/she has completed all the formalities, paid all dues and furnished/executed all the documents as required in the demand cum allotment letter under the provisions of Delhi Development Authority (Management & Disposal of Housing Estate) Regulations, 1968."

4. If the physical possession of the flat was not taken within one year of the date of the issuance of the possession letter, the allotment of the flat was again liable to the cancelled. In exceptional cases, physical possession could be given to allottee beyond 12 months and upto 24 months on payment of the charges as stated in Clause 17 (ii), provided prior permission of the DDA was obtained. Clause 17 (ii) of the brochure reads as under:-

> "17. (ii) If the allottee does not take possession of the flat within 3 months from the date of issue of possession letter, he/she shall be liable to pay watch and ward charges at the prescribed rates beyond a period of 3 months from the date of issue of possession letter upto a maximum period of one year from the date of issue of possession letter. At present watch & ward charges are Rs.1250/- per month for three bed room flats, Rs.1000/- per month for two bed room flats & expandable houses, Rs.750/- for one bed room flats and Rs.500/- for Janta/ORT flats."

5. The joys of the Petitioner were short lived in as much as when

he visited the area after allotment of the flat, he found that the construction was still going on and the flats were not ready for handing over the possession. The Petitioner alleges that although the payment in respect of 484 other Flats in Vasant Kunj, D-6 (Ganga Block) and 217 flats in Block G-2, E-1 & F-1 Dwarka Sector 18-B was deferred by the Respondent DDA, the payment in respect of flat allotted to the Petitioner in Yamuna Block, Pocket D-6, Vasant Kunj was not deferred. Thus, he was discriminated.

6. During the hearing of the appeal, it is stated by the learned counsel for the Petitioner that the payment of the balance amount of Rs. 36,38,851/- was made by the Petitioner on 21.09.2012, that is, within the stipulated period, but he had to pay interest, as in terms of the allotment letter, the Petitioner was obliged to pay interest if the payment was not made by 28.06.2012. The learned counsel submits that in the additional affidavit dated 15.09.2012 filed by the DDA, there is a categorical admission that essential amenities were expected to be functional only by 30.09.2012. In view of this, it was illegal and unjust on the part of the DDA to have issued the demand letter on 30.03.2012 granting him only 90 days time to make the payment and on payment being made thereafter, asking him to pay interest on delayed payment.

7. Although the averments made in the writ petition have been controverted by the DDA in their counter affidavit, various photographs placed on record, however, speaks volume with regard to the construction and the basic amenities provided in the area. Suffice it to say that in the affidavit dated 15.09.2012 filed by A.B. Talloo, Superintending Engineer of the DDA, it was stated that some of the basic amenities to which I shall advert to a little later were likely to be completed only by 30.09.2012. If that were so, it was unjust on the part of the DDA to have required the Petitioner to deposit the price of the flat on issuance of the demand letter latest by 28.06.2012 and charging him interest if payment is made thereafter. To put the record straight, I will extract the relevant portions of the additional affidavit filed by the DDA hereunder:-

> "I, A.B. Talloo, SE/CC-15, DDA aged 59 years, s/o Late Sh. B.G. Talloo, office at Sarita Vihar, New Delhi do hereby solemnly affirm and state that I am fully conversant with the facts and circumstances of the case as derived from the official records maintained by the Department, and hence competent to depose

by way of the present affidavit.

1.....

2.(a).....

2.(b). That the infrastructure for the basic amenities like sewer, water supply, SW drains, electricity etc. has to be provided in the flat by the respondent. In this context the details are submitted as under:

i) Water supply: That the underground water reservoirs have already been constructed and water supply lines have also been laid. The infrastructure development charges have already been paid to Delhi Jal Board (DJB). The DJB has also laid their water supply pipe lines in the complex. That it is humbly submitted that water was released during the Common Wealth Games-2010. Now DJB has again released the water from their tank to the underground reservoir of the Complex and water is available in the underground tank in the Complex.

ii) Pump house: That the water from the underground water tank to the individual flat is required to be boosted for which the pump house has been constructed and completed. The pumps in the pump house are in the final stage of completion and **it is expected that the same will be functional by 30th September, 2012.**

iii) Sewerage:..... .....

iv) S.W. drain:.....

v) Electricity: That the infrastructure development charges have already been paid to the BSES and they have already constructed 18 No. of Electric Sub Station (ESS) to cater the demands of the Narmada, Saraswati, Ganga and Yamuna Blocks. BSES is working on ground to reenergize this ESS. It is submitted that 10 sub-station have already been energised by BSES and **remaining 8 No. sub-stations are likely to be energized by 30th September,** 2012 by means of energizing the complete substations. However, at present, half of the portion of Yamuna Block including common portion has already been energized.

2(c).....

2(d).....

2(e).....

3.....

4.....

i) Electricity: That the infrastructure development charges have already been paid to the BSES and they have already constructed 18 No. of ESS to cater to the demands of the Narmada, Saraswati, Ganga and Yamuna Blocks. BSES is working on ground to reenergize this ESS. It is submitted that 10 sub-stations have already been energised by BSES and remaining **8 No. sub-stations are likely to be energized by 30th September, 2012** by means of energizing the complete substations. However, at present, half of the portion of Yamuna Block including common portion has already been energized.

ii).....

iii).....

iv).....

v).....

vi) That the Parking area as per approved layout plan has been completed in Narmada, Saraswati and Kaveri Blocks. **The work is in progress in Yamuna Block and it is likely to be completed by 30.09.2012.** It is pertinent to mention that the underground parking is only for the allottees of the G+8 Towers. The petitioner has been allotted of flat in G+3 Tower which has no provision of underground parking.

vii).....

viii).....

ix).....

x).....

xi).....

xii).....

5.....

6.....

7.....

8.....".

8. Thus, from the affidavit filed on behalf of the DDA, it is apparent that the amenities like water supply, energisation of the sub-station for providing electricity, parking facility in the area etc. were likely to be available only by 30.09.2012. In view of the clear cut admission made in the additional affidavit dated 15.09.2012, the averments made in the counter affidavit dated 28.08.2012 that all the basic amenities have been provided in the flat is untenable.

9. Since essential amenities, as stated above, were likely to be provided only by 30.09.2012 and possession could have been delivered to the Petitioner only thereafter, he could not have been asked to make the payment of the entire price of the flat by 28.06.2012 and charging him interest thereafter. Thus, interest paid by the Petitioner while depositing the amount on 21.09.2012 is liable to be refunded to him.

10. The writ petition is accordingly disposed of with the direction to the DDA to refund the interest amounting to Rs. 1,29,787/- paid by the Petitioner within a period of three months, failing which the Petitioner shall be entitled to interest @ 12% per annum from the date of order till the amount is refunded.

ILR (2013) VI DELHI 4635
CRL.

MAHENDER **....APPELLANT**

VERSUS

THE STATE (NCT OF DELHI) **....RESPONDENT**

(S.P. GARG, J.)

CRL.A. NO. : 749/2011 & 1000/2011 **DATE OF DECISION: 11.10.2013**

Indian Penal Code, 1860—341/304II IPC—Appellants convicted for having assaulted one Ajay with fists and kicks and thereby causing his death. Conviction challenged inter alia on the grounds that the appellants could not have been convicted of causing death of the victim for neither were they armed with any deadly weapon nor were any repeated blows inflicted on the vital organs of the victim and that the cause of death was opined to be cirrohosis of liver. Held: The injuries found on the body of the deceased were neither sufficient in the ordinary course of nature to result in death nor were they likely to cause death. The death did not take place as a result of the injuries received by him but took place due to the shock consequent to cirrohosis of liver and jaundice after about ten days of the incident. The appellants can therefore, only be held guilty of hurt under Section 323 IPC and not under Section 304 Part—II IPC. Appeal allowed.

Indisputably, a scuffle took place on 17.09.2004 in Kismat's factory in which Ajay was thrashed and beaten but neither he was taken for medical examination nor any report was lodged with the police. He was admitted in SGM hospital by Mohan Lal, his brother on 24.09.2004 at 10.15 P.M. Since the victim was unfit to make statement, the FIR was lodged

on Mohan Lal's statement under Sections 341/323 IPC. Whether the victim regained consciousness or was oriented and physically fit to record statement before he died on 30.09.2004 is uncertain and unclear. The MLC (Ex.PW-3/A) records that at the time of medical examination, he was conscious and oriented. Apparently, at no stage, the victim made a statement to the police implicating the appellants for causing injuries to him. PW-Mohan Lal, who was aware of the scuffle on 17.09.2004 from the inception and was in constant touch with the victim facilitating treatment at Dr.Rajesh's clinic did not lodge any report with the police any time soon after the incident. Undoubtedly, prior to 24.09.2004, he was under medical treatment at "Vaid Ortho and Gynae Clinic, 22, Najaf Garh Road, Nangloi, Delhi" and PW-8 (Dr.Rajesh Gupta) had prescribed medicines at the first instance for two days and thereafter, for a week. Ajay again visited Dr.Rajesh Gupta's clinic and complained of hiccup and vomiting. Dr.Rajesh advised admission if hiccup persisted vide prescription card Ex.PW-8/A. The victim got regular treatment as outdoor patient from Dr.Rajesh Gupta and at no stage implicated the appellants for the injuries inflicted to him. In prescription card (Ex.PW8/ A), no injuries were noticed on the body, name of disease was not depicted. PW-8 (Dr.Rajesh Gupta) did not consider it a medico-legal case to intimate the police. PW-3 (Dr.Manoj) proved MLC (Ex.PW-3/A) prepared on the first appearance at SGM Hospital on 24.09.2004 by Dr. Anju Garg in which she observed only one injury i.e. "Right eye sub conjuctival large facial defuse swelling ictrus present". PW-2 (Dr.B.K.Jha), autopsy surgeon in report Ex.PW-2/A found one external injury i.e. "Build abrasion on right frontal region just above eye brow 1cm X 1cm". The cause of death was opined as shock consequent to 'cirrohosis of liver as a result of physical assault'. In the cross-examination, he admitted that deceased was suffering from cirrohosis of liver, (a natural disease process) and jaundice. The Investigating Officer did not ascertain during investigation if the victim was getting any regular treatment for the said diseases. Mohan Lal,

deceased's brother did not divulge as to since when Ajay was suffering from the diseases and what treatment was being taken by him, and if so, from where. He did not produce any medical papers by which the victim had taken treatment. PW8 (Dr.Rajesh Gupta) was not aware of the victim suffering from cirrohosis and did not prescribe any medicine for its cure. The medical evidence is lacking to inform the stage of cirrohosis i.e. compensated or decompensated. In compensated cirrohosis, body functions fairly well despite scarring of the liver. De-compensated cirrohosis means that severe scarring of the liver has damaged and disrupted essential body functions. Patients with de-compensated cirrohosis may develop serious and life threatening symptoms and complications. Liver is an important organ of the body, it weighs about 3 ponds. Stage 4 is the final of all cirrohosis stages and the most dreaded one. Patients in the final stage have a chance of survival only if they opt for a liver transplant. Jaundice is one of the signs/symptoms of liver failure and mostly occurs in 4th stage. In the instant case, the victim was suffering from cirrohosis of liver and jaundice. Its weight was about 700 grams. Apparently, the beatings given on 17.09.2004 were not the direct cause of death of the victim. PW-1 (Mohan Lal), deceased's brother admitted in the cross-examination that when he went to the factory, Ajay was conscious; and was taken to PW-8 (Dr.Rajesh Gupta)'s clinic; got treatment for about a week without admission as in-door patient and on 24.09.2004, he was admitted in Sanjay Gandhi Memorial Hospital, Mangolpuri. The patient was advised X-ray skull, AP and lateral view, X-ray chest PA view, Liver Function Test and referred for surgical medical opinion. Those reports were not collected and placed on record. PW-3 (Dr.Manoj) was unable to give any opinion regarding injuries in the absence of X-ray reports and blood reports. The appellants had no animosity with the victim prior to the occurrence. A sudden quarrel took place on 17.09.2004 when the victim objected to carrying of the bamboos/ ballies from one factory to the other on the instructions of Contractor –

Suresh who was not implicated in the case. In the said scuffle A-1, A-2 and Dinesh assaulted Ajay and gave beatings resulting injuries on the body. The assailants were not armed with any deadly weapon and no repeated blows were inflicted on vital organ of the deceased. It appears that due to the intervention of the owner of the factory i.e. Kismat, the dispute was settled and the victim and his brother – Mohan Lal did not opt to report the incident to the police. The evidence available on record does not point out to any such injury which was so grievous as to constitute 'knowledge' in the mind of the accused persons that by infliction of such injuries they were likely to cause the death of the deceased. True, death was the resultant, but this resultant could not be attributed to the knowledge of the accused persons because of the obvious fact that the alleged injuries found on the person of the deceased were not such so as to constitute knowledge on the part of the accused persons. In an offence punishable under Section 304 Part-II IPC, 'knowledge' is an important element which is missing in the instant case, and hence, it remains simplicitor an offence of 'voluntarily causing hurt' as defined under Section 321 IPC and punishable under Section 323 IPC. The injuries found on the body of the deceased were neither sufficient in the ordinary course of nature to result in death nor were they likely to cause death. The death did not take place as a result of the injuries received by him but took place due to the shock consequent to cirrohosis of liver and jaundice after about ten days of the incident. The appellants can therefore, only be held guilty of hurt under Section 323 IPC and not under Section 304 Part-II IPC.

(Para 3)

Important Issue Involved: In an offence punishable under Section 304 Part—II IPC, 'Knowledge' is an important element, in the absence of which the act of assault even if it results in the death of the victim, remains simplicitor an offence of 'voluntarily causing hurt' as defined under Section 321 IPC and punishable under Section 323 IPC.

[An Gr]

APPEARANCES:

FOR THE APPELLANT : Mr. A.J. Bhambhani, Advocate with Ms. Nisha Bhambhani, Advocate.

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

CASES REFERRED TO:

1. *Ankush Shivaji Gaikwal* vs. *State of Maharashtra,* 2013 (6) SCC 770.
2. *State of Karnatka* vs. *Shivalingaieh.,* 1988 Crl.L.J. 394.
3. *Bal Krishan Sita Ram Pandit* vs. *State,* 1987 Crl.L.J. 479.

RESULT: Appeal allowed.

S.P. GARG, J.

1. Mahender (A-1), Radhey Shyam (A-2) and Dinesh were convicted for committing offences punishable under Section 341/304 part-II IPC. By an order dated 28.09.2010, they were sentenced to undergo RI for ten years with fine Rs. 15,000/-each. A-1 and A-2 being aggrieved have challenged correctness of the judgment.

2. The incident out of which these appeals arise took place on 17.09.2004 at about 09.00 A.M. at village Ranhola. The genesis of the incident was petty dispute among A-1 to A-3 on the one hand and Ajay, on the other hand whereby they wrongfully restrained Ajay and assaulted him with fists and kicks. Police machinery was set in motion on 24.09.2004 when Ajay was admitted at Sanjay Gandhi Memorial Hospital (in short SGM Hospital); Daily Diary (DD) No. 65B (Ex.PX) was registered at PS Nangloi and First Information Report was lodged on 25.09.2004, under Section 341/323/34 IPC after recording Mohan Lal's statement (Ex.PW-1/A). DD No. 38A (Ex.PW-10/C) was recorded after getting intimation of Ajay's death in the hospital on 30.09.2004. During the course of investigation, Mahender, Radhey Shyam and Dinesh were arrested. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted in the Court in which they were duly charged and brought to Trial. The prosecution examined eleven witnesses to establish the case. In their 313

statements, accused persons denied their complicity with the offence in question.

3. Indisputably, a scuffle took place on 17.09.2004 in Kismat's factory in which Ajay was thrashed and beaten but neither he was taken for medical examination nor any report was lodged with the police. He was admitted in SGM hospital by Mohan Lal, his brother on 24.09.2004 at 10.15 P.M. Since the victim was unfit to make statement, the FIR was lodged on Mohan Lal's statement under Sections 341/323 IPC. Whether the victim regained consciousness or was oriented and physically fit to record statement before he died on 30.09.2004 is uncertain and unclear. The MLC (Ex.PW-3/A) records that at the time of medical examination, he was conscious and oriented. Apparently, at no stage, the victim made a statement to the police implicating the appellants for causing injuries to him. PW-Mohan Lal, who was aware of the scuffle on 17.09.2004 from the inception and was in constant touch with the victim facilitating treatment at Dr.Rajesh's clinic did not lodge any report with the police any time soon after the incident. Undoubtedly, prior to 24.09.2004, he was under medical treatment at "Vaid Ortho and Gynae Clinic, 22, Najaf Garh Road, Nangloi, Delhi" and PW-8 (Dr.Rajesh Gupta) had prescribed medicines at the first instance for two days and thereafter, for a week. Ajay again visited Dr.Rajesh Gupta's clinic and complained of hiccup and vomiting. Dr.Rajesh advised admission if hiccup persisted vide prescription card Ex.PW-8/A. The victim got regular treatment as outdoor patient from Dr.Rajesh Gupta and at no stage implicated the appellants for the injuries inflicted to him. In prescription card (Ex.PW8/ A), no injuries were noticed on the body, name of disease was not depicted. PW-8 (Dr.Rajesh Gupta) did not consider it a medico-legal case to intimate the police. PW-3 (Dr.Manoj) proved MLC (Ex.PW-3/A) prepared on the first appearance at SGM Hospital on 24.09.2004 by Dr. Anju Garg in which she observed only one injury i.e. "Right eye sub conjuctival large facial defuse swelling ictrus present". PW-2 (Dr.B.K.Jha), autopsy surgeon in report Ex.PW-2/A found one external injury i.e. "Build abrasion on right frontal region just above eye brow 1cm X 1cm". The cause of death was opined as shock consequent to 'cirrohosis of liver as a result of physical assault'. In the cross-examination, he admitted that deceased was suffering from cirrohosis of liver, (a natural disease process) and jaundice. The Investigating Officer did not ascertain during investigation if the victim was getting any regular treatment for the said diseases. Mohan Lal,

deceased's brother did not divulge as to since when Ajay was suffering from the diseases and what treatment was being taken by him, and if so, from where. He did not produce any medical papers by which the victim had taken treatment. PW8 (Dr.Rajesh Gupta) was not aware of the victim suffering from cirrohosis and did not prescribe any medicine for its cure. The medical evidence is lacking to inform the stage of cirrohosis i.e. compensated or decompensated. In compensated cirrohosis, body functions fairly well despite scarring of the liver. De-compensated cirrohosis means that severe scarring of the liver has damaged and disrupted essential body functions. Patients with de-compensated cirrohosis may develop serious and life threatening symptoms and complications. Liver is an important organ of the body, it weighs about 3 ponds. Stage 4 is the final of all cirrohosis stages and the most dreaded one. Patients in the final stage have a chance of survival only if they opt for a liver transplant. Jaundice is one of the signs/symptoms of liver failure and mostly occurs in 4th stage. In the instant case, the victim was suffering from cirrohosis of liver and jaundice. Its weight was about 700 grams. Apparently, the beatings given on 17.09.2004 were not the direct cause of death of the victim. PW-1 (Mohan Lal), deceased's brother admitted in the cross-examination that when he went to the factory, Ajay was conscious; and was taken to PW-8 (Dr.Rajesh Gupta)'s clinic; got treatment for about a week without admission as in-door patient and on 24.09.2004, he was admitted in Sanjay Gandhi Memorial Hospital, Mangolpuri. The patient was advised X-ray skull, AP and lateral view, X-ray chest PA view, Liver Function Test and referred for surgical medical opinion. Those reports were not collected and placed on record. PW-3 (Dr.Manoj) was unable to give any opinion regarding injuries in the absence of X-ray reports and blood reports. The appellants had no animosity with the victim prior to the occurrence. A sudden quarrel took place on 17.09.2004 when the victim objected to carrying of the bamboos/ ballies from one factory to the other on the instructions of Contractor – Suresh who was not implicated in the case. In the said scuffle A-1, A-2 and Dinesh assaulted Ajay and gave beatings resulting injuries on the body. The assailants were not armed with any deadly weapon and no repeated blows were inflicted on vital organ of the deceased. It appears that due to the intervention of the owner of the factory i.e. Kismat, the dispute was settled and the victim and his brother – Mohan Lal did not opt to report the incident to the police. The evidence available on record does not point out to any such injury which was so grievous as to

constitute 'knowledge' in the mind of the accused persons that by infliction of such injuries they were likely to cause the death of the deceased. True, death was the resultant, but this resultant could not be attributed to the knowledge of the accused persons because of the obvious fact that the alleged injuries found on the person of the deceased were not such so as to constitute knowledge on the part of the accused persons. In an offence punishable under Section 304 Part-II IPC, 'knowledge' is an important element which is missing in the instant case, and hence, it remains simplicitor an offence of 'voluntarily causing hurt' as defined under Section 321 IPC and punishable under Section 323 IPC. The injuries found on the body of the deceased were neither sufficient in the ordinary course of nature to result in death nor were they likely to cause death. The death did not take place as a result of the injuries received by him but took place due to the shock consequent to cirrohosis of liver and jaundice after about ten days of the incident. The appellants can therefore, only be held guilty of hurt under Section 323 IPC and not under Section 304 Part-II IPC.

4. In **'State of Karnatka vs. Shivalingaieh',** 1988 Crl.L.J. 394, conviction was ultimately maintained by the Supreme Court under Section 325 IPC on the ground that the act of the accused in squeezing the testicles of a person would be an offence of voluntarily causing grievous hurt under Section 325 IPC. In the said case, there was a categorical statement of the doctor that the act was dangerous to human life and had led to cardiac arrest of the deceased which was instantaneous. In **'Bal Krishan Sita Ram Pandit vs. State',** 1987 Crl.L.J. 479, the cause of death given by the autopsy surgeon was heart failure due to coronary artery disease. He further opined that shock could also cause death if the person was having a weak heart or he was an emotional type of person. The deceased having a diseased heart and the danda blows might have produced a shock aggravating the heart attack. This Court held that the death was not necessarily caused on account of a danda blow and it could be a simple cause of heart attack on account of Mehtab Rai Jain having become emotional.

5. In the light of above discussion, conviction under Section 304 Part-II IPC is altered to Section 323/34 IPC. All the convicts were sentenced to undergo RI for ten years with fine Rs. 15,000/-each. A-1's nominal roll dated 10.07.2012 reveals that he has undergone two years, three months and twenty nine days incarceration as on 13.07.2012

excluding remission for eight months and seven days. A-2's nominal roll dated 14.11.2011 reveals that he has remained in custody for one year, four months and four days as on 16.11.2011 and earned remission for four months and twenty seven days. Apparently, they have served the sentence more than prescribed under Section 323/341 IPC and require to be released forthwith (if not required to be detained in any other case) and no further substantive sentence can be awarded to them. Though the appellants were not liable for culpable homicide/ murder, they were nevertheless instrumental in accelerating victim's 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. In **'Ankush Shivaji Gaikwal vs. State of Maharashtra',** 2013 (6) SCC 770, the Supreme Court emphasized that victim is not to be forgotten in criminal justice system and Section 357 Cr.P.C. should be read as imposing mandatory duty on the Court to apply its mind to the question of awarding compensation in every case. Accordingly, A-1 and A-2 are directed to deposit Rs. 40,000/-each as compensation before the Trial Court within fifteen days. The Trial Court shall issue notice to the widow to receive the compensation and if she is not available, the compensation amount should be disbursed to the deceased's children/legal heirs in equal proportions.

6. Dinesh did not opt to prefer appeal. Nominal roll dated 07.02.2013 received from Jail Superintendent reveals that he has undergone eight years, four months and four days as on 06.02.2013. The imprisonment awarded to him is almost complete. Intimation be sent to the Jail Superintendent to release Dinesh in FIR No. 868/2004 registered at PS Nangloi under Sections 341/323/34 IPC immediately if not required to be detained in any other case.

7. The appeals stand disposed of in the above terms. Trial Court record be sent back forthwith. Copy of the order be sent to the Jail Superintendent for compliance.

ILR (2013) VI DELHI 4644

O.A.

KRISHAN KUMAR ....PETITIONER

VERSUS

STATE & OTHERS ....RESPONDENTS

(JAYANT NATH, J.)

O.A. NO. : 28/2012 DATE OF DECISION: 22.10.2013
IN I.P.A. 14/2008

Code of Civil Procedure, 1908—Order 33—Petitioner filed suit claiming damages of Rs. 1 crore along with application U/o 33 of Code—Application was allowed holding petitioner as indigent person—Aggrieved respondents challenged the order and urged, petitioner owned immoveable property in New Delhi and he deliberately overvalued his suit, thus, order declaring him indigent person is bad.

Held:— The expression "possessed of sufficient means" refers to capacity to raise money and not the actual possession of property. The petitioner/appellant is not expected to sell everything he has with him, to pay the prescribed Court Fees.

This High Court in the case of **Shri Suneal Mangal vs. M/s Prime Maxi Mall Management and Anr.** (supra) in para 8 held as follows:

> "8. The petitioner/appellant is not expected to sell everything he has with him, to pay the prescribed Court fee. He need not be a pauper to obtain permission to sue as an indigent person. What needs to be seen in such cases is as to whether, after excluding the assets, which are exempt from attachment

and the belongings which are necessary to lead a dignified life, considering his family and social background, the petitioner/appellant is in a position to pay the prescribed Court fee or not. In the case before this Court, prima facie, it appears to me that even if all the assets of the petitioner are taken into consideration, though the law excludes from consideration those assets which are exempt from attachment, the figure will not even close to Rs. 61 lakh which is prescribed court fee payable on the claimed amount." **(Para 14)**

Important Issue Involved: The expression "Possessed of sufficient means" refers to capacity to raise money and not the actual possessed of property. The petitioner/appellant is not expected to sell everything he has with him, to pay the prescribed Court Fees.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Padmini Gupta, Advocate.

FOR THE RESPONDENTS : Mr. Sushil Dutt Salwan, ASC for ASC for R-1 to R-3 (GNCTD)

RESULT: Appeal dismissed.

JAYANT NATH, J.

O.A. No. 28/2012

1. The present appeal is filed by the respondents against the order dated 20th December 2011 passed by the Joint Registrar in the application of the petitioner under Order 33 of the Code of Civil Procedure holding that the petitioner does not have the means to pay the court fee ad valorem on the claim amount of Rs. 1 crore.

2. It is the contention of the petitioner that he applied to respondent no. 3 for running a coal depot on 29.12.1997 for which he was required to deposit a sum of Rs. 500/- as security deposit for issue of retail

license. The petitioner deposited the security deposit in the Post Office in favour of Commissioner Food & Supply, Delhi. The petitioner was allotted coal shop at premises no. 840/6, Chirag Delhi, New Delhi on rent. The petitioner ran the coal business in the name and style of K.K. Coal Depot as its sole proprietor.

3. It is the contention of the petitioner that after 07.04.1991 the coal supply was abruptly stopped by respondent no. 3 without any just and sufficient cause. However, the license issued by respondent no. 3 to the petitioner was renewed continuously year to year on payment of renewal fees till 1996 with assurances given to the petitioner that the supply of soft coal would be resumed soon. It is the contention of the petitioner that in the year 1995 a press communique was issued by the respondent no. 3 which was published on 13.01.1995 in almost all the leading newspapers which stated that the supply of soft coal would be resumed if the petitioner/ license holder deposit a sum of Rs. 13,000/- per truck as an advance upto 15.02.1995 for supply of three months from Jan, 1995 to March, 1995. It is further the contention of the petitioner that on contacting the respondent no. 3 after publication of the abovementioned circular, the respondent no. 3 informed the petitioner that he is not in a position to requisition soft coal. The petitioner contends that even after this, his license was renewed on 12.11.1996.

4. It is the contention of the petitioner that for about six years the work/ business of the petitioner came to a grinding halt due to non-supply of coal by respondent no. 3. The petitioner further contends that he filed Civil Writ Petition no. 564/1998 in this Court seeking a direction to respondent no. 2 and 3 to provide some avenue of income such as allotment of ration depot, STD kiosk or telephone booth on compassionate ground due to petitioner being a handicapped person. The petitioner by order of this Hon'ble Court was allotted a site for PCO booth on 14.06.2005 near Alaknanda Market, New Delhi in pursuance of Handicapped Certificate issued by All India Institute of Medical Sciences (AIIMS) certifying the petitioner as a physically handicapped person with sixty percent permanent physical impairment in relation to his right lower limb.

5. It is contended by the petitioner, that the petitioner is running a PCO booth and earns a meagre income of Rs. 1800/-per month. A copy of his income certificate issued by Deputy Commissioner (South District)

Delhi in support of the same has been placed on record. The petitioner further states that the petitioner has to pay the rent of the earlier allotted coal shop even after the stoppage of its business. The petitioner further submits that after the unlawful closure of the coal business of the petitioner due to the lapses on the part of respondent no. 3, the petitioner suffered extreme and exceptional hardship and mental agony since 1996.

6. The petitioner further submits that he is an indigent person and only earns Rs. 1800/- per month from running the PCO Booth which is the only source of petitioner's income. The petitioner has also filed a schedule of moveable and immovable properties showing that he has an immovable property dwelling house bearing no. J-3/227, DDA Flats, Kalkaji, New Delhi.

7. I have heard learned counsel for the parties.

8. Learned counsel appearing for the appellants/respondents has strenuously contended that the petitioner is the owner of an immovable property bearing No. J-3/227, DDA Flats, Kalkaji, New Delhi as is clear from Annexure A. Hence, it is contended that the petitioner has the means to pay the court fee. Further, it is submitted that the petitioner has deliberately over valued the suit claiming a sum of Rs. 1 crore as damages. It is stated that the sum of Rs. 1 crore has no co-relation to the alleged damages suffered by the petitioner. Reliance is placed on the judgment of the Full Bench of the Madhya Pradesh High Court in the case of **Tejkumar vs. Subhashchandra,** AIR 1989 MP 78 to contend that the court while examining a petition under Order 33 CPC is not precluded from examining the question of its pecuniary jurisdiction and to return the plaint for presentation to the proper court. Hence, it is contended that if the suit is valued properly, the petitioner would have the means to pay the proper court fees. Hence, the present appeal.

9. In contrast, the learned counsel appearing for the petitioner has contended that as far as the issue of ownership of the flat in question is concerned, the same is in the name of his mother. The question of the inheritance of the petitioner to the same is an issue which is presently not settled. It is contended that even otherwise, merely because the petitioner is in possession of a flat does not mean that he is possessed of sufficient means to enable him to pay the court fee prescribed by law. He has relied upon a judgment of the Delhi High Court in the case of **Shri Suneal Mangal vs. M/s Prime Maxi Mall Management and Anr.,** 2013 (196)

DLT 234 to point out that this Court has held that petitioner is not expected to sell everything he has with him to pay the prescribed court fee.

10. Having considered the rival submissions of the learned counsel for the parties, in my view, the present appeal is devoid of merits.

11. The Collector of Stamps, Kalkaji has submitted his report in this case. The Collector has noted that the petitioner is found residing at J-3/327, DDA Flat, Kalkaji which he is sharing with his wife and two sons. The flat is, as per the conveyance deed, in the name of the mother of the petitioner who has expired. It is also noted that the petitioner is aged 58 years old and has a monthly income of Rs.2,000-3,000/- per month and is running a PCO Booth. It is also noted that the petitioner is also financially supported by his married sisters, namely, Smt. Usha Rani, Smt. Sunita Rani and Smt.Ravinder Sood.

12. The petitioner in his affidavit deposed that he earns a meagre income of Rs. 1,800/- per month which is his only source of income. A certificate from the Executive Magistrate Kalkaji to the said effect has been filed along with his affidavit as Ex. AW1/2. The petitioner has also filed a certificate from the All India Institute of Medical Sciences, Ex. AW1/1 showing that he is physically handicapped and has 60% permanent physical impairment in his lower limb. There are no reasons to disbelieve these statements.

13. The contention of the learned counsel for the respondents/ appellants regarding the petitioner owing a residential flat is of no consequence. The impugned order rightly relies upon the judgment of Orissa High Court in the case of **Smt. Diptilata vs. Land Acquisition Collector,** Air 1995 Orissa 291 and of the Rajasthan High Court in the case of Smt. Manjulata vs. Sidhkarrant AIR 2005 Rajasthan 32 where it was held that the expression "possessed of sufficient means" refers to capacity to raise money and not the actual possession of property.

14. This High Court in the case of **Shri Suneal Mangal vs. M/s Prime Maxi Mall Management and Anr.** (supra) in para 8 held as follows:

> "8. The petitioner/appellant is not expected to sell everything he has with him, to pay the prescribed Court fee. He need not be a pauper to obtain permission to sue as an indigent person. What

needs to be seen in such cases is as to whether, after excluding the assets, which are exempt from attachment and the belongings which are necessary to lead a dignified life, considering his family and social background, the petitioner/appellant is in a position to pay the prescribed Court fee or not. In the case before this Court, prima facie, it appears to me that even if all the assets of the petitioner are taken into consideration, though the law excludes from consideration those assets which are exempt from attachment, the figure will not even close to Rs. 61 lakh which is prescribed court fee payable on the claimed amount."

15. Hence, merely because the petitioner allegedly owns a flat which is still in the name of his mother could not be a ground to hold that the he is not an indigent person.

16. The other contention of the appellants/respondents is also without merit. It is not possible to conclude at this stage as to whether the petitioner has over valued his claim. The Full Bench of the Madhya Pradesh High Court in the case of **Tejkumar vs. Subhashchandra** (supra), the judgment relied upon by the learned counsel for the respondents did hold that it was upon the non-applicant to lead evidence to disproof the claim of the applicant and to also show that the suit is overvalued and if the valuation would have been proper then the applicant is in a position to pay the court fees. In the present case, admittedly, the non-applicant, namely, the State has not led any evidence whatsoever. There is nothing to show and demonstrate that the suit has been over valued by the petitioner.

17. The present appeal is accordingly dismissed.

I.P.A. 14/2008

List the matter on 18.12.2013 before the Joint Registrar for further proceedings.

ILR (2013) VI DELHI 4650
CRL. A.

MANISH **....APPELLANT**

VERSUS

STATE **....RESPONDENT**

(S.P. GARG, J.)

CRL.A. NO. : 189/2004, 139/2004 & 169/2004 **DATE OF DECISION: 31.10.2013**

Indian Penal Code, 1860—Ss. 394, 397, 411 120B/392—Held, it is highly unbelievable that witness who had fleeting glance at the driver of the scooter would be able to recognize him after a long time—Accused justified to decline to participate in TIP as they were admittedly shown to the prosecution witnesses in the police station. Also held, that out of Rs.3.28 lacs robbed, only Rs. 25,000/- recovered after three months of incident—Highly unbelievable that accused would retain robbed case intact with their bank slips on it and would not change it—No independent associated at the time of recovery of cash—Money allegedly recovered not in exclusively possession of accused. Also held that when original record was not available and the re-constructed record was incomplete and does not contain statement of accused U/s.313 and statement of defence witnesses, benefit must go to the accused.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Rakesh Kumar with Mr. Deb Nandan, Advocates.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

RESULT: Appeal Allowed.

S.P. GARG, J.

1. Manish (A-1), Ram Sarup (A-2), Manoj (A-3) and Pintu @ Parvinder were arrested in case FIR No.19/2001 registered at Police Station Subzimandi and sent for trial for committing offences punishable under Sections 120-B/392/394/397 IPC. The prosecution case in the charge-sheet was that on 18.01.2001 Raghubir Singh and Ravinder had gone to deposit cash of their employer Om Prakash doing business in the name and style of M/s Kanshi Ram Pawan Kumar, at 181-182, Azad Market, Delhi in Oriental Bank of Commerce on scooter No.DL-4SS1731. They had bags containing cash Rs. 3,28,000/-and Rs. 2.5 lacs each. When they went near Oriental Bank of Commerce, Roshanara Road, at about 11.00 a.m. two boys armed with knife and katta snatched the bag containing Rs. 3,28,000/- from Raghubir Singh after inflicting injuries on his hands and legs. On raising hue and cry, the assailants fled the spot and escaped on a scooter standing nearby. The police machinery was set in motion when Daily Diary (DD) No.5A was recorded at 11.20 A.M. at Police Station Subzimandi on getting information from ASI Vijender, PCR that a dacoity had taken place near Oriental Bank of Commerce, Palace Cinema. The investigation was assigned to SI Gurusewak Singh (PW-25) who with Addl.SHO and Constables Satpal and Govind Ram went to the spot and came to know that injured had already been taken to hospital by PCR officials. He recorded Raghubir Singh's statement (Ex.PW-14/A) at Sir Ganga Ram Hospital and lodged First Information Report after making endorsement (Ex.PW-25/B) thereon. Statements of witnesses conversant with facts were recorded. On 28.01.2001 scooter bearing Registration No.DL-2S-C-9515 used in the crime was recovered from a gali in Aryapura, Subzimandi lying unclaimed and seized vide seizure memo (Ex.PW25/F). On 10.04.2001 Manoj (A-3) was arrested vide DD No.88B under Section 41-1 (a) Cr.P.C. registered at PS Gokulpuri and Rs.5,000/- were recovered from his house. On 09.04.2001 Manish (A-1) was arrested in case FIR No.139/2001 under Section 25 Arms Act PS Gokulpuri and pursuant to his disclosure statement, Rs.10,000/- were recovered from his house. On 18.04.2001 Pintu was arrested from near Ghantaghar, Subzimandi while sitting on a motor-cycle bearing registration No.3-SL-5260. On his instance A-2 was arrested on 19.04.2001. On 20.04.2001, in pursuance of disclosure statement made by him, Rs.10,000/- were recovered from his residence. A-1, A-3 and Pintu declined to

participate in the TIP proceedings. After completion of investigation, a charge-sheet was filed against all of them in the court for committing offences mentioned previously. They all were duly charged and brought to trial. The prosecution examined 40 witnesses to substantiate the charges. In their 313 statements, the appellants denied their complicity in the offences and pleaded false implication. They examined Durgesh (Manish's mother) and Phool Singh (Manoj's father) in defence. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment dated 04.02.2004 in Sessions Case No.53/2001 held A-1, A-3 and Pintu perpetrators of the crime under Sections 120-B, Section 392 read with Section 120B IPC. A-1 was held guilty for committing offence punishable under Section 394 and 397 IPC. Ram Sarup was acquitted of the charges of criminal conspiracy to commit robbery but was convicted under Section 411 IPC. A-1, A-3 and Pintu were awarded RI for two years under Section 120-B IPC and RI for four years each with fine Rs. 10,000/-each under Section 392/34 IPC. A-1 was further sentenced to undergo RI for seven years with fine Rs. 10,000/- for the offence under Section 394 IPC and RI for seven years for the offence under Section 397 IPC. A-2 was awarded RI for two years with fine Rs.10,000/-. All the substantive sentences were to operate concurrently. Being aggrieved, A-1 to A-3 have challenged their conviction. It appears that Pintu has not preferred any appeal.

2. I have heard the learned counsel for the parties and have examined the record. There is no challenge to the incident of robbery that took place on 18.01.2001 near Oriental Bank of Commerce in which Raghubir Singh was robbed of '3.28 lacs by the assailants using deadly weapons. PW-2 (Om Parkash) proved that on 18.01.2001 his employees Raghubir Singh and Ravinder had gone to deposit the cash in Oriental Bank at about 11.00 A.M. After about 20 minutes, he got a telephone call from the bank about the robbery whereby the employees were deprived/looted of Rs.3.28 lacs. He further disclosed that Ram Sarup was their employee in the shop prior to the incident and used to go to the bank to deposit the cash. PW-3 (Ravinder Kumar) and PW-14 (Raghubir Singh) have also testified on similar lines and there are no good reasons to disbelieve them. They were not imagined to fake the incident of robbery. The crucial question to be ascertained is as to who were the perpetrators of the crime. The prosecution implicated A-1, A-3 and Pintu to be the assailants who had committed the broad-day light robbery after getting

feedback from A-2. There is complete denial by the appellants of their involvement in the crime. Daily Dairy (DD) No.5A was recorded at 11.20 A.M. on getting information from ASI Vijender of PCR that a decoity had taken place near Oriental Bank of Commerce. ASI Vijender, who admitted the injured Raghubir Singh in the hospital was not examined. This DD No.5A does not contain the number of the assailants or the vehicle number in which the assailants had arrived at the spot. SI Gurusewak Singh recorded Raghubir Singh' statement (Ex.PW-14/A) in which he gave graphic detail as to how and in what manner he was robbed by two boys armed with knife and katta. When he did not part with the bag containing cash, he was injured and the assailants were successful to flee the spot with the bag. The complainant (Raghubir Singh) did not disclose the detailed description of the assailants. He also did not disclose if the assailants had fled the crime spot on a two wheeler scooter standing nearby. Apparently, the complainant did not disclose the scooter number on which the assailants had arrived at the spot and fled the scene. In his court statement as PW-14, Raghubir Singh did not opt to support the prosecution and exonerated the accused persons by declining to identify any of them. He was categorical to state that he was not in a position to identify the assailants present in the court. Additional Public Prosecutor cross-examined him after seeking court's permission. However, nothing material could be elicited to ascertain the identity of the assailants. The witness volunteered to add that his attention was towards the brief-case and he was unable to see the faces of the assailants. He denied the suggestion that on 20.04.2001, he had identified A-1 before the police. PW-3 (Ravinder Kumar) also turned hostile and did not identify and recognize the assailants. He was specific to depose that the four accused persons present in the court were not the assailants. Cross-examination by Additional Public Prosecutor did not yield any positive evidence. He rather deposed that in April, 2001 the police had shown him two boys in the police station and he had informed them that those boys Manish (A-1) and Pintu were not the assailants. Apparently, both PW-3 (Ravinder Kumar) and PW-14 (Raghubir Singh) who had direct confrontation with the assailants for long time during day-time and had enough and clear opportunity to observe their features did not opt to support the prosecution and exonerated the accused persons facing trial. No ulterior motive was assigned to these witnesses for deviating from their previous statements recorded during investigation. None of them was able to note down the scooter number on which the assailants had fled the spot. They also did

not subscribe to the prosecution story that the robbers were chased by PW-12 (HC Darshan Kumar) or that PW-6 (M.L.Nanda) had confrontation with them. PW-7 (Anurag Nanda) also preferred to resile from his previous statement (Ex.PW-7/A) and declined to identify the assailants stating that he was unable to see their faces. He denied the contents of statement (Ex.PW-7/A) to have been made by him to the police.

3. The prosecution heavily put reliance upon PW-6 (M.L.Nanda)'s testimony who was able to identify Pintu and Manish (A-1). He testified that he had seen both of them running near his work shop at premises No. A-8736, Roshan Ara Road, Kalu Ram Building, Delhi at about 11.00 A.M. One of the boys had a pistol in his hand with which he fired but it got misfired. The other boy had a black colour bag in his lef . When he attempted to push the said boy, he took out a meat cutting knife and intended to inflict injuries to him. Finally he succeeded to flee the spot on a two-wheeler scooter. Pintu was the boy who had a pistol in his hand with which he had fired and A-1 had attempted to injure him. In the cross-examination, he deviated from the version narrated in examination-in-chief and stated that due to knee problem, he was unable to walk and had not gone anywhere after hearing commotion. He was called in the police station after about two and a half months of the incident for identification of the accused person. He expressed inability to identify the offenders and when the police officials insisted, at their instance he identified them. He was categorical to state that he had not seen any person running away with the bag and had not seen the accused persons running from the spot. PW-6 (M.L.Nanda) cannot be considered as reliable and trustworthy witness to base conviction. Though he had allegedly seen the robbers sitting on a scooter and fleeing from the spot, he was unable to disclose scooter number used in the crime. He did not disclose the name of the police official who had given chase to the robbers. His statement has not been corroborated in material particulars by PW-12 (HC Darshan Kumar) who allegedly gave a chase to the assailants. In his deposition, he (H.C.Darshan Kumar) was not sure about the number of two-wheeler scooter used in the crime and described its number DL-2S-C-1915. The scooter recovered on 28.01.2001 after about 10 days of the incident from a nearby place in a Gali, Aryapura in an abandoned condition was having registration No.DL2S-C-9515. It is amazing that the police who was investigating a grave offence was unable to find out and recover the vehicle used in the incident for ten

days when it was lying abandoned at a nearby spot i.e.Aryapura, Subjimandi. It makes PW-12 (HC Darshan Kumar)'s version that had noted down the number of the scooter and had disclosed it in the statement recorded under Section 161 Cr.P.C. on the same day highly suspect. Had it been so, there could not have any difficulty to recover the scooter lying unclaimed at a nearby distance. The PCR officials who went to the spot at the first instance did not disclose the number of the scooter used in the incident. PW-12 (HC Darshan Kumar) in the cross-examination revealed that he had flashed the number of two wheeler scooter on wireless set, however, copy of the wireless message was not placed on record. DD No.5A does not record use of any scooter number in the crime. As per PW-13's testimony, this scooter was registered in the name of Surender Singh. PW-17 (Manoj Jain) deposed that scooter bearing registration No.DL-5SC-7245 belonged to him and it was stolen on 13.01.2001 for which he had lodged report of theft at police station Roop Nagar. The prosecution did not collect any evidence as to who was the accused in the said FIR or if the said scooter was stolen by the assailants in this case. PW-12 (HC Darshan Kumar) did not state if PW-6 (M.L.Nanda) had any confrontation with the assailants or any of them had fired. No crime weapon was recovered from the possession of the accused persons. PW-12 made vital improvements in his deposition and even identified Manoj who had driven the scooter. In his 161 statement (Ex.PW-12/DA), he did not claim to identify the third accomplice. It is highly unbelievable that this witness who had fleeting glance at the driver of the scooter would be able to recognize him in the court after lapse of long time. The accused persons were justified to decline to participate in the TIP proceedings as admittedly they were shown to the prosecution witnesses in the police station. PW-12's version does not find corroboration.

4. The next limb of the argument to connect the accused persons with the crime is recovery of the robbed cash at their instance from their houses. It reveals that out of Rs. 3.28 lacs robbed only a paltry sum of Rs. 25,000/-in all was recovered from the residences of A-1 to A-3 after a gap of about more than three months of the incident. It is highly unbelievable that these accused persons would retain robbed cash intact with their bank slips on it and would not change it. No independent public witness was associated at the time of recovery of cash. Neither the victims nor the owner was joined at the time of recovery. Moreover,

money allegedly recovered was not in the exclusive possession of accused persons. It is relevant to note that the original record was not traceable. The reconstructed record is incomplete and does not contain appellants' statements recorded under Section 313 and Statement of defence witnesses. In the absence of original documents on record and deficiencies in the record, it is difficult to appreciate the evidence of the witnesses minutely and the benefit must go to the accused persons.

5. In the light of the above discussion, I am of the view that the prosecution has failed to establish its case beyond reasonable doubt. The impugned judgment cannot be sustained and is set aside. The appeals are accepted and the conviction and sentence of the appellants are set aside. Personal bonds and surety bonds stand discharged.

6. A copy of the order be sent to Jail Superintendent, Tihar Jail for information. Trial Court record along with a copy of this order be sent back forthwith.

ILR (2013) VI DELHI 4656
W.P. (C)

GHANSHAM SINGH .....PETITIONER

VERSUS

UNION OF INDIA AND ORS. .....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 6722/2013 DATE OF DECISION: 06.11.2013

Service Law—Armed Forces—Assured career Progression Scheme——Article 226—Petitioner had completed 12 years of service on 28th February, 2004 and was offered opportunity to undergo PCC Pursuant to offer made only in January, 2006—Petitioner was compelled to express his unwillingness to undergo

PCC, as he was to proceed to his native place on leave due to some domestic problems of serious nature—Petitioner qualified PCC in second chance and result of same was informed on June, 2006 by respondent—Petitioner was granted financial upgradation by respondents w.e.f. 22.08.2006—Petitioner's representation for grant of first financial upgradation w.e.f. 28.02.2004 to respondents were of no avail—Petitioner approached HC for restoration of first financial upgradation as per Assured Career Progression Scheme w.e.f. 28th February, 2004—Plea taken, effective date for consideration of person for entitlement of grant of financial upgradation is date on which he acquires requisite number of years of service in a post without any promotional opportunities being made available to him—Completion of actual PCC would have no effect on effective date of grant of financial benefits inasmuch as all employees undergo PCC only after having become eligible for grant of ACP Scheme and are given three chances to complete PCC—Held—A person is entitled to financial benefit on date he completes required twelve years of service without a promotional opportunity—Completion of PCC is akin to completion of requisite training upon appointment/promotion—It does not change date of appointment or date of his promotion—Unwillingness certificate was restricted to Petitioner's inability to undergo PCC which commenced in January, 2006—Petitioner was offered his second chance and has successfully undertaken PCC commencing w.e.f. 05.06.2006 to 22.07.2006—In this background, Petitioner can't be denied of his rightful dues till date—As per Scheme, every employee is entitled to three chances to complete PCC—In case, Petitioner had undertaken PCC course when he was first offered same but had failed to course, respondents would not have then deprived him of benefits of financial upgradation but would have offered him a second; and thereafter,

even a third chance to successfully complete same—This being position, a person who was prevented by just and sufficient cause from undertaking PCC at first option cannot be deprived of benefit of financial upgradation in this matter—Petitioner has in fact cleared PCC course at second chance, when he underwent same—This writ petition has to be allowed holding that Petitioner would be entitled to grant of first financial upgradation under ACP Scheme benefit w.e.f with 28th February, 2004—In case, Petitioner was entitled to benefit of financial upgradation as per modified ACP Scheme as well, respondent shall consider claim of petitioner in accordance with scheme in light of forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

Important Issue Involved: A Person who was prevented by just and sufficient cause from undertaking promotional cadre course (PCC) at the first option cannot be deprived of the benefit of the financial upgradation w.e.f. the date he completed 12 years from the date of appointment to a post without any promotiomal financial benefit being made available to him after he has cleared the PCC course at the second chance, when he underwent the same.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Subhashish Mohanty, Advocate.

FOR THE RESPONDENTS : Ms. Barkha Babbar, 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: 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. 28th February 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. 28th February 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 28th February 2004 and was offered an opportunity to undergo PCC pursuant to an offer made only in January, 2006. The petitioner was compelled to express his unwillingness to undergo PCC, as he was to proceed to his native place on leave due to some domestic problems of serious nature.

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

> **"UNWILLINGNES CERTIFICATE**
>
> I ..... Rank.....Name.....of CISF Unit .....is not willing to undergo promotion course of Const. to HC/GD commencing w.e.f. ..... as detailed vide CISF Unit ..... Further I have no objection if I, am superseded due to my un-willingness."

6. It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 28th February 2004. The record placed before us shows that the petitioner successfully qualified the promotional cadre course in the second chance and the

result of the same was informed on June 2006 by the respondent.

7. It appears that prior thereto the respondents could not be granted ACP benefit due to the petitioner w.e.f. 28th February 2004 due to his submission of unwillingness to undergo promotion cadre course which was held w.e.f. 09.01.2006 which he was to undertake as his first chance. The petitioner's representations for grant of 1st financial upgradation w.e.f 28.02.2004 to respondents were of no avail. The respondent however, proceeded to grant the ACP upgradation to the petitioner by order SO Part. no. 13/2007 passed on 26.03.2007 which was made effective only from 22.08.2006. The petitioner was thus denied the benefit of the financial upgradation w.e.f. 28th February 2004 to 21st August 2006, from which date he due for grant of the first financial upgradation.

8. 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 withheld. 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 28th February 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 other enrolled members of the respondent like that of the petitioner when they 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. 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.

9. 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.

10. 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 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 No. 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."

11. 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 read as under :-

> "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 is 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."

12. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 28th February, 2004 which was actually not 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 January, 2006.

13. 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 able and willing 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.

14. 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.

15. So far as the failure of the petitioner to undertake the promotional cadre course for which he was detailed in January 2006 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".

16. The court thus held that the respondents were in greater default for not having detailed the petitioner for the PCC till January, 2006. The petitioner completed twelve years of service on 28th February, 2004 when he completed 12 years of continuous service. After February, 2004, the present petitioner was detailed for undertaking PCC only in January, 2006. It is an admitted position that the petitioner submitted his unwillingness for undergoing the Promotion Cadre Course in the said batch . He was offered his second chance and has successfully undertaken the PCC commencing w.e.f. 05.06.2006 to 22.07.2006 vide SO P-II No. 183/2006 dated 22.08.2006 of the respondents. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes.

17. 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.

18. Looked at from any angle, the acts of the respondents in recovering the amount and denying the financial upgradation to the petitioner from 28th February 2004 till 21st August 2006 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).

19. 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".

20. 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.

21. 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.

22. 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. As the petitioner submitted unwillingness for undergoing promotion cadre course in the first chance, grant of 1st financial upgradation due to him w.e.f. 28.02.2004 was withheld.

23. 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 28th February 2004. The petitioner is entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

24. 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. 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.

27. *Dasti* to learned counsel for the parties.

ILR (2013) VI DELHI 4668
CRL.

OM PARKASH **....APPELLANT**

VERSUS

STATE NCT OF DELHI **....RESPONDENT**

(S.P. GRAG, J.)

CRL.A NO. : 765/2001 & 742/2001 **DATE OF DECISION: 06.11.2013**

Indian Penal Code, 1860—Sec. 161, Prevention of Corruption Act, 1988—Sec. 5(1)(d)—Held, In the light of conflicting versions and suspicious features on crucial aspects, complainant's version does not appear to be wholly reliable—Neither the demand nor the acceptance alone is sufficient to establish the offence—Mere recovery of tainted money divorced form the circumstances under which it was paid is not sufficient to convict the accused—The complainant's testimony is lacking to prove that A-1 accepted the bribe amount with the tacit approval of A-2. No other independent public witness was associated in the investigation from the office of the accused where the alleged transaction took place. The prosecution was unable to establish that A-1 and A-2 shared common intention to demand and accept the bribe amount from the complainant. Conviction of the appellants cannot be founded on the basis of inference.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. K.B. Andley, Sr. Advocate with Mohd. Shamik, Advocate.

FOR THE RESPONDENT : Mr. Navin Kr. Jha, APP.

RESULT: Appeal allowed.

S.P. GARG, J.

1. Om Parkash (A-1) and Yogendra Singh Bhartwal (A-2) challenge correctness and legality of a judgment dated 29.09.2001 in CC No.10/93 arising out of FIR No.5/88 registered at Police Station Anti-Corruption Branch (ACB) of Delhi by which they were held guilty for committing offences punishable under Section 161 IPC read with Section 5 (1) (d) of POC Act and sentenced to undergo Rigorous Imprisonment for one year with fine '100 on each count. The factual matrix of the case are as under:

2. On 05.04.1988 Gulshan Lal (the complainant) looking after the construction on plot No.A/2-439, Sector 8, Rohini, belonging to his brother-in-law Ved Prakash moved an application in the office of DDA to inspect the construction completed upto DPC level. The dealing clerk gave the date of inspection as 07.04.1988 in between 10.30 a.m. to 1.30 p.m. The complainant requested A-2 to inspect it on 05.04.1988 itself to avoid its stoppage. A-2 demanded Rs. 200/- as bribe to carry out the inspection on the same day. The complainant agreed helplessly to make the payment of Rs. 200 after making arrangement. A-2 asked him to give money in between 2 to 5 p.m. The complainant approached ACB and lodged complaint (Ex.PW-6/A). PW-8 (Yog Raj Sharma), Raid Officer, carried out the pre-raid proceedings and associated NK Abraham as 'panch' witness. The raiding team after completing the formalities went to the plot where the inspection was to be carried out. The complainant was informed by the mason working on the plot that the surveyor has visited the plot and had instructed him to ask Gulshan to come to DDA office before 05.00 p.m. with Rs.200. On that, the raiding team reached at Project Office of DDA, Rohini and laid a trap. It is alleged that the complainant paid Rs.200/-as bribe to A-1 on the direction of A-2 and he (A-1) accepted it. On getting pre-determined signal from the 'panch' witness, the raiding party apprehended A-1 and recovered the tainted money from the pocket of his pant. Post raid proceedings were conducted and A-2 was arrested. During the course of investigation statements of witnesses conversant with the facts were recorded. After completion of investigation a charge-sheet was filed against A-1 and A-2 for committing the aforesaid offences. The prosecution examined 12 witnesses to establish their guilt. In their 313 statements, the appellants pleaded false implication.

DW-1 (Rakesh Kumar Sehrawat) was examined in defence. After appreciation of the evidence and taking into consideration the submissions of the parties, the Trial Court by the impugned judgment held both of them perpetrators of the crime and sentenced them accordingly. Being aggrieved, they have preferred the appeals.

3. I have heard the learned counsel for the parties and have examined the record carefully. Gulshan Lal (PW-6) claimed to be Ved Prakash's attorney to supervise the construction on his plot in question as he himself resided in Gurgaon. He did not place on record any such power of attorney executed in his favour. Application for inspection moved on 04.04.1988 bears Ved Prakash's signature whereby a request was made to the Project Officer to inspect the plot as construction upto DPC level was complete. The dealing clerk gave the date as 07.04.1988. The Investigating Officer did not examine the dealing clerk who has received the application and has given the specific date for inspection. The complainant did not explain as to how the application for inspection was signed by Ved Prakash when he was not available and the entire construction was being supervised by him. During the course of investigation, no attempt was made to contact Ved Prakash or to examine him as a witness. Apparently, Gulshan Lal had no authority to visit the office to insist inspection of the plot in the absence of any authorization by the owner. Application to carry out inspection was moved on 05.04.1988 and it was not expected by the officials to inspect the plot on the same day. PW-6 (Gulshan Lal) admittedly working as Junior Intelligence Officer in IB insisted to get the inspection carried out on the same day. There was no occasion for the complainant not to wait till 07.04.1988 and to get the inspection carried out on the same day on payment of Rs. 200/-. The complainant approached the ACB on 05.04.1988 and trap proceedings were conducted the same day. In the complaint (Ex.PW-6/A) A-1's name does not figure though in the cross-examination, the complainant admitted his acquaintance with him as he had taken the measurement of the plot. Additions and alterations at point 'X' and 'Y' on Ex.PW-6/A remained unexplained. The complaint does not reveal as to at which specific place bribe amount of Rs.200/-was to be accepted by A-2. When the raiding team went to the 'plot' at the appointed time, neither A-1 nor A-2 was present there to receive the bribe amount. It is alleged that 'mason' present at the spot informed the complainant about the visit of surveyor and gave direction to the complainant to visit the

office before 05.00 P.M. The raid officer admittedly did not visit the plot and examine the mason. He was unaware if any such information was conveyed by the mason to the complainant. Complainant and panch witnesses have given completely contradictory statements in this regard. Panch witness PW-7 (N.K.Abraham) deposed that when the complainant inquired from the labourers working on the plot if anybody had come to meet him, the reply was given in the negative. The Investigating Officer did not attempt to ascertain the name of the mason or the labour who had conveyed the information. Thereafter, the raiding team went to the office where Rs.200/-were allegedly accepted as bribe by A-1 on A-2's directions. All the witnesses have contradicted each other on this aspect and have given inconsistent version. PW-7 did not implicate A-2 at all and asserted payment of Rs.200/-by the complainant to A-1 only. He denied that he had given any predetermined signal to the raiding team. He was cross-examined by learned Additional Public Prosecutor after court's permission as he resiled from the previous statement recorded under Section 161 Cr.P.C. He elaborated that A-2 was arrested after he was named by A-1 who disclosed that money was to be given to him. PW-7 did not adhere to the prosecution's case that on specific demand by A-2 from the complainant in the office, A-1 was sent out to collect and accept the bribe amount on his behalf. The complainant did not offer any plausible explanation as to why the alleged bribe amount which he was supposed to offer to A-2 was not given in the office and why he opted to come out of the office to give the bribe amount to A-1. In the examination-in-chief he did not depose that A-2 had directed him to pay the bribe amount to A-1 outside the office. Apparently, there was no demand by A-1 and no acceptance by A-2. PW-6-complainant, PW-7panch witness and PW-8-raid officer were unable to narrate the entire facts completely in their examination-in-chief and were able to recollect after they were given specific suggestions in cross-examination by Addl. Public Prosecutor.

4. In the light of conflicting versions and suspicious features on crucial aspects, complainant's version does not appear to be wholly reliable. Neither the demand nor the acceptance alone is sufficient to establish the offence. Mere recovery of tainted money divorced from the circumstances under which it was paid is not sufficient to convict the accused. The complainant's testimony is lacking to prove that A-1 accepted the bribe amount with the tacit approval of A-2. No other independent public witness was associated in the investigation from the office of the accused where the alleged transaction took place. The prosecution was unable to establish that both A-1 and A-2 shared common intention to demand and accept the bribe amount from the complainant. Conviction of the appellants cannot be founded on the basis of inference.

5. In the light of the above discussion, the impugned judgment cannot be sustained and is set aside. The appeals are allowed. Benefit of doubt is given to the appellants and they are acquitted in this case.

6. Trial Court record along with a copy of this order be sent back forthwith.

ILR (2013) VI DELHI 4672
W.P.

NISHAN SINGH ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. .....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 6602/2013 DATE OF DECISION: 06.11.2013

Service Law—Armed Forces—Assured Career Progression Scheme—Constitution of India, 1950—Article 226—Petitioner completed 12 years of service on 17th June, 2003 and was offered opportunity to undergo promotional cadre course (PCC) pursuant to offer made only in October, 2004—Petitioner was compelled to express his unwillingness to undergo this PCC on ground of his availing leave to proceed to his native place on account of death of one of his family member—Petitioner was granted financial upgradation by respondents w.e.f. 17th June, 2003—

Petitioner was informed result of successfully qualifying PCC in second chance in April, 2006—Prior thereto, respondents issued order dated 20.05.2005 whereby ACP benefit granted to Petitioner w.e.f. 17th June, 2003 was cancelled due to submission of unwillingness to undergo PCC which was held in 2004 and respondents proceeded to recover amount paid to petitioner towards his financial upgradation w.e.f. June, 2003—Respondent however proceeded to re-grant ACP upgradation to Petitioner effective From 13th April, 2006—Order challanged before HC—Plea taken, effective date for consideration of person for entitlement of grant of financial upgradation is date on which he acquires requisite number of years of service in a post without any promotional opportunities being made available to him—Completion of actual PCC would have no effect on effective date of grant of financial benefits inasmuch as all employees undergo PCC only after having become eligible for grant of ACP Scheme and are given three chances to complete PCC—Held—A Person is entitled to financial benefit on date he completes required twelve years of service without a promotional opportunity—Completion of PCC is akin to completion of requisite training upon appointment/promotion—It does not change date of appointment or date of his promotion—Unwillingness certificate was restricted to Petitioner's inability to undergo PCC which commenced on 11.10.2004 and non other—There is nothing before us to show that Petitioner was detailed to undergo any other PCC for which it had expressed his unwillingness—After October, 2004, present Petitioner was detailed for undertaking PCC only in January, 2005—Petitioner accepted this offer and has successfully undertaken PCC which was conducted between 09.01.2006 to 25.02.2006—In this background, Petitioner can't be denied of his rightful dues till date—As per Scheme, every employee is entitled to

three chances to complete PCC—In case, Petitioner had undertaken PCC course when he was first offered same but had failed to clear course, respondents would not have then deprived him of benefits of financial upgradation but would have offered him a second; and thereafter even a third chance to successfully complete same—This being position a person who was prevented by just and sufficient cause form undertaking PCC at first option cannot be deprived of benefit of financial upgradation in this matter—Petitioner has in fact cleared PCC course at first chance, when he underwent same—This writ petition has to be allowed holding that Petitioner would be entitled to grant of first financial upgradation under ACP Scheme w.e.f. 17.06.2003—In case, Petitioner was entitled to benefit of second financial upgradation as per modified ACP Scheme as well, respondent shall consider claim of Petitioner in accordance with scheme in light of forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

Important Issue Involved: A Person who was prevented by just and sufficient cause from undertaking promotional course (PCC) at the first option cannot be deprived of the benefit of the financial upgradation w.e.f. the date he completed 12 years form the date of appointment to a post without any promotional financial benefit being made available to him after he has cleared the PCC course at the first chance, when he underwent the same.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Subhashish Mohanty, Advocate.

FOR THE RESPONDENTS : Mr. Neeraj Chaudhari, CGSC and Mr. Ravjyot Singh, 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: 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. 17th June 2003 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 17th June, 2011.

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 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 completed 12 years of service on 17th June, 2003 and was offered an opportunity to undergo PCC pursuant to an offer made only in October 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 on account of death of one of his family member.

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

"UNWILLINGNES CERTIFICATE

I ..... Rank.....Name.....of CISF Unit .....is not willing to undergo promotion course of Const. to HC/GD commencing w.e.f. ..... at ..... as detailed vide CISF Unit..... Further I have no objection if I, am superseded due to my un-willingness."

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 w.e.f 11.10.2004 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. 17th June 2003. The record placed before us shows that the petitioner successfully qualified the promotional cadre course in the second chance, the result of the same was informed vide Addl. Dy. Inspector General RTC Deoli SO Pt II No 34/2006 dated 13.04.2006 by the respondent. The petitioner had undergone the course between 09.01.2006 to 25.02.2006.

8. It appears that prior thereto the respondents have issued an order No. FHQrs ltr No (353) dt 07.11.2003 vide Commandant CISF Unit IGI New Delhi SO Pt. No. 38/2005 dated 20.05.2005 whereby the ACP benefit granted to the petitioner w.e.f. 17th June 2003 was cancelled due to the submission of his unwillingness to undergo the promotion cadre course which was held w.e.f. 11.10.2004 to 06.11.2004 as a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation granted w.e.f. 17th June 2003. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner effective from 13th April 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 completed on 17th June, 2003. 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. 17th June 2003 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 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 15.11.2004 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.
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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 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 11.10.2004. 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 11.10.2004, 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 from11.10.2004, 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 11.10.2004, 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."

14. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 17th June, 2003 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 11.10.2004.

15. 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 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.

16. 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 11.10.2004 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.

17. 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 October, 2004, the present petitioner was detailed for undertaking PCC only in January, 2005. It is an admitted position that the petitioner accepted this offer and has successfully undertaken the PCC which was conducted between 09.01.2006 to 25.02.2006. In this background, the petitioner cannot be denied of his rightful dues till date.

18. So far as the unwillingness of the petitioner to undertake the promotional 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 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".

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

20. 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.

21. Looked at from any angle, the acts of the respondents in depriving the petitioner from first financial upgradation from 17th June, 2003 till 12th April 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 Scheme w.e.f. 17th June, 2011. 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".

22. 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.

23. 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 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, which has been placed before us.

24. 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.

25. 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 first financial upgradation under the Assured Career Progression Scheme benefit with effect from 17th June, 2003.

26. The petitioner is as a result entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

27. In case the petitioner was 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.

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

29. *Dasti* to learned counsel for the parties.

ILR (2013) VI DELHI 4684
W.P. (C)

KATTA. YEDUKONDALA RAO .....PETITIONER

VERSUS

UNION OF INDIA AND ORS. .....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 6713/2013 DATE OF DECISION: 06.11.2013

Service Law—Armed Forces—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 successfully undertaken Promotional Cadre Course—Petitioner became eligible for grant of financial upgradation on 05.08.2000 and the same was granted

to him but to undergo PCC, petitioner was given an opportunity for the first time in September, 2003 but petitioner became unsuccessful and, thereafter, in second chance, petitioner cleared PCC in 2004—However, vide impugned order dated 29.01.2005, the ACP benefit granted to the petitioner was cancelled on account of his PCC failure and respondent proceeded to recover the said amount which is challenged in writ—Held, view of law laid down by the Court in WP(C) 6937/10, act of respondent in recovering the amount was not justified since admittedly petitioner had three chances to clear PCC.

Reiterating the view taken by us in W.P. (C) No.7758/2011 **Jaibir Singh vs. Union of India and Others** dated 21st May, 2013, 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. **(Para 14)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Subhasish Mohanty, Advocate.

FOR THE RESPONDENTS : Ms. Barkha Babbar, Adv. for Mr. Vijay Kinger, Advocate.

CASES REFERRED TO:

1. *Jaibir Singh* vs. *Union of India and Others* W.P. (C) No.7758/2011.

2. *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. 5th August 2000 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. 1st September, 2008.

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 5th August, 2000 and was given an opportunity to undergo PCC pursuant to an offer made only in September, 2003. The petitioner unfortunately failed in the first attempt in the PCC, but qualified in the supplementary PCC in the 2nd chance vide Order no. USP Part-II No. 371/04 dated 08.09.2004 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. 5th August, 2000. 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 September 2004 by the respondent.

6. It appears that prior thereto the respondents have issued an order SO Pt. I No. 02/2005 dated 29.01.2005 whereby the ACP benefit granted

to the petitioner w.e.f. 5th August 2000 was cancelled due to his failure in the promotion cadre course commencing with effect from September, 2003. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 5th August 2000. The petitioner's representations to respondents were of no avail. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner by order SO Pt. I no. 06/2005 passed on 05.03.2005 which was made effective only from 28th February 2005. The petitioner was thus denied the benefit of the financial upgradation w.e.f. 5th August, 2000 to 27th February 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 5th August 2000. 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. 5th August, 2000 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 11th September 2003. 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 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.

11. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 5th August, 2000 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 September, 2003.

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 able and willing 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. The petitioner completed twelve years of service on 5th August, 2000 when he was granted the first financial upgradation. After August, 2000, the present petitioner was detailed for undertaking PCC only in September, 2003. 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 commencing w.e.f. 19.08.2004 to 21.08.2004 vide USP Part-II No. 371/04 dated 08.09.2004 of the respondents. In this background, the petitioner cannot be denied of his rightful dues under the financial upgradation schemes.

14. Reiterating the view taken by us in W.P. (C) No.7758/2011 **Jaibir Singh vs. Union of India and Others** dated 21st May, 2013, 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.

15. Looked at from any angle, the acts of the respondents in recovering the amount and denying the financial upgradation to the petitioner from 5th August 2000 till 27th February 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).

16. 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".

17. 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.

18. 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.

19. 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 5th August 2000 to 28.01.2005 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.

20. 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 5th August 2000. The petitioner is entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

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

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

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

24. Dasti to learned counsel for the parties.

ILR (2013) VI DELHI 4692

W.P. (C)

PRADEEP KUMAR GULATI ....PETITIONER

VERSUS

D.D.A. .....RESPONDENT

(G.P. MITTAL, J.)

W.P.(C) NO. : 343/2013 DATE OF DECISION: 18.11.2013

Delhi Development Authority—Allotment—Petitioner purchased LIG Flat from open market—Petitioner's mother applied for allotment of a plot under Rohini LIG Scheme and was allotted registration in 1981—Petitioner's mother expired in 1994—Petitioner applied for transfer of the said registration in his favour in the year 2000—After some communication in 2003, transfer application of petitioner rejected by DDA on the grounds that Petitioner already owned a DDA flat—Held, the case is squarely covered by number of judgments of Delhi High Court including WP(C) 3680/13 decided no 29.05.13—Impugned order of cancellation of allotment quashed and DDA directed to allot a plot to the petitioner.

The case is squarely covered by a number of judgments of this Court, the latest being **Kamlesh Sharma v. Delhi Development Authority,** W.P.(C) 3680/2013, decided on 29.05.2013. **(Para 2)**

The writ petition is accordingly allowed. The communication dated 05.05.2003 cancelling the allotment made to the Petitioner under Rohini Residential Scheme is hereby quashed. DDA is directed to allot a plot to the Petitioner in any developed sector of Rohini Residential Scheme within a period of three months. **(Para 13)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Dilip Singh, Adv. with Ms. Taranum Parveen, Advocate.

FOR THE RESPONDENT : Ms. Manika Tripathy Pandey, Adv. with Mr. Ashutosh Kaushik, Advocate.

CASES REFERRED NO:

1. *Kamlesh Sharma* vs. *Delhi Development Authority,* W.P.(C) 3680/2013.
2. *DDA* vs. *B.B. Jain,* LPA No. 670/2012.
3. *Delhi Development Authority Etc.* vs. *Ambitious Enterprises & Anr.* 67(1997) DLT 774.

RESULT: Writ Petition Allowed.

G.P. MITTAL, J. (ORAL)

1. The short question falling for consideration in the instant writ petition is whether a person who purchases any DDA property measuring less than 67 sq. mts. from the open market (as a subsequent purchaser) is debarred from allotment or transfer of registration in case of death of his/her predecessor of a DDA property.

2. The case is squarely covered by a number of judgments of this Court, the latest being **Kamlesh Sharma v. Delhi Development Authority,** W.P.(C) 3680/2013, decided on 29.05.2013.

3. The facts of the case are not in dispute.

4. The Petitioner owned an LIG Flat, No.FG-I/43-B, Vikas Puri, New Delhi having purchased it from the open market. Late Smt. Pritam Kumari Gulati (the Petitioner's mother) applied for allotment of a plot under Rohini LIG scheme and was allotted registration No.84522 on dated 30.03.1981. Said Pritam Kumari Gulati expired on 23.05.1994. By a letter dated 20.11.2000, the Petitioner applied for transfer of the registration in his favour. He received a letter dated 01.06.2001 (Annexure D) from the DDA asking him to attend the office of the Assistant Director (LBS), Rohini to clarify some points and also to produce some

documents, as mentioned in the letter. By a letter dated 01.02.2002, the Petitioner produced the earlier said documents.

5. Thereafter, he received a letter dated 01.02.2002 (Annexure E) asking him to produce some more documents in proof of his identity and to prove that there were no other legal heirs of the deceased. He produced these documents on 10.04.2002. Then the DDA again, by a letter dated 21.05.2002 required the Petitioner to produce an Indemnity Bond, duly registered in the office of the Sub-Registrar and proof of his ownership of House No.FG-I/43-B, Vikas Puri, New Delhi. He attended the office of the DDA on 22.07.2002 and produce the required documents. Subsequently, the Petitioner was sent another letter (Annexure-I) dated 23.08.2002 to produce proof of his residence. He again attended the DDA's office on 12.09.2002 to explain the position. However, in spite of all this, his transfer application was rejected by a letter dated 05.05.2003 which read as under:-

"To,

Sh. Pradeep Kumar Gulati
FG-I/453-B, Vikas Puri,
New Delhi-110018.

Sub:- Request for transfer of regn. in favour of Shri Pradeep Kumar Gulati due to death of Smt. Pritam Kumari Gulati.

.....

Sir,

With reference to your letter dt.12.9.02 on the subject cited above, I am directed to inform you that since you already own a DDA flat in your name the regn. Under Rohini Registration scheme cannot be transferred in your name. You may kindly apply for refund of regn. money.

Yours faithfully,
Sd/-
Deputy Director, LSB (Rohini)"

6. Consequently, the Petitioner wrote a letter dated 02.02.2005 to the DDA requesting for allotment against Registration No.84522 and drew attention of the DDA to the DDA (Disposal of Developed Nazul Land) Rules, 1981 which permitted him the allotment of the plot. The

relevant portion of the letter is extracted hereunder:-

> ".....In this regard I brought to your kind notice that I did not get the LIG flat from DDA in any registration scheme. Therefore, I cannot be debarred from the mutation of registration of my mother due to sudden death. Here it will be appreciated to mention that there is a settled law if a person dies and after her sudden death, registration will be transferred in the name of her/his legal heirs even if they have a flat by way of allotment. But in my case it is not so, because it had been cleared in the policy of conversion, if property has been purchased on Power of Attorney and the 2nd had been taken by way of allotment. If the person applies for conversion then both the properties will be converted into free hold.
>
> In addition to the above it is also brought to your kind notice that the allotment of Rohini land is governed by Nazul rules. And as per provision of Rule 17 I am eligible for mutation of the registration in my name which provides as under:-
>
> "Provided that where, on the date of allotment of Nazul land-
>
> a) The other land owned by or allotted to such individual is less than 67 sq.mtrs., or
>
> b) The house owned by such individual is on a plot of land which measures less than 67 sq.mtrs., or
>
> c) The share of such individual in any such other land or house measures less than 67 sq.mtrs.
>
> He may be allotted a plot of Nazul land in accordance with the other provisions of these rules.
>
> The area of an LIG flat cannot be more than 67 sq.mtrs. Moreover these flats are multi-storeyed flat. Therefore, the land may be divided in equal, which becomes very less. Similarly case of Shri Naresh Kumar in file bearing No.F.22(1290)89/LSB (Rohini) has already been decided by the then V.C., DDA on 21.7.98. The mother/father of Shri Naresh Kumar had expired and the allotment of MIG plot measuring 90 sq.mtrs. was transferred in his name (Plot no.111 Pkt.6, Sector-22 Rohini). In his case it was also decided that "All cases of similar nature to be dealt accordingly."

7. Thus, the Petitioner not only clarified and reminded the DDA about the legal position but also informed it that a similar decision has been taken by the DDA in case of one Naresh Kumar. The Petitioner persisted with the merits of his case and wrote a letter dated 27.10.2005 to the Vice Chairman of the DDA, however, nothing happened. He then wrote a reminder dated 28.05.2012 and then finally approached this Court.

8. It may be noticed that the concerned officers/officials of the DDA had been asking him for documents in piecemeal and had also been requiring his personal attendance for no reason.

9. A learned Single Judge of this Court has dealt with the precedents at great length and has opined that it is the consistent view taken by this Court that DDA (Disposal of Developed Nazul Land) Rules, 1981 apply to the residents of Rohini Residential Scheme, whose turn for allotment of a plot under the said scheme matures on or after coming into force of the abovesaid rules. Relevant portion of the judgment in Kamlesh Sharma is extracted hereunder:-

> "3. The only issue, which is involved in this writ petition, is as to whether acquisition of a plot measuring 25.09 square metre from the market, rendered the petitioner ineligible for allotment of a plot under Rohini Residential Scheme of DDA. This issue recently came up for consideration before a Division Bench of this Court in **DDA vs. B.B. Jain,** LPA No. 670/2012, decided on 05.03.2013 and the following view was taken:
>
> "3.One of the terms and conditions stipulated in the Rohini Residential Scheme, 1981 of the appellant reads as under:- "(ii) The individual or his wife/her husband or any of his/her minor children do not own in full or in part on lease-hold or free-hold basis any residential plot of land or a house or have not been allotted on hire-purchase basis a residential flat in Delhi/New Delhi or Delhi Cantonment. If, however, individual share of the applicant in the jointly owned plot or land under the residential house is less than 65 sq. mts., an application for allotment of plot can be entertained. Persons who own a house or a plot allotted by the Delhi Development Authority on an area of even less than 65 sq.mts. shall not, however, be eligible for allotment."

4. Section 22 of Delhi Development Act, to the extent it is relevant, provides that the Central Government may, by notification in the Official Gazette, place, at the disposal of DDA, all or any developed or undeveloped land in Delhi vested in the Union known as Nazul Lands for the purpose of development in accordance with the provisions of the said Act. It further provides that after any such Nazul land has been developed by, or under the control of DDA, it shall be dealt with by the said Authority in accordance with the Rules made and directions given by the Central Government in this behalf. Section 56(j) of the said Act empowers the Government to make Rules prescribing the manner in which Nazul land should be dealt with after development. In exercise of the powers conferred upon it by Section 56(j) of the said Act, Central Government framed rules known as the DDA (Disposal of Developed Nazul Land) Rules, 1981. Rule 2(i) of the aforesaid Rules defines "Nazul land" to mean the land placed at the disposal of the Authority and developed by or under the control and supervision of the Authority under Section 22 of the Act. Rule 17 of the aforesaid Rule reads as under:-

"17. General restriction to allotment for residential purposes

Notwithstanding anything contained in these rules, no plot of Nazul land shall be allotted for residential purposes, to an individual other than an individual referred to in clause (i) of rule 6, who or whose wife or husband or any of his or her dependent children, whether minor or not, or any of his or her dependent parents or dependent minor brothers or sisters, ordinarily residing with such individual, own in full or in part, on lease-hold or free-hold basis, any residential land or, house or who has been allotted on hire-purchase basis any residential land or house in the Union territory of Delhi:

Provided that where, on the date of allotment of Nazul land,-

(a) the other land owned by or allotted to such individual is less than 67 square metres, or

(b) the house owned by such individual is on a plot of land which measures less than 67 square metres, or

(c) the share of such individual in any such other land or house measures less than 67 square metres, he may be allotted a plot of Nazul land in accordance with the provisions of these rules."

5. It is not in dispute that since the flat allotted by DDA to the respondent in these appeals have been constructed on land measuring less than 67 square metres, they would be entitled to allotment of a plot of Nazul land from DDA, if the matter is to be governed by the aforesaid Rules. Since the terms and conditions stipulated in the Rohini Residential Scheme, 1981 debar any allottee from DDA from allotment of a plot under the said scheme, even if the area of the house/plot allotted to them by DDA is an area less than 65 square metres, the question which comes up for consideration in this case is as to whether the allotments made by DDA under the Rohini Residential Scheme, 1981, after coming into force of Nazul Land Rules, would be governed by the terms of the Scheme or by the provisions of the Rules.

6. The contention of the learned counsel for the appellant was that the respondents having applied for allotment of plot, as per the terms and conditions stipulated in its Rohini Residential Scheme, 1981, they are stopped from questioning the terms of the said Scheme and are not entitled to allotment in violation of the provisions of the aforesaid Scheme. The learned counsel for the respondents, on the other hand, contended that the Nazul Land Rules, being statutory in nature would govern, even the allotments made under Rohini Residential Scheme, 1981 and would supersede the terms and conditions of the Scheme, to the extent they are repugnant to the said Rules.

7. The first question to be examined by us in this regard is as to what would be the relevant date to determine the eligibility of the applicant under the Scheme, whether it would be the date on which the application is submitted or it would be the date on which the allotment is made. Indisputably, mere submission of application to DDA for allotment of a plot under its Rohini Residential Scheme, 1981 does not constitute a binding contract between the parties for allotment of a plot to the applicant under the aforesaid Scheme. A binding contact would come into force only when a specific plot is offered and such an offer is accepted

by the applicant under the Scheme. If no binding contract between the parties came into force merely on submission of an application under the aforesaid Scheme, it would be difficult for us to say that the date of submitting an application would be the crucial date to determine the eligibility of the applicant for allotment of a plot. In our opinion, the crucial date on which the eligibility of the applicant is to be examined is the date on which the allotment of a plot is made by DDA. Since Nazul Land Rules came into force before allotment of plots under the aforesaid Scheme came to be made to the respondents, it would be difficult for us to say that the eligibility of the applicants for allotment of a plot under the aforesaid Scheme was to be examined de hors the provisions of the statutory Rules. Section 22(3) of Delhi Development Act contains a statutory mandate to the appellant to make allotment of Nazul Land developed by it or under its control and supervision only in accordance with the aforesaid Rules, which could be supplemented only by the directions, if any, given by the Central Government with respect to disposal of such Nazul Land. In our opinion, on coming into force of the Nazul Land Rules, the eligibility of the applicants for allotment of the plots is to be considered in terms of Rule 17 of the aforesaid Rules and the terms and conditions contained in the Scheme, to the extent they are repugnant to the provisions contained in the aforesaid rules, cannot be resorted to.

8. In **Delhi Development Authority Etc. v. Ambitious Enterprises & Anr.** 67(1997) DLT 774, the argument taken by the respondent before Supreme Court was that the Nazul Land Rules having been came into force only on 26th September, 1981 and the public advertisements for allotment of plots having been issued much earlier, the said Rules would not be applicable. The argument did not find favour with the Supreme Court. Noticing that no plots had been allotted prior to coming into force Nazul Land Rules, the Apex Court held that once these Rules, which are statutory, came into force, no allotment could have been made outside or in contravention of those Rules. In view of the authoritative pronouncement of Supreme Court in the above-referred case, there seems to be no scope for a contention that the allotments of plots under the Rohini Residential

Scheme of DDA will not be governed by Rule 17 of Nazul Land Rules.

9. The issue involved in these appeals came to be considered by a learned Single Judge of this Court in M.L.Aggarwal v DDA 2004 Rajdhani Law Reporter 21. In the aforesaid case, the petitioner before this Court applied for allotment of a plot in MIG category on 24.04.1981 and allotment was made to him on 29.11.1983. The allotment having been cancelled by DDA, on the ground that wife was holding a plot about 30 square metres, the said writ petition was filed by him questioning the cancellation of allotment. In reply to the writ petition, DDA relied upon the terms and conditions of allotment and contended that Nazul Land Rules having come into operation in September, 1981 and the Rohini Residential Scheme having been launched in February, 1981, the aforesaid Rules did not apply. Rejecting the contention, the learned Single Judge, inter alia+ held as under:-

"16. In order to appreciate the issue at hand, it has to be considered as to what would be the relevant dates – is it the date of registration under the scheme relevant or the date of allotment? The Supreme Court in DDA vs. Pushpendra Kumar Jain, JT. 1994 (6) SC 292 has held that the rights of a party come into existence only on the issuance of the allotment letter. There can be no dispute that the registration can take place by both the persons but there would not be entitlement to two allotments. The Nazul Rules came into force prior to the allotment being made.

17. In my considered view, the prospective application of the Nazul Rules cannot imply that the same would not be applicable to the present case in view of the fact that the rules did not exist when the scheme was propounded since these came into force about six months later. The Nazul Rules are statutory and the relevant date is the date of allotment. Thus, the Nazul Rules would be applicable even in the present case."

Being aggrieved from the above-referred order passed by the learned Single Judge, DDA filed an appeal being LPA No.191/2004 which was dismissed by a Division Bench of this Court on 02.02.2006 with the following order:-

"4. The petitioner applied for allotment of a plot in Rohini Residential Scheme and he was issued an allotment letter dated 29.11.1983 against which he deposited the amount of the said plot.

5. The question in this case is that whether the petitioner was disentitled from getting the allotment in view of the fact that his wife had already been allotted a plot.

6. In this connection Rule 17 of the DDA (Disposal of Developed Nazul Land) Rules, 1981 states:

X X X X X

Admittedly, the wife of the petitioner has a plot of area 31.28 sq. metres which is less than 67 sq. metres. In our opinion, the proviso to Rule 17 means that if the wife has a plot of more than 67 sq. metres then the husband cannot be allotted a plot. However, if the wife has been allotted a plot which is less than 67 sq. metres, the prohibition contained in the main part of Rule 17 does not apply. In our opinion, this is the simple and plain meaning of Rule 17 and we cannot twist its language."

The order passed by the Division Bench was further challenged by DDA before Supreme Court by way of Civil Appeal No. 4362/2007. Dismissing the appeal vide order dated 26.11.2009, the Apex Court, inter alia+ held as under:-

"We are of the opinion that the finding of the High Court that the allotment would be covered by Rule 17 of the Delhi Development Authority (Disposal Developed Nazul Land) Rules, 1981, appears to be correct as on the date of draw of lots the aforesaid rules had become operative."

10. It would thus be seen that in view of the above-referred decision of this Court, the issue involved in these appeals is no more res integra. The learned counsel for the appellant, however, contended that in none of these cases, the existing allotment was made by DDA, whereas in the case before this Court the existing allotments were made by DDA and it the terms and conditions contained in Rohini Residential Scheme, 1981 are not applied, it

would result in a person getting allotment of more than one plot/ flat from DDA. In our view, the contention is misconceived in law. The issue involved in this case is as to whether the allotments made under Rohini Residential Scheme, after coming into force of Nazul Land Rules would be governed by the provisions of the Scheme or by the provisions of the statutory Rules and the view taken in the above-referred case was that it is Nazul Land Rules which would govern such allotments. Once it is accepted that the eligibility of the registrants under the Rohini Residential Scheme, would be governed by the provisions of Nazul Land Rules and not the provisions of the Scheme to the extent the provisions of the Scheme are contrary to the statutory provisions contained in the Rules, it would be immaterial whether the existing allotment was made to DDA or by some other agency or it was free hold property purchased by the allottee from the open market. Rule 17 of the Nazul Land Rules admittedly does not debar the allottee from DDA from allotment of land by DDA, in a case where the area of the land/plot already owned by or allotted to him does not exceed 67 square metres."

10. It is conceded by the learned counsel for the DDA that the area of the LIG flat in any case has to be less than 67 sq.mtrs. Thus, it is evident that the cancellation of the allotment to the Petitioner by letter dated 05.05.2003 of the DDA was totally illegal.

11. In **Kamlesh Sharma,** the learned Single Judge of this Court was perturbed because of the flagrant violation of the judgments of this Court resulting into unnecessary harassment to the registrants under Rohini Residential Scheme. The learned Single Judge directed the DDA to take an administrative decision based on various judicial pronouncements of this Court and further not to cancel the allotment of such cases blindly so that the people are not driven to unnecessary litigation which in any case is also not beneficial to the DDA. Para 7 of the judgment in Kamlesh Sharma is extracted hereunder:-

"7. It is unfortunate that despite consistent view taken by this Court with respect to eligibility for allotment of a plot under Rohini Residential Scheme to those whose turn for allotment matured after coming into force of Nazul Land Rules, wherever the area of plot of the flat owned by them, whether individually

or jointly with others, does not exceed 67 square metre, DDA continues to cancel allotments on the ground that the registrant under the Rohini Residential Scheme owned another plot/flat in DDA even if the area of such plot/flat is less than 67 square metres. As a result, the registrants have no option, but to approach this Court by way of writ petitions, which results in the registrant/ allottee saddled with cost of litigation without any benefit to DDA. In fact, whenever such petitions are filed, DDA also suffers in monetary terms since it has to incur cost in defending such writ petitions. It is high time DDA takes an administrative decision, based upon various judicial pronouncements of this Court, not to cancel allotment in such cases, so that the people are not driven to litigation which brings no benefit to DDA, but at the same time causes financial loss to the registrants/allottees, besides harassment and mental agony which they have to suffer on account of cancellation of such allotments. It is, therefore, directed that one copy of this order be sent to the Chief Legal Advisor for being placed before the Vice-Chairman of DDA, within two weeks from today."

12. In spite of all this, instead of taking a policy decision, an affidavit dated 18.07.2013 (much after the passing of the judgment in Kamlesh Sharma) was sworn by Shri S.N. Gupta, Director (RL) taking the same plea that the Petitioner was not entitled to the demanded allotment of a plot as he already possessed an LIG flat. As stated earlier, the LIG flat was not allotted to the Petitioner by the DDA, rather he purchased it in resale from the open market and thus, he was entitled to the allotment in accordance with Rule 17 of the DDA (Disposal of Developed Nazul Land) Rules, 1981.

13. The writ petition is accordingly allowed. The communication dated 05.05.2003 cancelling the allotment made to the Petitioner under Rohini Residential Scheme is hereby quashed. DDA is directed to allot a plot to the Petitioner in any developed sector of Rohini Residential Scheme within a period of three months.

14. Since the DDA persisted with it's illegal stance in opposing the writ petition in spite of consistent view of this Court, this writ petition is allowed with costs quantified at Rs. 15,000/-.

15. The writ petition stands disposed of in above terms.

16. Pending applications also stand disposed of.

ILR (2013) VI DELHI 4704
CRL. A.

KAMLESH KUMAR @ K.K. ....APPELLANT

VERSUS

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

(S.P. GARG, J.)

CRL.A. NO. : 232/2003, 352/2003, 358/2003, 299/2003 & 422/2003 **DATE OF DECISION: 21.11.2013**

Indian Penal Code, 1860—Section 454-392-394-397-34 Arms Act—Section 25—Statements of witnesses recorded prior to apprehension of culprits, but none of the three witnesses named the culprit as suspect and they did not describe broad physical features/ description of assailant even though A1 was close relation of complainant and his family members—Even though the incident was narrated minutely, but the named of accused not mentioned—Complainant had direct confrontation with the culprits for sufficient duration and had sufficient and clear opportunity to see them—A2 to A5 also residing in the locality/vicinity since long—One of the witnesses did not identify any of the accused in the Court—Inconsistent version given by the prosecution witnesses as to apprehension of one of the accused and recovery—TIP could not take place because IO did not bring similar property to

be mixed with the case property—Adverse inference to be drawn. Held, the FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. There object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consulations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Vivek Vidyarthi, Advocate along with appellant in persons.

FOR THE RESPONDENT : Mr. Lovkesh Sawhney, APP.

CASE REFERRED TO:

1. *Jai Prakash Singh* vs. *State of Bihar & Anr.,* 2012 CRI.L.J.2101.

RESULT: Appeal allowed.

S.P. GARG, J.

1. Kamlesh Kumar @ K.K. (A-1), Sher Singh @ Lal (A-2), Sudesh @ Tyson (A-3), Raj Kumar (A-4) & Sarfraz (A-5) were arrested in case FIR No. 278/98 for committing offences punishable under Sections 458/392/394/397/34 IPC and 25 Arms Act registered at PS D.B.G. Road and

sent for trial on the allegations that on the night intervening 13/14.09.1998 at about 02.45 A.M. at House No. L-19A, Loco Shed Railway Colony, Kishan Ganj, Delhi, they while armed with deadly weapons committed dacoity and robbed ‘ 45,000/-, 1 kg silver ornaments, one gold ring and other gold ornaments after inflicting injuries to Vijay Shankar and his nephew Babloo. Police machinery was set in motion when Daily Diary (DD) No.8 was recorded at Police Post Shidi Pura on getting information from duty constable about admission of Vijay Shankar and Babloo in injured condition in Hindu Rao Hospital. The investigation was assigned to HC Rakesh Kumar who with Const. Sohan Lal went to the hospital and collected their MLCs. After recording Vijay Shankar’s statement (Ex.PW-1/A), he lodged First Information Report by making endorsement (Ex.PW-11/A) thereon. SI Ram Chander took over the investigation of the case. The crime team inspected the spot and took photographs. Soon thereafter, the Investigating Officer received secret information that the culprits were hiding on a roof of a double storey building at Railway colony, Kishan Ganj near Shiv Mandir. Acting on the secret information, SI Ram Chander apprehended A-5 from the roof of House No. L-126, Loco Shed, Railway Colony, Kishan Ganj, Delhi and recovered a bag which contained a desi katta, dagger, currency notes, articles of gold and silver. Pursuant to A-5’s disclosure statement, A-1 to A-4 were apprehended and arrested. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against them for committing the aforesaid offences in the Court. They all were duly charged and brought to trial. The prosecution examined sixteen witnesses to prove its case. In their 313 statements, the appellants pleaded false implication and refuted the prosecution’s allegations of their complicity in the crime. DW-1 (Const. Dev Narain) and DW-2 (Shiv Shankar) were examined in defence. The trial resulted in conviction of all under Section 397/458/34 IPC vide judgment dated 20.03.2003. Various prison terms with fine were awarded by an order dated 25.03.2003. Being aggrieved, they have preferred the appeals.

2. I have heard learned counsel for the parties and have examined the record. The appellants have not seriously challenged the incident in which complainant Vijay Shankar and his nephew Babloo were assaulted and deprived of their valuable articles but have denied their complicity in the crime. The complainant Vijay Shankar had no ulterior motive to fake the incident of robbery in which not only he and his nephew Babloo were

injured but they were robbed of their cash and jewellery articles. The incident was reported to the police promptly without any delay and the First Information Report was lodged at 05.30 A.M. Vijay Shankar and Babloo were taken to Hindu Rao Hospital and were medically examined. PW-8 (Jai Bhagwan), Medical Record Technician proved MLCs (Ex.PW-8/A and Ex.PW-8/B) prepared by Dr.Dinesh Kumar Sharma. Daily Diary (DD) No. 8 was recorded at Police Post Sidhi Pura on getting information about their admission in the hospital from the duty constable posted there. In the complaint (Ex.PW1/ A), Vijay Shankar gave graphic detail of the occurrence without naming the assailants. Neither the complainant nor any other inmate in the house suspected the involvement of any acquaintance in the occurrence. Statements of Vijay Shankar, Deepa and Babloo were recorded prior to the apprehension of the culprits but none of them named the culprits as suspect. They also did not describe broad physical features/description of the assailants. The complainant claimed to identify culprits but did not disclose as to how, he would be capable to recognise them in the absence of any specific features observed by him. The police on the basis of secret information received at about 07.00/07.30 A.M. allegedly apprehended and arrested A-5 and recovered the robbed articles from his possession. Subsequently, at his behest, A-1 to A-4 were taken into custody.

3. Indisputably, A-1 is the close relation of the complainant being the brother-in-law (Dever) of his daughter. It has come on record that there was a marriage proposal of Pinki (daughter of complainant's brother Suresh Chand) with Mithlesh Kumar, A-1's brother. It is not denied that on the day of marriage Mithlesh Kumar ran away and the marriage could not be celebrated. Pinki was married to Upender, younger brother of the complainant's Behnoi. Apparently, A-1 was acquainted with the complainant and his family members prior to the incident. The complainant though narrated the incident minutely in the statement (Ex.PW-1/A) and assigned specific role to the each assailant but omitted to name A-1 to be one of the assailants. The complainant had direct confrontation with the culprits for sufficient duration and had sufficient and clear opportunity to see them, however, A-1 was not at all named as suspect in the First Information Report. It has come on record that A-2 to A-5 were also residing in the said locality/vicinity since long. Even none of them was suspected to be the assailant. PW-2 (Babloo) in his Court statement categorically declined to identify and recognise any of the appellants as

assailants. He claimed that his uncle Vijay Shankar knew three intruders but he was not aware of their identity. Strange enough, Addl. Public Prosecutor did not opt to cross-examine the witness after CRL.A.No.232/2003 & connected appeals Page 6 of 14 seeking Court's permission as he resiled from the previous statement made to the police under Section 161 Cr.P.C. during investigation. PW-2 (Babloo), complainant's nephew had no extraneous reasons to demolish the prosecution case. PW-7 (Deepa), complainant's wife gave a wavering statement regarding identification of the appellants in the Court. She deposed that on the night of occurrence, she had identified Kamlesh (A-1) as one of the assailants being their relative. About other assailants, at first instance, she expressed inability to recognise them. She admitted that when the police had shown all the accused persons she was able to identify only A-1. She identified A-2 to A-5 in the Court simply because the police had arrested them in this case and she was satisfied that they must have been rightly apprehended by the police. She again reiterated that she was not sure regarding identification of A-2 to A-5. She did not offer any explanation as to why in her statement recorded on the day of incident under Section 161 Cr.P.C. she did not name A-1 though he was known to her being close relative. A-1 was not apprehended at the instance of this witness. In the cross-examination, she disclosed that A-1 was not named due to fear. Since the police machinery had come into motion soon after the occurrence, there was no occasion for the witness to be under fear not to name the assailants particularly A-1 in her statement. PW-1 is the complainant who identified A-1 to A-5 as assailants in his Court statement. He admitted that on the night of occurrence he could identify only A-1 out of the five assailants. The identity of A-2 to A-5 was not known to him. In the cross-examination, he admitted that A-1 and A-2 were known to him before the incident. He further admitted that his brother Maharaj Pujari was a tenant under A-3's father. However, he did not submit any plausible reason for not naming them in the statement (Ex.PW-1/A). He also did not give description of the assailants for identification purpose. He further admitted that A-1, A-2 and A-5 lived in the same locality i.e. Railway Colony and he had seen them by face before the occurrence. He further admitted that none of the assailants was in muffled face at the time of incident. Thus, there was no occasion for the complainant to omit the name of the assailants known to him prior to the occurrence in the First Information Report.

4. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version. In the case of **'Jai Prakash Singh v. State of Bihar & Anr.',** 2012 CRI.L.J.2101 the Supreme Court held :

> *"The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question."*

5. After the occurrence all the assailants fled the spot with the booty and none of them could be apprehended at the spot. Vijay Shankar did not inform the police soon after the occurrence and awakened his neighbour Lal Chand who took him and Babloo to hospital. Lal Chand has not been examined and no explanation has come forthwith as to why the serious occurrence/incident was not reported to the police immediately. The rukka was sent at about 05.30 A.M. and the investigation was taken over by SI Ram Chander. Strange enough, without any cogent inputs regarding the identity of the suspects, he was able to solve the incident at 07.00 or 07.30 A.M. when on the basis of a secret information A-5 was apprehended from the roof of the House No. L-126, Loco Shed, Railway Colony, Kishan Ganj, Delhi. Prosecution witnesses have given inconsistent version as to how and under what circumstances, A-5 was apprehended and the robbed articles were recovered from his possession. No independent public witness including the owner of the house was associated despite their availability at the time of conducting proceedings on the roof. It is unclear as to why A-5 who was not under suspicion would hide on the roof with stolen/robbed articles and inmates of the house would not come to know about his presence there. None of the

other assailants was found in possession of any robbed article and none of them attempted to flee from their respective houses. It is unbelievable that A-1 to A-4 would allow A-5 to retain all the robbed articles and would not share the booty. Contradictory statements have emerged as to whether the robbed articles were recovered from A-5's possession or he recovered it from underneath the waste articles lying on the roof. The roof was accessible to all the inmates of the house. There was no specific mark of identification on the robbed articles. Police did not offer any explanation as to why the entire cash of ' 45,000/-robbed could not be recovered despite apprehension of all the suspects soon after the incident. Application was moved by the Investigating Officer for conducting Test Identification Proceedings of the case property. The learned Magistrate directed the Investigating Officer to produce the property 'similar' to case property to mix for identification proceedings. However, the Investigating Officer could not arrange the 'similar' property to be mixed with the case property and consequently the Test Identification Proceedings could not take place. Adverse inference is to be drawn against the prosecution for not making available the 'similar' case property for identification purpose.

6. The material prosecution witnesses have given different version in their statements in the Court regarding the actual sequence of occurrence inside the house. There are conflicting statements as to the period since when PW-2 (Babloo) had started residing with the complainant in the house in question. PW-2 (Babloo) disclosed that on the night intervening 02.30 to 02.45 A.M. on seeing an intruder, he got Vijay Shankar and his wife awakened. Thereafter, two intruders barged in the room and demanded keys from his uncle Vijay Shankar. When he (Vijay Shankar) refused to hand over the keys, he was beaten. When he intervened, he was stabbed on his back thrice. He did not know what was stolen on that night. In all, there were three intruders and he was not aware if any other suspect was outside the house. PW-7 (Deepa) on the other hand disclosed that at about 02.30 A.M. she got up and noticed that one intruder was opening the steel almirah lying in the room. She made Babloo got up and informed him about the presence of a stranger in the room. Babloo got up and grappled with that person and made him to fall on the ground. By the time, her husband had also got up and he asked Babloo to beat that intruder. At that point of time, four more persons entered inside the room and three of them started assaulting

Babloo with a knife. When her husband told the intruders that he had no cash, he was stabbed with a knife. Complainant (PW-1) narrated another version of the occurrence and deposed that at about 02.30 A.M. (mid-night) he heard commotion and saw an intruder opening a steel almirah. His wife and nephew got up. They were surprised to see four persons inside the house. Babloo grappled with that intruder. Babloo was assaulted with the knife resulting in three stab wounds on the back. Within a second, he was assaulted with knife and was given two stab wounds on the head. Apparently, all these witnesses have given contradictory versions regarding their confrontation with the assailants inside the house. It appears that the prosecution witnesses have not presented true facts regarding the incident and have suppressed some material facts. It is unclear as to what was the nature of injuries suffered by the victims. Original record is not traceable and the reconstructed record does not contain the MLCs of the injured. PW-8 (Jai Bhagwan) is a Medical Record Technician from the Hindu Rao Hospital who merely proved the MLCs (Ex.PW-8/A and Ex.PW-8/B) prepared by Dr.Dinesh Kumar Sharma. It is not clear whether the injuries sustained by the victims were grievous or simple in nature. The weapons with which the injuries were inflicted were not sent to Forensic Science Laboratory for examination. It is not clear till which period the injured remained admitted in the hospital. However, it has come on record that both the victims were conscious when the police collected their MLCs. Since the intruders residing in the same locality were previously acquainted with the complainant and other witnesses, they were justified to decline to participate in the TIP proceedings and no adverse inference can be drawn against them on that score. The crime team inspected the spot in between 06.00 A.M. to 07.00 A.M. and at that time there was no inkling of the suspects. The witnesses made vital improvements in their depositions and were duly confronted with. A-5 is alleged to have been apprehended at a distance of about 200 meters from the place of occurrence. However, the Investigating Officer did not bother to associate the complainant and other eye witnesses that time.

7. In the light of above referred discrepancies, inconsistencies, infirmities or deficiencies touching core of the case, appellants' conviction can't be sustained. Resultantly, the appeals are allowed setting aside the conviction and sentence awarded to the appellants. Bail bonds and surety bonds of the appellants stand discharged. The Trial Court record be sent back forthwith. Pending application (if any) also stands disposed of.

ILR (2013) VI DELHI 4712
CRL. A.

MUKESH KUMAR ....APPELLANT

VERSUS

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

(S.P. GRAG, J.)

CRL. A. NO. : 776/2001 DATE OF DECISION: 22.11.2013

Indian Penal Code, 1860—Section 397—For attracting the provision Under Section 397 IPC the individual role of the accused has to be considered in relation to the use or carrying of a weapon at the time of robbery.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Sandeep Kumar, Advocate

FOR THE RESPONDENT : Mr. M.N. Dudeja, APP.

CASE REFERRED TO:

1. *Ashfaq* vs. *State (Govt.of NCT of Delhi),* JT 2004 (5) SC 484.

RESULT: Appeal allowed.

S.P.GARG, J. (ORAL)

Crl.M.A.17633/2013

For the reasons mentioned in the application, the non-bailable warrants issued against the appellant vide order dated 13.11.2013 stands

cancelled. The application stands disposed of.

CRL.A. 776/2001

1. With the consent of parties, the appeal is taken up for hearing today. The date already fixed in the matter i.e. 17.12.2013 stands cancelled.

1. Mukesh Kumar (the appellant) questions the legality and correctness of a judgment dated 12.09.2001 in Sessions Case No.81/98 arising out of FIR No.906/1997 registered at Police Station Kalkaji by which he was held guilty for committing offence under Section 397/34 IPC and sentenced to undergo Rigorous Imprisonment for seven years with fine Rs. 500/-. Allegations against him were that on 08.12.1997 at about 02.00 P.M. at Ma Anendmai Marg, opposite Giri Nagar Masjid, he and his companions Bhushan and Mahesh (not arrested) robbed Bhupender Kumar (PW-1) of Rs. 1 lac withdrawn by him from Canara Bank, Okhla Industrial Area after inflicting injuries with knife. The injured was taken to hospital and was medically examined. The Investigating Officer lodged First Information Report after recording Bhupender Kumar's statement (Ex.PW-1/A). During investigation statements of witnesses conversant with the facts were recorded. Mukesh Kumar was arrested in FIR No.29/1998 registered at Police Station Okhla Industrial Area and pursuant to his disclosure statement, he was taken into custody in this case. In the Test Identification Proceedings, he was identified by the complainant. After completion of investigation, a charge-sheet was filed and Mukesh Kumar was duly charged and brought to trial. His associates could not be apprehended and arrested. The prosecution examined 12 witnesses. In his 313 statement, the appellant denied complicity in the crime. On appreciating the evidence and after considering the rival contentions of the parties, the Trial Court by the impugned judgment held him guilty under Section 397/34 IPC.

2. During arguments, learned counsel for the appellant, on instructions, stated at Bar that the appellant has not opted to challenge the findings of the Trial Court on conviction under Section 394 IPC. He, however, prayed to take lenient view as the appellant had already undergone custody in this case for more than five years. Learned Additional Public Prosecutor has no objection to consider the mitigating circumstances.

3. Since the appellant has given up challenge to the findings of the Trial Court on conviction under Section 394 IPC where during robbery PW-1 (Bhupender Kumar) was deprived of a bag containing Rs. l lac, he

after inflicting injuries and there is overwhelming evidence in the statement of the complainant whereby he identified him in the TIP proceedings as well as in the court, the conviction under Section 394 IPC is affirmed. The prosecution was unable to establish beyond doubt if at the time of committing robbery, the appellant was in possession of any deadly arm/weapon or it was used by him. PW-1 (Bhupender Kumar) in examination-in-chief was unable to disclose as to which of the three assailants was armed with knife and who inflicted injury to him. He was not specific if the appellant-Mukesh had caused injuries to him with knife. The crime weapon was not recovered from the possession of the accused or at his instance. The Supreme Court in **Ashfaq v. State (Govt.of NCT of Delhi),** JT 2004 (5) SC 484 held:

> "Section 397, does not create any new substantive offence as such but merely serves as complementary to Section 392 and 395 by regulating the punishment already provided for dacoity by fixing a minimum term of imprisonment when the dacoity committed was found attendant upon certain aggravating circumstances viz. use of deadly weapon, or causing of grievous hurt of attempting to cause death or grievous hurt. For that reason, no doubt the provision postulates only the individual act of the accused to be relevant to attract section 397 IPC and thereby inevitably negates the use of principle of constructive of vicarious liability engrafted in Section 34 IPC. Each one of the accused in this case were said to have been wielding a deadly weapon of their own, and thereby squarely fulfilled the ingredients of Section 397 IPC do hors any reference to section 34 IPC."

In view of it, the individual role of the accused has to be considered in relation to the use or carrying of a weapon at the time of robbery for attracting the provisions of Section 397 IPC. In the instant case, the prosecution could not establish that the appellant was also carrying a deadly weapon with him at the time of alleged robbery. Hence conviction with the aid of Section 397 IPC cannot be legally sustained. By an order dated 12.09.2001 Mukesh Kumar was awarded Rigorous Imprisonment for seven years with fine Rs.500/-under Section 397 IPC. The substantive sentence is altered to Section 394/34 IPC. Appellant's nominal roll reveals that he had already undergone four years, five months and sixteen days incarceration as on 30.09.2004 besides earning remission for 11 months and six days. His overall conduct in jail was satisfactory and he had no

previous criminal antecedents. The other associates could not be apprehended or arrested during investigation. The appellant was not found in possession of robbed money. Considering these mitigating circumstances, the period already spent by him in custody is taken as his substantive sentence. The fine is stated to have already been deposited. The appellant need not surrender in the trial court. Conviction under Section 397 IPC is altered to Section 394/34 IPC and the appellant is released for the period already undergone by him in this case.

4. The appeal stands disposed of in the above terms. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation. Trial Court record along with a copy of this order be sent back forthwith.

ILR ((2013) VI DELHI 4715
W.P. (C)

JAGAN NATH GUPTA MEMORIAL EDUCATIONAL SOCIETY **.....PETITIONER**

VERSUS

DELHI DEVELOPMENT AUTHORITY & ANR. **.....RESPONDENT**

(G.P. MITTAL, J.)

W.P.(C) NO. : 1149/2013 **DATE OF DECISION: 22.11.2013**

Delhi Development Authority—Additional FAR—Under notification of 2008, petitioner deposited money with DDA towards additional FAR—Subsequently, in 2012, DDA amended the notification laying down that no charges for additional FAR be recovered from educational societies—Petitioner being educational society, sought refund of the money which had been deposited by it under protest—DDA did not refund money—Hence the petition—Held in W.P(C) 9572/09, the Division Bench allowed refund, so the present

petitioner being similar placed cannot be denied the same benefit on principles of parity.

This view is also in consonance with the decision of the Division Bench in batch of writ petitions i.e. W.P.(C) 9572/2009 wherein the Division Bench by order dated 20.07.2012 allowed refund of the additional FAR charges where sanction of the building plan was granted, subject to deposit of the additional FAR charges in the Court/on furnishing of bank guarantee. In fact, in W.P.(C) 9572/2009, the counsels for the DDA and the UOI had themselves pointed out that a Notification had since been issued and was likely to be published. **(Para 14)**

It is true that the Division Bench had observed that the decision dated 20.07.2012 shall be applicable only to the Petitioners before that Court in the batch of writ petitions. Yet, the Petitioner being a similarly placed person cannot be denied the benefit of the same. The Division Bench held as under:

> "In view of the above notification it is absolutely clear that no additional FAR charges are to be recovered from the Educational societies/Health care and Social welfare societies having income tax exemption. As such no additional FAR charges would therefore be recoverable from the present petitioners. If any of the petitioners have made deposits in this court pursuant to any order passed by this court the same shall be returned to the respective petitioners. In case of any Bank Guarantees that may have been furnished on account of directions of this court in view of the additional FAR charges, the petitioners concerned would also be entitled to have the same revoked.
>
> In view of the fact that now no FAR charges are to be recovered from the Educational societies/ Health care and Social welfare societies having income tax exemption, any action which may have been made

conditional on the payment of the additional FAR charges would now not have the said condition. In other words, the non-payment of the FAR charges will not come in the way of the petitioners to proceed with their release of sanctioned building plans, occupancy certificates, extension of time and NOCs etc. if the other conditions prescribed in law are fulfilled."

(Para 15)

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Amit Sibal with Mr. Ajiteshwar Singh, Mr. Amulya Dhingra & Mr. Chinmay Kumar, Advocates.

FOR THE RESPONDENTS : Mr. Ajay Verma, Advocate DDA.

RESULT: Writ Petition disposed of with directions.

G.P. MITTAL, J. (ORAL)

1. The Petitioner Jagan Nath Gupta Memorial Educational Society (the Society) seeks a writ of *mandamus* requiring the Respondent Delhi Development Authority(DDA) to refund a sum of Rs. 3,02,91,764/- deposited by the Petitioner with the Respondent in pursuance of the Notification dated 23.12.2008 towards additional FAR which was then applicable upon the holders of institutional plots including hospital plots.

2. The case of the Petitioner is that the Petitioner is a Society registered under the Societies Registration Act, 1860 and enjoys Income Tax exemption. By virtue of Notification dated 23.12.2008, holders of institutional plots including hospital plots were required to pay additional FAR charges as mentioned in para 6 of the Notification. Thus, the members of Association of Self Financing Institutions (of which the Petitioner is also a member) met the Hon'ble Lieutenant Governor of Delhi on 30.03.2009 against the levy of FAR charges upon educational institutions. The Association also wrote a letter dated 24.04.2009 to the Commissioner (Land Disposal DDA) highlighting the fact that the institutions like the Petitioner were non-profit organisations and application of charges for use of additional FAR upon them will only lead to an increase of the financial burden upon such institutions. Thereafter, there

were some correspondences between the Association of Self Financing Institutions and the DDA and finally the Under Secretary to the Government of India by a letter dated 15.05.2012(Annexure P-12) conveyed approval of the Central Government to the proposal of the DDA regarding exemption of additional FAR charges in respect of the educational societies which were exempted under the Income Tax Act. In the meanwhile, on the demand of Rs.3,02,91,764/- raised by the Assistant Engineer, DDA vide a letter dated 24.09.2009 on the Petitioner, the amount was deposited by the Petitioner with the DDA under protest with a request to refund the excess amount paid in case the additional FAR charges were reduced by the Government of India.

3. In pursuance of the approval of the Central Government, a fresh Notification dated 17.07.2012 was issued by the DDA amending the earlier Notification stating that no additional FAR charges are to be recovered from educational societies, healthcare institutions and social welfare societies having Income Tax exemption.

4. In pursuance of this Notification, the Petitioner by a letter dated 14.06.2012 sought refund of the amount of Rs.3,02,91,764/- deposited by him under protest with the DDA. The abovesaid letter is extracted hereunder:

> "Sir,
>
> Kindly refer to our letter dated Sept 24, 2009 on the subject mentioned above, whereby we had submitted Rs.3,02,91,764/- (Thee crores two lakhs ninety one thousand seven hundred and sixty four only) towards additional FAR Charges in respect of our institute at MOR Pocket-105, Kalkaji, New Delhi-110019 (copy of letter along with receipt enclosed).
>
> Since Ministry of Urban Development vide its letter date 15th May 2012 has conveyed approval of Central Government to the proposal of DDA regarding exemption of additional FAR charges in respect of Educational Societies which are exempted from IT ACT. (copy enclosed for your kind perusal). As such, we request you to kindly process our case and refund the above said amount with interest."

5. Since the amount paid was not refunded, the instant writ petition has been filed by the Petitioner.

6. The DDA has contested the writ petition by way of filing a counter affidavit. The sole ground laid in the affidavit is that since the Notification dated 17.07.2012 was issued subsequent to the payment of FAR charges, it will not have any retrospective effect. In the affidavit, it is stated that the cases in which the building plans had already been approved cannot be reopened and the amount thus paid by the Petitioner cannot be refunded.

7. Mr.Amit Sibal, learned counsel for the petitioner, has urged that by virtue of the amendment of the original notification dated 23.12.2008 by a subsequent notification dated 17.07.2012, it became operative from the initial date of notification only. He has urged that any other interpretation will make levy of FAR charges totally arbitrary. Referring to an order dated 20.07.2012 passed by a Division Bench of this Court in a batch matter in W.P.(C).9572/2009 etc., the learned counsel for the Petitioner urges that even on the ground of parity, the amount deposited by the Petitioner is liable to be refunded to it.

8. On the other hand, Mr. Ajay Verma, the learned counsel for the DDA submits that the notification will not have any effect retrospectively and that in the order dated 20.07.2012, the Division Bench had clarified that the order was applicable only to the Petitioners who were before the Court in those writ petitions.

9. It may be noted that by virtue of Notification dated 23.12.2008, certain regulations were framed for payment of certain charges for additional FAR in respect of different properties. The property in question is dealt at Serial No.6 of the Notification, which is extracted hereunder:-

"DELHI DEVELOPMENT AUTHORITY
NOTIFICATION
New Delhi, the 23rd December, 2008

Fixation of rates to be applied for use conversion, mixed land use and other charges for enhanced FAR arising out of MPD 2021.

S.O.2955(E) – In exercise of power conferred by Section 57 of the Delhi Development Act, 1957 (61 of 1957), the Delhi Development Authority with the previous approval of the Central Government, hereby makes the following Regulations in pursuance to Notification No.S.O.2432(E) dated 10th October, 2008:

Sl. No.	*Item*	*Recommendation of the Ministry*	*Rates worked out on the basis of the recommendations of the Ministry (Rates in Rs. per sqm)*
6.	*(g) Additional FAR charges for institutional Plots i.e. including hospital plots.*	*@ 50% of the updated zonal market rate of institutional properties for those disposed by auction as well as for those properties which were allotted to private parties. This is not applicable to those institutions which were allotted land @ Re.1/- for whom no such charges is recommended.*	*South & Dwarka Rs. 29525/- North, East, West & Rohini Rs. 13008/- Narela Rs. 9691/- This is not applicable to those institutions which were allotted land @ Re.1/-for whom no such charge is recommended.*

10. The plots of land of this category were exempted from payment of additional FAR charges by virtue of the subsequent Notification dated 17.07.2012. The Notification is extracted hereunder:-

"DELHI DEVELOPMENT AUTHORITY
LAND COSTING WING
VIKAS SADAN INA
NEW DELHI NOTIFICATION

Subject: - Exempting additional FAR charges in respect of Educational institutions/Trusts, Health-care and other social

In exercise of powers conferred by section 57 of the Delhi Development Act, 1957 (No.61 of 1957), the Delhi Development Authority with the previous approval of the Central Government hereby makes the following modification to Notification S.O. 2432(E), dated 10-10-2008 and S.O. 2955 (E), dated 23-12-2008 published in the Gazette of India, Part II, Section 3, Sub-section (ii) with regard to fixation of rates to be applied for additional FAR charges for Institutional plots. 6(g) for Educational Societies/Health-care, Social Welfare societies etc, where mode of disposal of land is still allotment.

Accordingly Para 6(g) of these notifications dated 10-10-2008 and 23-12-2008 shall be amended by the following:

Sl. No.	*Item*	*Modified Rates approved by the Ministry*
1	*Additional FAR charges for Institutional plots. 6(g).*	*No additional FAR charges to be recovered from Educational societies /Health care and Social welfare societies having Income Tax Exemption.*

The other contents of the notification dated 23/12/2008 will remain unchanged. The exemption of additional FAR charges will remain in force till further modification and notification by the Government of India.

File No. F2[163] 07/AO(P)/Pt-II/ Dated: 17 July, 2012

D Sarkar
Commissioner-cum-secretary
Delhi Development Authority"

11. A perusal of the Notification dated 17.07.2012 clearly reveals that it has not modified the payment of charges for additional FAR. Rather, an amendment had been issued only to the effect that Para 6 (g) of the Notification dated 10.10.2008 and 23.12.2008 was amended as stated in the Notification dated 17.07.2012. 12. It is true that the amendment has not been specifically made effective retrospectively, yet it may be mentioned that a policy decision was taken by the Central Govt. on recommendation of the DDA.

13. It may also be noted that immediately after issuance of the Notification dated 23.12.2008, there were representations by Association

of Self Financing Institutions to review the additional FAR charges payable as per MPD 2021 on the ground, inter alia, that the payment of additional charges will make the higher education unaffordable to the residents of this city. This ultimately found favour with the DDA who recommended to the Central Govt. to carry out the said amendment. Since only Item No.6 of the Notification was amended, it has to be presumed that the amendment will relate back to the issuance of the original Notification dated 23.12.2008.

14. This view is also in consonance with the decision of the Division Bench in batch of writ petitions i.e. W.P.(C) 9572/2009 wherein the Division Bench by order dated 20.07.2012 allowed refund of the additional FAR charges where sanction of the building plan was granted, subject to deposit of the additional FAR charges in the Court/on furnishing of bank guarantee. In fact, in W.P.(C) 9572/2009, the counsels for the DDA and the UOI had themselves pointed out that a Notification had since been issued and was likely to be published.

15. It is true that the Division Bench had observed that the decision dated 20.07.2012 shall be applicable only to the Petitioners before that Court in the batch of writ petitions. Yet, the Petitioner being a similarly placed person cannot be denied the benefit of the same. The Division Bench held as under:

"In view of the above notification it is absolutely clear that no additional FAR charges are to be recovered from the Educational societies/Health care and Social welfare societies having income tax exemption. As such no additional FAR charges would therefore be recoverable from the present petitioners. If any of the petitioners have made deposits in this court pursuant to any order passed by this court the same shall be returned to the respective petitioners. In case of any Bank Guarantees that may have been furnished on account of directions of this court in view of the additional FAR charges, the petitioners concerned would also be entitled to have the same revoked.

In view of the fact that now no FAR charges are to be recovered from the Educational societies/ Health care and Social welfare societies having income tax exemption, any action which may have been made conditional on the payment of the additional FAR charges would now not have the said condition. In other

words, the non-payment of the FAR charges will not come in the way of the petitioners to proceed with their release of sanctioned building plans, occupancy certificates, extension of time and NOCs etc. if the other conditions prescribed in law are fulfilled."

16. Thus, on parity also the Petitioner who has deposited the amount with the DDA is entitled to the refund in view of the order dated 20.07.2012 passed by the Division Bench.

17. In accordance with this, the writ petition is disposed of.

18. The Respondent DDA is directed to refund the amount of Rs.3,02,91,764/- to the Petitioner, deposited towards additional FAR within a period of eight weeks, failing which the Petitioner shall be entitled to an interest @ 12% per annum from the date of this order till the amount is refunded.

19. Pending applications stand disposed of.

ILR (2013) VI DELHI 4723
W.P. (C)

DAL CHAND **....PETITIONER**

VERSUS

GOVT. OF N.C.T. OF DELHI & ORS. **RESPONDENTS**

(G.P. MITTAL, J.)

W.P.(C) NO. : 7310/2013 **DATE OF DECISION: 22.11.2013**

Land Acquisition Act, 1894—Alternative Alltoment—Petitioner sought quashing of letter dated 01.09.1999 whereby his request for allotment of alternative plot was rejected after his land was acquired—Held, since the rejection letter dated 01.09.1999 was duly received by the petitioner and he kept sleeping over the issue

till December, 2008, on account of inordinate delay of 14 years, petition is bad for laches—Dismissed.

In the instant case, it is not in dispute that the rejection letter dated 01.09.1999 was duly received by the Petitioner. The Petitioner woke up only in December, 2008 (after more than 9 years of the receipt of rejection letter) and that too in the form of seeking some information under the RTI Act. It is not in dispute that the Petitioner was very much aware of the rejection of his case vide letter dated 01.09.1999. In these circumstances, it is evident that there was a delay of 14 years in approaching this Court, which is not permissible in view of the Division Bench judgment of this Court in Jagdish Singh. Paras 6 & 7 of the judgment are extracted hereunder for ready reference:-

"6. We find force in this submission. We may point out that when the respondent received rejection letter dated 23.2.1999, he responded to the same vide his letter dated 14.7.1999 refuting the stand of the DDA by alleging that he had never received any letter qua the first allotment.

7. Thus, it cannot be said that the respondent was ignorant. He was aware of his rights. In such circumstances, after receiving the rejection order in the year 1999, there was no reason for him to wait for an abnormal period of ten years before approaching the Court in the year 2009. We have to keep in mind that the purpose of the scheme for allotment of alternate plot is to give succour for those persons whose lands were acquired and on this deprivation; they become homeless or need house in this city. Such persons have to file appropriate application within time and it is also necessary for them to avail legal remedies without delay. Since we find that there is an inexplicable delay of more than ten years, that itself is sufficient to reject the petition of the appellant."

(Para 8)

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. S.S. Panwar, Adv. with Mr. Sunil Dutt Baloni, Advocate.

FOR THE RESPONDENTS : Mr. Yeeshu Jain, Adv. for R-1, R-3 & R-4. Ms. Sangeeta Sondhi Adv. with Mr. Sanjeev Narula, adv. for R-2.

CASE REFERRED TO:

1. *Govt. of NCT of Delhi* vs. *Veerwati, 189 (2012) DLT 674.*

RESULT: Dismissed.

G.P. MITTAL, J.

CM APPL.15724/2013 (exemption) in W.P.(C) 7310/2013

CM APPL.15727/2013 (exemption) in W.P.(C) 7311/2013

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

W.P.(C) 7310/2013 and CM APPL.15725/2013 (stay)

1. By virtue of this writ petition, the Petitioner prays for quashing of the rejection letter dated 01.09.1999 whereby the request of the Petitioner for allotment of an alternative plot was rejected.

2. The Petitioner's land forming part of Khasra No.646, 506, 576, 644, 878, 1179/498, 504, 1257/502, 1186/498, 1257/502, 504, (62-17) & 866, 959, 931, 932, 944, 868, 988, 867, 730(24-2), situated in the revenue estate of village Kilokari, New Delhi was acquired in pursuance of the Notification under Section 4, dated 23.06.1989 and under Sections 6 and 17 dated 22.06.1990 of the Land Acquisition Act, 1894. The possession of the acquired land was taken on 27.12.1990 and further on 22.09.1995. According to the Petitioner, he was paid compensation in instalments from 06.06.1994 to 21.03.1997 and the last instalment of compensation amounting to Rs.22,019.49p was paid on 21.03.1997.

3. The learned counsel for the Petitioner urges that the Petitioner was the occupier as well as occupancy tenant of the land. The dispute with the owner of the land was settled and the last instalment of compensation was paid to the Petitioner on 21.03.1997.

4. The learned counsel for the Petitioner contends that the rejection of the Petitioner's request for allotment of an alternative plot simply on the ground that there was a delay in making the application for allotment was wholly unjustified. It is urged that before passing the order of rejection, the Petitioner was not issued any show cause notice and thus, the principles of natural justice were violated. To appreciate the contention raised by the learned counsel for the Petitioner, it will be appropriate to extract the impugned letter dated 01.09.1999 hereunder:-

"To,
Shri Dal Chand
S/o Sh. Shadi Ram
H.No.128-C, Villaege Kilokari,
New Delhi-110014

Sub: Allotment of alternative plot under the Scheme of Large Scale Acquisition, Development & Disposal of Land in Delhi, 1961.

Sir,

With reference to your application dated 7.6.96 on the subject noted above, I am directed to inform you that as per the public notice dated 30th November, 1993 published in the newspapers, the individuals whose lands were acquired for planned development of Delhi after 31st December, 1988, were required to apply for allotment of alternative plots of land to this office by 31st January, 1994 or within one year from the competition of the acquisition proceedings whichever is later. As per your application you had received compensation on 13.7.94, hence the application for allotment of alternative plot should have been submitted latest by 12.7.95 whereas the same was submitted in this office on 7.6.96.

Your case has therefore been considered and rejected as being time barred.

This issues with the approval of the Secretary (Land)....."

5. The learned counsel for the Petitioner contends that after the rejection of Petitioner's request for alternative allotment of a plot, the Petitioner moved an application under the RTI Act in December, 2008. By a reply dated 12.01.2009, the Public Information Officer of the Land & Building Department informed the Petitioner that his file was not traceable. The learned counsel for the Petitioner refers to the letter dated 31.03.2009 followed by legal notices dated 29.10.2010 and 13.06.2011 and letter dated 23.07.2012 to urge that the Respondent was not justified in denying the allotment of the alternative plot to the Petitioner. The learned counsel for the Petitioner refers to a Division Bench judgment of this Court in **Govt. of NCT of Delhi vs. Veerwati,** 189 (2012) DLT 674 to contend that the Petitioner cannot be said to be guilty of delay and laches.

6. On the other hand, Mr. Yeeshu Jain, Advocate appearing on advance notice on behalf of the Land & Building Department urges that there was an unexplained delay of 14 years in filing of the present writ petition, as the rejection of the Petitioner's request was in the year 1999. The writ petition thus, cannot be entertained. In support of his contention, Mr. Yeeshu Jain heavily relies on a Division Bench judgment of this Court in **Govt. of NCT of Delhi v. Jagdish Singh,** 192 (2012) DLT 368.

7. I have gone through the judgments cited at the Bar. In Veerwati, the Respondent was consistently pursuing her case with the Govt. of NCT of Delhi. Respondent Veerwati had produced the documents before the concerned officer/officers of the Delhi Administration from time to time, however, the Respondent (Veerwati) by a letter dated 09.12.1993 was informed about the closure of her case. Although, Veerwati disputed the receipt of this letter, yet it was a matter of record that she visited the office of the DDA on 10.12.1993 to find out about the progress of her case and when she was informed about the closure of her case due to non-submission of documents, she submitted the documents vide letter dated 27.12.1993. Thus, admittedly, within 20 days of the closure of the case, Respondent Veerwati challenged the closure and produced the relevant documents. Even thereafter, Veerwati continued to write various letters, which is borne out from Para 7 of the judgment. It was under these circumstances that the learned Single Judge held that the Respondent was not guilty of delay and laches, which order was upheld in the LPA in **Veerwati** (supra).

8. In the instant case, it is not in dispute that the rejection letter dated 01.09.1999 was duly received by the Petitioner. The Petitioner woke up only in December, 2008 (after more than 9 years of the receipt of rejection letter) and that too in the form of seeking some information under the RTI Act. It is not in dispute that the Petitioner was very much aware of the rejection of his case vide letter dated 01.09.1999. In these circumstances, it is evident that there was a delay of 14 years in approaching this Court, which is not permissible in view of the Division Bench judgment of this Court in Jagdish Singh. Paras 6 & 7 of the judgment are extracted hereunder for ready reference:-

> "6. We find force in this submission. We may point out that when the respondent received rejection letter dated 23.2.1999, he responded to the same vide his letter dated 14.7.
>
> 999 refuting the stand of the DDA by alleging that he had never received any letter qua the first allotment.
>
> 7. Thus, it cannot be said that the respondent was ignorant. He was aware of his rights. In such circumstances, after receiving the rejection order in the year 1999, there was no reason for him to wait for an abnormal period of ten years before approaching the Court in the year 2009. We have to keep in mind that the purpose of the scheme for allotment of alternate plot is to give succour for those persons whose lands were acquired and on this deprivation; they become homeless or need house in this city. Such persons have to file appropriate application within time and it is also necessary for them to avail legal remedies without delay. Since we find that there is an inexplicable delay of more than ten years, that itself is sufficient to reject the petition of the appellant."

9. The Petitioner is thus guilty of inordinate delay and laches. Hence, the writ petition filed by the Petitioner cannot be entertained.

10. The writ petition stands dismissed in limine.

11. Pending application stands disposed of.

W.P.(C) 7311/2013 and CM APPL.15728/2013 (stay)

12. In this case, the facts are similar except that the learned counsel

for the Petitioners urges that the Petitioners were never aware of the rejection letter dated 01.09.1999 as Late Shri Shiv Charan (Predecessor of the Petitioners) expired on 14.10.2001 and the Petitioners were not aware of the application submitted by him for allotment of an alternative plot or its rejection by the letter dated 01.09.1999.

13. With the help of the learned counsel for the Petitioners, I have gone through the averments made in the writ petition. The writ petition is completely silent that the Petitioners came to know about making of any application for allotment of an alternative plot and rejection thereof only in the year 2010. Rather, the Petitioners are quite categorical that the case of alternative allotment of plot in favour of Late Shri Shiv Charan was rejected vide letter dated 01.09.1999. A copy of the letter has been attached as well with the writ petition as Annexure P-7. It has further been stated in the writ petition that the earlier said Shiv Charan expired on 14.10.2001 and that after death of Late Shri Shiv Charan, the Petitioners never received any information or notice regarding the further progress of the case.

14. The submissions made by the learned counsel for the Petitioners are contrary to the record and the averments made in the writ petition. The Petitioners have neither averred in the writ petition nor it is stated in any of the letters annexed (dated 29.10.2010, 06.04.2011 & 13.06.2011) that the Petitioners were not aware of submission of an application by Late Shri Shiv Charan for allotment of an alternative plot or it's rejection. Rather, from the legal notice dated 29.10.2010, it is clear that the Petitioners were very much aware of the submission of the application by Late Shri Shiv Charan vide Form No.1351 against acknowledgement dated 11.12.1996.

15. The Petitioners are thus guilty of inordinate delay and laches. The reasons, which have been mentioned by me while dealing with W.P.(C). 7310/2013, clearly apply to this case. Hence, the writ petition filed by the Petitioners cannot be entertained.

16. The writ petition stands dismissed in limine.

17. Pending application also stands disposed of.

ILR (2013) VI DELHI 4730
W.P.

BIJENDER KR GUPTA ....PETITIONER

VERSUS

CORPORATION BANK OF INDIA .....RESPONDENT

(G.P. MITTAL, J.)

W.P.(C) NO. : 2132/2012 DATE OF DECISION: 22.11.2013
CM. APPL. NO. : 4608/2012
(STAY)

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Intrest Act, 2002—Section 14(2)—Petitioner sought quashing of orders passed by ACMM under Section 14(2) of the Act directing the receiver to take possession of the petitioner's land—Petitioner claimed that the land in question is agricultural land so the provision of SARFAESI Act not applicable—Respondent contended that the impugned order is amenable to appeal under Section 17 of the Act—Held, since no agricultural activity is being carried out on the land in question and rather a banquet hall has been constructed on the land and commercial activity being done, It ceases to be land under Section 31 (i) of the Act, so provisions of the Act are applicable—Further Held, in view availability of alternative efficacious remedy, the writ petition is not maintainable.

Moreover, the SARFAESI Act nowhere defines 'land' or 'agricultural land'. Though 'land' as envisaged under Section 3(13) of the DLR Act is a very wide term and includes any land on which any of the various activities mentioned in the Section is being carried on, however, by no means, it can be read to be an agricultural land for the purposes of Section

31(i) of the SARFAESI Act. The provisions of Section 31(i) appear to have been incorporated to only protect the land where actual agricultural activity is being carried on. It is not even the case of the Petitioner that any agricultural activity is being carried on on the land in question. Also, Respondent No.1's plea that a banquet hall is being run on the land in question has not been rebutted by the Petitioner by either producing any document or by even filing any rejoinder affidavit refuting that contention. Thus, the land cannot be called to be an 'agricultural land' as envisaged under Section 31(i) of the SARFAESI Act. Hence, it cannot be said that the provisions of SARFAESI Act are not applicable to the land in question.

(Para 12)

Thus, the instant case is squarely covered by the judgments of the Hon'ble Supreme Court in O.C. Krishnan and Satyawati Tondon. Hence, in view of the availability of an alternative efficacious remedy, it will not be permissible for this Court to entertain the present writ petition. **(Para 17)**

[Gi Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Atul Bandhu, Advocate.

FOR THE RESPONDENT : Mr. Ajant Kumar Advocate.

CASES REFERRED NO:

1. *Baburam Prakash Chandra Maheshwari* vs. *Antarim Zila Parishad* [AIR 1969 SC 556].
2. *United Bank of India* vs. *Satyawati Tondon,* (2010) 8 SCC 110.
3. *Nilima Gupta & Ors.* vs. *Yogesh Saroha & Ors.,* 156(2009) DLT 129.
4. *Narain Singh & Anr.* vs. *Financial Commissioner,* 152 (2008) DLT 167.
5. *Anand J. Datwani* vs. *Geeti Bhagat Datwani & Ors.,* (CS(OS).758/2008) decided on 30.04.2013.

6. *N.B. Singh(HUF)* vs. *Perfexa Solutions Pvt. Ltd.,* (IA Nos.13634/2007 & 3114/2009 in CS(OS).2311/2006).
7. *U.P. State Spg. Co. Ltd.* vs. *R.S. Pandey,* (2005) 8 SCC 264.
8. *Harbanslal Sahnia* vs. *Indian Oil Corpn. Ltd.* [(2003) 2 SCC 107].
9. *GKN Driveshafts (India) Ltd.* vs. *ITO* [(2003) 1 SCC 72].
10. *Pratap Singh* vs. *State of Haryana* [(2002) 7 SCC 484 : 2002 SCC (L&S) 1075].
11. *L.L. Sudhakar Reddy* vs. *State of A.P.* [(2001) 6 SCC 634].
12. *Punjab National Bank* vs. *O.C. Krishnan,* (2001) 6 SCC 569.
13. *Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha* vs. *State of Maharashtra* [(2001) 8 SCC 509].
14. *A. Venkatasubbiah Naidu* vs. *S. Chellappan* [(2000) 7 SCC 695].
15. *Kerala SEB* vs. *Kurien E. Kalathil* [(2000) 6 SCC 293 : AIR 2000 SC 2573].
16. *Ramendra Kishore Biswas* vs. *State of Tripura* [(1999) 1 SCC 472 : 1999 SCC (L&S) 295 : AIR 1999 SC 294].
17. *Sheela Devi* vs. *Jaspal Singh* [(1999) 1 SCC 209].
18. *Shivgonda Anna Patil* vs. *State of Maharashtra* [(1999) 3 SCC 5 : AIR 1999 SC 2281].
19. *Tin Plate Co. of India Ltd.* vs. *State of Bihar* [(1998) 8 SCC 272 : AIR 1999 SC 74].
20. *Whirlpool Corpn.* vs. *Registrar of Trade Marks* [(1998) 8 SCC 1].
21. *Rajasthan SRTC* vs. *Krishna Kant* [(1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1995) 31 ATC 110 : AIR 1995 SC 1715].

22. *H.B. Gandhi* vs. *Gopi Nath and Sons* [1992 Supp (2) SCC 312].

23. *S.T. Muthusami* vs. *K. Natarajan* [(1988) 1 SCC 572 : AIR 1988 SC 616].

24. *Ram Lubbaya Kapoor* vs. *J.R. Chawala & Ors.,* 1986(10)DRJ 359.

25. *Ram and Shyam Co.* vs. *State of Haryana* (1985) 3 SCC 267 : AIR 1985 SC 1147.

26. *CCE* vs. *Dunlop India Ltd.* [(1985) 1 SCC 260 : 1985 SCC (Tax) 75 : AIR 1985 SC 330].

27. *Siliguri Municipality* vs. *Amalendu Das* [(1984) 2 SCC 436 : 1984 SCC (Tax) 133 : AIR 1984 SC 653].

28. *Titaghur Paper Mills Co. Ltd.* vs. *State of Orissa* [(1983) 2 SCC 433 : 1983 SCC (Tax) 131 : AIR 1983 SC 603].

29. *Amrit Bhikaji Kale & Ors.,* vs. *Kashinath Janardhan Trade & Another,* (1983) 3 SCC 437.

30. *Bihari Lal & Ors.* vs. *Union of India & Anr.,* AIR 1979 Delhi 84.

31. *State of U.P.* vs. *Indian Hume Pipe Co. Ltd.* [(1977) 2 SCC 724 : 1977 SCC (Tax) 335.

32. *Raja Anand Brahma Shah* vs. *State of Uttar Pradesh,* AIR 1967 SC 1081.

33. *ITO* vs. *Short Bros. (P) Ltd.* [(1966) 3 SCR 84 : AIR 1967 SC 81].

34. *K.S. Venkataraman and Co. (P) Ltd.* vs. *State of Madras* [(1966) 2 SCR 229 : AIR 1966 SC 1089].

35. *State of M.P.* vs. *Bhailal Bhai* [(1964) 6 SCR 261 : AIR 1964 SC 1006].

36. *C.A. Abraham* vs. *ITO* [(1961) 2 SCR 765 : AIR 1961 SC 609].

37. *N.T. Veluswami Thevar* vs. *G. Raja Nainar* [1959 Supp (1) SCR 623 : AIR 1959 SC 422].

38. *Union of India* vs. *T.R. Varma* [1958 SCR 499 : AIR 1957 SC 882].

39. *State of U.P.* vs. *Mohd. Nooh* [1958 SCR 595 : AIR 1958 SC 86].

40. *Sangram Singh* vs. *Election Tribunal, Kotah* [(1955) 2 SCR 1 : AIR 1955 SC 425].

41. *Kiran Singh & Ors.* vs. *Chaman Paswan & Ors.,* AIR 1954 SC 340.

42. *K.S. Rashid and Son* vs. *Income Tax Investigation Commission* [1954 SCR 738 : AIR 1954 SC 207].

43. *G. Veerappa Pillai* vs. *Raman & Raman Ltd.* [1952 SCR 583 : AIR 1952 SC 192].

RESULT: Dismissed.

G.P. MITTAL, J.

1. Petitioner Bijender Kumar Gupta by virtue of this writ petition under Article 226 and 227 of the Constitution of India prays for quashing of the orders dated 02.11.2011 and 01.03.2012 passed by the learned Additional Chief Metropolitan Magistrate (ACMM) in Complaint Case No.2098/2/2011 whereby in pursuance of the application under Section 14(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), the Receiver was directed to take into possession the land measuring 16 Biswas out of Khasra No.59/17, situated in the Revenue Estate of Village Mundka, Delhi-41 and land measuring 1 Bigha 4 Biswas out of Khasra No.59/17(1-04) situated in the Revenue Estate of Village Mundka, Delhi-41 and the objections preferred by the Petitioner were dismissed.

2. One Anil Kumar, proprietor of M/s Anil Trading Company had mortgaged the earlier stated land in favour of the Corporation Bank(Respondent No.1) by depositing its title deeds on 10.03.2000. Letters of equitable mortgage were signed by the said Anil Kumar on 02.05.2001 for the purpose of securing the cash credit limit of Rs.25 lakhs granted in his favour. Prem Prakash, Sunil Dutt and Ashok Kumar stood as guarantors for repayment of the said loan. Anil Kumar defaulted in repayment of the loan. Respondent No.1, therefore, preferred an application under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993(DRT Act) before the Debt Recovery Tribunal(DRT). Subsequently, the application under Section 13 of

SARFAESI Act was moved by Respondent No.1 to take possession of the mortgaged land.

3. In the instant writ petition, the case of the Petitioner is that the land in question is an agricultural land and the provisions of SARFAESI Act are not attracted to such land. It is averred that the Petitioner is bona fide purchaser of the said land. Before purchasing the land in question on 11.10.2005, the Petitioner made inquiries from the Revenue Department as also the Office of the Sub-Registrar (but he could not find any interest having been created in respect of the land). On moving of an application by the Petitioner, the land in question was also mutated in his favour. The Petitioner relies on the definition of 'land' as given under Section 3(13) of the Delhi Land Reforms Act, 1954(DLR Act). It is thus stated that the action of the learned ACMM in appointing a Receiver for taking possession of the Petitioner's land and then dismissing his application for directions is illegal and without application of judicial mind.

4. Respondent No.1 filed reply to the present writ petition supported by an affidavit of its Manager. The sum and substance of its case is that on 20.01.2005, an application under Section 17 of DRT Act was filed before the DRT for recovery of Rs.31,31,990.65P against Anil Kumar and the guarantors. In the said application, all the Defendants including the principal guarantor (Anil Kumar) were proceeded ex parte. A sum of Rs.78,73,616/- inclusive of interest was due against the borrowers and the guarantors upto 30.09.2012. The order dated 02.11.2011 was passed by the learned ACMM under Section 14(2) of SARFAESI Act. Section 17 of SARFAESI Act provides for an appeal. Thus, in view of an alternative efficacious remedy available, a writ petition is not maintainable. It is submitted that the sale deed annexed with the petition does not relate to the property in question.

5. It is averred that the land in question cannot be said to be an agricultural land as no agricultural activity is being carried out on the land in question. Rather, a banquet hall has been constructed over the land and commercial activity is being carried thereon. It is also stated that Anil Kumar could not have sold the property in question on 11.10.2005 to the Petitioner as Respondent No.1 had already moved the Court of the learned ACMM on 20.01.2005 for taking possession of the land. Hence, the sale would be hit by the doctrine of lis pendens. It is urged by the learned counsel for Respondent No.1 that a letter dated 10.12.2011 was written

by Anil Kumar to them whereby he informed the bank that since the original title deeds were lying with the bank, the same was informed to the purchaser, that is, the Petitioner herein and sale agreement was signed between him(Anil Kumar) and the purchaser of the property whereby the purchaser (the Petitioner) had agreed to clear the outstanding amount due to the bank.

6. The Petitioner did not file any rejoinder affidavit to controvert the averments made in the letter dated 10.12.2011 that the subsequent purchaser was informed to clear the outstanding dues of the bank or that a banquet hall was running on the land in question.

7. The following issues arise for determination in the instant writ petition:

(i) Whether the land in question can be said to be an agricultural land so as to exclude the applicability of the SARFAESI Act ?

(ii) Whether the writ petition can be entertained in the face of alternative remedy provided under Sections 17 and 18 of the SARFAESI Act?

8. There is no gainsaying that Section 31(i) of the SARFAESI Act makes the provisions of this Act inapplicable on any security or interest created in an agricultural land. The question for consideration is thus, whether any land on which a banquet hall has been built would still retain the character of an 'agricultural land'. The learned counsel for the Petitioner relies on a Division Bench judgment of this Court in **Bihari Lal & Ors. v. Union of India & Anr.,** AIR 1979 Delhi 84 to contend that any land which could be put to agriculture will continue to be an agricultural land as envisaged under Section 31 of the SARFAESI Act. On the other hand, the learned counsel for Respondent No.1 relied on **Ram Lubbaya Kapoor v. J.R. Chawala & Ors.,** 1986(10)DRJ 359; **Nilima Gupta & Ors. v. Yogesh Saroha & Ors.,** 156(2009) DLT 129; **N.B. Singh(HUF) v. Perfexa Solutions Pvt. Ltd.,** (IA Nos.13634/2007 & 3114/2009 in CS(OS).2311/2006) decided on 29.05.2009 and **Anand J. Datwani v. Geeti Bhagat Datwani & Ors.,** (CS(OS).758/2008) decided on 30.04.2013 to urge that a land ceases to be an agricultural land if it is not being used for agricultural purposes.

9. In Bihari Lal, the question before the Division Bench was whether

the contended land was an arable land or a waste land. Relying on **Raja Anand Brahma Shah v. State of Uttar Pradesh,** AIR 1967 SC 1081, the Division Bench held that the land was undoubtedly being used for cultivation at one time and therefore, was capable of being cultivated. Thus, the Division Bench concluded that any land, whether it is actually being cultivated or not is arable land. Under the provisions of Section 17 of the Land Acquisition Act, 1894 (LAC Act) as it existed at the relevant time, the normal procedure of acquisition after hearing objections etc. under Sections 5A, 6 and 9 could be dispensed with in certain circumstances in respect of acquisition of arable as well as waste land. Thus, *Bihari Lal* relied upon by the learned counsel for the Petitioner does not deal with the present controversy, that is, whether the land in question is actually an agricultural land as envisaged under Section 31(i) of SARFAESI Act. Rather, the answer to the same is found in *Ram Lubbaya Kapoor* relied upon by Respondent No.1, which squarely lays down that if any land has been put to non-agricultural use by carving out plots etc., it shall cease to be a 'land' as defined under Section 3(13) of DLR Act.

10. In **Anand J. Datwani,** this issue was dealt with at great length by the learned Single Judge of this Court. It would be appropriate to extract paras 18 to 22 and 26 hereunder:

> "18. In **Ram Lubbaya Kapoor's** case (supra) this court has held that any land before it can be termed "land" for the purpose of the Delhi Land Reforms Act,1954 must be held or occupied for purposes connected with agriculture, horticulture or animal husbandry etc. and if it is not used for the said purposes, it ceased to be a land for the purposes of the Act and the provisions thereof will no longer apply and the remedy of the aggrieved party, if any, would be under the general law of the land. Similar view was taken by this Court in **Narain Singh & Anr. vs. Financial Commissioner,** 152 (2008) DLT 167.
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> 19. In **Nilima Gupta's** case (supra), it was held by the learned single judge of this court that:
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> > "The Delhi Land Reforms Act was not meant to decide the Civil Disputes of unauthorized colonies, which emerged on agricultural land. The hard realty of today is that though large chunks of land stand in the revenue record as 'khasra numbers' but in fact the land has been converted into unauthorized/authorized colonies, where people have either built houses or have plots and civil disputes are arising day in and day out in respect of these plots. Sometimes, plots are sold twice, sometimes there are disputes regarding possession of plots, sometimes there are disputes regarding encroachment, sometimes there are disputes regarding invalid/valid sale of the plots. The Legislature while framing the Delhi Land Reforms Act had not envisaged these kinds of disputes to be referred to the Revenue Authorities. A perusal of chart given in Schedule I pertaining to Section 185 itself shows that all disputes which are envisaged by the Delhi Land Reforms Act to be decided by the Revenue Assistant or Deputy Commissioner are those, which pertain to agricultural land and they are not those disputes which arise when agricultural land is converted into unauthorized colonies or authorized colonies. The Courts cannot be divorced from the ground realities and live in an imaginary world of jurisdiction. Once the agricultural land loses its basic character of 'agricultural land' and changes hands several times and gets converted into an authorized/ unauthorized colony by dividing it into plots, the disputes of plot-holders are not those, which can be decided by the Revenue Authorities and these disputes have to be decided by the Civil Courts."
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> 20. In **N.B. Singh's** case (Supra), the defendant-company had taken the premises on lease for the residence of its managing director at monthly rent of Rs.1,60,000. The learned single judge held that a property ceases to be an agricultural property if it is not used for agricultural purposes and the defendant is estopped from contending that the suit property is an agricultural land covered by the Delhi Land Reforms Act. It was further contended that the description of the plaintiff as Bhumidar in revenue records is of no consequence.
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> 21. After having heard both the parties and perusing the judgments being relied upon by them, I am of the view that the provisions of the Delhi Land Reforms Act, 1954 shall not apply to a land which at the outset was an agricultural land but is no longer

being used for the agricultural purposes.

22. Section 13(3) of the Act specifically lays down that the term "land" means land held or occupied for purpose connected with agriculture, horticulture or animal husbandry including pisciculture and poultry farming. The definition of land is inclusive but is not wide enough to include the land which has ceased to be an agricultural land by reason of its no longer being used for the agricultural purposes. In cases titled **Ram Lubbaya, Narain Singh, N.B. Singh** and **Nilima Gupta** (Supra), this court has clearly and consistently held that the provisions of Delhi Land Reforms Act ceases to apply as soon as the land ceases to be an agricultural land.

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26. Above discussion makes it amply clear that an agricultural land must be used for the agricultural purposes only if the Land Reforms Laws are to be made applicable and if it is not so used, it will cease to be an agricultural land. In the instant case, admittedly, the land in question has not been used for any purposes contemplated therein under the Land Reforms Act, instead, the land has been built upon. Admittedly, two residential units have been constructed on the land in question out of which one is used by the parties as their residence and the other one was rented out and so far, the land has not been, in fact had never been used for the agricultural purposes. It is not the case of the defendants that they are carrying out any agricultural activity or any other allied permissible activity on the land in question. Therefore, as per the aforesaid reasoning and the view taken consistently by this court in number of judgments, the land in my considered view, has ceased to be an agricultural land and will no longer be governed by the provisions of the Delhi Land Reforms Act. Thus, the jurisdiction of civil court cannot be said to be barred by virtue of the provisions of section 185 of the Act."

11. Thus, there is no escape from the conclusion that the land in question is not a 'land' as envisaged under Section 3(13) of the DLR Act.

12. Moreover, the SARFAESI Act nowhere defines 'land' or 'agricultural land'. Though 'land' as envisaged under Section 3(13) of the DLR Act is a very wide term and includes any land on which any of the various activities mentioned in the Section is being carried on, however, by no means, it can be read to be an agricultural land for the purposes of Section 31(i) of the SARFAESI Act. The provisions of Section 31(i) appear to have been incorporated to only protect the land where actual agricultural activity is being carried on. It is not even the case of the Petitioner that any agricultural activity is being carried on on the land in question. Also, Respondent No.1's plea that a banquet hall is being run on the land in question has not been rebutted by the Petitioner by either producing any document or by even filing any rejoinder affidavit refuting that contention. Thus, the land cannot be called to be an 'agricultural land' as envisaged under Section 31(i) of the SARFAESI Act. Hence, it cannot be said that the provisions of SARFAESI Act are not applicable to the land in question.

13. It is well settled that the powers under Article 226 of the Constitution conferred on all the High Courts in the matter of issuing writs are very wide. There are, however, self-imposed limitations on the powers of the High Courts not to issue such writs when adequate efficacious alternative remedy is available. In **U.P. State Spg. Co. Ltd. v. R.S. Pandey,** (2005) 8 SCC 264, the Supreme Court at length discussed the exceptional cases wherein writs under Article 226 could be issued in spite of availability of alternative efficacious remedy. Paras 11 to 16 of the Report in R.S. Pandey are extracted hereunder:

> "11. Except for a period when Article 226 was amended by the Constitution (Forty-Second Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure

that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

12. Constitution Benches of this Court in **K.S. Rashid and Son v. Income Tax Investigation Commission** [1954 SCR 738 : AIR 1954 SC 207], **Sangram Singh v. Election Tribunal, Kotah** [(1955) 2 SCR 1 : AIR 1955 SC 425], **Union of India v. T.R. Varma** [1958 SCR 499 : AIR 1957 SC 882], **State of U.P. v. Mohd. Nooh** [1958 SCR 595 : AIR 1958 SC 86] and **K.S. Venkataraman and Co. (P) Ltd. v. State of Madras** [(1966) 2 SCR 229 : AIR 1966 SC 1089] held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

13. Another Constitution Bench of this Court in **State of M.P. v. Bhailal Bhai** [(1964) 6 SCR 261 : AIR 1964 SC 1006] held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been reiterated in **N.T. Veluswami Thevar v. G. Raja Nainar** [1959 Supp (1) SCR 623 : AIR 1959 SC 422], **Municipal Council, Khurai v. Kamal Kumar** [(1965) 2 SCR 653 : AIR 1965 SC 1321], **Siliguri Municipality v. Amalendu Das** [(1984) 2 SCC 436 : 1984 SCC (Tax) 133 : AIR 1984 SC 653], **S.T. Muthusami v. K. Natarajan** [(1988) 1 SCC 572 : AIR 1988 SC 616], **Rajasthan SRTC v. Krishna Kant** [(1995) 5 SCC 75 : 1995 SCC (L&S) 1207 : (1995) 31 ATC 110 : AIR 1995 SC 1715], **Kerala SEB v. Kurien E. Kalathil** [(2000) 6 SCC 293 : AIR 2000 SC 2573], **A. Venkatasubbiah Naidu v. S. Chellappan** [(2000) 7 SCC 695], **L.L. Sudhakar Reddy v. State of A.P.** [(2001) 6 SCC 634], **Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha v. State of Maharashtra** [(2001) 8 SCC 509], **Pratap Singh v. State of Haryana** [(2002) 7 SCC 484 : 2002 SCC (L&S) 1075] and **GKN Driveshafts (India) Ltd. v. ITO** [(2003) 1 SCC 72].

14. In **Harbanslal Sahnia v. Indian Oil Corpn. Ltd.** [(2003) 2 SCC 107] this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

15. In **G. Veerappa Pillai v. Raman & Raman Ltd.** [1952 SCR 583 : AIR 1952 SC 192], **CCE v. Dunlop India Ltd.** [(1985) 1 SCC 260 : 1985 SCC (Tax) 75 : AIR 1985 SC 330], **Ramendra Kishore Biswas v. State of Tripura** [(1999) 1 SCC 472 : 1999 SCC (L&S) 295 : AIR 1999 SC 294], **Shivgonda Anna Patil v. State of Maharashtra** [(1999) 3 SCC 5 : AIR 1999 SC 2281], **C.A. Abraham v. ITO** [(1961) 2 SCR 765 : AIR 1961 SC 609], **Titaghur Paper Mills Co. Ltd. v. State of Orissa** [(1983) 2 SCC 433 : 1983 SCC (Tax) 131 : AIR 1983 SC 603], **H.B. Gandhi v. Gopi Nath and Sons** [1992 Supp (2) SCC 312], **Whirlpool Corpn. v. Registrar of Trade Marks** [(1998) 8 SCC 1 : AIR 1999 SC 22], **Tin Plate Co. of India Ltd. v. State of Bihar** [(1998) 8 SCC 272 : AIR 1999 SC 74], **Sheela Devi v. Jaspal Singh** [(1999) 1 SCC 209] and **Punjab National Bank v. O.C. Krishnan** [(2001) 6 SCC 569] this Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

16. If, as was noted in **Ram and Shyam Co. v. State of Haryana** [(1985) 3 SCC 267 : AIR 1985 SC 1147] the appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the alternative remedy would not be

efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in First **ITO v. Short Bros. (P) Ltd.** [(1966) 3 SCR 84 : AIR 1967 SC 81] and **State of U.P. v. Indian Hume Pipe Co. Ltd.** [(1977) 2 SCC 724 : 1977 SCC (Tax) 335] That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."

14. No such exceptional case has been made out by the Petitioner in order to enable me to entertain this writ petition in spite of availability of alternative efficacious remedy under Section 17 of the SARFAESI Act.

15. In **Punjab National Bank v. O.C. Krishnan,** (2001) 6 SCC 569, the decree passed by the Debt Recovery Tribunal, Calcutta was challenged in a writ filed under Article 226. The High Court allowed the petition by observing that as the mortgaged property directed to be sold was situated in Chennai, the Debt Recovery Tribunal had no territorial jurisdiction in respect thereto and it could not have ordered the sale of the mortgaged property. However, the Supreme Court said that the High

Court should not have entertained the writ petition because of availability of an adequate alternative efficacious remedy. In paras 5 and 6 of the Report, the Supreme Court held as under:

"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

16. In **United Bank of India v. Satyawati Tondon,** (2010) 8 SCC 110, the Supreme Court observed that the expression "any person" in Section 17(1) of SARFAESI Act includes even guarantor or any other person. The Supreme Court deprecated the practice of entertaining writs under Article 226 in spite of availability of statutory remedies under the DRT Act and the SARFAESI Act. Paras 42 to 46 and 55 of the Report are extracted hereunder:

"42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules

of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in **Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad** [AIR 1969 SC 556], **Whirlpool Corpn. v. Registrar of Trade Marks** [(1998) 8 SCC 1] and **Harbanslal Sahnia v. Indian Oil Corpn. Ltd.** [(2003) 2 SCC 107] and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.

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55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues.

We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

17. Thus, the instant case is squarely covered by the judgments of the Hon'ble Supreme Court in **O.C. Krishnan and Satyawati Tondon.** Hence, in view of the availability of an alternative efficacious remedy, it will not be permissible for this Court to entertain the present writ petition.

18. The learned counsel for the Petitioner relies on a three Judge Bench decision of the Hon'ble Supreme Court in **Kiran Singh & Ors. v. Chaman Paswan & Ors.,** AIR 1954 SC 340 to contend that where a Court entertains a suit or an appeal over which it has no jurisdiction, a decree passed by the Court is without jurisdiction and is a nullity and it can be challenged before any Court at any time. The learned counsel for the Petitioner also relies on **Amrit Bhikaji Kale & Ors., v. Kashinath Janardhan Trade & Another,** (1983) 3 SCC 437 to urge that where a Tribunal of limited jurisdiction entertains a petition ignoring a statutory provision by a decision wholly unwanted with regard to the jurisdictional fact, its decision is a nullity and the plea of nullity can be set up in collateral proceedings. Again the judgments relied are inapplicable as it has been demonstrated above that the Petitioner was entitled to invoke the provisions of Section 17 and 18 of the SARFAESI Act even if the order passed by the learned ACMM was without jurisdiction or the mortgaged property was not a secured asset or even if the order was passed in respect of a land to which the Act was not applicable.

19. No exceptional circumstances have been made out by the Petitioner to invoke the writ jurisdiction under Article 226/227 of the Constitution in view of adequate efficacious alternative remedy being available to him.

20. The writ petition is devoid of any merit; the same is accordingly dismissed with costs quantified at Rs. 25,000/-.

21. Pending applications, if any, stand disposed of.

ILR (2013) VI DELHI 4748
W.P. (C)

MANJEET KUMAR ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 1592/2013 DATE OF DECISION: 05.12.2013

Service Law—Armed Forces—Constitution of India, 1950—Petitioner chargesheeted, disciplinary proceedings held and he was ordered to be removed from service—Order upheld by Appellant Authority and by Revisionist Authority—Aggrieved petitioner preferred writ and punishment awarded is grossly disproportionate to charge levelled against him. Held:— When order passed on admissions and detailed consideration of facts and circumstances it cannot be faulted.

The orders dated 9th April, 2011 of the disciplinary authority, impugned order dated 15th July, 2011 of the appellate authority and order dated 16th December, 2011 of the revisional authority are reasoned and based on a detailed consideration of the facts and circumstances leading to the removal of the service of the petitioner. The same have not been faulted on any legally tenable ground. The allegation is premised on his admission. **(Para 4)**

Important Issue Involved: When order passed on admissions and detailed consideration of facts and circumstances it cannot be faulted.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Ms. Rekha Palli, Advocate.

FOR THE RESPONDENTS : Mr. Amrit Pal Singh, Advocate.

RESULT: Writ petition disposed of.

GITA MITTAL, J. (Oral)

1. The petitioner in the instant case has prayed for setting aside of the order dated 9th April, 2011 whereby punishment of removal from service was imposed upon the petitioner on the recommendations of the enquiry officer. The petitioner has also impugned the order dated 15th July, 2011 passed by the appellate authority and the order of the revisional authority dated 16th December, 2011 upholding the order of removal from service. The order dated 9th April, 2011 has been passed after holding disciplinary proceedings against the petitioner pursuant to a chargesheet dated 31st July, 2010 on the following charges:

Article 1

That Force No.001373612 Sepoy/GD Manjit Kumar of G/134 Battalion while working on the post of Sepoy/GD has committed an offence of misconduct being a member of the Force under Section 11 (1) of CRPF Act, 1949 and committed of misconduct and indiscipline whereby he was nominated for the advance party leaving for Sindri on 18/4/2010 and he left a letter in the office that he running away from camp and the same was later on admitted by him in the cross examination in the preliminary enquiry. Hence he has committed the offence of running away from the camp which is against the orders and discipline of the Force.

Article 2

That Force No.001373612 Sepoy/GD Manjit Kumar of G/134 Battalion while working on the post of Sepoy/GD has committed an offence of misconduct being a member of Force under Section 11 (1) of CRPF Act, 1949 and committed misconduct and indiscipline wherein when Force No.001373612 Sepoy/GD Manjit Kumar of G/134 Battalion was undergoing anti national operation training at Group Centre CRPF Sindri run away from the camp on 1/5/2010 and remained absent from duty from 1/5/2010 to 20/7/2010 for total 80 days without leave/permission of the competent authority. Hence Force No.001373612 Sepoy/GD Manjit Kumar of G/134 Battalion has committed the offence of misconduct and indiscipline which is against the orders and discipline of the Force and is a punishable offence.

2. The petitioner had accepted his culpability and charges resulting in the inquiry officer finding him guilty of the charges. The order dated 9th April, 2011 resulted as a consequence thereof.

3. The learned counsel for the petitioner has assailed the aforesaid orders on the ground that the punishment awarded to the petitioner is grossly disproportionate to the charges levelled against him. Respondents have strongly disputed this contention and in the counter affidavit have additionally pointed out the offences and penalties imposed upon the petitioner.

4. The orders dated 9th April, 2011 of the disciplinary authority, impugned order dated 15th July, 2011 of the appellate authority and order dated 16th December, 2011 of the revisional authority are reasoned and based on a detailed consideration of the facts and circumstances leading to the removal of the service of the petitioner. The same have not been faulted on any legally tenable ground. The allegation is premised on his admission.

5. On a consideration of the facts and circumstances of the case, we find that the punishment imposed upon the petitioner is commensurate with the gravity of the charges against him. We see no reason to interfere with the impugned orders.

6. The petitioner in the alternative has prayed in the writ petition to grant compassionate allowance to him. The petitioner is certainly entitled to consideration of this prayer by the respondents.

7. We, accordingly, while dismissing the writ petition so far as the challenge to the impugned orders is concerned and upholding the punishment imposed upon the petitioner, we grant liberty to him to make an appropriate representation to the respondents for grant of the compassionate allowance.

8. We also make it clear that while considering the request for

compassionate allowance, the competent authority shall examine the same uninfluenced by the previous observations made by the respondents in the impugned order as well as by the order we have recorded today. An independent view shall be taken on the entire issue. A reasoned and speaking order shall be passed which shall be promptly conveyed to the petitioner.

9. The present writ petition is disposed of in the above terms.

ILR (2013) VI DELHI 4751
W.P. (C)

WING COMMANDER RAVI MANI (RETD.) ....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 7754/2013 &
CM. NO. : 16506/2013 DATE OF DECISION: 10.12.2013

Service Law—Armed Forces—Constitution of India, 1950—Armed Forces Tribunal (Procedure) Rule 2008-Rule 6-Petitioner challenged order passed by Armed Forces Tribunal Holding, Tribunal did not have territorial jurisdiction to entertain and adjudicate upon subject matter of the case as no Part of cause of action arose in Delhi—According to petitioner, he made representation on which order was passed at Delhi. Held:—The choice of selecting forum in case of matters covered by the Armed Forces Tribunal is wider unlike in the case of Section 20 of CPC. If competent authority rejected representation in Delhi, then the Principal Bench of Armed Forces Tribunal had the jurisdiction to adjudicate the dispute.

In this regard, we may also usefully refer to the observations of this court in **Lt. Col. Ashok Kumar (Retd.) Vs. UOI** (supra) wherein the court held thus:-

> "10. It is apparent from the provision itself that the choice of instituting a proceeding or application before the Tribunal is with the petitioner/applicant. He can choose any of the following places:
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> (i) where the applicant is posted (or attached) for the time being.
>
> (ii) (where the applicant) was last posted or attached; or
>
> (iii) where the cause of action, wholly or in part, has arisen: Unlike in the case of Section 20 of the CPC, which mandates that the place where the defendant resides or works for gain, or where the cause of action arises, in whole or in part, the choice of selecting the forum in the case of matters covered by the Armed Forces Tribunal is wider; it can be exercised by the applicant. Interestingly, the applicant can even approach the Bench of the Tribunal having jurisdiction over the place where he was last posted or attached.
>
> 11. In the present writ petition, considering the totality of the facts and circumstances and observing that the competent authority which ordered the PMR and later rejected the request of the Petitioner for cancellation of the PMR order is situated in Delhi, it can be said that the Principal Bench of the Armed Forces Tribunal had the jurisdiction to adjudicate the disputes of the petitioner pertaining to his application of cancellation of premature retirement. In the circumstances, the order of the Tribunal directing the application of the petitioner to be sent to the Lucknow Bench of the Armed Forces Tribunal cannot be justified."

(Paras 10)

Learned counsel for the petitioner has also contended that though his permanent residence is in Belgaon, however, he ordinarily resides at New Delhi with his offspring at the address which was also reflected in the memo of parties placed before the Principal Bench. The Principal Bench, New Delhi would have jurisdiction over the subject matter by application of Rule 6(2) as well. This aspect has been completely overlooked. **(Paras 11)**

Important Issue Involved: The choice of selecting forum in case of matters covered by the Armed Forces Tribunal is wider unlike in the case of Section 20 of CPC. If competent Authority rejected representation in Delhi,then the Principal Bench of Armed Forces Tribunal had the jurisdiction to adjudicate the dispute.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Inderjit Singh, Advocate.

FOR THE RESPONDENTS : Mr. Himanshu Bajaj, CGSC for R-1 to 4.

CASE REFERRED TO:

1. *Lt. Col. Alok Kaushik (Retd.)* vs. *Union of India & Ors.* WP (C) No.1096/2013.

RESULT: Petition allowed.

GITA MITTAL, J. (Oral)

CM No.16506/2013

1. Allowed, subject to just exceptions.

WP (C) No.7754/2013

2. The petitioner in the instant case assails the order dated 20th November, 2013 passed by the Armed Forces Tribunal (AFT), Principal Bench, New Delhi in OA No.444/2013 praying for quashing of the PPO No.08/14/A/Rev.3407/2013 dated 31st May, 2013 and an order passed

by the Principal Director, Directorate of Air Veterans, New Delhi, respondent no.3 herein, dated 27th August, 2013 rejecting the representation of the petitioner.

3. The petitioner in the instant case is an officer of the Indian Air Force serving in the Metrological Branch. The petitioner's request for premature retirement was favourably considered by the respondents and he proceeded on such retirement w.e.f 28th February, 1997.

4. The petitioner has contended that upon such retirement, he was granted pension benefits taking the reckonable qualifying service for its computation as twenty six years one month and zero days. It appears that a corrigendum was issued on 31st May, 2013 intimating that the Pension Payment Orders (PPOs) have been amended which led to the respondents treating the reckonable service as twenty five years two months and fourteen days resulting in reduction of the pension which was being paid to the petitioner. This order was passed at Delhi by the Deputy Controller of Defence Accounts, Subroto Park, New Delhi, respondent no.4 herein. The petitioner's representation against the same was rejected by the respondent no.3 also at Delhi.

5. Aggrieved by these orders, the petitioner had filed the afore-noticed original application before the Armed Forces Tribunal, Principal Bench, New Delhi. This petition was taken up for hearing on 20th November, 2013 and was summarily rejected on the ground that the petitioner was not residing within the jurisdiction of the Principal Bench at New Delhi and, therefore, the Bench did not have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

6. Before us, learned counsel for the petitioner has submitted that even though the permanent address of the petitioner has been reflected as different place beyond the jurisdiction of the court, however, both the impugned orders have been passed at Delhi. Therefore, in terms of Rule 6 1(ii) of the Armed Forces Tribunal (Procedure) Rules, 2008, the cause of action for filing the petition had arisen wholly within the jurisdiction of the Principal Bench, New Delhi and by virtue of sub-rule 1(ii) of Rule 6 of the Armed Forces Tribunal (Procedure) Rules, 2008. As such, the Principal Bench at New Delhi had territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

7. We have heard learned counsel for the parties on the matter in issue which is raised in this petition. Our attention has been drawn to a similar issue which was decided by an order dated 21st February, 2013 passed in WP (C) No.1096/2013 **Lt. Col. Alok Kaushik (Retd.) Vs. Union of India & Ors.** before this court in similar circumstances which supports the case of the petitioner.

8. Before considering the factual aspect of the matter, we may firstly advert to the rule position. In this regard, Rule 6 of the Armed Forces Tribunal (Procedure) Rule, 2008 is relevant and reads thus:-

> "6. Place of filing application (1) An application shall ordinarily be filed by the applicant with the Registrar of the Bench within whose jurisdiction-
>
> (i) the applicant is posted for the time being, or was last posted or attached; or
>
> (ii) where the cause of action, wholly or in part, has arisen:
>
> Provided that with the leave of the Chairperson the application may be filed with the Registrar of the Principal Bench and subject to the orders under section 14 or section 15 of the Act, such application shall be heard and disposed of by the Bench which has jurisdiction over the matter.
>
> (2) Notwithstanding anything contained in sub-rule (1), a person who has ceased to be in service by reason of his retirement, dismissal, discharge, cashiering, release, removal, resignation or termination of service may, at his option, file an application with the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time of filing of the application."

9. A bare reading of Rule 6 would show that sub-rule 1(ii) of the Rule, in fact, confers discretion upon a retired force person to file the petition before a Bench within whose jurisdiction he is ordinarily residing at the time of filing of the application. Even otherwise, sub-rule 1(ii) of Rule 6 further mandates that an application shall ordinarily be filed before the Bench within whose jurisdiction the cause of action wholly or in part has arisen. In the instant case, both the impugned orders have been passed at Delhi. Therefore, the Principal Bench, New Delhi would have

the territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

10. In this regard, we may also usefully refer to the observations of this court in **Lt. Col. Ashok Kumar (Retd.) Vs. UOI** (supra) wherein the court held thus:-

> "10. It is apparent from the provision itself that the choice of instituting a proceeding or application before the Tribunal is with the petitioner/applicant. He can choose any of the following places:
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> (i) where the applicant is posted (or attached) for the time being.
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> (ii) (where the applicant) was last posted or attached; or
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> (iii) where the cause of action, wholly or in part, has arisen: Unlike in the case of Section 20 of the CPC, which mandates that the place where the defendant resides or works for gain, or where the cause of action arises, in whole or in part, the choice of selecting the forum in the case of matters covered by the Armed Forces Tribunal is wider; it can be exercised by the applicant. Interestingly, the applicant can even approach the Bench of the Tribunal having jurisdiction over the place where he was last posted or attached.
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> 11. In the present writ petition, considering the totality of the facts and circumstances and observing that the competent authority which ordered the PMR and later rejected the request of the Petitioner for cancellation of the PMR order is situated in Delhi, it can be said that the Principal Bench of the Armed Forces Tribunal had the jurisdiction to adjudicate the disputes of the petitioner pertaining to his application of cancellation of premature retirement. In the circumstances, the order of the Tribunal directing the application of the petitioner to be sent to the Lucknow Bench of the Armed Forces Tribunal cannot be justified."

11. Learned counsel for the petitioner has also contended that though his permanent residence is in Belgaon, however, he ordinarily resides at New Delhi with his offspring at the address which was also reflected in the memo of parties placed before the Principal Bench. The Principal

Bench, New Delhi would have jurisdiction over the subject matter by application of Rule 6(2) as well. This aspect has been completely overlooked.

12. In view of the above, the order dated 20th November, 2013 is hereby set aside and quashed. The matter shall stand remanded to the Armed Forces Tribunal, Principal Bench, New Delhi for hearing on the merits of the rival contentions.

13. The parties shall appear before the Registrar of the Armed Forces Tribunal on 15th January, 2014 for further directions in the matter.

This writ petition is allowed in the above terms.

Dasti to counsel for the parties.

ILR (2013) VI DELHI 4757
W.P. (C)

WING COMMANDER V. GOURIPATHI (RETD.) .....PETITIONER

VERSUS

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

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO.L : 7759/2013 DATE OF DECISION: 10.12.2013
CM NO. 16510/2013

Service Law—Armed Forces—Armed Forces Tribunal (Procedure) Rules, 2008—Rule 6 (1) (ii) and (2)—Original Application of Petitioner challenging amendment to his Pension Payment Orders (PPOs) resulting in reduction of pension rejected by Armed Forces Tribunal (AFT) on ground that Petitioner was not residing within jurisdiction of Principal Bench at New

Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—order challenged before HC–Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held—A bare reading of Rule 6 would show that Sub-Rule 1 (ii) of Rule, in fact, confers discretion upon a retired force person to file petition before a bench within whose jurisdiction he is ordinarily residing at time of filing of application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before Bench within whose jurisdiction cause of action wholly or in part has arisen—In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Important Issue Involved: The Bench of Armed Forces Tribunal within whose jurisdiction the impugned orders are passed and cause of action wholly or in part has arisen will have territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

[Ar Bh]

APPEARANCES.

FOR THE PETITIONER : Mr. Inderjit Singh, Advocate.

FOR THE RESPONDENTS : Mr. Himanshu Bajaj, CGSC for R-1 to 4.

CASE REFERRED TO:

1. *Lt. Col. Alok Kaushik (Retd.)* vs. *Union of India & Ors.* WP (C) No.1096/2013.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

CM No.16510/2013

1. Allowed, subject to just exceptions.

WP (C) No.7759/2013

2. The petitioner in the instant case assails the order dated 20th November, 2013 passed by the Armed Forces Tribunal (AFT), Principal Bench, New Delhi in OA No.445/2013 praying for quashing of the PPO No.08/14/A/Rev./6384/2009 rejecting the representation of the petitioner.

3. The petitioner in the instant case is an officer of the Indian Air Force serving in the Metrological Branch. The petitioners' request for premature retirement was favourably considered by the respondents and he proceeded on such retirement w.e.f 30 th April, 2003.

4. The petitioner has contended that upon such retirement, he was granted pension benefits taking the reckonable qualifying service for its computation as twenty six years three months and twenty one days. It appears that a corrigendum was issued intimating that the Pension Payment Orders (PPOs) have been amended which led to the respondents treating the reckonable service as twenty five years four months and three days resulting in reduction of the pension which was being paid to the petitioner. This order was passed at Delhi by the Deputy Controller of Defence Accounts, Subroto Park, New Delhi, respondent no.4 herein. The petitioner also made a representation against the same to respondent no.3 on 18th June, 2013. However, no reply was received by the petitioner. was rejected by the respondent no.3 also at Delhi.

5. Aggrieved by these orders, the petitioner had filed the afore-noticed original application before the Armed Forces Tribunal, Principal Bench, New Delhi. This petition was taken up for hearing on 20th November, 2013 and was summarily rejected on the ground that the petitioner was not residing within the jurisdiction of the Principal Bench at New Delhi and, therefore, the Bench did not have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

6. Before us, learned counsel for the petitioner has submitted that

even though the permanent address of the petitioner has been reflected as different place beyond the jurisdiction of the court, however, both the impugned orders have been passed at Delhi. Therefore, in terms of Rule 6 (1) (ii) of the Armed Forces Tribunal (Procedure) Rules, 2008, the cause of action for filing the petition had arisen wholly within the jurisdiction of the Principal Bench, New Delhi and by virtue of sub-rule 1(ii) of Rule 6 of the Armed Forces Tribunal (Procedure) Rules, 2008. As such, the Principal Bench at New Delhi had territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

7. We have heard learned counsel for the parties on the matter in issue which is raised in this petition. Our attention has been drawn to a similar issue which was decided by an order dated 21st February, 2013 passed in WP (C) No.1096/2013 **Lt. Col. Alok Kaushik (Retd.) Vs. Union of India & Ors.** before this court in similar circumstances which supports the case of the petitioner.

8. Before considering the factual aspect of the matter, we may firstly advert to the rule position. In this regard, Rule 6 of the Armed Forces Tribunal (Procedure) Rule, 2008 is relevant and reads thus:-

> "6. Place of filing application (1) An application shall ordinarily be filed by the applicant with the Registrar of the Bench within whose jurisdiction-
>
> (i) the applicant is posted for the time being, or was last posted or attached; or (ii) where the cause of action, wholly or in part, has arisen:
>
> Provided that with the leave of the Chairperson the application may be filed with the Registrar of the Principal Bench and subject to the orders under section 14 or section 15 of the Act, such application shall be heard and disposed of by the Bench which has jurisdiction over the matter.
>
> (2) Notwithstanding anything contained in sub-rule (1), a person who has ceased to be in service by reason of his retirement, dismissal, discharge, cashiering, release, removal, resignation or termination of service may, at his option, file an application with the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time of filing of the application."

9. A bare reading of Rule 6 would show that sub-rule 1(ii) of the Rule, in fact, confers discretion upon a retired force person to file the petition before a Bench within whose jurisdiction he is ordinarily residing at the time of filing of the application. Even otherwise, sub-rule 1(ii) of Rule 6 further mandates that an application shall ordinarily be filed before the Bench within whose jurisdiction the cause of action wholly or in part has arisen. In the instant case, both the impugned orders have been passed at Delhi. Therefore, the Principal Bench, New Delhi would have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

10. In this regard, we may also usefully refer to the observations of this court in **Lt. Col. Ashok Kumar (Retd.) Vs. UOI** (supra) wherein the court held thus:-

> "10. It is apparent from the provision itself that the choice of instituting a proceeding or application before the Tribunal is with the petitioner/applicant. He can choose any of the following places:
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> (i) where the applicant is posted (or attached) for the time being.
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> (ii) (where the applicant) was last posted or attached; or
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> (iii) where the cause of action, wholly or in part, has arisen:
>
> Unlike in the case of Section 20 of the CPC, which mandates that the place where the defendant resides or works for gain, or where the cause of action arises, in whole or in part, the choice of selecting the forum in the case of matters covered by the Armed Forces Tribunal is wider; it can be exercised by the applicant. Interestingly, the applicant can even approach the Bench of the Tribunal having jurisdiction over the place where he was last posted or attached.
>
> 11. In the present writ petition, considering the totality of the facts and circumstances and observing that the competent authority which ordered the PMR and later rejected the request of the Petitioner for cancellation of the PMR order is situated in Delhi, it can be said that the Principal Bench of the Armed Forces Tribunal had the jurisdiction to adjudicate the disputes of the petitioner pertaining to his application of cancellation of premature retirement. In the circumstances, the order of the Tribunal directing the application of the petitioner to be sent to the Lucknow Bench of the Armed Forces Tribunal cannot be justified."

11. Learned counsel for the petitioner has also contended that though his permanent residence is in Hyderabad, however, he ordinarily resides at New Delhi with his offspring at the address which was also reflected in the memo of parties placed before the Principal Bench. The Principal Bench, New Delhi would have jurisdiction over the subject matter by application of Rule 6(2) as well. This aspect has been completely overlooked.

12. In view of the above, the order dated 20th November, 2013 is hereby set aside and quashed. The matter shall stand remanded to the Armed Forces Tribunal, Principal Bench, New Delhi for hearing on the merits of the rival contentions.

13. The parties shall appear before the Registrar of the Armed Forces Tribunal on 15th January, 2014 for further directions in the matter.

This writ petition is allowed in the above terms.

Dasti to counsel for the parties.

ILR (2013) VI DELHI 4763
W.P. (C)

WING COMMANDER E.K. VIJAYAN (RETD.) .....PETITIONER

VERSUS

UNION OF INDIA & ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 7760/2013 & 16511/2013 **DATE OF DECISION: 10.12.2013**

Service Law—Armed Forces—Armed Forces Tribunal (Procedure) Rules, 2008—Rule 6 (1) (ii) and (2)—Original Application of Petitioner challenging amendment to his Pension Payment Orders (PPOs) resulting in reduction of pension rejected by Armed Forces Tribunal (AFT) on ground that Petitioner was not residing within jurisdiction of principal Bench at New Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Order challenged before HC—Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held —A bare reading of Rule 6 would show that Sub—Rule 1 (ii) of Rule, in fact confers discretion upon a retired force person to file petition before a bench within whose Jurisdiction he is ordinarily residing at time of filing of application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before bench within whose jurisdiction cause of action wholly or in part has arisen—In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Important Issue Involved: The Bench of Armed Forces Tribunal within whose jurisdiction the impugned orders are passed and cause of action wholly or in part has arisen will have territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Inderjit Singh, Advocate.

FOR THE RESPONDENTS : Mr. Himanshu Bajaj, CGSC for R-1 to 4.

CASE REFERRED TO:

1. *Lt. Col. Alok Kaushik (Retd.)* vs. *Union of India & Ors.* WP (C) No.1096/2013.

RESULT: Writ Petition Allowed.

GITA MITTAL, J. (Oral)

CM No.16511/2013

1. Allowed, subject to just exceptions.

WP (C) No.7760/2013

2. The petitioner in the instant case assails the order dated 21st November, 2013 passed by the Armed Forces Tribunal (AFT), Principal Bench, New Delhi in OA No.458/2013 praying for quashing of the PPO No.08/14/A/Rev.0791/2009 dated 20th April, 2009 and an order passed by the Deputy Controller of Defence Accounts (AF), Subroto Park, New Delhi, respondent no.4 herein, dated 25th February, 2013 rejecting the representation of the petitioner.

3. The petitioner in the instant case is an officer of the Indian Air Force serving in the Metrological Branch. The petitioner's request for premature retirement was favourably considered by the respondents and he proceeded on such retirement w.e.f 31st January, 2003.

4. The petitioner has contended that upon such retirement, he was granted pension benefits taking the reckonable qualifying service for its computation as twenty six years zero month and twenty one days. It appears that a corrigendum was issued on 20th April, 2009 intimating that the Pension Payment Orders (PPOs) have been amended which led to the respondents treating the reckonable service as twenty five years one month and three days resulting in reduction of the pension which was being paid to the petitioner. This order was passed at Delhi by the Deputy Controller of Defence Accounts, Subroto Park, New Delhi, respondent no.4 herein.

5. Aggrieved by these orders, the petitioner had filed the afore-noticed original application before the Armed Forces Tribunal, Principal Bench, New Delhi. This petition was taken up for hearing on 20th November, 2013 and was summarily rejected on the ground that the petitioner was not residing within the jurisdiction of the Principal Bench at New Delhi and, therefore, the Bench did not have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

6. Before us, learned counsel for the petitioner has submitted that even though the permanent address of the petitioner has been reflected as different place beyond the jurisdiction of the court, however, both the impugned orders have been passed at Delhi. Therefore, in terms of Rule 6 (1)(ii) of the Armed Forces Tribunal (Procedure) Rules, 2008, the cause of action for filing the petition had arisen wholly within the jurisdiction of the Principal Bench, New Delhi and by virtue of sub-rule 1(ii) of Rule 6 of the Armed Forces Tribunal (Procedure) Rules, 2008. As such, the Principal Bench at New Delhi had territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

7. We have heard learned counsel for the parties on the matter in issue which is raised in this petition. Our attention has been drawn to a similar issue which was decided by an order dated 21st February, 2013 passed in WP (C) No.1096/2013 **Lt. Col. Alok Kaushik (Retd.) Vs. Union of India & Ors.** before this court in similar circumstances which supports the case of the petitioner.

8. Before considering the factual aspect of the matter, we may firstly advert to the rule position. In this regard, Rule 6 of the Armed Forces Tribunal (Procedure) Rule, 2008 is relevant and reads thus:-

"6. Place of filing application (1) An application shall ordinarily be filed by the applicant with the Registrar of the Bench within whose jurisdiction-

(i) the applicant is posted for the time being, or was last posted or attached; or

(ii) where the cause of action, wholly or in part, has arisen:

Provided that with the leave of the Chairperson the application may be filed with the Registrar of the Principal Bench and subject to the orders under section 14 or section 15 of the Act, such application shall be heard and disposed of by the Bench which has jurisdiction over the matter. (2) Notwithstanding anything contained in sub-rule (1), a person who has ceased to be in service by reason of his retirement, dismissal, discharge, cashiering, release, removal, resignation or termination of service may, at his option, file an application with the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time of filing of the application."

9. A bare reading of Rule 6 would show that sub-rule 1(ii) of the Rule, in fact, confers discretion upon a retired force person to file the petition before a Bench within whose jurisdiction he is ordinarily residing at the time of filing of the application. Even otherwise, sub-rule 1(ii) of Rule 6 further mandates that an application shall ordinarily be filed before the Bench within whose jurisdiction the cause of action wholly or in part has arisen. In the instant case, both the impugned orders have been passed at Delhi. Therefore, the Principal Bench, New Delhi would have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

10. In this regard, we may also usefully refer to the observations of this court in **Lt. Col. Ashok Kumar (Retd.) Vs. UOI** (supra) wherein the court held thus:-

"10. It is apparent from the provision itself that the choice of instituting a proceeding or application before the Tribunal is with the petitioner/applicant. He can choose any of the following places:

(i) where the applicant is posted (or attached) for the time being.

(ii) (where the applicant) was last posted or attached; or

(iii) where the cause of action, wholly or in part, has arisen:

Unlike in the case of Section 20 of the CPC, which mandates that the place where the defendant resides or works for gain, or where the cause of action arises, in whole or in part, the choice of selecting the forum in the case of matters covered by the Armed Forces Tribunal is wider; it can be exercised by the applicant. Interestingly, the applicant can even approach the Bench of the Tribunal having jurisdiction over the place where he was last posted or attached.

11. In the present writ petition, considering the totality of the facts and circumstances and observing that the competent authority which ordered the PMR and later rejected the request of the Petitioner for cancellation of the PMR order is situated in Delhi, it can be said that the Principal Bench of the Armed Forces Tribunal had the jurisdiction to adjudicate the disputes of the petitioner pertaining to his application of cancellation of premature retirement. In the circumstances, the order of the Tribunal directing the application of the petitioner to be sent to the Lucknow Bench of the Armed Forces Tribunal cannot be justified."

11. Learned counsel for the petitioner has also contended that though his permanent residence is in Bangalore, however, he ordinarily resides at New Delhi with his offspring at the address which was also reflected in the memo of parties placed before the Principal Bench. The Principal Bench, New Delhi would have jurisdiction over the subject matter by application of Rule 6(2) as well. This aspect has been completely overlooked.

12. In view of the above, the order dated 21st November, 2013 is hereby set aside and quashed. The matter shall stand remanded to the Armed Forces Tribunal, Principal Bench, New Delhi for hearing on the merits of the rival contentions.

13. The parties shall appear before the Registrar of the Armed Forces Tribunal on 15th January, 2014 for further directions in the matter.

This writ petition is allowed in the above terms.

Dasti to counsel for the parties.

ILR (2013) DELHI 4768
W.P.

WING COMMANDER J. RAMANI (RETD.) .....PETITIONER

VERSUS

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

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 7761/2013 & CM NO. : 16512/2013 **DATE OF DECISION: 10.12.2013**

Service Law—Armed Forces—Armed Forces Tribunal (Procedure) Rules, 2008—Rule 6 (1) (ii) and (2)—Original Application of Petitioner challenging amendment to his Pension Payment Orders (PPOs) rejected by Armed Forces Tribunal (AFT) on ground that Petitioner was not residing within jurisdiction of Principal Bench at New Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Order challenged before HC—Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held—A bare reading of Rule 6 would show that Sub-Rule 1 (ii) of Rule, in fact, confers discretion upon a retired force person to file petition before a bench within whose jurisdiction he is ordinarily residing at time of filing a application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before Bench within whose

jurisdiction cause of action wholly or in part has arisen—In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Important Issue Involved: The Bench of Armed forces Tribunal within whose jurisdiction the impugned orders are passed and cause of action wholly or in part has arisen will have territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Inderjit Singh, Advocate.

FOR THE RESPONDENTS : Mr. Himanshu Bajaj, CGSC for R-1 to 4.

CASE REFERRED TO:

1. *Lt. Col. Alok Kaushik (Retd.)* vs. *Union of India & Ors.* WP (C) No.1096/2013.

RESULT: Writ petition allowed.

GITA MITTAL, J. (Oral)

CM No.16512/2013

1. Allowed, subject to just exceptions.

WP (C) No.7761/2013

2. The petitioner in the instant case assails the order dated 20th November, 2013 passed by the Armed Forces Tribunal (AFT), Principal Bench, New Delhi IN OA No.446/2013 praying for quashing of the PPO No.08/14/A/Rev./1304/2013 dated 16th May, 2013 and an order passed by the Principal Director, Directorate of Air Veterans, New Delhi, respondent no.3 herein, dated 4th October, 2013 rejecting the

representation of the petitioner.

3. The petitioner in the instant case, an officer of the Indian Air Force, joined the Air Force on 15th January, 1971 in the Metrological Branch. The petitioner proceeded on pre-mature retirement on 31st October, 2001.

4. The petitioner has contended that upon such retirement, he was granted pension benefits taking the reckonable qualifying service for its computation as thirty years nine months and sixteen days. It appears that a corrigendum was issued on 16th May, 2013 intimating that the Pension Payment Orders (PPOs) have been amended which led to the respondents treating the reckonable service as twenty nine years ten months and thirteen days. This order was passed at Delhi by the Deputy Controller of Defence Accounts, Subroto Park, New Delhi, respondent no.4 herein. The petitioner's representation against the same was rejected by the respondent no.3 also at Delhi.

5. Aggrieved by these orders, the petitioner had filed the afore-noticed original application before the Armed Forces Tribunal, Principal Bench, New Delhi. This petition was taken up for hearing on 20th November, 2013 and was summarily rejected on the ground that the petitioner was not residing within the jurisdiction of the Principal Bench at New Delhi and, therefore, the Bench did not have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

6. Before us, learned counsel for the petitioner has submitted that even though the permanent address of the petitioner has been reflected as different place beyond the jurisdiction of the court, however, both the impugned orders have been passed at Delhi. Therefore, in terms of Rule 6 (1)(ii) of the Armed Forces Tribunal (Procedure) Rules, 2008, the cause of action for filing the petition had arisen wholly within the jurisdiction of the Principal Bench, New Delhi and by virtue of sub-rule 1(ii) of Rule 6 of the Armed Forces Tribunal (Procedure) Rules, 2008. As such, the Principal Bench at New Delhi had territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

7. We have heard learned counsel for the parties on the matter in issue which is raised in this petition. Our attention has been drawn to a similar issue which was decided by an order dated 21st February, 2013

passed in WP (C) No.1096/2013 **Lt. Col. Alok Kaushik (Retd.) Vs. Union of India & Ors.** before this court in similar circumstances which supports the case of the petitioner.

8. Before considering the factual aspect of the matter, we may firstly advert to the rule position. In this regard, Rule 6 of the Armed Forces Tribunal (Procedure) Rule, 2008 is relevant and reads thus:-

> "6. Place of filing application (1) An application shall ordinarily be filed by the applicant with the Registrar of the Bench within whose jurisdiction-
>
> (i) the applicant is posted for the time being, or was last posted or attached; or
>
> (ii) where the cause of action, wholly or in part, has arisen:
>
> Provided that with the leave of the Chairperson the application may be filed with the Registrar of the Principal Bench and subject to the orders under section 14 or section 15 of the Act, such application shall be heard and disposed of by the Bench which has jurisdiction over the matter.
>
> (2) Notwithstanding anything contained in sub-rule (1), a person who has ceased to be in service by reason of his retirement, dismissal, discharge, cashiering, release, removal, resignation or termination of service may, at his option, file an application with the Registrar of the Bench within whose jurisdiction such person is ordinarily residing at the time of filing of the application."

9. A bare reading of Rule 6 would show that sub-rule 1(ii) of the Rule, in fact, confers discretion upon a retired force person to file the petition before a Bench within whose jurisdiction he is ordinarily residing at the time of filing of the application. Even otherwise, sub-rule 1(ii) of Rule 6 further mandates that an application shall ordinarily be filed before the Bench within whose jurisdiction the cause of action wholly or in part has arisen. In the instant case, both the impugned orders have been passed at Delhi. Therefore, the Principal Bench, New Delhi would have the territorial jurisdiction to entertain and adjudicate upon the subject matter of the case.

10. In this regard, we may also usefully refer to the observations

of this court in **Lt. Col. Ashok Kumar (Retd.) Vs. UOI** (supra) wherein the court held thus:-

> "10. It is apparent from the provision itself that the choice of instituting a proceeding or application before the Tribunal is with the petitioner/applicant. He can choose any of the following places:
>
> (i) where the applicant is posted (or attached) for the time being.
>
> (ii) (where the applicant) was last posted or attached; or
>
> (iii) where the cause of action, wholly or in part, has arisen:
>
> Unlike in the case of Section 20 of the CPC, which mandates that the place where the defendant resides or works for gain, or where the cause of action arises, in whole or in part, the choice of selecting the forum in the case of matters covered by the Armed Forces Tribunal is wider; it can be exercised by the applicant. Interestingly, the applicant can even approach the Bench of the Tribunal having jurisdiction over the place where he was last posted or attached.
>
> 11. In the present writ petition, considering the totality of the facts and circumstances and observing that the competent authority which ordered the PMR and later rejected the request of the Petitioner for cancellation of the PMR order is situated in Delhi, it can be said that the Principal Bench of the Armed Forces Tribunal had the jurisdiction to adjudicate the disputes of the petitioner pertaining to his application of cancellation of premature retirement. In the circumstances, the order of the Tribunal directing the application of the petitioner to be sent to the Lucknow Bench of the Armed Forces Tribunal cannot be justified."

11. Learned counsel for the petitioner has also contended that though his permanent residence is in Chennai, however, he ordinarily resides at New Delhi with his offspring at the address which was also reflected in the memo of parties placed before the Principal Bench. The Principal Bench, New Delhi would have jurisdiction over the subject matter by application of Rule 6(2) as well. This aspect has been completely overlooked.

12. In view of the above, the order dated 20th November, 2013 is hereby set aside and quashed. The matter shall stand remanded to the

Armed Forces Tribunal, Principal Bench, New Delhi for hearing on the merits of the rival contentions.

13. The parties shall appear before the Registrar of the Armed Forces Tribunal on 15th January, 2014 for further directions in the matter. This writ petition is allowed in the above terms. Dasti to counsel for the parties.

ILR (2013) VI DELHI 4773
W.P. (C)

ANIL KUMAR **....PETITIONER**

VERSUS

STATE SELECTION COMMISSION (NORTH REGION) AND ANR. **....RESPONDENTS**

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 1571/2013 & CM. NOS. : 2950-51/2013 **DATE OF DECISION:11.12.2013**

Service Law—Armed Forces—Constitution of India, 1950—Aggrieved petitioner for rejection of his candidature in selection process undertaken by respondent no. 1 preferred writ petition—It was urged that petitioner qualified physical endurance test, written examination as well as medical examination tests—At time of interview, petitioner relied upon OBC certificate which was rejected by respondent No.1 as not being in requisite format—According to respondent, certificate produced was beyond cut off date prescribed Held:— An OBC certificate beyond cut off date did not meet with requisite stipulations. Creamy layers have to be excluded, thus, there being a requirement of OBC certificates to be issued within 3 years prior on date of receipt of applications.

It has been contended by the respondents that stipulation with regard to certification of the persons being in the non creamy layer in the prescribed format had to be strictly complied with. In this regard learned counsel for the respondents places reliance on the pronouncement of this court dated 14th September, 2012 in WP(C)No.5580/2012 **Vishesh Kumar v. Staff Selection Commission** wherein in para 5, the court had observed as follow:-

> "5. Suffice would it be to state that as against members belonging to Scheduled Castes or Scheduled Tribes, where even a billionaire would be entitled to reservation, the legal position with respect to Backward Classes is different. Creamy layers have to be excluded and thus there being a requirement of OBC certificates being issued within three years prior to the date of receipt of applications. A person may have less wealth on a particular date and may become wealthy a few years later and thereby coming within the Creamy Layer." **(Para 9)**

In the pronouncement of this court dated 17th April, 2012, in WP(C)No.2211/2013 **Parminder Bhadana v. Staff Selection Commission**, the court had occasion to consider an issue identical as one raised before us so far as the date of the certificate is concerned. The petitioner had produced a certificate similar to that produced by the petitioner before us which was beyond the cut off date prescribed. In para 16, the court had held thus:-

> "16. The learned counsel for the petitioner has not been able to dispute that the OBC certificate, a copy of which is also annexed with the writ petition as Annexure P-2 was issued on the basis of the application number 6866 on 9. 7. 2007. The said certificate, in the facts and circumstances, is not according to stipulation 4C as detailed hereinabove and such an

OBC certificate which is more than three years old from 4. 3. 2011 could not be accepted as a valid certificate about the creamy layer status of the petitioner. The learned counsel for the petitioner, in the facts and circumstances, is unable to explain as to how the petitioner can be treated as an OBC candidate by the respondents." **(Para 10)**

Important Issue Involved: An OBC certificate beyond cut off date did not meet with requisite stipulations. Creamy layers have to be excluded, thus, there being a requirement of OBC certificates to be issued within 3 years prior on date of receipt of applications.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Jasbir Singh Malik and Mr. Siddharth Mittal, Advocates.

FOR THE RESPONDENTS : Mr. Ravinder Aggarwal, CGSC.

CASE REFERRED TO:

1. *Vishesh Kumar* vs. *Staff Selection Commission* WP(C)No.5580/2012.

RESULT: Petition dismissed.

GITA MITTAL, J. (Oral)

1. In the instant writ petition, the petitioner is aggrieved for rejection of his candidature in the selection process undertaken by the Staff Selection Commission – respondent no.1 herein pursuant to the advertisement dated 29th May, 2010 published in the employment newspaper/Rojgar Samachar whereby the respondents advertised 1000 vacancies for the post of Assistant Sub-Inspector (Exe) in the CISF.

2. The petitioner had applied in the reserved category as an OBC from the State of Rajasthan and claims to possess the relevant certification in this regard. It is undisputed before us that the petitioner was successful in the written examination and also qualified the physical endurance test

as well as the medical examination test. As per the scheme of the selection process, verification of the documents submitted by the petitioner was undertaken by the respondents before the interview which was conducted on 12th February, 2011.

3. The respondents have submitted that the petitioner had relied before them on a certificate dated 23rd April, 2008 issued to him by the office of the Tehsildar, Behror, Alwar, Rajasthan certifying that the petitioner was covered under the Other Backward Class ('OBC') category. However, this certification was not in the requisite format and also did not contain any reference to the relevant notification.

4. The petitioner was therefore, informed that the certification was not in terms of the notified procedure and he would be considered as an unreserved category candidate. In support of his willingness to be so considered, the petitioner gave an undertaking to the Staff Selection Commission on 8th February, 2011 which deserves to be considered in extenso and reads as follows:-

"STAFF SELECTION COMMISSION
(NORTHERN REGION)

UNDERTAKING

Subject : Asstt. Sub-Inspector (Exe) in CISF Examination 2010 – Undertaking regarding category status

With reference to my candidature for the above mentioned examination, I Anil Kumar Roll No.2402500362 undertake that although I applied and qualified written part of Examination in OBC category. But I could not furnish the OBC certificate in the prescribed Proforma for Central Govt. Officers issued by the Competent Authority between 28th June, 2007 to 28th June, 2010 as per annexure VII of the Notice of the said Examination.

It is therefore, requested that my category may be treated as UR i.e, (General).

I will not claim for OBC status in future. Decision taken by the Commission regarding my candidature will be acceptable to me." (underlining by us)

5. A reading of the above would show that the petitioner was fully

aware of the fact that the OBC certification had not only to be in the prescribed procedure issued by the competent authority but also of the fact that the same had to be issued between the period from 28th June, 2007 to 28th June, 2010.

6. Mr. Ravinder Aggarwal, learned Standing Counsel for the respondents has drawn our attention also to the clear information given in the advertisement inviting the application in this regard.

7. The respondents had also fairly given an additional opportunity before closure of the selection process to the candidates who had overlooked submission of the requisite certification. It appears that in view of the certain deficiencies which included non provision of the requisite certification by reserved category candidates, result of 136 candidates including the petitioner, had been withheld. The respondents had issued notice in this regard dated 11th May, 2011. It is noteworthy that by this notice dated the respondents gave yet another opportunity to candidates to remove the deficiency. Para 8 of the notice dated 11th may, 2011 may be usefully extracted in this regard and reads as follows:-

> "8. For candidates belonging to reserved categories for whom certain percentage of vacancies are reserved as per Government Policy, the category status is indicated against their Roll Numbers. It is important to note that some of these candidates have been declared qualified only for the category mentioned against their Roll Numbers. If any candidate does not actually belong to the category mentioned against his/her name, he/she may not be eligible to be included in the list. It is, therefore, in the interest of the candidates concerned to immediately contact the respective Regional Office of the Commission in all such cases where they do not belong to the category shown against their Roll Numbers. Similarly, candidates whose result has been withheld are also advised to contact the concerned regional office of the Commission to prove their category status/remedy document deficiencies."

8. The petitioner took advantage of this opportunity thereafter and admittedly produced the certificate dated 2nd November, 2010. The respondents have urged that though this certificate was in the prescribed format but the same was beyond the period stipulation by the respondents for which the certification had to be given. In this background, this

certification which was beyond the cut off date of 28th June, 2010 and as such also did not meet the requisite stipulations. Given the undertaking by the petitioner and this deficiency in the certificate produced by him, the petitioner could only be considered as an unreserved category candidate. It is undisputed that he has been accorded such consideration and he failed to meet the merit position.

9. It has been contended by the respondents that stipulation with regard to certification of the persons being in the non creamy layer in the prescribed format had to be strictly complied with. In this regard learned counsel for the respondents places reliance on the pronouncement of this court dated 14th September, 2012 in WP(C)No.5580/2012 **Vishesh Kumar v. Staff Selection Commission** wherein in para 5, the court had observed as follow:-

> "5. Suffice would it be to state that as against members belonging to Scheduled Castes or Scheduled Tribes, where even a billionaire would be entitled to reservation, the legal position with respect to Backward Classes is different. Creamy layers have to be excluded and thus there being a requirement of OBC certificates being issued within three years prior to the date of receipt of applications. A person may have less wealth on a particular date and may become wealthy a few years later and thereby coming within the Creamy Layer."

10. In the pronouncement of this court dated 17th April, 2012, in WP(C)No.2211/2013 **Parminder Bhadana v. Staff Selection Commission,** the court had occasion to consider an issue identical as one raised before us so far as the date of the certificate is concerned. The petitioner had produced a certificate similar to that produced by the petitioner before us which was beyond the cut off date prescribed. In para 16, the court had held thus:-

> "16. The learned counsel for the petitioner has not been able to dispute that the OBC certificate, a copy of which is also annexed with the writ petition as Annexure P-2 was issued on the basis of the application number 6866 on 9. 7. 2007. The said certificate, in the facts and circumstances, is not according to stipulation 4C as detailed hereinabove and such an OBC certificate which is more than three years old from 4. 3. 2011 could not be accepted as a valid certificate about the creamy layer status of the petitioner.

The learned counsel for the petitioner, in the facts and circumstances, is unable to explain as to how the petitioner can be treated as an OBC candidate by the respondents."

11. The petitioner has also placed on record a caste certificate dated 21st October, 2009 and claimed reliance thereon in support of his eligibility for selection as an OBC candidate. The respondents have completely denied receipt of this certificate from the petitioner. In case this certificate was actually available with the petitioner and its copy had been filed by him with the respondents, there was never any occasion for him to tender the undertaking to the respondents to the effect that he may be treated as unreserved category at the stage of the interview. In such eventuality, there was also no occasion to the petitioner to obtain a fresh certificate and submit the same after the respondents given opportunity pursuant to the notice dated 11th May, 2011. Learned Standing Counsel for the respondents urges that in any case that this certificate is not in the prescribed format.

12. In view of the above discussion, the challenge by the petitioner is misconceived. We find no merit in this petition which is hereby dismissed.

CM Nos.2950-51/2013

In view of the order passed in the writ petition, these applications do not survive for adjudication and are hereby dismissed.

ILR (2013) VI DELHI 4780
W.P. (C)

J.S. PUNIA ....PETITIONER

VERSUS

UNION OF INDIA .....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C) NO. : 5749/2011 DATE OF DECISION: 12.12.2013
CM NO. :12141/2013

Service Law—Armed Forces—Constitution of India, 1950—Petition Regulation for Army Act—1961—Regulations 72 & 197—Petitioner filed petition challenging order passed by Armed Forces Tribunal rejecting his prayer for direction to respondent to pay invalid pension to him from date of his release from service along with arrears and interest thereon—Also, respondent to add period of leave pending retirement for 108 days with 12% interest thereon—According to petitioner, he had served for more than 15 ½ years, therefore, was entitled to invalid pension which was applicable to all ranks on completion of 10 years of service under Regulation 12 and other circulars issued by Ministry of Defence—As per respondent, petitioner was not invalidated out of service because of exigency of service or low medical category—On the contrary, he had sought voluntary retirement from service.

Held:—The concept of invalidment applies to cases in which the tenure of service is cut short due to invalidment on account of war injury or disability. The concept of invalidment does not apply to cases where an officer completes his tenure of service and retires on attaining the age of superannuation.

Mr. Ankur Chhibber, learned counsel for the respondents has submitted that the petitioner's claim is liable to be rejected in view of the pronouncement of the Supreme Court reported at **P.K. Kapur v. Union of India & Ors.** JT 2007 (3) SC 98. In this case, the court has rejected the claim for invalid pension on similar grounds. The contention of the appellant as well as finding of the court reads as follows:-

> "8. It is lastly urged by the appellant that he has not been paid war injury pension at the current rate. In this connection, he submitted that under the rules for casualty pensioners invalidation from service is a necessary condition for the grant of disability pension. If a person is released from service in a lower medical category then what he was at the time of recruitment, he would be treated as invalided from service. Appellant contended that he was released in a lower medical category from service on 30.11.89 then what he was at the time of recruitment and, therefore, he should be treated as invalided from service with effect from the date of release for the purpose of grant of disability pension.
>
> 9. We do not find any merit in the third submission. Appellant retired on 30.11.89 on superannuation. He was never invalided. He now claims to be invalided out of service. Having stood retired from service after completing full tenure of service, appellant cannot now claim that he was invalided out of service. The concept of invalidment applies to cases in which the tenure of service is cut short due to invalidment on account of war injury or disability. The concept of invalidment does not apply to cases where an officer completes his tenure of service and retires on attaining the age of superannuation. Therefore, there is no merit in the third contention raised by the appellant."
>
> **(Para 31)**

Placing reliance on the pronouncement in **P.K. Kapur** (Supra), the Supreme Court also rejected a similar claim by accepting a challenge made by the official respondents to grant of relief of invalid pension to **Naik Narikar** by the order **dated 24th May, 2012** passed in **Civil Appeal No(s).8433-8434/2009**. In the present case, the petitioner's tenure has not been cut short due to invalidment on account of injury or disability. Though placed in a low medical category, he was gainfully retained in service. He opted to leave the force on voluntary retirement, which request stood accepted. The principles laid down in **P.K. Kapur** (Supra) squarely apply to the present case. **(Para 31)**

Important Issue Involved: The concept of invalidment applies to cases in which the tenure of service is cut short due to invalidment on account of war injury or disability. The concept of invalidment does not apply to cases where an officer completes his tenure of service and retires on attaining the age of superannuation.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Col (Retd.) S.R. Kalkal, Advocate.

FOR THE RESPONDENT : Mr. Ankur Chhibber, Advocate.

CASES REFERRED TO:

1. *P.K. Kapur* vs. *Union of India & Ors.* JT 2007 (3) SC 98.
2. *Alka Dabas & Ors* vs. *Union of India & Ors.* (writ petition no.19-21/94) on 5.1.1995.

RESULT: Petition dismissed.

GITA MITTAL, J.

1. The instant writ petition has been filed by the petitioner impugning the order dated 7th July, 2011 passed by the Armed Forces Tribunal in OA No.737/2010 rejecting the petitioner's prayer for direction to the

respondents to pay invalid pension to him with effect from the date of his release from service along with arrears and 12% interest thereon. The petitioner had also prayed that the respondents be directed to add the period of leave pending retirement ('LPR') for 108 days with 12% interest thereon.

2. The present case has a chequered history and is preceded by several litigations which would not only guide the present adjudication but bind the same.

3. The facts of the case as well as judicial history are briefly noted hereafter to the extent that the same is relevant for the purpose of the present case.

4. The petitioner was granted permanent commission in the Indian Air Force on the 15th of June, 1980 after having been found physically and medically fit. The petitioner has placed several grievances against his commanding officer and claims that he had made a written complaint in this regard on the 29th of October, 1990 to the Company Commander. It was claimed by the petitioner that his Commanding Officer initiated AFMSF – 10, that is referring the petitioner as a psychiatric case and flew him with armed guards to Military Hospital, Ahmedabad on the 5th of November, 1990. He was subsequently transferred to the psychiatric ward of the Command Hospital, Pune. The petitioner submits that he was unnecessarily heavily drugged. His condition was diagnosed as a case of "Maniac Depressives Psychosis" and he was placed in the low medical category A-4, G-5(T). As a result, on the 2nd of March, 1991, the petitioner was declared unfit for flying.

Thereafter on 22nd April, 1991, the petitioner was posted to the Air Force Station Rajokri as an Operations Officer and was assigned several important duties.

5. In the Review Medical Board held at Command Hospital (AF) Bangalore on the 27th of November, 1991, the petitioner.s temporary medical category was extended by 24 weeks. On 12th October, 1994, the respondents held the last Review Medical Board of the petitioner in which he was placed in permanent low medical category in A-4(P), G-2(P) and declared permanently unfit for flying. The percentage of disability was assessed at 20%.

6. On the 12th of March, 1992, the petitioner was relieved from all appointments by his Commanding Officer and on the 14th of March, 1992, he was again sent with armed escorts to Army Hospital, Delhi Cantt where, again without informed consent, the petitioner was forcibly put on a very strong drug along with electroconvulsive therapy (ECT). The petitioner apprehended irreversible damage and even fatal consequences of the treatment. The wife protested about the same and finally approached this court by way of CWP No.2718/1992. This court restrained the respondents from administering any medication against the wishes of the petitioner and his wife and also directed the respondent to get the petitioner examined at AIIMS. The doctors of AIIMS found that there is lack of evidence of any definite psychiatric abnormality in the petitioner.

7. At this stage, the petitioner was served with a charge-sheet informing him that he was charged with the offence of having been absent without leave and also the direction to try him for the same by General Court Martial. The petitioner was asked to get admitted in the psychiatric ward for certification of his fitness to stand trial in the General Court Martial. The petitioner was in low medical category and by procedure had to be admitted in the psychiatric ward every six months for review. There was no chance to get back to flying or to ever be fit to stand for trial in General Court Martial.

8. Under great mental pressure, the petitioner submitted an application on the 24th of November, 1992 for release from service on medical grounds. This application was recommended by the Commanding Officer but turned down by the Air Headquarters.

9. The petitioner assailed the initiation of the General Court Martial by way of WP(Crl)No.209/1993 before this court. Though the trial was initially stayed by an order passed on the 2nd of April, 1993 but the writ petition was finally dismissed by an order passed on the 15th of February, 1995. Aggrieved thereby, the petitioner filed a Special Leave Petition (Criminal) No.881/1995 before the Supreme Court of India.

10. The petitioner has also placed before us a copy of the Medical Board Proceedings – Categorisation/Sick Leave-All Ranks held on the 12th of October, 1994. The relevant portion thereof deserves to be extracted and reads as follows:-

"13.(a) Principal disabilities Affective Disorder (MDP Cyclic)

14. xxx xxx xxx

15. Give concisely the essential facts of the history of the disability Note : - Boards subsequent to the first should record here the progress of the case since last appearance.

This 36+ yrs old F(P) officer is an old case of Affective disorder (MDP Cyclic), onset in Nov 90 at Jamnagar. He was admitted and treated with antipsychotic drugs at CH(SC) Pune. Ever since he is under periodic review in low medical category. In Nov 91 he had the depressive episode and was treated with anti-depressant therapy as an OPD case at CH AF Bangalore. In Mar 92 he had a relapse of the hypomanic episode and was admitted to AHDC on 14 Mar 92. He refused treatment and became AWOL from AHDC wef 17 Mar 92. During this period he represented in Delhi High Court against the treatment or hospitalisation against his wishes and the court upheld his appeal and was referred to AIIMS New Delhi for psychiatric evaluation where he was reported to have suffered from MDP (Bipolar) but was in remission at the time of examination. However he was not evaluated in service till 14 July 94 when his medical board was held at this centre and was placed in med category A4, G4 (T-12). He has now reported here for review and recategorisation

OPINION OF THE BOARD

9. Any specific restriction regarding employment Perm unfit A1; A2; A3 duties. Fit for full ground duties but slightly below the GI standard in all parts of the world.

10 & 11.xxx xxx xxx

12. Next Board due on Annually at AFCME/IAM with fresh executive report and AFMSF – 10.

13. Instructions given to the indidual by the President of Board.

a) To report to unfit MO/SMO.

b) Review by psychiatrist locally after 6 months.

Last date of Appeal to reach Air HQ (RKP) through President. AF CME by 27 Oct 94."

11. The respondents placed the details of the petitioner's illness as well as its impact on him before the Supreme Court. On a consideration of the same, by an order dated 29th September, 1995, the Supreme Court made observations and passed the following directions:-

"In view of the stand of the respondents themselves in respect of the mental condition of the Appellant, we fail to appreciate as to what useful purpose will be served in pursuing the court martial which is pending against the appellant.

The appellant seeks premature retirement because of the aforesaid ailment. We are satisfied that this is a fit case where premature retirement should be granted to the appellant and all proceedings including court martial should be dropped.

This court in case of **Alka Dabas & Ors Vs Union of India & Ors.** (writ petition no.19-21/94) on 5.1.1995 passed an order directing premature retirement to the petitioner of the writ petition and court martial which was pending against him was directed to be dropped.

Accordingly, we direct that the appellant be prematurely retired and all proceedings including court martial pending against him be dropped. The appellant shall be entitled to all other benefits in accordance with law.

The appeal is allowed. No costs."

12. It is noteworthy that the maniac depressive psychosis from which the petitioner suffered had rendered the petitioner unfit only for flying. It is an admitted position that the petitioner was posted as an Operations Officer at the Air Force Station Rajokri with effect from the 22nd of April, 1991; he was assigned many duties which included the duties of Counter Intelligence Officer (CIO), Station Adjutant as full time; sent for umpiring duties for EX. Trishul from 16th to 23rd October, 1991 to Suratgarh during a joint Army Air Force Exercise.

13. In view of the above, the respondents have issued a order dated 27th November, 1995 for premature retirement of the petitioner. The petitioner unconditionally accepted the same. Eight years thereafter, the petitioner filed WP(C)No.3490/2003 complaining that he was not released retiral benefits including the gratuity, encashment of leave, service pension

and disability pension etc. It is noteworthy that the writ petition was filed after serving a legal notice.

14. Before the court hearing arguments on the 8th of January, 2008, only a claim for disability pension was strongly pressed on the ground that though the petitioner was discharged from service on his instance, but the same was on account of disability and therefore, he was entitled to disability pension. It was urged on behalf of the petitioner that he was medically fit at the time of his commission and that the disease was attributable and aggravated during service. On the 8th of January, 2008, the court noted that no such case was set up either in the writ petition or in the legal notice served by the petitioner. The petitioner was therefore, permitted by this court to withdraw the writ petition with liberty to file a substantive petition raising the aforesaid issues.

15. Pursuant to the aforesaid liberty, the petitioner filed second writ petition being WP(C)No.604/2008. This writ petition was dismissed by an order dated 23rd September, 2008. The claim of the petitioner; the observations as well as the findings of the court have material bearing on the present petition. It is noteworthy that the petitioner had pressed a claim only for award of disability pension in this writ petition. The relevant extract of the order reads as follows:-

> "3. The petitioner was still aggrieved as he wanted the pension/ retiral benefits. This resulted in certain proceedings but it is not in dispute that all retiral/pensionary benefits have been paid to the petitioner except the disability pension. It is this claim for disability pension which forms the subject matter of the present petition.
>
> 4. The disability pension would be admissible to the petitioner if he was invalidated out of the service on account of medical reasons attributable to or aggravated by military service. The Medical Board, in the case of the petitioner, has opined against the petitioner in respect of attributability/aggravation aspect. The remedy for the same would thus had been an Appeal Medical Board as this Court cannot sit in appeal and re-examine the proceedings of the Medical Board. It is for the medical experts to determine the attributability/aggravation of the disease on account of military service.
>
> 5. The aforesaid course of action is, however, not available in the present case as considerable time has lapsed since the earlier Medical Bard was held and it is not possible after 13 years to now direct an Appeal Medical Board to determine the validity of the findings of the Medical Board held earlier in the year 1995. The petitioner himself is to blame for this position as from 1995 till 2002/2003 the petitioner was silent for a period of more than seven years. The petitioner thereafter filed a writ petition No.3490/ 2003 which was also withdrawn after five years to file a fresh petition which has now been filed. The grant of pension is undoubtedly a continuing cause of action but that can be granted in case the entitlement is not in dispute. In the present case the entitlement itself is in dispute.
>
> 6. xxx xxx xxx
>
> 7. The Medical Board, in the present case, has opined against the petitioner specifically in this behalf and holding an Appeal Medical Board after so many years would serve no purpose to ascertain the cause of the disease 13 years ago. The petitioner cannot thus be granted any relief in exercise of jurisdiction under Article 226 of the Constitution of India."
>
> (Underlining by us)

16. This order was assailed by the petitioner by way of SLP (Civil)No.30154/2008 which came to be dismissed by the Supreme Court granting him liberty to file a review petition before this court. The petitioner thereafter filed Review Petition No.56/2009 in WP(C)No.604/2008 which was dismissed by this court on the 6th of February, 2009. The petitioner challenged this order as well by way of SLP(Civil)No.10099-10100/2009 which was dismissed by the Supreme Court.

17. The matter deserved a closure after the above litigation. It had been categorically held that the petitioner had received all his reitral benefits and was disentitled to any disability pension. The order dated 23rd September, 2008 had categorically observed that it was not possible thirteen years after the petitioner's voluntary retirement to direct an appeal medical board to determine the validity of the findings of the Board of 1994 and holding an appeal medical board after so many years would serve no purpose to ascertain the cause of the disease 13 years ago.

18. Despite the above position, the petitioner was advised and has laid a completely new claim, this time for invalid pension by way of O.A.No.737/2010, fifteen years after he had been retired from service. The same was considered in the light of the applicable rules and rejected by an order dated 7th July, 2011 passed by the Armed Forces Tribunal.

19. Appearing for the petitioner, Colonel (Retd.) S.R. Kalkal has pressed that the petitioner had served for more than 15½ years and therefore was entitled to invalid pension which was applicable to all ranks on completion of 10 years of service under Regulation 72 of the Pension Regulations for the Army, 1961 and Part – I of the Government of India, Ministry of Defence letter dated 30th October, 1987; 3rd February, 1998 and 5th May, 2008 and Circular dated 29th September, 2009.

20. Before the Armed Forces Tribunal, the petitioner had placed reliance on Rule 4 of the Entitlement Rules for Casualty Pensionary Awards 1982 which reads thus:-

> "Rule 4.
>
> 4. Invaliding from serving is a necessary condition for grant of disability pension. An individual who, at the time of his release under the Release Regulations, is in a lower medical category than that in which he was recruited will be treated as invalidated from service. JCO/OR and equivalents in other services who are placed permanently in a medical category other than 'A' and are discharged because no Alternative or Shelter Appointment can be provided, as well as those who having been retained in alternative employment but are discharged before the completion of their engagement will be deemed to have been invalidated out of service."

21. It is argued that the petitioner was released from service in a low medial category which has to be treated as invalidated out of service in terms of the above and therefore, the respondents ought to have granted him invalid pension on their own accord.

22. Our attention has also been drawn to Regulation 197 of the Pension Regulations for the Army 1961 Part-I which reads as follows:-

> "Invalid Pensions/Gratuity when admissible.
>
> 197. Invalid pension/gratuity shall be admissible in accordance with the Regulations in this chapter. to -

> (a) an individual who is invalided out of service on account of a disability which is neither attributable to nor aggravated by service;
>
> (b) an individual who is though invalided out of service on account of a disability which is attributable to or aggravated service, but the disability is assessed at less than 20%.
>
> (c) a Low Medical Category individual who is retired/ discharged from service for **lack of alternative employment compatible with his low medical category.**"

(Emphasis supplied)

23. It is important to note that the petitioner was not invalidated out of service because of exigency of service or the low medical category. On the contrary, he had sought voluntary retirement from service before the Supreme Court. This request was granted to him.

24. The Armed Forces Tribunal has concluded that for entitlement to invalid pension, the rule position required is that the individual must have been invalidated out of service as he could not be detained in service and such person could not be penalized because of his having been rendered invalid. It is in this eventuality, so far as a person who had put in 10 years of service before his invalidation is concerned, he would be entitled to such pension.

25. The petitioner was discharged from service based on his voluntary requirement, disentitling him to grant of invalid pension. As noted above, though the petitioner was in low medical category and had been opined to be unfit for flying but the respondents had been deploying his services for ground duties and he was assigned many important duties.

26. In this regard, we may also refer to the opinion of the recategorization medical board of the petitioner dated 12th October, 1994 which had specifically observed that though the petitioner was in low medical category however, he was fit for full ground duties but slightly below the GI standard in all parts of the world. The petitioner was required to report for a review of his medical condition after six months. This was never done by the petitioner.

27. So far as reliance on the Government circular dated 29th

September, 2009 is concerned, the same relates to implementation of the Government decision on the recommendations of the 6th Central Pay Commission. In para 3 of the circular, it is specifically stated that the same would apply to the Armed Forces personnel who are retired/ discharged from service on or after 11th January, 2006. The Tribunal has therefore rightly concluded that the circular has no application to the case of the petitioner who voluntary retired from service on the 27th of November, 1995.

28. The Tribunal has noted Regulation 397 of the Air Force which clearly stipulates that an individual air force personnel shall not be eligible for invalid pension on account of disability in case of voluntary discharge and therefore, the claim of the petitioner before the Armed Forces Tribunal as well as before this court is completely misconceived.

29. Colonel (Retd.) S.R. Kalkal, learned counsel for the petitioner has pressed yet another point in support of his writ petition. It is contended that at the time of the petitioner's release from the Air Force, it was incumbent to conduct a Release Medical Board or an Invaliding Medical Board. In this regard reliance is placed on para 1.1.10 (Release Medical Boards) and 1.1.11 (Invaliding Medical Boards) of the *Manual of Medical Examinations and Medical Boards – IAP 4303 (4th Edition : September, 2010)* issued by the respondents. The above paras of this Manual read as follows:-

> **"1.1.10 Release Medical Boards.** Release medical board are conducted to assess the fitness of the individual at the time of his/her release from service so as to assess the effects of service career on his/her health, if any, and to decide fitness for commutation of pension. In cases of prior disability the attributability/aggravation factors, percentage of disability and frequency of review and fitness for civil employment after release from service are also decided in a Release Medical Board.
>
> **1.1.11. Invaliding Medical Boards.** These are held when, due to disease or disability, an individual can no longer perform his/ her service duties. Such individuals are invalided out of service."

30. The petitioner has remembered the fact that he was permitted to voluntary retire without a Medical Board or Invaliding Medical Board being conducted, only in the present writ petition which has been filed

15 years after he was voluntary retired on the 27th of November, 1995. On this issue, we have extracted above the order dated 23rd September, 2008 in WP(C)No.604/2008 wherein this court has concluded in para 8 that the Medical Board after so many years would serve no purpose to ascertain the cause of the disease 13 years ago. A Medical Board conducted in 2013 would not facilitate determination of the petitioner's medical condition on 27th November, 1995 when he voluntary retired. It is therefore, too late in the day for the petitioner to seek his medical evaluation by a Medical Board or a Invaliding Medical Board.

31. Mr. Ankur Chhibber, learned counsel for the respondents has submitted that the petitioner's claim is liable to be rejected in view of the pronouncement of the Supreme Court reported at **P.K. Kapur v. Union of India & Ors.** JT 2007 (3) SC 98. In this case, the court has rejected the claim for invalid pension on similar grounds. The contention of the appellant as well as finding of the court reads as follows:-

> "8. It is lastly urged by the appellant that he has not been paid war injury pension at the current rate. In this connection, he submitted that under the rules for casualty pensioners invalidation from service is a necessary condition for the grant of disability pension. If a person is released from service in a lower medical category then what he was at the time of recruitment, he would be treated as invalided from service. Appellant contended that he was released in a lower medical category from service on 30.11.89 then what he was at the time of recruitment and, therefore, he should be treated as invalided from service with effect from the date of release for the purpose of grant of disability pension.
>
> 9. We do not find any merit in the third submission. Appellant retired on 30.11.89 on superannuation. He was never invalided. He now claims to be invalided out of service. Having stood retired from service after completing full tenure of service, appellant cannot now claim that he was invalided out of service. The concept of invalidment applies to cases in which the tenure of service is cut short due to invalidment on account of war injury or disability. The concept of invalidment does not apply to cases where an officer completes his tenure of service and retires on attaining the age of superannuation. Therefore, there is no merit in the third contention raised by the appellant."

32. Placing reliance on the pronouncement in **P.K. Kapur** (Supra), the Supreme Court also rejected a similar claim by accepting a challenge made by the official respondents to grant of relief of invalid pension to **Naik Narikar** by the order **dated 24th May, 2012** passed in **Civil Appeal No(s).8433-8434/2009**. In the present case, the petitioner's tenure has not been cut short due to invalidment on account of injury or disability. Though placed in a low medical category, he was gainfully retained in service. He opted to leave the force on voluntary retirement, which request stood accepted. The principles laid down in **P.K. Kapur** (Supra) squarely apply to the present case.

33. This writ petition could have been summarily dismissed on a short legal issue. The prayer made by way of the present writ petition was available to him when he filed his first writ petition being WP(C)No.3490/2003 but was not sought. The petitioner did not make any claim for invaliding pension even in the second writ petition bearing WP(C)No.604/2008 filed by him. The petitioner having failed to seek a relief which was available to him when he initiated litigation, would be deemed to have abandoned the claim and stood precluded from raising the claim by way of the application before the Armed Forces Tribunal as well as from pressing the same by way of the present writ petition. However, given the long history of the litigation, we have dealt with the petitioner's claim on merits as well so as to bring the entire controversy to rest.

34. For all these forgoing reasons, we find no merit in this writ petition and application which are hereby dismissed.

ILR (2013) VI DELHI 4794
W.P. (C)

NAIK MANIKANDAN R ....PETITIONER

VERSUS

UNION OF INDIA AND ORS. ....RESPONDENTS

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P.(C) NO. : 6317/2012 DATE OF DECISION: 12.12.2013

Service Law—Armed Forces—Constitution of India, 1950—Regulations for Army (1987 Edition) Regulations 364 and 381—Petitioner challenged findings and sentence of Summary Court Martial ordering imprisonment for 28 days in military custody and to be reduced to ranks from Hawildar to Sepoy—As per petitioner, Summary Court Martial by Depot Regiment, Jabalpur was without jurisdiction to try his case. Held:— In case of deserter Regulation 381 of Regulations for Army is applicable. Also according to Regulation 364, Intermediary Authority had the jurisdiction to close the case under information to the higher authority in chain.

Since the petitioner was declared a 'deserter' his case is covered under this rule. The unit to which he was attached was an operationally committed Unit deployed in High Altitude Area. So under Regulation 381 of the Regulations for the Army, the HQs 1, the Signal Training Centre, Jabalpur had the jurisdiction to deal with the case of desertion by the petitioner. The HQs 1, Signal Training Centre, Jabalpur attached the petitioner to Depot Regiment, Corps of Signals for purpose of his trial. It therefore cannot be said that the HQ 1, Signal Training Centre Jabalpur had no jurisdiction to hold the trial of petitioner for the offence of desertion.

(Para 15)

Regulation 364 of the Regulations for the Army deals with complaints. From a bare reading of Para k of this regulation, it is apparent that it confers power to Intermediary Authority to grant the redressal asked for. In the case of the petitioner, he was granted redressal. The Intermediary Authority therefore had the jurisdiction to close the case under information to the higher authority in chain. The order by Intermediary Authority was in exercise of powers conferred upon him/her under regulation 364 (j) & (k) of Regulations for the Army. **(Para 21)**

Important Issue Involved: In case of deserter Regulation 381 of Regulations for Army is applicable. Also, according to Regulation 364, Intermediary Authority had the jurisdiction to close the case under information to the higher authority in chain.

[Sh Ka]

APPEARANCES:

FOR THE PETITIONER : Mr. Major K. Ramesh, Advocate.

FOR THE RESPONDENTS : Dr. Ashwani Bhardwaj, Advocate.

CASE REFERRED TO:

1. *Ex. Lance Naik Vishav Priya Singh* vs. *Union of India and Others* 147 (2008) DLT 202.

RESULT: Petition dismissed.

DEEPA SHARMA, J.

1. The petitioner vide this petition has challenged the findings and sentence of the Summary Court Martial dated 15th November, 2010, whereby, the petitioner was sentenced rigorous imprisonment for twenty eight days in military custody and to be reduced to ranks from Havildar to sepoy. The petitioner has also challenged the order dated 14th February, 2012 passed by General Officer Commanding in Chief on his statutory petition dated 23rd July, 2011 whereby the punishment was commuted from reduction in rank and 28 days rigorous imprisonment in military

custody to severe reprimand. His petition dated 23 July 2011 was disposed off accordingly.

2. The brief facts of the case are that the petitioner had joined the respondents and was enrolled as **"Signalman"** with the corps of Signal on 27th December, 1994. The petitioner got promoted to rank of Havildar on 1st January, 2002.

3. When the petitioner was serving 53 Rashtriya Rifles Battalian and was posted at Jammu and Kashmir, he availed sanctioned casual leaves of 28 days w.e.f 13th April, 2010 to 10th May, 2010 and went to his home town. During the period of leave, he requested his Unit for extension of leave and his leave was extended upto 5th June, 2010 which included the balance of annual leave of the year 2010 and 20 days'advance leave of annual leave for the year 2011. The petitioner was required to join his duties on 6th June, 2010 but he continued to remain absent from duty. By the order of Commanding Officer of 53 Rashtriya Rifles Battalion dt 5.7.10 the court of inquiry was initiated against the petitioner wherein the statements of witnesses namely Platoon Havildar M. Bashir Ahmed, Havildar Manoj Kumar and of Subedar Kawaljit Singh, all posted in 53, Rashtriya Rifles Battalion (Punjab) were recorded. On the basis of evidence on record, the findings were given by the court that since the petitioner had not contacted the Unit since 6th June, 2010 nor had sent any request for extension of leave and even after being informed by Platoon Havildar to rejoin from leave, he had not rejoined duty after termination of leave, the petitioner be declared as *"deserter"* with effect from 6th June, 2010. The Commanding Officer had declared on 2nd August, 2010, based on the findings of the court of inquiry, the petitioner a deserter on account of overstay of his leave w.e.f. 6.06.2010 without sufficient cause. Even thereafter there was no response from the petitioner.

4. The petitioner surrendered on 15th August, 2010.

5. A summary of evidence was directed to be prepared against these actions of the petitioner which was recorded on 4th November, 2010, in which the petitioner had fully participated. He did not cross-examine any witness. The statement of petitioner was recorded wherein he had given reasons of his overstay stating that overstay was due to unavoidable circumstances at home. He had stated that his son was born on 25th May, 2006 and his wife underwent sterilization operation on 12th May, 2007. Due to demise of his son in January, 2008, his wife had

undergone de- sterilisation on 23rd June, 2009 from Kasturba Hospital Gandhigram. Despite the fact that the petitioner availed leave two times from 53 Rashtriya Rifles Battalion, his wife could not conceive during this leave period. He was sanctioned 28 days' casual leave w.e.f. 13th April, 2010. During his leave period, he requested his unit for extension of leave and got the same extended upto 5th June, 2010. During the leave period, he got his wife fully checked up and the Doctor advised him to stay with his wife for two months and therefore he stayed at home. After realising his mistake, he voluntarily surrendered to Depot Regiment on 15th August, 2010 after overstaying leave for 71 days.

6. On 6th November, 2010, the petitioner was given Charge sheet under Section 39(b), Army Act, 1950. The charge reads as under:-

"Army Act WITHOUT SUFFICIENT CAUSE

Sec 39 (b) OVERSTAYING LEAVE GRANTED TO HIM.

At Field, while on active service, on 06 June 2010, having been granted leave of absence from 13 April 2010 to 05 June 2010 to proceed his home, failed without sufficient cause to rejoin his unit, 53 Rashtriya Rifles Battalion at 0001 hours on 06 June 2010, on expiry of the said leave until surrendered voluntarily to Depot Regiment (Corps of Signals) on 15 August 2010 at 1130 hours."

7. Thereafter, the petitioner was subjected to a Summary Court Martial (SCM) on 15th November, 2010. During the trial, the petitioner had pleaded guilty to charge. On his plea of guilt, he was sentenced to be reduced to the rank of Sepoy from Havildar with 28 days rigorous imprisonment in the Unit Quarter.

8. A statutory complaint challenging the punishment awarded to the petitioner by Summary Court Martial was made to Chief of Army staff on 23rd July, 2011 wherein he prayed to set aside the order dated 15th November, 2010 on humanitarian grounds. This statutory complaint was heard by Lieutenant General, GOC in Chief (Intermediary Authority) who partially commuted the sentenced and reduces the punishment of petitioner of reduction in rank from Havildar to Naik with severe reprimand and set aside the sentence of imprisonment.

9. The petitioner has assailed the above order mainly on the following three grounds:-

(i) That since during the period of his leave, he was posted with 53 Rashtriya Rifles Batalion, the Summary Court Martial at Depot Regiment (corps of signals) Jabalpur is without jurisdiction and the entire proceedings of the Summary Court Martial needs to be quashed. The petitioner had relied upon the judgment of this High Court delivered in the **Ex. Lance Naik Vishav Priya Singh v. Union of India and Others** 147 (2008) DLT 202.

(ii) The second ground of challenge is that as per rule and procedure, a statutory petition of a Jawan submitted to Chief of Army Staff can be disposed of by Chief of Army Staff alone, and the Intermediary Authority has no right to dispose of and has relied on para 364 of Regulations for Army (1987 Edition).

(iii) The third ground on which the order has been assailed is that he had sufficient reasons to overstay the period of leave and therefore, it cannot be said that he had overstayed the leave without sufficient reasons.

10. We have given due consideration to the arguments forwarded by learned counsels for the parties as well as the record of the case and the law relied upon by them.

11. The first contention of the petitioner is that his Summary Court Martial by Depot Regiment Jabalpur was without jurisdiction and that he could have been tried only by Commanding Officer of 53, Rashtriya Rifles Battalion.

12. It is argued on behalf of the respondents that when the petitioner did not report back on expiry of his leave period, the court of inquiry in this regard was initiated by Commanding Officer of 53 Rashtriya Rifles Battalion which commenced on 25th July, 2010 and as a result the petitioner was declared deserter. It is argued that since the battalion of the petitioner was posted at High Altitude, therefore, as per the Regulation 381, Defence Services Regulation, 1987, the Commanding Officer of the Depot Regiment (Court of Signals) becomes the Commanding Officer of the petitioner. It is also argued that findings in the case relied upon by the petitioner **Ex Lance Naik** (supra) has no application to the facts and circumstances of the present case.

13. We have carefully considered the case law relied upon by the petitioner. It is apparent that the findings in the case **Ex Lance Naik** (supra) are not applicable on the facts of the present case since the facts of the instant case are entirely different. In that case the petitioner had not been declared a 'deserter'. The court has clearly distinguished the case of a 'deserter' in the said judgment. Relevant portion reads as under:-

Para 25:

> "None of the petitioners have been charged with the most reprehensible offence conceivable in the Armed Forces that is of Desertion. Even if so charged it would have to have been further established, as a pre- condition for the holding of an SCM by the Commanding Officer of the Unit to which the petitioner was attached, that the Commanding Officer of the Unit to which the accused belonged was serving in a high altitude area, or overseas or engaged in counter- insurgency operations or active hostilities or in Andaman and Nicobar Islands."

14. In the present case, the petitioner had been declared as **"Deserter"**. The Regulation 381 of Regulations for Army deals with the trial of **"Deserter"** which reads as under:-

> 381 Trial of Deserters - under normal circumstances trial by Summary Court Martial for desertion will be held by CO of the unit of the deserter. However, when a deserter or an absentee from a Unit shown in column one of the table below surrenders to or is taken over by, the unit shown opposite in Column two and is properly attached to and taken on the strength of the latter unit he may, provided evidence, particularly evidence of identification, is available with the latter unit, be tried by Summary Court Martial by the CO of that unit when the unit shown in column one is serving in high altitude area or overseas or engaged in counter- insurgency operation or active hostilities or Andaman and Nicobar. In no circumstances will a man be tried by Summary Court Martial held by a CO other than the CO of the unit to which the man properly belong; a unit to which the man may be attached subsequent to commission of the offence by him will also be a unit to which the man properly belongs.

TABLE

Column One	Column Two
A unit of Signals	Signal Training Centre, Jabalpur

15. Since the petitioner was declared a 'deserter' his case is covered under this rule. The unit to which he was attached was an operationally committed Unit deployed in High Altitude Area. So under Regulation 381 of the Regulations for the Army, the HQs 1, the Signal Training Centre, Jabalpur had the jurisdiction to deal with the case of desertion by the petitioner. The HQs 1, Signal Training Centre, Jabalpur attached the petitioner to Depot Regiment, Corps of Signals for purpose of his trial. It therefore cannot be said that the HQ 1, Signal Training Centre Jabalpur had no jurisdiction to hold the trial of petitioner for the offence of desertion.

16. The next argument of the petitioner is that disposal of his statutory complaint addressed to Chief of Army Staff by the Intermediary is violative of regulation 364 of Regulations for Army (1987 Edition).

17. The respondents have countered the argument saying that under Sub Section (j) of Regulation 364, Regulations for the Army (1987 Edition), an Intermediate Authority can examine the grievances set forth by the complainant and can either grant the redress sought for in the complaint or forward the complaint to the next higher authority along with his comments and recommendations.

18. It is further stated by the respondents that Sub clause (k) of Regulation 364, Regulations for the Army (1987 Edition) confers power upon an Intermediary Authority to grants the redressal asked for and close the case, informing complainant and intimating next higher authority.

19. We have considered the rival contentions and perused the relevant regulation relied upon by both the parties. The regulation 364 (j) & (k) of Regulations for Army (1987 Edition) reads as under:-

> "364 xx
>
> (j) An intermediate authority will examine the grievances set forth by the complainant and will either grant the redress sought for in the complaint or forward the complaint to the next higher authority along with his comments and recommendations. The

immediate superior authority in chain will in addition also offer his detailed Para wise comments on the complaint. In case of any of the conditions mentioned below is not satisfied he will withhold the complaint and inform the next superior authority and the complainant the reasons for withholding the complaint:-

i. That the complaint is complete an all respects and is in the correct form.

ii. That the complaint is not couched in a discourteous, disrespectful or improper language.

(k) If an intermediary authority grants the redressal asked for, the complainant will be informed and the case closed under intimation to the next higher authority, the immediate superior authority of the aggrieved individual will endeavour to interview the complainant and make such investigations as he considered necessary. He will then forward the complaint, his detailed Para wise comments and recommendations to the next superior intermediary authority. While forwarding the statutory complaint to the next higher authority, concerned formation headquarters shall invariably inform Army Headquarters about the progress of the case and also inform the complainant through his Commanding Officer. "

20. In his petition dt. 23.7.2011, the petitioner sought the relief of setting aside the excessive punishment of reduction in the ranks and 28 days of rigorous imprisonment in military custody, on humanitarian grounds. Vide the order dated 14th February, 2012, the petitioner was granted relief asked for. His rank was ordered to be reduced to that of Naik and to be severely reprimanded as punishment. Thus the punishment of reduction in rank to Sepoy and 28 days of military imprisonment was set aside.

21. Regulation 364 of the Regulations for the Army deals with complaints. From a bare reading of Para k of this regulation, it is apparent that it confers power to Intermediary Authority to grant the redressal asked for. In the case of the petitioner, he was granted redressal. The Intermediary Authority therefore had the jurisdiction to close the case under information to the higher authority in chain. The order by Intermediary Authority was in exercise of powers conferred upon him/

her under regulation 364 (j) & (k) of Regulations for the Army.

22. The third argument on behalf of the petitioner is that he had a valid reason for remaining absent from duty and therefore, he ought not to have been found guilty under section 39(b) of the Army Act.

23. The respondents have countered this submission pointing out that the petitioner had throughout had participated in summary of evidence. He chose not to cross examine the witnesses. He made a statement which was duly recorded. On the basis of Summary of Evidence he was issued a charge sheet. He pleaded guilty to the charge and therefore now it is not open to him to plead that he had valid reason to overstay leave.

24. We have given thoughtful consideration to rival arguments. It is clear that the petitioner has not contended any procedural lapse on part of respondent while conducting the Summary Court Martial. It is also apparent that, while recording the Summary of Evidence, the petitioner was given full opportunity to cross examine the witnesses but he did not cross examine any of the witnesses. His explanation was duly recorded in his statement. He opted not to produce any witness in his defence. During the Summary Court Martial, the petitioner had accepted his guilt and been found guilty on his plea of guilt. Even during recording of his Statement in the Summary of Evidence, petitioner has stated that it was his mistake that he had overstayed his leave.

25. During the Summary Court Martial, petitioner had not produced any evidence that he tried to contact his unit for extension of leave after it was extended till 5th June, 2010. He has only produced some mobile call records from 20.5.10 to 14.8.10 to strengthen his contention that he tried to contact his unit for extension of further leave but even this record in no way supports his contention. This call record shows that his alleged first call between this period was on 8.7.10. It is apparent that upon expiry of his leave on 5.6.10, the petitioner was required to join his unit on 6.6.10. This record does not show that he made any attempt to contact his unit for extension of leave between 5.6.10 to 8.7.10. It is to be noted that during the recording of summary of evidence the petitioner had not put any question to witnesses that he tried to contact his unit. Even in his own statement during summary of evidence, he made no mention of seeking extension of leave after 6.6.10.

26. It is also not shown that the mobile number from which the

alleged call has been made belongs to the petitioner or that he had disclosed this mobile number to his unit.

27. We find that the petitioner admits the offence but has setup an explanation for mitigating the punishment which ought to be avoided. These grounds have already been taken into consideration by the Intermediary Authority, while reducing his punishment to reduction in rank to the rank of Naik and severe reprimand.

28. The army is a disciplined force and discipline is the backbone of this institution. The members of this institution are required to maintain higher standards of discipline. Any violation of discipline is required to be viewed very seriously. In this case, the petitioner had overstayed his leave for 71 days.

29. Since the findings on charge under section 39(b) of the Army Act is based on admission of guilt by the petitioner, we find no merit in the contention of the petitioner that there were no adequate grounds to find him guilty for overstaying his period of leave without sufficient reasons.

30. From the above discussion, it follows that the order of punishment dated 14th February, 2012 and reduction of rank from Havildar to Naik does not suffer from any illegality and infirmity. We find no force in the writ petition, the same is dismissed.

31. No order as to costs.

ILR (2013) DELHI 4804
MAC. APP.

TEK BAHADUR .....APPELLANT

VERSUS

RAM BHAROSE & ORS. .....RESPONDENTS

(G.P. MITTAL, J.)

MAC. APP. NO. : 472/2011 DATE OF DECISION: 17.12.2013
MAC. APP. NO. : 504/2011

Motor Accident Claim—Claimant was working as Hawaldar in Indian Army—The Claims Tribunal awarded compensation of Rs.12,34,260/- —Both sides filed appeals i.e. the claimant claiming that compensation was less and the insurance company claiming that the compensation excessive. The Claimant was liable to be discharged from his service on completion of 24 years of service—The same was however extendable by 2 years by the Screening Committee—Thus the claimant was entitled to an extension of 2 years if he had not suffered the injury resulting in placing him in low medical category—Held, claimant would be entitled to loss of income for two years. Despite opportunities the claimant did not produce reliable evidence to prove extent of his functional disability suffered by him even after grant of opportunity to lead additional evidence—From the disability certificate seen that there was shortening of left leg by 1.5 cm—Functional disability of claimant taken to be 30%, as after his retirement he could have got an employment as a Security Supervisor or a Similar job in any security agency or private sector.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. F.K. Jha, Advocate.

FOR THE RESPONDENTS : Mr. Anand Vardhan Sharma, Advocate. with Mr. V.S. Vashdev, Advocate for R-3.

CASES REFERRED TO:

1. *Raj Kumar* vs. *Ajay Kumar & Anr.,* 2011 (1) SCC 343.
2. *Arvind Kumar Mishra* vs. *New India Assurance Company Limited,* (2010) 10 SCC 254.

RESULT: Appeal Dismissed.

G.P. MITTAL, J.

1. These two Appeals arise out of a judgment dated 23.02.2011 passed by the Motor Accident Claims Tribunal (MACT-03, Dwarka Courts, New Delhi) (the Claims Tribunal) whereby a compensation of Rs. 12,34,260/- was awarded in favour of Tek Bahadur, for having suffered injuries in a motor vehicle accident which occurred on 29.01.2009.

2. MAC APP.472/2011 has been preferred by Tek Bahadur (hereinafter referred to as the Claimant) for enhancement of compensation whereas MAC APP.504/2011 has been preferred by the New India Assurance Company Limited (the Insurance Company) stating that the compensation awarded is excessive and exorbitant.

3. On 29.01.2009 at about 7:15 a.m., while the Claimant was crossing the road of VRC colony and Shankar Vihar, he was hit by a speeding Lancer car bearing No.DL-9CC-5313. The Claimant was initially removed to R.R. Hospital, Delhi Cantt. He was found to have suffered multiple fractures of both bones, left leg with fracture of femur neck. The Claimant remained admitted in R.R. Hospital, Delhi Cantt. till 15.04.2009 where he was operated upon. Thereafter, he was again admitted in Command Hospital, Western Command, Chandi Mandir, Chandigarh for further follow up. The Claimant claimed that he suffered 60% disability on account of the injuries suffered. The Claims Tribunal awarded the compensation under various heads which is extracted hereunder:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Loss of earning capacity	Rs. 11,89,260/-
2.	Pain & Suffering	Rs. 30,000/-
3.	Special Diet	Rs. 10,000/-
4.	Conveyance Expenses	Rs. 5,000/-
	Total	**Rs.12,34,260/-**

4. It is urged by the learned counsel for the Claimant that the Claimant who was working as a *Hawaldar* in the Indian Army was prematurely discharged from the military services and the Claims Tribunal erred in awarding a compensation of only Rs. 11,89,260/- towards loss of income. His salary had increased to about Rs. 20,000/- at the time of his discharge and he should have been awarded full compensation for loss of income on the multiplier of 14, which was relevant to his age of 42 years at the time of his discharge; the compensation awarded towards pain and suffering is inadequate; no compensation has been awarded towards loss of amenities and inconvenience caused to him and the compensation awarded towards special diet and conveyance is highly disproportionate.

5. On the other hand, the learned counsel for the Insurance Company argues that the Claimant was discharged on completion of full service of 24 years. No evidence was produced by the Claimant to show as to how many more years he would have been continued in Army service as a Hawaldar. No evidence was produced that he was likely to be promoted. The disability certificate reflected only temporary disability in respect of his left lower limb, which cannot be taken as functional disability or loss of earning capacity. The compensation, it is urged, awarded towards loss of future income is excessive and exorbitant.

6. Since the claimant had claimed that he was discharged from the military service on account of the injury suffered by him, he was permitted to lead additional evidence to prove his premature discharge. The Claimant examined Mr. V.Karthikeyan Naik who deposed that the Claimant was boarded out from the army service as he was unfit for military service

due to the accident. Neither any oral nor any documentary evidence was produced by the Claimant to show the further service years he was entitled to put in the Indian Army as a Hawaldar.

7. As per the documents placed on record, the Claimant had joined the military service on 18.02.1988. He was discharged from the service on 01.03.2012 although the instant accident occurred on 29.01.2009. The terms and conditions of JCOs/OR available on the website of the Indian Army are extracted hereunder:-

"Terms and Conditions: JCOs/OR

7. Rank Structure and Age/Tenure/Service Limit for Retirement.

(a) Sepoys. ReferAI1/S/76 as amended and Min of Def Letter No F14(3)/98/D(AG) dated 03 Sep 98.

Rank	***Present Criteria***
(GD Categories/ Semi-skilled categories) Sep – Group I	*17 years of service with colours extendable by two years by screening and two years in reserve or till attainment of 42 years of age, whichever is earlier.*
(Skilled/Tech Categories/Specialist Categories and Tradesmen) Sep – Group II	*20 years of service with colours extendable by two years by screening and three years in reserve or till attainment of 48 years of age, whichever is earlier.*

(b) NCOs. Refer to Min of Def Letter No F. 14(3)/98/D(AG) dt 03 Sep 98.

Rank	***Present Criteria***
Naik	*On completion of 22 years' service with colours extendable by two years by screening or 49 years of age, whichever is earlier.*
Dafadar/Havildar	*On completion of 24 years' service with colours extendable by two years by screening or 49 years of age, whichever is earlier.*

Note: Reserve liability of all NCOs is up to 51 years of age or two years after retirement, whichever is earlier."

8. Thus, it would be seen that a Hawaldar is liable to be discharged on completion of 24 years of service. The same is, however, extendable by two years by screening committee. Thus, at the most what the Claimant can claim is the salary for a period of two years at the salary last drawn by him for a period of two years because his service was extendable only by two years.

9. The disability certificate dated 09.02.2010 (Ex.PW-2/1) produced on record shows that the Claimant had suffered fracture of both bones, left leg on 29.01.2009. Open reduction and internal fixation of fracture was done. There was residual shortening of left leg by 1.5 cms. and there was stiffness of left knee and ankle joint. The disability certificate further reveals that the disability was assessed to the extent of 60% for one year and reassessment was recommended after one year.

10. In **Raj Kumar v. Ajay Kumar & Anr.,** 2011 (1) SCC 343, the Hon'ble Supreme Court emphasised that permanent disability and functional disability are two different things. The permanent disability may cause loss of earning capacity in different persons depending upon the nature of their profession, occupation or job, etc. etc. It was also emphasised that normally expert evidence ought to be taken to assess the percentage of functional disability of a person who has suffered any permanent disability. Para 19 of the report in *Raj Kumar* is extracted hereunder:-

"19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).

(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability

can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

11. It is well settled by a catena of judgments that while awarding compensation in personal injury cases, an attempt should be made to put the injured in the same position as he was as far as money is concerned. In **Arvind Kumar Mishra v. New India Assurance Company Limited,** (2010) 10 SCC 254, in para 9 the Supreme Court observed as under:-

"9. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was insofar as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered."

12. Although the Claimant was permitted to prove the loss of his income and exact functional disability by leading additional evidence during the pendency of the appeal, he was however, content to place the entire file on record concerning his treatment. Page 25 of the documents (Ex.A-2/1-181 collectively) produced on record gave details of the various army personnel who were not granted extension and were retired on completion of their service. The details of the Claimant are extracted hereunder:-

13. Before his discharge, the Claimant was issued a certificate dated 10.08.2011 which is extracted hereunder:-

"CERTIFICATE OF CIVIL EMPLOYMENT

Certified that No.5346616A Rank: HAV Name: Tek Badr. Pun Unit 1/4 GR, C/O 99 APO is unfit for military service but fit for

appropriate civil employment as deemed suitable for present medical condition of the individual/existing diagnosis and pre placement medical examination."

14. Thus, taking these two documents together, what can be inferred is that the Claimant was entitled to an extension of two years if he had not suffered the injury resulting in placing him in low medical category. Hence, the Claimant would be entitled to loss of income for two years.

15. The Claimant has also not produced on record any reliable evidence to show the extent of functional disability suffered by him. What can be gathered from the disability certificate is that there was shortening of left leg by 1.5 cms. There was stiffness in left knee and left ankle. Unfortunately, even the extent of stiffness was not brought on record by the Claimant. As stated earlier, this Court even permitted the Claimant to produce additional evidence in the appeal, but in spite of all this, evidence was not brought in. In the circumstances, this Court will refrain from remanding the case to the Trial Court to make a fresh assessment as to the functional disability.

16. Considering the facts stated above, I would take the functional disability in case of the Claimant to be 30% as after his retirement from military service as a Hawaldar, he could have got an employment as a security supervisor or a similar job either in any security agency or in private sector. The minimum wages of a skilled worker or a Matriculate on the date of the Claimant's discharge i.e. 01.03.2012 were Rs. 9386. Thus, he would be entitled for compensation towards loss of earning capacity by giving him benefit of 30% disability (age being 42 years on the date of discharge). On account of loss of earning capacity the compensation comes to Rs. 6,14,970/- (9386/- + 30% x 12 x 14 x 30%).

17. As per the last pay slip placed on record, the Claimant was getting a salary of Rs. 16,942/- per month as the time of the accident. At the time of recording of the statement of the Claimant as PW-1 on 27.08.2010, the Claimant was getting a salary of Rs. 20,000/- per month. As stated above, the Claimant would be entitled to a sum of Rs. 4,80,000/- (Rs. 20,000/- x 24) towards loss of income for two years.

18. Since the Claimant's treatment was in the military hospital, the Claimant admitted that he did not have to spend anything on his treatment. Considering the nature of injuries, period of admission in the hospital and confinement at home, I would further make a provision of Rs.50,000/-

towards pain and suffering, Rs.50,000/- towards loss of amenities/ inconvenience, Rs.10,000/- towards special diet, Rs.10,000/- towards attendant charges and Rs.10,000/- towards conveyance charges for himself as well as for the attendant. The overall compensation awarded is computed as under:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of earning capacity	Rs. 11,89,260/-	Rs. 6,14,970/-
2.	Loss of Income (for two years)	—	Rs. 4,80,000/-
3.	Pain & Suffering	Rs. 30,000/-	Rs. 50,000/-
4.	Loss of amenities/inconvenience	—	Rs. 50,000/-
5.	Special Diet	Rs. 10,000/-	Rs. 10,000/-
6.	Conveyance Expenses	Rs. 5,000/-	Rs. 10,000/-
7.	Attendant charges	—	Rs. 10,000/-
	Total	**Rs. 12,34,260/-**	**Rs. 12,24,970/-**

19. Thus the compensation of Rs. 12,34,260/- awarded by the Claims Tribunal is just and reasonable and does not call for any interference.

20. The compensation awarded shall be released in terms of the order passed by the Claims Tribunal.

21. Both the appeals stand disposed of accordingly.

22. The statutory deposit of Rs. 25,000/- shall be refunded to the Appellant Insurance Company in MAC APP.504/2011.

23. Pending applications also stand disposed of.

ILR (2013) VI DELHI 4812
CRL. A.

MD. TASKEEN **.....APPELLANT**

VERSUS

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

(SUNITA GUPTA, J.)

CRL.A. NO. : 1387/2012 **DATE OF DECISION: 20.12.2013**

Indian Penal Code, 1860—Sec. 376—Sentence—Sentencing for any offence has a social goal—Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed—It serves as a deterrent—The principle of proportionality between an offence committed and the penalty imposed are to be kept in view it is obligatory on the part of the Court see the impact of the offence on the society as a whole and its ramifications as well as its repercussions on the victim.

Rape is one of the most heinous crimes committed against a woman—It insults womanhood—It dwarfs her personality and reduces her confidence level—It violates her right to life guaranteed under Article 21 of the Constitution of India.

A minimum of seven years sentence is provided under Section 376(1) of the Indian Penal code (IPC—Sentence for a term of less than seven years can be imposed by a court only after assigning adequate and special reasons for such reduction—Thus, ordinarily sentence for an offence of rape shall not be less than seven years—When the legislature provides for a minimum sentence and makes it clear that for any reduction

from the minimum sentence of seven years, adequate and special reasons have to be assigned in the judgment, the courts must strictly abide by this legislative command—Whether there exists any "special and adequate reason" would depend upon a variety of factors and the peculiar facts and circumstances of each case—No hard and fast rule can be laid down in that behalf for universal application

Important Issue Involved: While imposing sentence on persons convicted of rape, the court must be careful and must not overlook requirement of assigning reasons for imposing sentence below the prescribed minimum sentence.

[Di Vi]

APPEARANCES:

FOR THE APPELLANT : Mr. Imran Khan, Advocate.

FOR THE RESPONDENT : Ms. Fizani Hussain, APP.

CASES REFERRED TO:

1. *Simbhu and Anr.* vs. *State of Haryana* 2013 (10) SCALE 595.
2. *Jugendra Singh* vs. *State of Uttar Pradesh* (2012) 6 SCC 297.
3. *State of Andhra Pradesh* vs. *Polamala Raju @ Rajarao* (2000) 7 SCC 75.
4. *State of Karnataka* vs. *Krishnappa* (2000) 4 SCC 75.
5. *State of Punjab* vs. *Gurmit Singh and Ors.* AIR 1996 SC 1393.
6. *Bodhisatwa Gautam* vs. *Subhra Chakraborty* 1996 (1) SCC 490.
7. *State of A.P.* vs. *Bodem Sundara Rao* (1995) 6 SCC 230.

RESULT: Appeal dismissed.

SUNITA GUPTA, J.

1. The challenge in this appeal is to the judgement and order of sentence dated 22nd March, 2012 and 23rd March, 2012 in Sessions Case No. 15/2011 arising out of FIR No. 375/2010 under Sections 363/376/506/34 Indian Penal Code, 1860 (for short, 'IPC') registered as Police Station Sarai Rohilla vide which the appellant was convicted for the offence under Section 376 IPC and sentenced to undergo rigorous imprisonment for 4 years and a fine of Rs 5000/-, in default of payment of fine, to undergo simple imprisonment for 2 months.

2. The prosecution case emanates from the fact that on 11th November, 2010, Complainant Rama Anuj came to the police station Sarai Rohilla and lodged the missing report of his daughter aged about 15 years i.e. the prosecutrix (name withheld to keep her identity confidential) since 8th November, 2010. He further raised his suspicion upon one Sunil who used to live in the same house as the complainant as a tenant and stated that his daughter may have been taken away by the said Sunil by enticing her. On the statement of the complainant, case under Section 363 IPC was registered. During investigation of the case, on 13th November, 2010, accused/appellant Mohd. Taskeen was apprehended from Old Delhi Railway station and prosecutrix was recovered from his custody. Investigating Officer of the case recorded the statement of prosecutrix wherein she stated that accused Md. Taskeen had committed rape upon her by threatening her. Medical examination of both the prosecutrix as well as the accused was conducted. Sections 376/506/34 IPC were added in the chargesheet. During further investigation of the case, Investigating Officer of the case got the statement of the prosecutrix recorded under Section 164 Cr.P.C, prepared site plan, obtained the date of birth certificate of the prosecutrix, sent the exhibits to FSL. After completion of the investigation, a charge sheet under Sections 363/376/506/34 IPC was filed in the court.

3. Charge for offences under Sections 376/506 IPC was framed against the appellant. Appellant pleaded not guilty to the charge and claimed trial.

4. In order to substantiate its case, prosecution examined 16 witnesses. Prosecution basically relied upon the testimony of PW-1 i.e. the prosecutrix. Prosecutrix was aged 15 years and 7 months at the time of the incident. She has deposed that on 8th November, 2010, she had left with one Sunil and was taken by him to the railway station where

they boarded the train for going to Saharanpur. However, they boarded the wrong train which went to Ghaziabad and thereafter they came back to Delhi and then again boarded the train which reached Saharanpur. At Saharanpur Railway Station, they met the appellant who also boarded the train in which the prosecutrix and the said Sunil were travelling. Sunil got down from the train by stating that he was going to exchange the railway ticket whereas the prosecutrix and appellant remained in the train. As the train was about to move, the appellant told the prosecutrix that she was alone and he would take her to Sunil, after which both of them got down from the train. They searched for Sunil at Saharanpur Railway station but he was not found. According to the prosecutrix thereafter she was taken by the appellant to the house of his friend where he committed rape upon her. Appellant had taken her on his motorcycle and they travelled around the city on his motorcycle but again in the night hours, appellant took her in a lonely jhuggi and there again he committed rape upon her. On the next day morning, appellant took the prosecutrix on his motorcycle to the house of one female whom he addressed as Didi but that woman told the appellant that she would not keep the prosecutrix in her house because the prosecutrix was a minor and so the appellant was forced by that woman to leave the prosecutrix and at her instance, appellant agreed to leave the prosecutrix. Thereafter both of them boarded the train for Delhi and reached the Old Delhi Railway station where her father and the police were present and the appellant was apprehended by the police. The entire facts were narrated by the prosecutrix to her father and to the police and her statement was also recorded under Section 164 Cr.P.C. The statement of prosecutrix to the extent of her leaving from her parental home and having been found at the Delhi railway station along with the appellant is corroborated by her father and other police witnesses. Medical evidence also corroborates the version of prosecutrix as scratch marks just below the left anteriorilia, abrasion on left thigh as well as abrasions on posterior commissure were found on her body. Prosecutrix was a girl of tender age of 15 years only.

5. All the incriminating evidence appearing against the accused was put to him while recording his statement under Section 313 Cr.P.C. wherein he denied the case of the prosecution and pleaded his innocence and stated that he has been falsely implicated in the present case.

6. After meticulously examining the evidence led by the prosecution, vide impugned judgement, appellant was convicted for offence under Section 376 IPC and sentenced as stated above. However, he was

acquitted of the charge under Section 506 IPC.

7. Feeling aggrieved by the same, present appeal has been preferred by the appellant.

8. I have heard Mr. Imran Khan, learned counsel for the appellant and Ms. Fizani Hussain, learned Additional Public Prosecutor for the state and have perused the record.

9. At the outset, learned counsel for the appellant submitted that he does not challenge the appeal on merits of the case. Appellant was also called from Jail and he reiterated that he does not want to challenge the appeal on merits. However, it was submitted that appellant was sentenced to undergo rigorous imprisonment for a period of four years out of which he has already undergone imprisonment of 3 years and 6 months. As such, it was submitted that he be released on the period already undergone. Learned APP for the State did not oppose the prayer made by learned counsel for the appellant for releasing the appellant on the period already undergone.

10. I have considered the submissions of learned counsel for the parties and have perused the Trial court record.

11. From the testimony of the prosecutrix and other corroborating evidence, prosecution had succeeded in proving the charge under Section 376 IPC. The findings of learned Trial Court in this regard do not suffer from any infirmity which calls for interference. Even the appellant has opted not to challenge the findings of the Trial Court on conviction under Section 376 IPC. As such, the order of conviction passed by the learned Trial Court stands confirmed.

12. Coming to the quantum of sentence, it is submitted by learned counsel for the appellant that the appellant was awarded rigorous imprisonment of four years and fine. The appellant has already undergone sentence of 3½ years, as such, he be sentenced to the period already undergone.

13. Primarily it is to be borne in mind that sentencing for any offence has a social goal. Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed. The fundamental purpose of imposition of sentence is based on the principle that the accused must realise that the crime committed by him has not only created a dent in his life but also a concavity in the

social fabric. The purpose of just punishment is designed so that the individuals in the society which ultimately constitute the collective do not suffer time and again for such crimes. It serves as a deterrent. True it is, on certain occasions, opportunities may be granted to the convict for reforming himself but it is equally true that the principle of proportionality between an offence committed and the penalty imposed are to be kept in view. While carrying out this complex exercise, it is obligatory on the part of the Court to see the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

14. Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. It dwarfs her personality and reduces her confidence level. It violates her right to life guaranteed under Article 21 of the Constitution of India. In this regard, it will be apt to note the observations made by the Apex Court in **Bodhisatwa Gautam v. Subhra Chakraborty** 1996 (1) SCC 490 where it was observed that "rape is violative of the victim's most cherished of the fundamental rights guaranteed under Article 21 of the Constitution of India.

15. Rape is an aberrant, atrocious, horrendous and monstrous burial of her dignity in darkness. It is a crime against the entire society. In **State of Punjab v. Gurmit Singh and Ors.** AIR 1996 SC 1393, Supreme Court observed the effect of rape on a victim with anguish:

> "We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault-it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female."

16. In **Jugendra Singh v. State of Uttar Pradesh** (2012) 6 SCC 297, while dwelling upon the gravity of the crime of rape, Supreme Court had expressed thus:

> "Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman

> lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. No one has any right of encroachment. An attempt for the momentary pleasure of the accused has caused the death of a child and had a devastating effect on her family and, in the ultimate eventuate, on the collective at large. When a family suffers in such a manner, the society as a whole is compelled to suffer as it creates an incurable dent in the fabric of the social milieu."

17. Section 376 IPC provides for punishment for rape. Offence of rape is punishable with imprisonment of either description for a term which shall not be less than seven years but which may be extend to ten years. The convict shall also be liable to fine. Proviso to Section 376(1) states that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. Thus, a minimum of seven years sentence is provided under Section 376(1) of the Indian Penal Code (IPC). Sentence for a term of less than seven years can be imposed by a court only after assigning adequate and special reasons for such reduction. Thus, ordinarily sentence for an offence of rape shall not be less than seven years. When the legislature provides for a minimum sentence and makes it clear that for any reduction from the minimum sentence of seven years, adequate and special reasons have to be assigned in the judgment, the courts must strictly abide by this legislative command.

18. It is a fundamental rule of construction that a proviso must be considered in relation to the main proviso to which it stands as a proviso, particularly, in such penal provisions. Whether there exists any "special and adequate reason" would depend upon a variety of factors and the peculiar facts and circumstances of each case. No hard and fast rule can be laid down in that behalf for universal application.

19. Section 376(1) read with the proviso thereto reflects the anxiety of the legislature to ensure that a rapist is not lightly let off and unless there are some extenuating circumstances stated in writing, sentence below the minimum i.e. less than seven years cannot be imposed. While imposing sentence on persons convicted of rape, the court must be careful and must not overlook requirement of assigning reasons for imposing sentence below the prescribed minimum sentence.

20. In **State of Karnataka v. Krishnappa** (2000) 4 SCC 75 the High Court had reduced the sentence of ten years rigorous imprisonment

imposed by the trial court on the accused for an offence under Section 376 of the Indian Penal Code (IPC) to four years rigorous imprisonment. Severely commenting on this indiscretion, Apex Court observed as under:

> "Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the Respondent to show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced. The courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others. Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

21. In **State of A.P. v. Bodem Sundara Rao** (1995) 6 SCC 230 the Accused was sentenced by the trial court for an offence under Section 376 of the Indian Penal Code (IPC) for ten years. The High Court maintained the conviction, however, reduced the period of sentence to four years. Supreme Court set aside the High Court's order and

enhanced the sentence to seven years which is the minimum prescribed sentence under Section 376 of the Indian Penal Code (IPC). The relevant observations are as under:

> "In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

22. In **State of Andhra Pradesh v. Polamala Raju @ Rajarao** (2000) 7 SCC 75 a three Judge Bench of the Supreme Court set aside the judgment of the High Court for non-application of mind to the question of sentencing. The Supreme Court reprimanded the High Court for having reduced the sentence of the accused convicted under Section 376, IPC from 10 years imprisonment to 5 years without recoding any reasons for the same. The Court said:

> "... We are of the considered opinion that it is an obligation of the sentencing Court to consider all relevant facts and circumstances bearing on the question of sentence and impose a sentence commensurate with the gravity of the offence...
>
> XXX XXX XXX
>
> ... To say the least, the order contains no reasons, much less "special or adequate reasons". The sentence has been reduced in a rather mechanical manner without proper application of mind..."

23. Very recently, in **Simbhu and Anr. v. State of Haryana** 2013 (10) SCALE 595 a three Judge Bench took a serious view about taking a liberal view while awarding sentence for such a heinous crime by observing as under:-

> "This is yet another opportunity to inform the subordinate Courts and the High Courts that despite stringent provisions for rape Under Section 376 Indian Penal Code, many Courts in the past have taken a softer view while awarding sentence for such a heinous crime. This Court has in the past noticed that few subordinate and High Courts have reduced the sentence of the accused to the period already undergone to suffice as the punishment, by taking aid of the proviso to Section 376(2) Indian Penal Code. The above trend exhibits stark insensitivity to the need for proportionate punishments to be imposed in such cases."

24. The observations made in the above legal pronouncements reflect what should be the approach of the Courts while sentencing the accused convicted of rape. Present case has to be examined in the light of the above discussion.

25. A perusal of the Trial Court order goes to show that it has taken a liberal view by awarding the sentence of rigorous imprisonment for four years, meaning thereby less than the minimum sentence prescribed under the Act probably, under the proviso to Section 376(1) on the ground that the convict had shown good gesture in agreeing to take the prosecutrix back to her parental home when he was apprehended. This cannot be said to be "special or adequate reason" for imposing sentence less than the minimum sentence prescribed under the Act. However, the State has not preferred any appeal for enhancement of the sentence. Under the circumstances, no case is made out for reducing the sentence further to the period already undergone by the appellant as prayed by learned counsel for the appellant.

26. The result of the aforesaid discussion is that there is no merit in the appeal and the same is accordingly dismissed.

A copy of the order along with the Trial Court record be sent back.

ILR (2013) VI DELHI 4822
W.P. (C)

UNION OF INDIA & ANR. ....PETITIONER

VERSUS

MADAN LAL ....RESPONDENT

(GITA MITTAL & DEEPA SHARMA, JJ.)

W.P. (C). NO. : 3944/2012 DATE OF DECISION: 01.10.2013
CM. NO. : 8258/2012

Service Law—CCS (Pension) Rules, 1972—Rule 9—Respondent was assigned duty of inspection of consignment present for export—Directorate of Revenue Intelligence initiated inquiry in availment of duty drawback and issued notice to exporter—After 12 years, Petitioners forwarded a note to CVC for its first stage advice for initiation of regular departmental action for major penalty proceedings—On date of retirement of respondent, chargesheet issued—CAT held departmental proceedings would be exercise in futility and result in harassment meted out to employee after retirement—Order challenged before HC—Held—DRI had permitted several officers against whom similar allegations have been made without initiation of any disciplinary proceedings—Petitioners have themselves therefore not treated matters as of any import effecting discipline of department—Inordinate and unexplained delay of almost 12 years occurred in commencing disciplinary proceedings would disentitle Petitioners from proceeding in matter—Such delay manifests lack of seriousness on part of disciplinary authority in pursuing charges against employee—While evaluating impact of delay, Court must consider nature of charge, its complexity and for what reason delay

has occurred—It is not case of present Petitioners that respondent had colluded or connived with offending exporter in effecting fraudulent exportation of goods in violation of provisions of Customs Act—Since Respondent had already retired, no punishment can be awarded if delinquency alleged may not be of grave misconduct or negligence—If case is only of Supervisory lapses and not of grave negligence, Respondent cannot be punished—Issuance of Chargesheet after inordinate delay cannot be said to be fair to Delinquent Officer—Since it would also make task of proving charges difficult, it would also not be in interest of administration—If delay is too long and remains unexplained, Court may interfere and quash charges—Writ Petition dismissed.

Important Issue Involved: (A) Inordinate and unexplained delay of almost 12 years occurred in commencing the disciplinary proceedings would disentitle the petitioners from proceeding in the matter.

(B) While evaluating the impact of the delay, the court must consider the nature of the charge, its complexity and for what reason the delay has occurred.

(C) Issuance of chargesheet after inordinate delay cannot be said to be fair to the Delinquent Officer. Since it would also make the task of proving the charges difficult, it would also not be in the interest of administration. If the delay is too long and remains unexplained, the court may interfere and quash the charges.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Dr. Ashwani Bhardwaj, Advocate.

FOR THE RESPONDENT : Ms. Shikha Sapra, Advocate.

RESULT: Writ petition dismissed.

GITA MITTAL, J. (Oral)

1. The petitioner before us has raised a challenge to the judgment dated 8th November, 2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi in Original Application No. 23/2011 holding that the departmental proceedings in the present case would be an exercise in futility and result in harassment meted out to the employee after retirement. Other reasons for arriving at this finding has been noted in the judgment which we are suppose to consider hereafter.

2. The respondent herein was posted as Inspector at the Export Shed, Inland Container Deport (ICD), Tughlakabad, New Delhi on 4th October, 1998, where he was assigned the duty of inspection of consignment present for export. The respondent was directed by the then Deputy Commissioner on 21st August, 1998 to attend to the clearance of two consignments pertaining to M/s Aravali (India) Ltd. in the absence of the Superintendent having the charge of the unit as a stop-gap-arrangement. It is submitted that the respondent was not in charge of the subject export M/s Aravali (India) Ltd. and attended to the subject AR-4s on specific instructions of the Deputy Commissioner in the absence of the regular incumbent.

3. It appears that the Directorate of Revenue Intelligence (DRI) initiated an inquiry in availment of duty drawback on export of chief quality junk UPFC pipes between 1998 and 1999 by M/s Aravali (India) Limited, Hissar which culminated in issuance of a notice to show cause dated 21st December, 2000 to the exporter. In this notice, reliance was placed on the shipping bills of said firm with regard to the subject transaction. This show cause notice was not addressed to the respondent. It is noteworthy that nothing adverse against the respondent was mentioned therein.

4. No action at all was taken by the petitioner herein against the respondent for a period of 12 years. The petitioner herein forwarded a note to the Central Vigilance Commission for its first stage advice for initiation of regular departmental action for major penalty proceedings which were accorded by the CVC on 24th September, 2010.

5. It is noteworthy that the respondent as per his age, attained the age of superannuation on 15th September, 2010. But as per rules, the employee would retire on the last date of the month and therefore, he superannuated on 30th September, 2010. Unfortunately on the same date, petitioner issued the following Charge sheet to the petitioner. The relevant portion of the said Charge sheet are reproduced hereunder which reads as follows:-(Page 24)

> "STATEMENT OF ARTICLES OF CHARGES FRAMED AGAINST SHRI MADAN LAL, THEN SUPERINTENDENT, CENTRAL EXCISE, RANGE-II, HISSAR (NOW DEPUTY COMMISSIONER, CENTRAL EXCISE, ALWAR DIVISION, JAIPUR COMMISSIONERATE)
>
> That the said Shri Madan Lal, then Superintendent (Now Deputy Commissioner), while functioning as Superintendent, Central Excise, Range-II, Hissar, Central Excise Commissionerate, Delhi V (Rohtak), on 21.08.1998.
>
> ARTICLE – I
>
> Failed to maintain absolute integrity in as much as he along with Shri N.S. Bhola, Inspector, examined and cleared the export consignment of M/s Aravali (India) Ltd., Hissar (Haryana) under 02 (two) AR-4s Nos. Namely 27/98-99 dated 21.08.1998 vide which the offending goods were exported, without raising any objection. The goods were misdeclared and overvalued for the purpose of fraudulent availment of drawback. The goods which were exported were junk material and not rigid UPVC as mentioned in the aforesaid AR-4s."

6. Aggrieved with the said memo of charges, the petitioner assailed the same by way of O.A.No.23/2011 which was filed before the Central Administrative Tribunal, Principle Bench, New Delhi. There is no dispute that other than the said memo issued on the date of the respondent's superannuation, he had unblemished record of 32 years of service.

7. Apart from several grounds urged on merits in the writ petition, it is submitted that the petitioners opted to issue the impugned Memorandum after more than 12 years of the alleged occurrence of misconduct on the part of respondent. The inordinate delay in issuing the charge sheet is contrary to the settled law that charges cannot be levelled

after inordinate delay unless the delay can be explained beyond the reasonable grounds.

8. Learned counsel for the respondent submits that after completion of the investigation by the DRI in 1999-2000, no further investigation was carried out in respect of the subject export by any agency and no further material or evidence came on record to warrant the issuance of the impugned Memorandum. The issuance of Charge Sheet at belated stage in respect of an incident occurred in 1999 is illegal. It is urged that after this period the respondent was accorded two promotions, one to the grade of Assistant Commissioner in 2002 and one to the grade of Deputy Commissioner in 2009 after due vigilance clearance from the competent authority. The conduct of the petitioners shows malafide on the part of the petitioners as they did not take any action till August, 2010 against the respondent.

9. A specific plea was raised even if the allegations were taken to be true, the same could at best be considered as merely supervisory lapses against the respondent. As such, the disciplinary proceedings were misconceived.

10. We may note that the petitioners herein proceeded in identical manner in respect of the some other employees who also assailed the belated charge sheets issued to them. One such employee Joseph Kuok was implicated in the same transactions as the present respondent. He assailed the disciplinary proceedings similarly initiated against him by way of OA No. 2777/2010. The Central Administrative Tribunal allowed the petition of Joseph Kyon on the ground of inordinate and unexplained delay in issuing the charge memo and quashed the same. The judgment has attained finality. 11. We also noticed that in collateral proceedings, that the DRI had permitted several officers against whom similar allegations have been made without initiation of any disciplinary proceedings. The petitioners have themselves therefore not treated the matters as of any import effecting the discipline of the department.

12. Another similarly situated employee Hari Singh was also served a Charge Memo dated 25th February, 2011 in respect of the same transactions. He assailed the same by way of OA No. 1844/2011 interalia on the ground of inordinate and unexplained delay before the Central Administrative Tribunal in issuing the Charge Memo. Initially the petition was rejected. However, Hari Singh had filed a Review Application No.

27/2012 premised on the documents which had fallen into his hands. Subsequently, the Tribunal thereafter reviewed its previous judgment and allowed the challenge filed by Hari Singh vide judgment dated 8th January, 2013.

13. The petitioners assailed the judgment dated 8th January, 2013 by way of W.P.(C) No. 4245/2013 tilted as UOI v. Hari Singh. This writ petition came up for hearing before us and the same was dismissed by detailed judgment dated 23rd September, 2013.

14. The present respondents have placed strong reliance on this judgment and submitted that the same squarely covers the case of the present respondents.

15. We have perused the record of the present case as well as the judgment dated 23rd September, 2013 passed in W.P.(C) No. 4245/2013. All material facts necessary for adjudication of the present case have been noted in the judgment passed in W.P.(C) No. 4245/2013. The factual matrix of W.P.(C) No. 4245/2013 is similarly, if not identical in all material aspects. In our judgment dated 23rd September, 2013, we arrived at a conclusion that inordinate and unexplained delay of almost 12 years occurred in commencing the disciplinary proceedings would disentitle the petitioners from proceeding in the matter. It was concluded by the petitioners that, at best, the matter pertains to supervisory lapses and does not involve any element of mis-conduct inviting disciplinary action against the respondents.

16. In the instant case, the Central Administrative Tribunal has noted that delay which is unexplained and unreasonable which would cause prejudice to the delinquent employee. Such delay manifests lack of seriousness on the part of disciplinary authority in pursuing the charges against the employee. While evaluating the impact of the delay, the court must consider the nature of the charge, its complexity and for what reason the delay has occurred. It is not the case of the present petitioners that the respondent had colluded or connived with the offending exporter in effecting the fraudulent exportation of the goods in violation of the provisions of the Customs Act.

17. The Tribunal had concluded the chargesheet, by and large, specifically make a mention of the supervisory lapses at best, on the part of the respondents, and that none of the charges suggest grave negligence

on the part of respondent. Since the respondent had already retired, proceedings could only be continued against him under Rule 9 of the CCS (Pension) Rules 1972. No punishment can be awarded to an officer after retirement who may be proceeded under Rule 9 of the Rules of 1972, if the delinquency alleged may not be of grave misconduct or negligence. If the case is only of supervisory lapses and not of grave negligence, the respondent cannot be punished. It was noted that the disciplinary proceedings would take several years to conclude.

18. The Tribunal has further held that disciplinary proceedings would be therefore an exercise in futility whereas continuance of the same would amount to harassment to the respondent that too after his retirement. For all these reasons, the charge Memo was quashed and set aside.

19. These very grounds and circumstances except the facts relating to the superannuation of the petitioner have been considered in great detail in the case of **UOI v. Hari Singh** (supra). No circumstances, reasons or grounds had been pointed out to us by learned counsel for the petitioner which would enable us to take a different view in the instant petition.

20. In the judgment dated 23rd September, 2013, we have also noted the office Memo dated 23rd May, 2000 issued by Central Vigilance Commission Schedule of Time limits in conducting investigation as well as departmental enquiry, CVC had observed that delay in disposal of the disciplinary proceedings was a matter of a serious concern to the Commission and such delay also affects the morale of the suspected charge employees and others in the organization.

21. We have noted in **UOI v. Hari Singh** (supra) that disciplinary proceedings should be conducted, soon after the alleged mis-conduct or negligence on the part of the employee, is discovered. Issuance of charge sheet after inordinate delay cannot be said to be fair to the Delinquent Officer. Since it would also make the task of proving the charges difficult, it would also not be in the interest of administration. If the delay is too long and remains unexplained, the court may interfere and quash the charges. The position in this present case is no different.

22. Learned counsel for respondent submits that despite the petitioner having succeeded before the Central Administrative Tribunal as back as on 8th November, 2011 and that there being no stay in the present case,

the respondent have till date not even computed the payments to be made to the petitioner regarding retirement benefits. To say the least, this is most unfortunate and despite the settled position in law.

23. As noted by us in **UOI v. Hari Singh** (supra) this petition is completely mis-concieved.

24. In view of the above, we direct as follow :-

(i) The writ petition is dismissed as devoid of legal merits.

(ii) The petitioners shall ensure t hat the terminal benefits due to the respondent are computed within a period of four weeks from today and communicated to the respondents forthwith.

(iii) The petitioner shall ensure that the payment of arrears of the pension is effected to the respondents within a further period of four weeks thereafter.

(iv) The respondents shall be entitled to costs which are assessed as Rs.25,000/- each before the 7th day of next calendar year.

25. The writ petition and the application are disposed of in above terms.

ILR (2013) VI DELHI 4829
W.P. (C)

RISHABH EDUCATIONAL SOCIETY ....PETITIONER

VERSUS

DELHI DEVELOPMENT AUTHORITY & ORS. ....RESPONDENTS

(G.P. MITTAL, J.)

W.P. (C) NO. : 1755/2010 DATE OF DECISION: 17.12.2013

Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981—Rule 4, 5, 8 and 20—Cases of

Petitioner for allotment of a site for running a nursery school was cleared by Planning Department of DDA and a site was earmarked in Kondli—For want of a clear approach to site, it was not feasible to establish and run a nursery school at said site—On representation of Petitioner alternative site was identified and in meanwhile Master Plan 2012 came into effect whereby it was laid down that nursery schools may function only as a part of Primary School /Secondary School /Senior Secondary School wherever needed—Practice of providing dedicated nursery school plots in layout plan was discontinued and hence alternative site was refused to Petitioner—Writ Petition filed challenging action of DDA—Plea taken, since Petitioner had applied of a plot for running a nursery school in year, 1997, it's eligibility school be considered on date of application and since plot was identified in year, 2004, Respondent DDA is under obligation to allot same to Petitioner in accordance with provisions of Master Plan in existence at relevant time—Per contra plea taken, since allotment of plot had not yet been made, there was no vested right in Petitioner for allotment of a site for running a nursery school—Held—On account of noting in files, no vested right was created in favour of Petitioner as to allotment of any plot of land for running a nursery school—On coming force of Master Plan—2021, neither Petitioner nor anybody else entitled to allotment of any land from DDA for running a nursery school—Writ Petition accordingly dismissed.

Important Issue Involved: No vested right is created merely on the basis of notings in the files.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. R.K. Saini, Advocate.

FOR THE RESPONDENT : Mr. Rajiv Bansal, Adv. with Ms. D. Ray, Adv. for R-1. Ms. Megha Bharara, Adv. for R-3 . Ms. H. Hnumpull, Adv. for R-4.

CASES REFERRED TO:

1. *Sethi Auto Service Station & Anr.* vs. *DDA & Ors.,* (2009) 1 SCC 180.
2. *Bhagwan Mahavir Education Society (Reg.) & Anr.* vs. *Health & Education Society (Reg.),* W.P.(C) 2459-60/ 2005.
3. *Bahadursinh Lakhubhai Gohil* vs. *Jagdishbhai M. Kamalia & Ors.,* (2004) 2 SCC 65.
4. *Howrah Municipal Corporation & Ors.* vs. *Ganges Rope Co. Ltd. & Ors.,* (2004) 1 SCC 663.
5. *Anjuman-E-Islam* vs. *State of Karnataka and Anr.,* 2001 (9) SCC 465.
6. *Bachhittar Singh* vs. *State of Punjab,* (1987) 3 SCC 34).
7. *The Vellore Educational Trust* vs. *State of Andhra Pradesh & Ors.,* JT 1987 (4) SC 396.

RESULT: Dismissed.

G.P. MITTAL, J.

1. Having failed to get allotment of a site for running a nursery school, the Petitioner has preferred this writ petition with the following prayers:-

> " (b) A writ of certiorari quashing the action of the Respondent in not allotting land for nursery school to the Petitioner Society after more than 8 years of recommendations and even after clearance from the Institutional Allotment Committee and earmarking of a piece of land, being illegal, arbitrary, unjust, malafide, discriminatory, unwarranted and in gross violation of the Rules, Regulations and Policy and the Principles of Equity, Justice, Good Conscience and Esttopel and consequently quashing the letter dated 5.10.2009 (Annexure P-14);
>
> (c) A writ of mandamus commanding the Respondent to forthwith allot to the Petitioner the alternative site/plot of land for nursery school in DDA Janta Flats, Pocket D Area, Kondli Gharoli Complex, Mayur Vihar Phase III, proposed for it by the Planning Department (TYA) on 23.8.2004, after the site earlier earmarked for it in the same area was found not having a clear approach;"

2. The sum and substance of the averments made in the writ petition is that after completion of all the formalities in 2001, the case of the Petitioner for allotment of a site for running a nursery school was cleared by the Planning Department of the DDA and a site was earmarked in Kondli Gharoli Complex, Mayur Vihar Phase-III. However, for want of a clear approach to the site, it was not feasible to establish and run a nursery school at the said site and hence, the Petitioner made a representation dated 09.06.2003 to the Director, DDA to allot it an alternative site rather than the one suggested by the Planning Department. It is the case of the Petitioner that sometime in the year 2004, an alternative site was identified in Pocket D, Kondli Gharoli Complex, Mayur Vihar Phase-III. However, an unduly long time was taken in processing the file and in the meanwhile Master Plan-2021 came into effect w.e.f. 07.02.2007 whereby it was laid down that nursery schools may function only as a part of the primary school/secondary school/senior secondary school wherever needed. The practice of providing dedicated nursery school plots in the layout plan was discontinued and hence an alternative site was refused to the Petitioner. The grievance of the Petitioner is that since the Petitioner had applied for allotment of a plot for running a nursery school in the year 1997, it's eligibility should be considered on the date of the application and since the plot was identified in the year 2004, the Respondent DDA is under obligation to allot the same to the Petitioner in accordance with the provisions of the Master Plan in existence at the relevant time.

3. In the counter affidavit filed by the DDA, it is stated that since the allotment of the plot had not yet been made, there was no vested right in the Petitioner for allotment of a site for running a nursery school. The Respondent refers to the New Master Plan-2021, according to which it is not permissible to allot any site for nursery school.

4. The short question for determination in the instant writ petition is whether earmarking of any plot in the files of the DDA conferred any vested right in the Petitioner for allotment of a site and whether the Petitioner is entitled to the allotment of a plot in accordance with the rules

which were in existence at the time of making the application. In support of his case, Mr. R.K.Saini, learned counsel for the Petitioner relies on two decisions of the Supreme Court, that is, **The Vellore Educational Trust v. State of Andhra Pradesh & Ors.,** JT 1987 (4) SC 396 and **Anjuman-E-Islam v. State of Karnataka and Anr.,** 2001 (9) SCC 465.

5. In The Vellore Educational Trust, the decision had turned on the ground that the Respondent had granted recognition to certain colleges, i.e. Chudi Ranganayakalu Charitable Trust, Guntur and Chudi Ranganayakalu Engineering College at Chilkalurupeta in Guntur District which had applied for the same on 15.10.1984 while the Petitioner's application for grant of such recognition for a private engineering college for which an application was made on 24.05.1984 was rejected on the ground that new Rules had come into force in July, 1985. This is what the Supreme Court had to say in Para 8 and 10 of the judgment :-

> "8. It is evident from the Government's letter dated November 15, 1985, annexed as Annexure-I to the writ petition that the respondent 1 accorded permission to Nagarjuna Education Society, Guntur to establish a private engineering college subject to the fulfilment of conditions mentioned in Section 20 of the Act. Permission was accorded for establishment of a new engineering college even after the government policy said to have been adopted in July 1985. The respondent No.1 also considered the application made by Chudi Ranganayakalu Charitable Trust, Guntur who applied for permission for the establishment of a private engineering college on October 16, 1984 and granted permission for the establishment of Chudi Ranganayakalu Engineering College at Chilakalurupeta in Guntur District. It may be mentioned in this connection that the application made by the petitioner was much earlier in point of time as it was submitted on May 24, 1984. It was also long before the policy adopted by the respondent No.1.
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> x x x x x x x x x x x
>
> 10. The impugned order made by the respondent No.1 refusing to grant permission solely on the ground of policy of the Government, is in our considered opinion not at all tenable as we have stated hereinbefore that such permission has already been

> accorded to establish private engineering college to Nagarjuna Education Society on November 15, 1985. Moreover the application for permission was filed long before the alleged policy in question was adopted by the respondent No.1."

6. Hence, the decision in The Vellore Educational Trust turned on account of arbitrariness and discrimination on the part of the State.

7. As far as *Anjuman-E-Islam* is concerned, the Supreme Court categorically ruled that the decision was rendered on the peculiar facts of the case and it would not mean to be a precedent for the others.

8. Turning to the facts of the instant case, it is well settled that noting in the file would not confer any right upon any person. (**Bahadursinh Lakhubhai Gohil v. Jagdishbhai M. Kamalia & Ors.,** (2004) 2 SCC 65 and **Bachhittar Singh v. State of Punjab,** (1987) 3 SCC 34).

9. In **Howrah Municipal Corporation & Ors. v. Ganges Rope Co. Ltd. & Ors.,** (2004) 1 SCC 663, the Respondent applied for sanction for construction of additional three floors to the existing complex as per the relevant building bylaws and the application was required to be processed ordinarily within a period of 60 days. However, the application was not processed and in the meanwhile Howrah Municipal Corporation Building Rules, 1991 framed under the provisions of Howrah Municipal Corporation Act, 1980 were amended and multi-storey construction above one plus two floors on G.T. road Howrah was prohibited. The Supreme Court held that there was no vested right in the Respondent to obtain the sanction within the stipulated period of 60 days and that the application was to be processed in accordance with the rules as applicable at the time when the application was actually processed. In para 37, the Supreme Court held as under:-

> "37. The argument advanced on the basis of so-called creation of vested right for obtaining sanction on the basis of the Building Rules (unamended) as they were on the date of submission of the application and the order of the High Court fixing a period for decision of the same, is misconceived. The word "vest" is normally used where an immediate fixed right in present or future enjoyment in respect of a property is created. With the long usage the said word "vest" has also acquired a meaning as "an absolute or indefeasible right" [see K.J. Aiyer's Judicial Dictionary

(A Complete Law Lexicon), 13th Edn.]. The context in which the respondent Company claims a vested right for sanction and which has been accepted by the Division Bench of the High Court, is not a right in relation to "ownership or possession of any property" for which the expression "vest" is generally used. What we can understand from the claim of a "vested right" set up by the respondent Company is that on the basis of the Building Rules, as applicable to their case on the date of making an application for sanction and the fixed period allotted by the Court for its consideration, it had a "legitimate" or "settled expectation" to obtain the sanction. In our considered opinion, such "settled expectation", if any, did not create any vested right to obtain sanction. True it is, that the respondent Company which can have no control over the manner of processing of application for sanction by the Corporation cannot be blamed for delay but during pendency of its application for sanction, if the State Government, in exercise of its rule-making power, amended the Building Rules and imposed restrictions on the heights of buildings on G.T. Road and other wards, such "settled expectation" has been rendered impossible of fulfilment due to change in law. The claim based on the alleged "vested right" or "settled expectation" cannot be set up against statutory provisions which were brought into force by the State Government by amending the Building Rules and not by the Corporation against whom such "vested right" or "settled expectation" is being sought to be enforced. The "vested right" or "settled expectation" has been nullified not only by the Corporation but also by the State by amending the Building Rules. Besides this, such a "settled expectation" or the so-called "vested right" cannot be countenanced against public interest and convenience which are sought to be served by amendment of the Building Rules and the resolution of the Corporation issued thereupon."

10. Similar question fell for consideration before the Supreme Court in **Sethi Auto Service Station & Anr. v. DDA & Ors.,** (2009) 1 SCC 180, where the Petitioner was entitled to resitement of his petrol pump in accordance with the guidelines issued in 1999. The policy was revised w.e.f. 20.06.2003 stating that the resitement will be permissible only where the existing petrol pump/gas godown site is utilised for a planned project/scheme. Although the Petitioner had made an application for

resitement of the site much before revised policy dated 20.06.2003 came into existence, the Supreme Court held that the doctrine of legitimate expectations was not attracted in the instant case. In para 38, the Supreme Court held as under:-

> "38. Having bestowed our anxious consideration to the facts in hand, in our judgment, the doctrine of legitimate expectation, as explained above, is not attracted in the instant case. It is manifest that even under the 1999 policy, on which the entire edifice of the appellants' substantive expectation of getting alternative land for resitement is built does not cast any obligation upon DDA to relocate the petrol pumps. The said policy merely laid down a criterion for relocation and not a mandate that under the given circumstances DDA was obliged to provide land for the said purpose. Therefore, at best the appellants had an expectation of being considered for resitement. Their cases were duly considered, favourable recommendations were also made but by the time the final decision-making authority considered the matter, the policy underwent a change and the cases of the appellants did not meet the new criteria for allotment laid down in the new policy."

11. The instant case is also covered by decision of a Division Bench of this Court in **Bhagwan Mahavir Education Society (Reg.) & Anr. v. Health & Education Society (Reg.),** W.P.(C) 2459-60/2005, decided on 25.03.2011 where on account of amendment in Rules 4,5,8 and 20 of the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981 w.e.f. 19.04.2006, the Division Bench held that from the date of amendment, the only mode for disposal of Nazul Land for hospitals, dispensaries, higher or technical education institutions and schools would be by way of public auction.

12. In this view, there is no escape from the conclusion that on account of noting in the files, no vested right was created in favour of the Petitioner as to the allotment of any plot of land for running a nursery school. On coming into force of the Master Plan-2021, neither the Petitioner nor anybody else was entitled to allotment of any land from the DDA for running a nursery school.

13. The writ petition therefore has to fail; the same is accordingly dismissed.

14. Pending application also stands disposed of.

ILR (2013) VI DELHI 4837
W.P. (C)

V.P. SUNITA **....PETITIONER**

VERSUS

DDA **RESPONDENT**

(G.P. MITTAL, J.)

W.P. (C) NO. : 7602/2010 **DATE OF DECISION: 17.12.2013**

Constitution of India, 1950—Article 226—Demand-cum-allotment Letter (DAL) was received by Petitioner after a delay of three months as she was away to America on account of illness of her father for a few months—Petitioner made entire demanded payment in 3 instalments and last instalment was paid with a delay of 418 days—Petitioner applied for conversion of flat from hire purchase to cash down basis—A sum of Rs. 6,50,000 as demanded by DDA was duly paid and balance payment of Rs. 1,373 was also made by Petitioner—By impugned letter, request for restoration of allotment was cancelled in spite of fact that Petitioner had paid restoration charges as demanded by DDA—As representations of Petitioner were rejected, present Writ Petitioner was filed in HC—Plea taken by DDA, since Petitioner failed to make payment in terms of DAL, allotment stood cancelled automatically is permissible if delay in payment is less than three years—Since Petitioner's case is not covered under policy, delay was not condoned—Held—There was a delay of only one year and two months in making payment—Payment of instalments was not made as Petitioner had made a request for conversion of allotment from conversion of allotment from hire purchase to cash down payment, which admittedly was being processed by DDA and amount as demanded

including interest was deposited by Petitioner—In a number of cases, delay of even upto three years has been condoned but DDA not given any defence as to way case of Petitioner could not similarly considered—As per policy of DDA, VC was competent to condone delay in making payment upto three years in deserving case—It is not case of DDA that Petitioner's case was not found to be deserving—Thus, act of DDA in declining to condone delay in making payment is arbitrary and cannot be sustained—Writ of mandamus issued directing DDA to forthwith restore allotment and handover possession of flat in question a period of eight weeks from today—In case, this already allotted to some other person, DDA is directed to allot and deliver possession of another flat with similar area on ground floor in Sector 14, Dwarka, New Delhi Within a period of 12 weeks from today.

Important Issue Involved: As per policy of DDA, Vice—Chairman is competent to condone the delay in making the payment upto three years in deserving cases. Act of DDA in declining to condone the delay in making the payment in a deserving case will be arbitrary.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Ms. Richa Kapoor, Adv. with Ms. Karuna Chhatwal, Advocate.

FOR THE RESPONDENT : Ms. Manika Tripathy Pandey, Advocate.

CASES REFERRED TO:

1. *Pitamber Dutt* vs. *DDA & Anr.,* W.P.(C) No.3184/2012, decided on 14.08.2012.
2. *Mohd. Sultan* vs. *DDA,* W.P.(C) No.13290/2009, decided on 11.01.2011.

3. *Pran Nath Thukral* vs. *Delhi Development Authority* [Writ Petition (Civil) No. 19783 of 2005].

RESULT: Allowed.

G.P. MITTAL, J.

1. By virtue of this writ petition under Article 226 of the Constitution of India, the Petitioner seeks restoration of allotment and handing over the possession of the MIG Flat No.239, (Ground Floor), Sector 14, Pocket B, Phase-2, Dwarka, New Delhi as the entire payment of the flat has already been made to the DDA.

2. On 29.12.1989, the Petitioner applied for allotment of an MIG flat under the Ambedkar Awas Yojna being a member of Scheduled Caste category. She paid a sum of Rs. 12,200/- as registration and processing fee and was allotted Registration No.9335 and Priority No.5881. On 31.12.2002, the Petitioner was declared successful in the draw of lots and was allotted the flat mentioned earlier. As per the demand-cum-allotment letter (DAL) dated 24-31.03.2003 mailed at the Petitioner's local address, she was required to make payment of Rs.5,50,279/- upto 30.05.2003. The Petitioner was further given the option to pay the amount with interest, i.e. Rs.5,70,632/- by 28.08.2003. Since the Petitioner had applied for allotment under the hire purchase scheme, the balance cost of the flat was payable by the Petitioner in 120 monthly instalments of Rs. 6810/- per month commencing from 10.07.2003.

3. According to the Petitioner, she was away to America on account of illness of her father for a few months. On her return from America, she got the letter after a delay of three months. On 04.12.2003, the Petitioner made a payment of Rs. 3 lacs. The Petitioner further made a payment of Rs.2 lacs on 05.02.2004 after a delay of eight months. It is claimed that a letter dated 26.07.2004 was written by the DDA asking for verification of the Petitioner's case. By letters dated 18.05.2004 and 26.07.2004, the Petitioner was requested to appear in person along with relevant record for verification of the documents. Although the DDA claims that the Petitioner failed to appear, Petitioner avers to the contrary. The Petitioner thereafter made further payment of Rs. 70,000/- with a delay of 418 days.

4. The Petitioner then applied for conversion of the flat from hire purchase scheme to cash down basis. A sum of Rs.6,50,000/- as demanded

by the DDA was duly paid. By a letter dated 15.09.2005, the DDA asked the Petitioner to make the balance payment of Rs.1373/- which was also made by the Petitioner on 19.10.2005. Although the Petitioner's case was being processed for restoration of the allotment, however, by a letter dated 11.07.2006 (Annexure R-2), the request for restoration of the allotment was cancelled in spite of the fact that the Petitioner had paid the restoration charges as demanded by the DDA. The Petitioner then made a representation to the Vice Chairman and to the Lt. Governor of Delhi in the capacity of the Chairman, DDA. However, the same were also rejected, hence the writ petition.

5. The defence raised by the DDA is plain and simple. It is stated that since the Petitioned failed to make the payment in terms of the demand-cum-allotment letter, the allotment stood cancelled automatically on failure to make the payment. It is stated that as per the policy of the DDA dated 31.01.1999, 01.06.2000 and 30.06.2005, restoration of allotment is permissible if the delay in payment is less than three years. It is stated that since the Petitioner's case is not covered under the policy, the delay was not condoned.

6. It is the admitted case of the parties that as per the terms of the allotment letter, payment of Rs.5,70,632/- (inclusive of interest for delayed payment) was required to be made by the Petitioner by 28.08.2003. It is also borne out that the payment of Rs.5,70,000/- was made by 19.10.2004 in three parts starting with payment of Rs.3 lacs on 04.12.2003. It is also borne out from the record that the Petitioner's case for conversion from hire purchase to cash down payment was processed (though not formally allowed) and the Petitioner was informed to make the balance payment of Rs. 6,50,000/- which was duly made. The Petitioner was further informed to make the payment of Rs.1373/- which was also made as demanded.

7. The defence of the DDA is that an allottee cannot be permitted to make the payment as per his/her whims and fancies. Reliance is also placed on a judgment passed by a learned Single Judge of this Court in **Pitamber Dutt v. DDA & Anr.,** W.P.(C) No.3184/2012, decided on 14.08.2012.

8. I am not inclined to agree with the submissions made by the DDA. Pitamber Dutt is not attracted to the facts of the instant case. In the instant case, even if all the three payments made by the Petitioner are

considered to be delayed and the last date is considered as 19.10.2004, there was a delay of only one year and two months in making the payment. The payment of instalments was not made as the Petitioner had made a request for conversion of the allotment from hire purchase to cash down payment, which admittedly was being processed by the DDA and the amount as demanded including interest was deposited by the Petitioner. The Petitioner has drawn attention of the Court to a number of cases where delay of even upto three years has been condoned by the DDA. The DDA in the counter affidavit has not given any defence as to why the case of the Petitioner could not be similarly considered. I would extract para 11 and ground G of the writ petition hereunder:-

> "11. During all these while, when the Petitioner's representatives were visiting the office of the Respondent's office, they were being informed that the case of the Petitioner was being processed for regularization of the delay and that the Accounts Wing of the Respondent has confirmed the receipts of the above payments, in all totalling Rs.12,21,375/-. The details of payments are given herein below:-

S.No.	Challan No.	Date	Amount
1.	62212	4.12.03	3,00,000
2.	193498	5.2.04	2,00,000
3.	46256	19.10.04	70,000
4.	32180	12.5.05	1,87,500
5.	32181	12.5.05	1,93,500
6.	32178	12.5.05	81,000
7.	32179	12.5.05	1,88,000
8.	96650	19.10.05	1,375
		Total	12,21,375

> G. Because in fact, as a matter of routine, senior officials of the Respondent, condone the delay in genuine cases and the

> Petitioner's case is one such, where the delay in payment ought to be condoned by the Respondent. There have been a large number of cases, where the delay of more than even four years has been condoned by the Respondent. To cite few examples, the Petitioner is giving below details of cases, where the delay of few years in making payment has been condoned and restoration has been allowed on old cost + interest/restoration charges.

Sl. No.	Date of Draw/ allotment	Name of the allottee	Flat Particulars	Delay in payment – Number of years/ months	Date of Execution of Conveyance Deed
1.	31.5.02	Bimla Devi w/o Late Sh. M.R. Gover	251, Sector 17, Pocket E, Phase 2, Dwarka	3 yrs.	31.5.05
2.	22.12.01	Asha Bhushan/ Asha Gautam	187, Sector 13, Pocket B, Dwarka, Phase 2	2 yrs. 8 months	14.6.04
3.	22.12.01	Suresh Humdraj Prithyani	209, Sector 13, Pocket B, Phase 2, Dwarka	2 yrs. 2 months	—
4.	30.5.03	Surinder Bhatia	271, Sector 17, Pocket E, Phase 2, Dwarka	2 yrs. 10 months	28.3.05

9. It cannot be said that the Petitioner was making the payment on her own whims and fancy. When the Petitioner made a request to convert her allotment from hire purchase to cash down, the DDA asked her to make the lump sum payment of Rs.6,50,000/-. The DDA itself admits that it is permissible to condone the delay upto three years. In the instant case, even if the last payment of Rs.70,000/- is considered to have been made on 19.10.2004, there was a delay of just one year and two months in making the payment of Rs.5,70,000/- from the last date 28.08.2003

as mentioned in DAL. In the instant case, the ground for delay given by the Petitioner is that she was out of country to attend to her ailing father.

10. The policy laid down by letter dated 03.06.2005 placed on record by the Petitioner reveals that the Vice Chairman of the DDA was competent to condone the delay in making the payment upto three years in deserving cases. The relevant portion of the Resolution dated 03.06.2005 is extracted hereunder:-

"DELHI DEVELOPMENT AUTHORITY
HOUSING DEPTT.

Item No.29/2005
Sub: Policy for Restoration of cancelled DDA flats.
Ref. File No.F2(10)2001/N&C/

The Authority vide its resolution No.46/2001 (Appendix-A) has 65 to 66) resolved as under:

(i) These decisions shall apply only to the future cases of restoration where DDA is at fault.

(ii) Commissioner (H) shall be competent to approve restoration for delay in payment upto one year.

(iii) No restoration shall be normally allowed where delays are beyond one year. However, the Vice-Chairman, DDA shall be competent to approve restorations for delays upto 3 years, in deserving cases.

(iv) Restoration beyond three years can be permitted only in extremely deserving cases by the Vice-Chairman with the prior approval of Chairman."

11. Thus, it would be seen that the Vice Chairman was competent to condone the delay even beyond three years with the approval of the Chairman in deserving cases. It is not the case of the DDA that the Petitioner's case was not found to be deserving. Thus, the act of the DDA in declining to condone the delay in making the payment is arbitrary and cannot be sustained.

12. A learned Single Judge of this Court in **Mohd. Sultan v. DDA,** W.P.(C) No.13290/2009, decided on 11.01.2011 considered the condonation of delay as per the policy in existence in the year 2003 and observed that the Petitioner was denied condonation of delay in making

the payment without any genuine reason and held that the discretion should have been exercised in his favour. Paras 10 to 12 of this order are extracted hereunder:-

"10. In terms of the policy of the DDA, in case of a delay beyond 180 days and upto 270 days (inclusive of the 180 days), the Principal Commissioner would have the powers to condone the delay. Where the delay was up to 360 days (inclusive of the 270 days) the case can be regularized by the Vice Chairman. This regularization would be done on payment of restoration charges and penal interest @ 15% per annum. If the delay is beyond one year, the power to condone the delay lies with the Lieutenant Governor subject to the case being an "extremely deserving" one.

11. In the present case, the DDA was bound to consider whether the grounds adduced by the Petitioner for not being able to make the payment of instalments in time were genuine and whether the discretion could be exercised in his favour. Apart from stating that the Petitioner should be put to strict proof of the averments regarding his financial difficulties on account of the prolonged illness of his family members, the DDA is not in a position to assert that such claim by the Petitioner is false. The only factor that appears to have weighed with the DDA is that despite granting an extension of 180 days for making payment, the Petitioner did not pay the second instalment within the extended time. Therefore, the allotment was cancelled. This Court finds that the DDA really did not consider whether the delay in the present case should be condoned in terms of its policy. It is not as if the DDA has never condoned a delay of over 500 days in making payment of instalments. Some of the instances are reflected in the notings on files, copies of which have been placed as Annexure P-18 of the paper book. Certain other instances have been noticed by the Division Bench of this Court in its order dated 11th August 2008 in Raj Kumar Sharma v. Delhi Development Authority. In para 9 of the said order, it was observed as under:

"9. We have given our anxious consideration to the arguments made at the Bar and we have also gone through the records including various policies of the DDA regarding restoration and condonation of the delay. In the present case, the Appellant had

waited for the allotment for over 24 years and when he was allotted the demised flat in the year 2003, he was not in a financial position to make payment due to illness of his mother. The Appellant has cited in paragraph 17 of the writ petition cases of allottees Bimla Devi, Asha Bhushan, Suresh Humdraj Prithyani and Surinder Bhatia etc. in which cases DDA has condoned delay of over four years whereas in the case of the Appellant the delay in payment was only for a year. The Appellant has also furnished three specific examples where in the case of Satya Pal and Rita Pura delay of five years and six years respectively was regularized after approval of Lt. Governor. In the third case of one Manju Jain, the DDA had restored allotment after about 17 long years. Our attention was also drawn to the judgment of this Court in **Pran Nath Thukral v. Delhi Development Authority** [Writ Petition (Civil) No. 19783 of 2005] decided on 5th October 2005, wherein it is observed as under:

> "Would it be just and fair to do so considering the fact that DDA has monopoly status over land in Delhi. These registrants have stood as honest citizens and have awaited a plot in an authorized colony. Many of their counterparts have chosen the softer route. Those who have abided by law must be entitled to a compassionate consideration. It is expected that the Vice Chairman and the Chairman, DDA would have a relook on the Rohini Residential Scheme and in particular in relation to the time-frame within which allottees have to make the necessary payments. While reconsidering the matter, it should be kept in mind that the executive has the power to condone the delay on charging reasonable interest."

12. This Court is of the considered view that the Petitioner's case also ought to have been considered by the DDA in light of its policy. Two members of his family expired during the period in question after prolonged illness for which considerable expenditure had been incurred. It cannot be said that this was not a genuine reason. Discretion should be exercised in his favour. In view of the hardship explained by the Petitioner, and the delay in making the payments ought to have been condoned."

13. The Petitioner has given four specific instances in ground 'G'

of the writ petition which have been extracted earlier in Para 8 of this judgment where the delay of more than two years and in one case of three years was condoned. The DDA is completely silent about the same in the counter affidavit which would show that the delay in those cases was condoned. Since this Court has already observed above that there was a delay of just one year and two months in making the part payment of the initial amount of '5,70,632/- (inclusive of interest), the Petitioner was entitled to favourable consideration in view of the policy formulated by the DDA. Otherwise also, the action of the DDA was discriminatory and arbitrary in view of the instances referred to earlier.

14. The writ petition therefore, has to succeed. Since the full payment in respect of Flat No. 239, (Ground Floor), Sector 14, Pocket B, Phase-2, Dwarka, New Delhi has been made by the Petitioner, she is entitled to the allotment and the possession thereof immediately. Consequently, this Court issues a writ of mandamus directing the Respondent DDA to forthwith restore the allotment and handover the possession of Flat No. 239, (Ground Floor), Sector 14, Pocket B, Phase-2, Dwarka, New Delhi to the Petitioner within a period of eight weeks from today. In case this flat has already been allotted to some other person, the DDA is directed to allot and deliver possession of another flat with similar area on the ground floor in Sector 14, Dwarka, New Delhi within a period of 12 weeks from today.

15. The writ petition stands disposed of in above terms.

16. Pending applications, if any, also stand disposed of.

ILR (2013) VI DELHI 4847
W.P. (C)

KUSUM JAIN AND ORS. ....PETITIONER

VERSUS

D.D.A. AND ANR. ....RESPONDENT

(G.P. MITTAL, J.)

W.P. (C) NO. : 5160/2012 DATE OF DECISION: 20.12.2013

Code of Civil Procedure, 1908—Order 1 Rule 10—Order 23 Rule 3—Section 151—Delhi Rent Control Act, 1958—Section 14(1) (e), (f) and (g) and 14D—Action of DDA cancelling Conveyance Deed of Petitioner's Property challenged before HC—Application filed for impleading applicant as a Respondent in writ petition—Plea taken, since applicant is a tenant in premises, he has a direct interest in property and is therefore a necessary party—Per contra plea taken, applicant has accepted Petitioner No. 2 as landlord and has paid rent without any protest—Applicant has no right to be heard in present application as outcome of present writ petition would have no effect on applicant, who is merely a tenant in premises—Held—It may be true that action for cancellation of Conveyance Deed might have been taken by DDA on basis of complaints made by applicant—However, at same time, matter of cancellation of Conveyance Deed or it's restoration is only between DDA and Petitioners and applicant in that sense does not have any direct interest in instant writ petition—Petitioner is *dominus litus* and cannot be forced to add a party against whom he does not want of fight unless it is a compulsion of rule of law—Applicant has no direct interest in controversy raised in instant writ petition—Applicant would be a tenant whether under initial owner or his successor by whatever mode transfer takes place—Applicant has or substantial interest in controversy whether cancellation of Conveyance Deed in favour of Petitioner No.1 be held illegal whether Petitioner be entitled be entitled to restoration—Hence, applicant is not a necessary party to instant writ petition.

Important Issue Involved: (A) The law with regard to impleadment of the parties is quite liberal in the sense that a party can be added at any stage of the proceedings. The only embargo is that the presence of the party who is sought to be impleaded must be necessary in order to enable the Court to effectively and completely adjudicate upon and settle the question involved in the *lis*.

(B) The petitioner is the *dominus litus*. Thus, unless a person who moves an application for impleadment satisfies the Court that he has a direct interest in the lis, he/ she cannot be impleaded as a party.

[Ar Bh]

APPEARANCES:

FOR THE PETITIONER : Mr. Sanjeev Narula, Advocate.

FOR THE RESPONDENT : Mr. Arjun Pant, Adv. for Respondent No. 1. Mr. Ravi Shankar Kumar, Adv. with Mr. Arnab Bhattacharya, Adv. & Ms. J.K. Goyal, Adv. for the Intervener /Applicant.

CASES REFERRED TO:

1. *Kasturi* vs. *Iyyamperumal & Ors.,* (2005) 6 SCC 733.
2. *P.M.A. Hakeem, Chairman, Maharashtra State Road Transport Corporation & Ors.* vs. *UP Co-operative Spinning Mills Federation Limited & Ors.,* 2002 (4) BomCR 564.

RESULT: Dismissed.

G.P. MITTAL, J.

1. This is an application under Order 1 Rule X read with Section 151 of the Code of Civil Procedure, 1908, (CPC) for impleading the applicant as a Respondent in the instant writ petition.

2. In order to decide the application, it would be appropriate to extract the provisions of Order 1 Rule 10 CPC hereunder:-

> **"10. Suit in name of wrong plaintiff.-**
>
> (1) .....
>
> (2) Court may strike out or add parties - The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.
>
> (3) .....
>
> (4) .....
>
> (5) ....."

3. The law with regard to impleadment of the parties is quite liberal in the sense that a party can be added at any stage of the proceedings. The only embargo is that the presence of the party who is sought to be impleaded must be necessary in order to enable the Court to effectively and completely adjudicate upon and settle the question involved in the lis. It is also well settled that the Petitioner is the dominus litus. Thus, unless a person who moves an application for impleadment satisfies the Court that he has a direct interest in the lis, he/she cannot be impleaded as a party.

4. Before adverting to the grounds on which the impleadment is sought by the applicant, it would be fruitful to recapitulate a few facts leading to the filing of the instant writ petition.

5. A Perpetual Sub-Lease Deed in respect of property No.A-3/3, Vasant Vihar, New Delhi was registered in favour of Late Ram Kanwar

Jain on 24.04.1971. Thereafter, the said Shri Ram Kanwar Jain expired. On the death of Late Shri Ram Kanwar Jain, the property was mutated on 21.04.1998 in favour of his widow Late Smt. Bimla Devi Jain. According to the averments made in the writ petition, Late Smt. Bimla Devi Jain appointed one Late Shri Dharam Chand Jain as her attorney. It is the case of the Petitioners that sometime in the year 1995, Late Smt. Bimla Devi Jain applied to the DDA for conversion of the property in question from leasehold to freehold. It is further the case of the Petitioners that Late Smt. Bimla Devi Jain acting through her attorney Late Shri Dharam Chand Jain entered into agreement to sell dated 05.07.1995 and agreed to sell the property for a total sale consideration of Rs. 70 lacs to the Petitioners. An amount of Rs.18 lacs was paid in advance and the balance sale consideration was to be paid at the time of registration of the Sale Deed after conversion of the property from leasehold to freehold. Shri Dharam Chand Jain, attorney of Late Smt. Bimla Devi Jain also expired on 09.12.1995. In the year 1996, Petitioner No.2 (Ms. Glory Promoters (P) Ltd.) filed a suit for specific performance of the earlier said agreement against Late Smt. Bimla Devi Jain being C.S. (OS) No.1329/1996.

6. In the meanwhile, the applicant herein (Mr. P.C. Srivastava) who is a tenant in the property, on or about 27.11.1989 made certain complaints to Respondent No.1 (claimed to be false by the Petitioners) alleging that Late Smt. Bimla Devi Jain had sold the demised property to Late Shri Dharam Chand Jain. The property was inspected by Respondent No.1. According to the Petitioner, the lease in favour of Late Smt. Bimla Devi Jain was thereby determined on account of the alleged false and frivolous complaints made by the applicant herein.

7. It is further the case of the Petitioners that after verifying all aspects on 02.04.1992, the DDA allowed restoration of the lease on 01.05.1992, subject to the deposit of restoration charges. Thereafter, in the year 1995, Late Smt. Bimla Devi Jain applied for conversion of the property from leasehold to freehold. It is alleged that in the year 1997 (during pendency of the civil suit) Late Smt. Bimla Devi Jain, who was living in United States visited India and a settlement was arrived at between Petitioner No.2 and Late Smt. Bimla Devi Jain. As per the terms of the settlement, Late Smt. Bimla Devi Jain registered a General Power of Attorney and a Will dated 13.11.1997 in favour of her two daughters, namely, Mrs. Saroj Jain and Mrs. Kusum Jain. Late Smt. Bimla Devi Jain agreed to register the Sale Deed in favour of Petitioner No.2 after

conversion of the property from leasehold to freehold and after execution of the Conveyance Deed in her favour by Respondent No.1 (DDA). It is alleged that a Conveyance Deed dated 05.03.1999 was executed in favour of Late Smt. Bimla Devi Jain by the DDA.

8. Thereafter, Respondent No.1 DDA converted the property from leasehold to freehold on 05.03.1999, after a lapse of four years and after verification of complaints made by the applicant Mr. P.C. Srivastava.

9. After conversion of the property from leasehold to freehold, Late Smt. Bimla Devi Jain through her attornies along with Petitioner No.2 moved an application under Order 23 Rule 3 CPC for recording of compromise in Civil Suit No.1329/1996. Vide order dated 23.08.1999, the application was allowed and the suit was disposed of in terms of the compromise reached between the parties on 20.08.1999.

10. According to the Petitioners, on 10.04.2003, the property was mutated in favour of Smt. Kusum Jain and Smt. Saroj Jain. On 06.10.2004, they executed and registered a Sale Deed in favour of Petitioner No.2 which was also duly registered.

11. It is the case of the Petitioners that in the year 2005, Petitioner No.2 filed a Petition for eviction against the applicant (Mr. P.C. Srivastava) under Section 14 (1) (f) & (g) of the Delhi Rent Control Act, 1958 (DRCA) which is still pending before the Court of learned Additional Rent Controller, Saket, New Delhi.

12. It is averred that an application was also moved by the applicant herein in Suit No.1329/1996 for setting aside of the decree. The said application was dismissed by an order dated 25.03.2009 with costs of Rs. 25,000/-. It is alleged that the applicant Mr. P.C. Srivastava continued with his complaints to the DDA. The DDA sought clarification about the death of Late Smt. Bimla Devi Jain. In the meanwhile, Petitioner No.2 also filed an Eviction Petition against the applicant under Section 14(1) (e) of DRCA, which is also pending.

13. The sum and substance of the grievance made by the Petitioners in the writ petition is that the Conveyance Deed dated 05.03.1999 was cancelled by the DDA by letter dated 18.06.2012. The Petitioners made a representation dated 30.07.2012 and requested for revocation of the decision to cancel the Conveyance Deed. The action of the DDA in cancelling the Conveyance Deed is claimed to be illegal and arbitrary by the Petitioners.

14. In the instant application under Order 1 Rule 10 CPC, the applicant who as stated above, is a tenant in premises bearing No.A-3/3, Vasant Vihar, New Delhi seeks his impleadment being a necessary party on the grounds that the Petitioners with *mala fide* intentions want to construct multi-storey apartments on the property in question and then to sell those units in black market; that father of Petitioner No.1 got allotment of Plot No.A-3/3, Vasant Vihar, New Delhi on 19.01.1971 being a member of the Government Servant Co-operative House Building Society and as per the terms of sub-lease executed in his favour, he was (or for that matter his successors) not entitled to sell, transfer or otherwise part with the possession of the whole or any part of the plot; that the father of Petitioner No.1 never utilised the premises for himself since the inception of the construction and let out the entire house to the applicant and after sometime he developed a motive to sell out the property in black market; that Late Smt. Bimla Devi Jain also filed an Eviction Petition under Section 14D of the DRCA against the applicant. It is also the case of the applicant that some false and fictitious documents were executed between the Petitioners and a collusive suit for Specific Performance of Contract dated 20.04.1995 was filed against Late Smt. Bimla Devi Jain and other successors of Late Ram Kumar Jain, who were necessary parties to the suit but were not impleaded therein.

15. In the application, it is also averred that on 08.10.2004, a Sale Deed of the property was executed by Mrs. Kusum Jain for herself and being the Attorney of her sister Mrs. Saroj Jain on her behalf as well in favour of M/s. Glory Promoters Pvt. Ltd. through it's Director Mr. Lalit Mohan Madan. Mr. Lalit Mohan Madan filed another Eviction Petition under Section 14(1)(f) & (g) of the DRCA against the applicant. The applicant states that in the year 2006, the applicant brought to the notice of the President of India, Vice Chairman of the DDA and other higher authorities the scam going on in respect of the properties allotted by the DDA in South Delhi. The applicant also refers to certain letters written by some Members of Parliament to the Union Minister for Urban Development regarding malfunctioning of the DDA.

16. The sum and substance of the impleadment application made is that since the applicant is a tenant in the premises, he has a direct interest in the property and is therefore a necessary party.

17. The application has been opposed by the Petitioners by way of filing a written reply to the application. It is urged that the applicant has

accepted Petitioner No.2 as the landlord and has paid rent upto 31.03.2011 without any protest. It is stated that the applicant has no right to be heard in the present application as the outcome of the present writ petition would have no effect on the applicant, who is merely a tenant in the premises in question.

18. It may be true that the action for cancellation of the Conveyance Deed might have been taken by the DDA on the basis of the complaints made by the applicant. However, at the same time, the matter of cancellation of Conveyance Deed or it's restoration is only between the DDA and the Petitioners and the applicant in that sense does not have any direct interest in the instant writ petition. It has to be borne in mind that the Petitioner is the dominus litus and cannot be forced to add a party against whom he does not want to fight unless it is a compulsion of the rule of law.

19. In **Kasturi v. Iyyamperumal & Ors.,** (2005) 6 SCC 733, an agreement to sell was entered into between the Appellants and Respondents No.2 and 3. A suit for specific performance was filed by the Appellants against the earlier said Respondents. Respondents No.1 and 4 to 11 set up claim of independent title and possession over the subject matter of the agreement to sell and filed an application to get themselves impleaded as Defendants in the Suit. The Trial Court allowed the application on the ground that as Respondent No.1 and 4 to 11 were claiming title and possession of the contracted property, they must be having direct interest in the subject matter of the suit and therefore, must be entitled to be added as a party (Defendants) in the suit as their presence would be necessary to decide the controversy raised in suit. The High Court in Revision confirmed this order. Aggrieved by the order passed by the High Court, the Appellant approached the Supreme Court. Allowing the Appeal, the Supreme Court held that Respondents No.1 and 4 to 11 were neither necessary nor proper parties in the suit for specific performance. In paras 18 and 19, the Supreme Court observed as under:-

> "18. That apart, there is another principle which cannot also be forgotten. The appellant, who has filed the instant suit for specific performance of the contract for sale is dominus litis and cannot be forced to add parties against whom he does not want to fight unless it is a compulsion of the rule of law, as already discussed above. For the reasons aforesaid, we are, therefore, of the view that Respondents 1 and 4 to 11 are neither necessary parties nor proper parties and therefore they are not entitled to be added as

party-defendants in the pending suit for specific performance of the contract for sale.

19. The learned counsel appearing for Respondents 1 and 4 to 11, however, contended that since Respondents 1 and 4 to 11 claimed to be in possession of the suit property on the basis of their independent title to the same, and as the appellant had also claimed the relief of possession in the plaint, the issue with regard to possession is common to the parties including Respondents 1 and 4 to 11, therefore, the same can be settled in the present suit itself. Accordingly, it was submitted that the presence of Respondents 1 and 4 to 11 would be necessary for proper adjudication of such dispute. This argument which also weighed with the two courts below although at the first blush appeared to be of substance but on careful consideration of all the aspects as indicated hereinearlier, including the scope of the suit, we are of the view that it lacks merit. Merely in order to find out who is in possession of the contracted property, a third party or a stranger to the contract cannot be added in a suit for specific performance of the contract for sale because Respondents 1 and 4 to 11 are not necessary parties as there was no semblance of right to some relief against Respondent 3 to the contract. In our view, the third party to the agreement for sale without challenging the title of Respondent 3, even assuming they are in possession of the contracted property, cannot protect their possession without filing a separate suit for title and possession against the vendor. It is well settled that in a suit for specific performance of a contract for sale the lis between the appellant and Respondents 2 and 3 shall only be gone into and it is also not open to the Court to decide whether Respondents 1 and 4 to 11 have acquired any title and possession of the contracted property as that would not be germane for decision in the suit for specific performance of the contract for sale, that is to say in a suit for specific performance of the contract for sale the controversy to be decided raised by the appellant against Respondents 2 and 3 can only be adjudicated upon, and in such a lis the Court cannot decide the question of title and possession of Respondents 1 and 4 to 11 relating to the contracted property."

20. In **P.M.A. Hakeem, Chairman, Maharashtra State Road Transport Corporation & Ors. v. UP Co-operative Spinning Mills**

Federation Limited & Ors., 2002 (4) BomCR 564, the Bombay High Court held that a party seeking to be impleaded as a party to the suit must demonstrate that it has a direct and substantial interest in the subject matter of the suit and that such interest would be affected directly by the decree that may be passed in the suit or that it's presence as a party to the suit must be necessary for answering the issues arising in the suit. These factors must demonstrably exist before the party applying can be allowed to be impleaded as a party to the suit.

21. Herein, the applicant has no direct interest in the controversy raised in the instant writ petition. The applicant would be a tenant whether under the initial owner or his successor by whatever mode the transfer takes place. Thus, the applicant has no direct or substantial interest in the controversy whether the cancellation of the Conveyance Deed in favour of Petitioner No.1 be held illegal or whether the Petitioner be entitled to restoration. Hence, the applicant is not a necessary party to the instant writ petition.

22. It may be mentioned that while dismissing the applicant's prayer for setting aside of the decree for specific performance and his impleadment, the learned Single Judge while imposing costs of Rs.25,000/- observed that the application has been filed by the applicant who was a tenant at an extremely low rate of rent in the property only to build a defence and thereby delay the proceedings, if any, for his eviction. The relevant portion of the order passed by the learned Single Judge is extracted hereunder:-

> "I find the present application to be an attempt on the part of the applicant who is a tenant at an extremely low rate of rent in the property to build a defence and thereby delay the proceedings, if any, for his eviction. Such applications cannot be entertained.
>
> Even if the averments of the applicant are true, the grievance, if any, would be of the sons of Mrs. Bimla Devi Jain. The applicant cannot take up cudgels on their behalf.
>
> The applicant has already lodged complaints with respect to under valuation and on that ground, this application cannot be entertained.
>
> The judgments relied upon by the counsel for the applicant are not found to be applicable.
>
> On enquiry from the senior counsel for the applicant, as to how

> the sale/compromise is motivated against the applicant, it is stated that the plaintiff as owner is now pursuing eviction of the applicant. The only inference is that Mrs. Bimla Devi Jain was probably unable to aggressively eviction of the applicant – the applicant is prejudiced that upon sale, the purchaser i.e. the plaintiff is taking steps for eviction of the applicant.
>
> A tenant cannot stop the owner from selling the property. The applicant has not laws to challenge the sale or even any irregularity therein. No right of the applicant has been effected by compromise decree and no fraud can be said to have been played.
>
> I may record that the counsel for the plaintiff has appeared on advance copy having been furnished. He states that Mrs. Bimla Devi Jain died in March, 2003 in USA.
>
> The applicant has taken up time of this Court. The application is found to be in abuse of process of the court and dismissed with costs of Rs.25,000/- payable to Delhi Legal Services Authority. If the applicant fails to furnish proof of payment of costs to the Registry of this Court within 15 days. The Registry to put up the file for appropriate action against the applicant."

23. It is evident that the instant application has also been preferred by the applicant only to stall the proceedings taken by the Petitioners. In pursuance of the directions given by this Court, the applicant has placed on record his Income Tax Returns for Assessment Year 2012-13 showing that he returned an income of about Rs.30 Lakhs. Since the costs of Rs.25,000/- imposed by the learned Single Judge did not deter the applicant in his misadventure to move frivolous application, this Court is bound to dismiss such application on suitable terms. The application is frivolous and is accordingly dismissed with costs of Rs.2,00,000/- to be deposited with *"Welfare Fund for Children and Destitute Women"* at Jail Road, Tihar, New Delhi, within a period of 12 weeks. If the cost is not paid by the applicant within 12 weeks, the matter shall be listed before the Registrar for taking execution of the order.

W.P.(C) 5160/2012

24. List before the Registrar for completion of pleadings on 03.01.2014.

25. List before the Court on 26.02.2014.

INDIAN LAW REPORTS
DELHI SERIES
2013

(Containing cases determined by the High Court of Delhi)

VOLUME-6, PART-II

(CONTAINS GENERAL INDEX)

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

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Wing Commander E.K. Vijayan (Retd.) v. *Union of India & Ors.* *4763*

— Rule 6 (1) (ii) and (2)—Original Application of Petitioner challenging amendment to his Pension Payment Orders (PPOs) rejected by Armed Forces Tribunal (AFT) on ground that Petitioner was not residing within jurisdiction of Principal Bench at New Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Order challenged before HC—Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held—A bare reading of Rule 6 would show that Sub-Rule 1 (ii) of Rule, in fact, confers discretion upon a retired force person to file petition before a bench within whose jurisdiction he is ordinarily residing at time of filing a application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before Bench within whose jurisdiction cause of action wholly or in part has arisen—In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Wing Commander J. Ramani (Retd.) v. *Union of India & Ors.* *4768*

BENAMI TRANSACTIONS (PROHIBITION ACT), 1988—Limitation Act, 1963—Section 14—Constitution of India, 1950—

Article 226—Duly authorized Income Tax Officer carried out search and seizure operations at residential and business premises of Respondent No. 1 Seven pay orders for Rs. 50.40 Lakhs prepared from accounts were found—Income Tax officials issued a demand seizure order with respect to seven pay orders and served it upon Manager, PNB—Original pay orders were in control and possession of Respondent No. 1 who approached Income Tax Authorities with respect to same—Efforts of Respondent No. 1 at securing release from income tax authorities ended with order by CIT rejecting their application u/s 132 (11)—Writ petition challenging order dismissed relegating Respondent No. 1 to a civil court for its remedies by way of a suit through a consent order—Suit filed by Respondent No. 1 was decreed ex parte, in full—Judgment challenged in appeal—Plea taken, suit was barred u/s 293 of Income Tax Act and there was no ground to give benefit of Section 14 of Limitation Act—Held—There can be no dispute that question of liability itself, as a matter of a contractual agreement between parties, is a matter properly reserved for jurisdiction of civil court—Question, here, however does not concern private remedies that lie between two parties in this case, but whether, ownership seven pay orders seized by income tax authorities u/s 132, can be subject matter of present suit—Section 132 (11) provides third person (in this case M/s Bansal Commodities), with necessary opportunity to present its case or claim that it is real and true owner or beneficial owner of proceeds (or amounts) under seven pay orders, before income tax authorities—That was, in fact, done in this case—M/s. Bansal Commodities clearly had recourse to Section 132 (11), which they took advantage of, though ultimately their view was rejected by income tax authorities in accordance with statutory discretion vested in it—Thus, Section 293 clearly comes into operation in this case—Order u/s 132 effecting a deemed seizure of pay orders as against tax dues of RKA continues to operate till date, having never been set aside in any writ proceeding before this court or Special Leave Petition before SC—Therefore, effect of Present suit would be that order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits present action—Impugned judgment of Learned Single Judge that ownership of seven pay orders lies with M/s. Bansal Commodities and order of CIT i.e. that seven pay Orders are to be utilized as against tax dues of RKA, can't stand together—Writ proceedings u/s 132 having been initiated in 1989 and having attained finality in terms of procedure within that provision being complied with, Section 293 mandates that

jurisdiction of civil court with respect to present suit is barred—As far as question of applicability of Section 14 of Limitation Act is concerned, there is sufficient material on record disclosing that plaintiff had been pursuing its remedies under IT Act diligently and Division Bench recorded that proper forum to agitate disputed questions about ownership of seven pay order would be civil court—There has been indeed no lack of bonafides on part of Respondent in filing suit, after said order—In facts of this case, view taken by this judgment will operate harshly on plaintiff—Therefore, liberty granted to said plaintiffs to seek leave to revive writ petition previously disposed off through appropriate application—Appeals allowed subject to liberty reserved to respondents.

Rakesh Kumar Agarwal v. *Bansal Commodities & Ors.* *4579*

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

S.K. Shah v. *UOI and Ors.* *4421*

— 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.

Vishnu Pal Singh v. *Delhi Tourism and Transportation Development Corporation* *4192*

CCS (PENSION) RULES, 1972—Rule 9—Respondent was assigned duty of inspection of consignment present for export—Directorate of Revenue Intelligence initiated inquiry in availment of duty drawback and issued notice to exporter—After 12 years, Petitioners forwarded a note to CVC for its first stage advice for initiation of regular departmental action for major penalty proceedings—On date of retirement of respondent, chargesheet issued—CAT held departmental proceedings would be exercise in futility and result in harassment meted out to employee after retirement—Order challenged before HC—Held—DRI had permitted several officers against whom similar allegations have been made without initiation of any disciplinary proceedings—Petitioners have themselves therefore not treated matters as of any import effecting discipline of department—Inordinate and unexplained delay of almost 12 years occurred in commencing disciplinary proceedings would disentitle Petitioners from proceeding in matter—Such delay manifests lack of seriousness on part of disciplinary authority in pursuing charges against employee—While evaluating impact of delay, Court must consider nature of charge, its complexity and for what reason delay has occurred—It is not case of present Petitioners that respondent

had colluded or connived with offending exporter in effecting fraudulent exportation of goods in violation of provisions of Customs Act—Since Respondent had already retired, no punishment can be awarded if delinquency alleged may not be of grave misconduct or negligence—If case is only of Supervisory lapses and not of grave negligence, Respondent cannot be punished—Issuance of Chargesheet after inordinate delay cannot be said to be fair to Delinquent Officer—Since it would also make task of proving charges difficult, it would also not be in interest of administration—If delay is too long and remains unexplained, Court may interfere and quash charges—Writ Petition dismissed.

Union of India & Anr. v. *Madan Lal*..... *4822*

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*

— Order 33—Petitioner filed suit claiming damages of Rs. 1 crore along with application U/o 33 of Code—Application was allowed holding petitioner as indigent person—Aggrieved respondents challenged the order and urged, petitioner owned immoveable property in New Delhi and he deliberately overvalued his suit, thus, order declaring him indigent person is bad.

— Held:— The expression "possessed of sufficient means" refers to capacity to raise money and not the actual possession of property. The petitioner/appellant is not expected to sell everything he has with him, to pay the prescribed Court Fees.

Krishan Kumar v. *State & Others* *4644*

— Order 1 Rule 10—Order 23 Rule 3—Section 151—Delhi Rent Control Act, 1958—Section 14(1) (e), (f) and (g) and 14D—Action of DDA cancelling Conveyance Deed of Petitioner's Property challenged before HC—Application filed for impleading applicant as a Respondent in writ petition—Plea taken, since applicant is a tenant in premises, he has a direct interest in property and is therefore a necessary party—Per contra plea taken, applicant has accepted Petitioner No. 2 as landlord and has paid rent without any protest—Applicant has no right to be heard in present application as outcome of present writ petition would have no effect on applicant, who is merely a tenant in premises—Held—It may be true that action for cancellation of Conveyance Deed might have been taken by DDA on basis of complaints made by applicant—However, at same time, matter of cancellation of Conveyance Deed or it's restoration is only between DDA and Petitioners and applicant in that sense does not have any direct interest in instant writ petition—Petitioner is *dominus litus* and cannot be forced to add a party against whom he does not want of fight unless it is a compulsion of rule of law—Applicant has no direct interest in

controversy raised in instant writ petition—Applicant would be a tenant whether under initial owner or his successor by whatever mode transfer takes place—Applicant has or substantial interest in controversy whether cancellation of Conveyance Deed in favour of Petitioner No.1 be held illegal whether Petitioner be entitled be entitled to restoration—Hence, applicant is not a necessary party to instant writ petition.

Kusum Jain and Ors. v. *D.D.A. and Anr.*..... *4847*

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).

State v. *Mohd. Iqbal* *4289*

— 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.

State v. *Lalita* *4328*

— 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 482—Indian Penal Code, 1860—Section 419, 420, 467, 468, 471 & 120B—Prevention of Corruption Act, 1988—Section 13 (2), 13 (1) (d)—Framing of Charge—Prosecution case that, Mansarowar Co-operative Group Housing Ltd. was fraudulently managed by Madhu Aggarwal and her husband G.C. Aggarwal, the accused, on strength of forged documents and fake members—Bisht, dealing assistant, Man Singh, AR and Devakar, RCS all co-accused conspired with Madhu Aggarwal and G.C. Aggarwal and orders without making proper verification regarding existence of society and its office bearers/members and approved list of fictitious/non-existing members of the society—Address of the society belonged to accused/petitioner Ajit Singh who confirmed having received communication from DDA—Trial Court framed

charges u/s 419, 420, 467, 468, 471, r.w. S. 120B IPC and S. 13 (2), 13 (1) (d) of P.C. Act—Held, well settled that charge cannot be framed merely on suspicion against accused however, at stage of framing charge, court is only to take a tentative view on the basis of material on record—If court of view that accused might have committed offence, it would be justified in framing charge against the accused—On facts held, material collected raises strong suspicion that petitioner part of conspiracy to obtain allotment of land by main accused G.C. Aggarwal—Special Judge fully Justified in framing charges— Petition dismissed.

Ajit Singh v. *CBI* *4552*

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.

Shahi Exports Pvt. Ltd. & Another v. *CMD Buildtech Pvt. Ltd.* *4108*

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.

Balbir Singh v. *Union of India & Ors.* *4176*

— 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.

Ghan Shyam Singh v. *Union of India & Ors.* *4179*

— 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.

Jindal Steel & Power Limited & Anr. v. *Rail Vikas Nidam Ltd.* *4440*

— 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.

Manish Kumar v. *The Chairman, Railway Board and Ors.* *4455*

— 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.

Santosh Kumar v. *Union of India & Ors.* *4463*

— 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.

Satish Kumar v. *Union of India & Ors.* *4470*

— Article 226—Petitioner is a promotee officer working as Superintendent BR Grade—II with Border Road Organization (BRO)—BRO implemented recommendations of 5th Central Pay Commission w.e.f. 1st January, 1996 and started paying a higher salary to Overseers and Superintendents BR Grade—II who were direct recruits and possessed either a diploma or a degree in applicable filed i.e. Electrical or Mechanical; depending upon Stream—This was denied to promotee officers who joined as Masons, Carpenters etc. and earned promotion—Writ Petition filed praying to pay salary in same pay scale/pay band with grade pay as was paid to Ghan Shyam Viswakarma pursuant to a decision passed by Gauhati High Court (Aizwal Branch) in WP (C) No. 51/2009—Held—Issue raised in present writ petition has arisen in several petitions decided earlier—Action of respondents was held discriminatory and quashed—Mandamus was issued that same scale of pay benefit, as recommended by pay commission, be awarded to such officers for reason that Pay Commission did not draw any such distinction while marking their recommendations—Despite repeated directions, respondents are granting benefits only to such persons who approached Court which is legally impermissible—In spite of directions that decision has to be implemented in rem, no action has been taken by respondents and persons as petitioners are being compelled to approach this Court for same relief—Writ allowed directing that Petitioner working as Superintendent BR Grade—II with BRO be accorded benefit of recommendations made by 5th and 6th Central Pay Commissions as was awarded to Ghan Shyam Viswakarma.

Sudhir Kumar Kapoor v. *UOI and Ors.* *4614*

— Article 226—Petitioner applied for allotment of a flat under 'DDA Housing Scheme, 2010' and was declared successful in draw of lots held by DDA—As per terms of allotment contained in brochure issued by DDA, allottee was liable to make payment of price of flat within 90 days from date of issue of demand letter, without interest—Thereafter, allottee was liable to deposit amount within a further period of 90 days alongwith interest @ 15% per annum compounded on 31st March—When Petitioner visited area after allotment of flat, he found construction was still going on and flats were not ready for handing over possession—Writ petition filed before HC for directions to DDA to complete construction and repairs of flats and surrounding area specially of flat allotted to Petitioner and for staying operation of impugned demand—Plea taken, payment in respect of 484 other flats in Vasant Kunj 217 flats in Dwarka was deferred by DDA, payment in respect of flat allotted to Petitioner was not deferred and thus he was discriminated—Payment of balance amount was made by Petitioner within stipulated period, but he had to pay interest in terms of allotment letters—As essential amenities were not available, it was illegal and unjust on part of DDA to have issued demand letter granting him only 90 days time to make payment and no payment being made thereafter, asking him to pay interest on delayed payment—Held—Additional affidavit of DDA stated that some of basic amenities were likely to be completed by 30.09.2012—If that were so, it was unjust on part of DDA to have required Petitioner to deposit price of flat on issuance of demand letter latest by 28.06.2012 and charging him interest if payment is made thereafter—Since essential amenities were likely to be provided only by 30.09.2012 and possession could have been delivered to Petitioner only thereafter, he could not have been asked to make payment of entire price of flat by 28.06.2012 and charging him interest—Interest paid by Petitioner while depositing amount on 21.09.2012 is liable to be refunded to him—Writ Petition is disposed of with directions to DDA to refund interest amounting to Rs. 1,29,787/- paid by Petitioner within a period of three months, failing which Petitioner shall be entitled to interest @ 12%p.a. from date of order till amount is refunded.

Devinder Singh Saini v. *D.D.A.* *4627*

— Article 226—Duly authorized Income Tax Officer carried out search and seizure operations at residential and business premises of Respondent No. 1 Seven pay orders for Rs. 50.40 Lakhs prepared from accounts were found—Income Tax officials issued

a demand seizure order with respect to seven pay orders and served it upon Manager, PNB—Original pay orders were in control and possession of Respondent No. 1 who approached Income Tax Authorities with respect to same—Efforts of Respondent No. 1 at securing release from income tax authorities ended with order by CIT rejecting their application u/s 132 (11)—Writ petition challenging order dismissed relegating Respondent No. 1 to a civil court for its remedies by way of a suit through a consent order—Suit filed by Respondent No. 1 was decreed ex parte, in full—Judgment challenged in appeal—Plea taken, suit was barred u/s 293 of Income Tax Act and there was no ground to give benefit of Section 14 of Limitation Act—Held—There can be no dispute that question of liability itself, as a matter of a contractual agreement between parties, is a matter properly reserved for jurisdiction of civil court—Question, here, however does not concern private remedies that lie between two parties in this case, but whether, ownership seven pay orders seized by income tax authorities u/s 132, can be subject matter of present suit—Section 132 (11) provides third person (in this case M/s Bansal Commodities), with necessary opportunity to present its case or claim that it is real and true owner or beneficial owner of proceeds (or amounts) under seven pay orders, before income tax authorities—That was, in fact, done in this case—M/s. Bansal Commodities clearly had recourse to Section 132 (11), which they took advantage of, though ultimately their view was rejected by income tax authorities in accordance with statutory discretion vested in it—Thus, Section 293 clearly comes into operation in this case—Order u/s 132 effecting a deemed seizure of pay orders as against tax dues of RKA continues to operate till date, having never been set aside in any writ proceeding before this court or Special Leave Petition before SC—Therefore, effect of Present suit would be that order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits present action—Impugned judgment of Learned Single Judge that ownership of seven pay orders lies with M/s. Bansal Commodities and order of CIT i.e. that seven pay Orders are to be utilized as against tax dues of RKA, can't stand together—Writ proceedings u/s 132 having been initiated in 1989 and having attained finality in terms of procedure within that provision being complied with, Section 293 mandates that jurisdiction of civil court with respect to present suit is barred—As far as question of applicability of Section 14 of Limitation Act is concerned, there is sufficient material on record disclosing that plaintiff had been pursuing its remedies under IT Act diligently and

Division Bench recorded that proper forum to agitate disputed questions about ownership of seven pay order would be civil court—There has been indeed no lack of bonafides on part of Respondent in filing suit, after said order—In facts of this case, view taken by this judgment will operate harshly on plaintiff—Therefore, liberty granted to said plaintiffs to seek leave to revive writ petition previously disposed off through appropriate application—Appeals allowed subject to liberty reserved to respondents.

Rakesh Kumar Agarwal v. *Bansal Commodities & Ors.*. *4579*

— Armed Forces Tribunal (Procedure) Rule 2008-Rule 6-Petitioner challenged order passed by Armed Forces Tribunal Holding, Tribunal did not have territorial jurisdiction to entertain and adjudicate upon subject matter of the case as no Part of cause of action arose in Delhi—According to petitioner, he made representation on which order was passed at Delhi. Held:—The choice of selecting forum in case of matters covered by the Armed Forces Tribunal is wider unlike in the case of Section 20 of CPC. If competent authority rejected representation in Delhi, then the Principal Bench of Armed Forces Tribunal had the jurisdiction to adjudicate the dispute.

Wing Commander Ravi Mani (Retd.) v. *Union of India & Ors.* *4751*

— Aggrieved petitioner for rejection of his candidature in selection process undertaken by respondent no. 1 preferred writ petition—It was urged that petitioner qualified physical endurance test, written examination as well as medical examination tests—At time of interview, petitioner relied upon OBC certificate which was rejected by respondent No.1 as not being in requisite format—According to respondent, certificate produced was beyond cut off date prescribed Held:— An OBC certificate beyond cut off date did not meet with requisite stipulations. Creamy layers have to be excluded, thus, there being a requirement of OBC certificates to be issued within 3 years prior on date of receipt of applications.

Anil Kumar v. *State Selection Commission (North Region) and Anr.* *4773*

— Petition Regulation for Army Act, 1961—Regulations 72 & 197—Petitioner filed petition challenging order passed by Armed Forces Tribunal rejecting his prayer for direction to respondent to pay invalid pension to him from date of his release from service along with arrears and interest thereon—Also, respondent to add period of leave pending retirement for 108 days with 12% interest

thereon—According to petitioner, he had served for more than 15 ½ years, therefore, was entitled to invalid pension which was applicable to all ranks on completion of 10 years of service under Regulation 12 and other circulars issued by Ministry of Defence—As per respondent, petitioner was not invalidated out of service because of exigency of service or low medical category—On the contrary, he had sought voluntary retirement from service.

J.S. Punia v. *Union of India* *4780*

— Regulations for Army (1987 Edition) Regulations 364 and 381—Petitioner challenged findings and sentence of Summary Court Martial ordering imprisonment for 28 days in military custody and to be reduced to ranks from Hawildar to Sepoy—As per petitioner, Summary Court Martial by Depot Regiment, Jabalpur was without jurisdiction to try his case. Held:—In case of deserter Regulation 381 of Regulations for Army is applicable. Also according to Regulation 364, Intermediary Authority had the jurisdiction to close the case under information to the higher authority in chain.

Naik Manikandan R v. *Union of India and Ors.* *4794*

— Article 226—Demand-cum-allotment Letter (DAL) was received by Petitioner after a delay of three months as she was away to America on account of illness of her father for a few months—Petitioner made entire demanded payment in 3 instalments and last instalment was paid with a delay of 418 days—Petitioner applied for conversion of flat from hire purchase to cash down basis—A sum of Rs. 6,50,000 as demanded by DDA was duly paid and balance payment of Rs. 1,373 was also made by Petitioner—By impugned letter, request for restoration of allotment was cancelled in spite of fact that Petitioner had paid restoration charges as demanded by DDA—As representations of Petitioner were rejected, present Writ Petitioner was filed in HC—Plea taken by DDA, since Petitioner failed to make payment in terms of DAL, allotment stood cancelled automatically is permissible if delay in payment is less than three years—Since Petitioner's case is not covered under policy, delay was not condoned—Held—There was a delay of only one year and two months in making payment—Payment of instalments was not made as Petitioner had made a request for conversion of allotment from conversion of allotment from hire purchase to cash down payment, which admittedly was being processed by DDA and amount as demanded including interest was deposited by Petitioner—In a number of cases, delay of even upto three years has been condoned but DDA not given any defence as

to way case of Petitioner could not similarly considered—As per policy of DDA, VC was competent to condone delay in making payment upto three years in deserving case—It is not case of DDA that Petitioner's case was not found to be deserving—Thus, act of DDA in declining to condone delay in making payment is arbitrary and cannot be sustained—Writ of mandamus issued directing DDA to forthwith restore allotment and handover possession of flat in question a period of eight weeks from today—In case, this already allotted to some other person, DDA is directed to allot and deliver possession of another flat with similar area on ground floor in Sector 14, Dwarka, New Delhi Within a period of 12 weeks from today.

V.P. Sunita v. *DDA* *4837*

DELHI DEVELOPMENT AUTHORITY (DISPOSAL OF DEVELOPED NAZUL LAND) RULES, 1981—Rule 4, 5, 8 and 20—Cases of Petitioner for allotment of a site for running a nursery school was cleared by Planning Department of DDA and a site was earmarked in Kondli—For want of a clear approach to site, it was not feasible to establish and run a nursery school at said site—On representation of Petitioner alternative site was identified and in meanwhile Master Plan 2012 came into effect whereby it was laid down that nursery schools may function only as a part of Primary School /Secondary School /Senior Secondary School wherever needed—Practice of providing dedicated nursery school plots in layout plan was discontinued and hence alternative site was refused to Petitioner—Writ Petition filed challenging action of DDA—Plea taken, since Petitioner had applied of a plot for running a nursery school in year, 1997, it's eligibility school be considered on date of application and since plot was identified in year, 2004, Respondent DDA is under obligation to allot same to Petitioner in accordance with provisions of Master Plan in existence at relevant time—Per contra plea taken, since allotment of plot had not yet been made, there was no vested right in Petitioner for allotment of a site for running a nursery school—Held—On account of noting in files, no vested right was created in favour of Petitioner as to allotment of any plot of land for running a nursery school—On coming force of Master Plan—2021, neither Petitioner nor anybody else entitled to allotment of any land from DDA for running a nursery school—Writ Petition accordingly dismissed.

Rishabh Educational Society v. *Delhi Development Authority & Ors.* *4829*

— Delhi Development Authority—Allotment—Petitioner purchased LIG Flat from open market—Petitioner's mother applied for allotment of a plot under Rohini LIG Scheme and was allotted registration in 1981—Petitioner's mother expired in 1994—Petitioner applied for transfer of the said registration in his favour in the year 2000—After some communication in 2003, transfer application of petitioner rejected by DDA on the grounds that Petitioner already owned a DDA flat—Held, the case is squarely covered by number of judgments of Delhi High Court including WP(C) 3680/13 decided no 29.05.13—Impugned order of cancellation of allotment quashed and DDA directed to allot a plot to the petitioner.

Pradeep Kumar Gulati v. *D.D.A.* *4692*

— Delhi Development Authority—Additional FAR—Under notification of 2008, petitioner deposited money with DDA towards additional FAR—Subsequently, in 2012, DDA amended the notification laying down that no charges for additional FAR be recovered from educational societies—Petitioner being educational society, sought refund of the money which had been deposited by it under protest—DDA did not refund money—Hence the petition—Held in W.P(C) 9572/09, the Division Bench allowed refund, so the present petitioner being similar placed cannot be denied the same benefit on principles of parity.

Jagan Nath Gupta Memorial Educational Society v. *Delhi Development Authority & Anr.* *4715*

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.

Vishnu Pal Singh v. *Delhi Tourism and Transportation Development Corporation* *4192*

DELHI RENT CONTROL ACT, 1958—Section 14(1) (e), (f) and (g) and 14D—Action of DDA cancelling Conveyance Deed of Petitioner's Property challenged before HC—Application filed for impleading applicant as a Respondent in writ petition—Plea taken, since applicant is a tenant in premises, he has a direct interest in property and is therefore a necessary party—Per contra plea taken, applicant has accepted Petitioner No. 2 as landlord and has paid rent without any protest—Applicant has no right to be heard in present application as outcome of present writ petition would have no effect on applicant, who is merely a tenant in premises—Held—It may be true that action for cancellation of Conveyance Deed might have been taken by DDA on basis of complaints made by applicant—However, at same time, matter of cancellation of Conveyance Deed or it's restoration is only between DDA and Petitioners and applicant in that sense does not have any direct interest in instant writ petition—Petitioner is *dominus litus* and cannot be forced to add a party against whom he does not want of fight unless it is a compulsion of rule of law—Applicant has no direct interest in controversy raised in instant writ petition—Applicant would be a tenant whether under initial owner or his successor by whatever mode transfer takes place—Applicant has or substantial interest in controversy whether cancellation of Conveyance Deed in favour of Petitioner No.1 be held illegal whether Petitioner be entitled be entitled to restoration—Hence, applicant is not a necessary party to instant writ petition.

Kusum Jain and Ors. v. *D.D.A. and Anr.*..... *4847*

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.

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

— Section 132(1) (5), (11) and (12), 245C (1), 245D(1) and 293—Benami Transactions (Prohibition Act), 1988—Limitation Act, 1963—Section 14—Constitution of India, 1950—Article 226—Duly authorized Income Tax Officer carried out search and seizure operations at residential and business premises of Respondent No. 1 Seven pay orders for Rs. 50.40 Lakhs prepared from accounts were found—Income Tax officials issued a demand seizure order with respect to seven pay orders and served it upon Manager, PNB—Original pay orders were in control and possession of Respondent No. 1 who approached Income Tax Authorities with respect to same—Efforts of Respondent No. 1 at securing release from income tax authorities ended with order by CIT rejecting their application u/s 132 (11)—Writ petition challenging order dismissed relegating Respondent No. 1 to a civil court for its remedies by way of a suit through a consent order—Suit filed by Respondent No. 1 was decreed ex parte, in full—Judgment challenged in appeal—Plea taken, suit was barred u/s 293 of Income Tax Act and there was no ground to give benefit of Section 14 of Limitation Act—Held—There can be no dispute that question of liability itself, as a matter of a contractual agreement between parties, is a matter properly reserved for jurisdiction of civil court—Question, here, however does not concern private remedies that lie between two parties in this case, but whether, ownership seven pay orders seized by income tax authorities u/s 132, can be subject matter of present suit—Section 132 (11) provides third person (in this case M/s Bansal Commodities), with necessary opportunity to present its case or claim that it is real and true owner or beneficial owner of proceeds (or amounts) under seven pay orders, before income tax authorities—That was, in fact, done in this case—M/s. Bansal Commodities clearly had recourse to Section 132 (11), which they took advantage of, though ultimately their view was rejected by income tax authorities in accordance with statutory discretion vested in it—Thus, Section 293 clearly comes into operation in this case—Order u/s 132 effecting a deemed seizure of pay orders as against tax dues of RKA continues to operate till date, having never been set aside in any writ proceeding before this court or Special Leave Petition before SC—Therefore, effect of Present suit would be that order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits present action—

Impugned judgment of Learned Single Judge that ownership of seven pay orders lies with M/s. Bansal Commodities and order of CIT i.e. that seven pay Orders are to be utilized as against tax dues of RKA, can't stand together—Writ proceedings u/s 132 having been initiated in 1989 and having attained finality in terms of procedure within that provision being complied with, Section 293 mandates that jurisdiction of civil court with respect to present suit is barred—As far as question of applicability of Section 14 of Limitation Act is concerned, there is sufficient material on record disclosing that plaintiff had been pursuing its remedies under IT Act diligently and Division Bench recorded that proper forum to agitate disputed questions about ownership of seven pay order would be civil court—There has been indeed no lack of bonafides on part of Respondent in filing suit, after said order—In facts of this case, view taken by this judgment will operate harshly on plaintiff—Therefore, liberty granted to said plaintiffs to seek leave to revive writ petition previously disposed off through appropriate application—Appeals allowed subject to liberty reserved to respondents.

Rakesh Kumar Agarwal v. *Bansal Commodities & Ors.* *4579*

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.

Khem Chand v. *State* *4113*

— 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*

— 341/304II IPC—Appellants convicted for having assaulted one Ajay with fists and kicks and thereby causing his death. Conviction challenged inter alia on the grounds that the appellants could not have been convicted of causing death of the victim for neither were they armed with any deadly weapon nor were any repeated blows inflicted on the vital organs of the victim and that the cause of death was opined to be cirrohosis of liver. Held: The injuries found on the body of the deceased were neither sufficient in the ordinary course of nature to result in death nor were they likely to cause death. The death did not take place as a result of the injuries received by him but took place due to the shock consequent to cirrohosis of liver and jaundice after about ten days of the incident. The appellants can therefore, only be held guilty of hurt under Section 323 IPC and not under Section 304 Part—II IPC. Appeal allowed.

Mahender v. *The State (NCT of Delhi)* *4635*

— Ss. 394, 397, 411 120B/392—Held, it is highly unbelievable that witness who had fleeting glance at the driver of the scooter would be able to recognize him after a long time—Accused justified to decline to participate in TIP as they were admittedly shown to the prosecution witnesses in the police station. Also held, that out of Rs.3.28 lacs robbed, only Rs. 25,000/- recovered after three months of incident—Highly unbelievable that accused would retain robbed case intact with their bank slips on it and would not change it—No independent associated at the time of recovery of cash—Money allegedly recovered not in exclusively possession of accused. Also held that when original record was not available and the re-constructed record was incomplete and does not contain statement of accused U/s.313 and statement of defence witnesses, benefit must go to the accused.

Manish v. *State* *4650*

— Sec. 161, Prevention of Corruption Act, 1988—Sec. 5(1)(d)—Held, In the light of conflicting versions and suspicious features on crucial aspects, complainant's version does not appear to be wholly reliable—Neither the demand nor the acceptance alone is sufficient to establish the offence—Mere recovery of tainted money divorced form the circumstances under which it was paid is not sufficient to convict the accused—The complainant's testimony is lacking to prove that A-1 accepted the bribe amount with the tacit approval of A-2. No other independent public witness was associated in the investigation from the office of the accused where the alleged transaction took place. The prosecution was unable to

establish that A-1 and A-2 shared common intention to demand and accept the bribe amount from the complainant. Conviction of the appellants cannot be founded on the basis of inference.

Om Parkash v. *State NCT of Delhi* *4668*

— Section 397/392/34 IPC and 25 Arms Act and under Section 392/34 IPC respectively—In their 313 statements, the appellants admitted their presence in the TSR on the date and time disclosed by the complainant. They also admitted their apprehension by the police soon after the occurrence. They pleaded that an altercation/quarrel had taken place with the complainant over sharing of fare. It did not find favour and was outrightly rejected by the Trial Court with cogent reasons. The assailants were named at the first instance by the complainant in the statement (Ex.PW-3/A) and role played by each of them was described with detailed account. The assailants were apprehended by the police on the pointing our of the complainant soon after the incident and the robbed articles were recovered from their possession.—FIR in a criminal case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. Early reporting of the occurrence by the informant with all its vivid details gives an assurance truth of the version.—The complainant Narinder had no prior acquaintance with the assailants and did not nurture any ill-will or grievance to falsely implicate them in the incident.—In my view these discrepancies highlighted by the counsel are not significant to away the cogent and trustworthy testimony of complainant—Narinder Singh who had no ulterior motive to fake the incident of robbery. Non-lifting of finger prints from the knife is not fatal A-1 did not explain the purpose to keep with him a 'deadly weapon prohibited under Arms Act. He further failed to explain the purpose of his presence in the TSR at that odd hours. Robbed currency notes were recovered from the possession of Kanti Giri who is no more. The Trial Court has dealt with all the relevant contentions A-1 and has given cogent reasons to discard them. I find no sufficient or good reasons to deviate from the findings which are based on fair appraisal of the evidence. Admittedly, A-2 was a TSR driver who drove TSR No. DL-IR-2454 in which the incident of robbery took place.—There are no allegations that he in any manner assisted robbed article or weapon was recovered from his possession at the time of his apprehension. His presence in the TSR being a driver was natural and probable and that per se cannot be a factor to held him vicariously liable for the acts of other assailants—No adverse inference can be drawn that A-2 being a TSR driver was in hand

and glove with other assailants and in any manner facilitated the commission of crime. Since the other assailants and in any manner facilitated the commission of crime. Since the other assailants were armed with knives possibility of A-2 not to intervene due to fear cannot be ruled out. Sine A-2 did not participate in the commission of crime and no over act was attributed to him and in the absence of any recovery of weapon or robbed article from his possession, his conviction under Section 392 IPC cannot be sustained and he deserves benefit of doubt—The appeal filed by A-2 (Crl.A. No. ; 262/2000) is accepted and his conviction and sentence are set aside. Appeal preferred by A-1 (Crl.A. No. : 288/2000) is unmerited and is dismissed. A-1 (Pramod Kumar) is directed to surrender and serve the remaining period of sentence.—The appeal stand disposed of.

Pramod Kumar v. *State* *4505*

— Sections 307, 324, 323 & 34—The case of the prosecution as projected in the charge-sheet was that on 13.06.1999 at 04.30 P.M. in front of House No. 17/113, Geeta colony, the appellants with their associates in furtherance of common intention inflicted injuries to Ram Saran Dass, Shyam Sunder and Kishan Malik in an murder them. Daily (DD) No. 25A (Ex.PW-6/C) was recorded at 04.50. P.M. at PS Geeta Colony on getting information about a serious quarrel at House No.17/113. Geeta Colony.—After completion of the investigation, a charge-sheet was filed in the Court. A-1 and A-2 were duly charged and brought to trial. In order to establish their guilt, the prosecution examined fifteen witnesses and produced medical. In their 313 statement, the appellants denied their complicity in the crime and alleged false implication. The trial resulted in their conviction for the offences mentioned previously giving rise to the filing of the present appeal.—Learned Senior Counsel for the appellants 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 testimonies of interested witnessed without independent corroboration. No specific role in the occurrence was attributed to A-1. Vital discrepancies and improvement in the evidence were ignored without sound reasons. The complainant had attempted to implicate the appellants' father but during investigation his role could not be ascertained and no charge-Sheet was filed against him. Learned Addl. Public prosecutor urged that the injured persons have given consistent version and had no ulterior motive to falsely implicate the accused.—On scrutinizing the testimonies of the witnesses, it stands

established that A-1 and A-2 were among the assailants who caused injuries with iron and hockey to PW-1 (Ram Saran Dass) and PW-2 (Shyam Sunder). Both the victims have proved their involvement in the incident beyond reasonable doubt. Despite searching and lengthy cross-examination, their testimonies could not be shattered by extracting material inconsistencies or discrepancies. The victims had no prior ill-will or enmity to falsely implicate the appellants. Nothing emerged on record if there was any political rivalry forcing the injured to spare the real culprits and to falsely rope in the appellants.—The fact that PW-1 and Pw-2 sustained injuries at the time and place of occurrence, lends support to their testimony that they were present during the occurrence of history of hostile relations, on valid reason exists to discard the testimony of injured witnesses which is accorded a special status in law.—Recover of crime weapons iron rod (Ex.P-2) and hockey (Ex.P-3) is an incriminating circumstance. Minor contradictions, improvements and discrepancies, highlighted by the learned Senior Counsel are not of serious magnitude to affect the core of the prosecution case and to discard their testimonies in its entirety. When such kind of sudden incident happens and injuries are inflicted with quick succession in short time, it is too much to expect from a witness to narrate the exact injuries caused on a particular location of the victim/injured. Mere marginal variations in the statements cannot be dubbed as improvements—A-1's nominal roll reveals that the suffered incarceration for two years and four days besides earning remission of seven months and three days as on 14.07.2002 before enlargement on bail on 12.11.2002. He was not involved in any other criminal case and his jail conduct was satisfactory. He was aged about nineteen years on the day of occurrence. Considering his role in the incident and other mitigating factors, the period already spent by him in custody is taken as substantive sentence. He, however, will have to pay Rs. 50,000/- (Fifty Thousand Rupees) as compensation to the victim Shyam Sunder. A-2's nominal roll reveals that before his substantive sentence was suspended on 21.03.2003, he had undergone three and a half years including remission in custody. A-2 is the main assailant who inflicted head injuries to PW-2 which were 'dangerous' in nature. The initial confrontation had taken place with his brother A-1 when PW-1 (Ram Saran Dass) objected his conduct to pass comments upon ladies. Without ascertaining the true facts, he (A-2) rushed to the spot with him and inflicted injuries to PW-1 (Ram Saran Dass). PW-2 (Shyam Sunder) who had no fault at all and had not even intervened at the time of initial altercation/confrontation was not

spared and caused head injuries by iron rod putting his life in danger. The offence was intentional and deliberate and for that reason, A-2 deserves no leniency. His conviction and sentence are maintained. The appeal preferred by him is dismissed. He shall surrender before the Trial Court on 03.12.2013 to serve the remaining period of sentence. A-1 shall deposit compensation of Rs. 50,000/- in the Trial Court within fifteen days besides depositing the fine imposed by the Trial Court (if unpaid) and it will be released to PW-2 (Shyam Sunder) after notice. Disposed of.

Mohd. Ilyas & Anr. v. *The State* *4520*

— Sections 307, 84—Appellant challenged his conviction U/s 307 of Code claiming that at time of commission of offence he was insane—Offence may had been committed under delusional disorder. Held:— To claim defence of insanity, mental status of the accused at the time of doing act complained of has to be considered.

Raj Ballabh v. *State (GNCT) Delhi* *4530*

— Sections 328/379/468/471/34—Appellant challenged conviction U/s 328/379/468/471/34 of Code urging principal accused did not prefer any appeal and served sentence—Whereas appellant had no role in entire sequence of events and even otherwise remained in jail for more than a period for which he was awarded sentence. Held:—Appellant correctly identified during test identification proceedings as well as in court. No animosity, ill—Will or grudge has been alleged for false implication. The connivance of the appellant and other accused manifestly established. Sentence modified to the period already undergone as under trial prison.

Khairati Ram v. *The State* *4542*

— 307/34—Delay of 14 days in lodging of FIR—No satisfactory explanation given. Held, "that the object of insisting upon prompt lodging to the F.I.R. is to obtain the earliest information regarding the circumstances in which the crime was committed. Delay in lodging the F.I.R. often results in embellishments, which is a creature of an afterthought. On account of delay, the F.I.R. not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story." Relied upon, *Sajjad Ali Khan @ Sanjay Vs. State of Delhi* 2000 (1) JCC (Delhi) 109 In the initial statement by the injured and his father, no allegations levelled against anybody and it was claimed that injuries were sustained in an accident fall. Subsequently, after

14 days statement against accused given implicating them. Held, that the very fact that the two sets of evidence are forthcoming makes it clear that prosecution has not proved the guilt of accused beyond reasonable doubt.

Laxman & Anr. v. *State Govt. of N.C.T. of Delhi* *4596*

— Section 392/34—Appellant convicted of having robbed alongwith his associates (not arrested), the complainant of cash, gold chain, gold ring and wristwatch while he was travelling in the TSR being driven by the appellant—Conviction challenged inter alia on the ground that the brother of the complainant posted in Delhi Police was instrumental in falsely implicating and that it has not been proved that the appellant was driving the TSR or that robbed articles were recovered form him and further that the identity of the other assailants could not be established and delay in lodging the FIR was not explained. Held: Conviction of the appellant based upon fair appreciation of the evidence and requires no interference. Testimony of the owner of the TSR that the appellant was in possession of the date of the incident not challenged. Deposition of the complainant giving vivid description of the incident and identifying the appellant, not shaken during cross—Examination. No ulterior motive was assigned to the complainant to falsely implicate the appellant in the incident and adverse inference is also to be drawn against the appellant for refusing to participate in TIP and it makes no difference if after the said proceedings he was identified in the police station by the complainant. In his u/s 313 Cr. PC statement, the appellant could not give plausible explanation to the incriminating circumstances proved against him. Non recovery of robbed articles not material. Delay in lodging the FIR has been explained. It has come on record that the complainant's brother had no role to play to influence the investigation. He was not going to be benefited by false implication as no robbed article was even recovered from the appellant.

Mohd. Iqbal v. *State* *4609*

— Section 498A/304B IPC—Conviction of appellant for the offences punishable u/s 498A/304B IPC challenged inter alia on the ground that the dying declaration was not genuine and that the victim had not complained to any authority earlier about the harassment or torture allegedly caused to her by the appellant. Held: No evidence has come on record that the dying declaration was the result of any tutoring, prompting or imagination. There are no sound reasons to disbelieve the testimony of the SDM who being an independent

witness holding high position, had no reason to do anything which was not proper. The appellant also has no foundation/basis to doubt the mental disposition of the victim to make statement as neither he nor any of his family members accompanied her to the hospital or remained with her till death. Merely because the deceased had not told close friends about the dowry or harassment or had not complained about the same to any authority, does not positively prove the absence of demand or dowry. The evidence regarding demand of dowry is established in he dying declaration which is cogent and reliable. Appeal is unmerited and dismissed.

Ashok Kumar v. *State* *4618*

— Section 454-392-394-397-34 Arms Act—Section 25—Statements of witnesses recorded prior to apprehension of culprits, but none of the three witnesses named the culprit as suspect and they did not describe broad physical features/description of assailant even though A1 was close relation of complainant and his family members—Even though the incident was narrated minutely, but the named of accused not mentioned—Complainant had direct confrontation with the culprits for sufficient duration and had sufficient and clear opportunity to see them—A2 to A5 also residing in the locality/vicinity since long—One of the witnesses did not identify any of the accused in the Court—Inconsistent version given by the prosecution witnesses as to apprehension of one of the accused and recovery—TIP could not take place because IO did not bring similar property to be mixed with the case property—Adverse inference to be drawn. Held, the FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. There object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it looses the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consulations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.

Kamlesh Kumar @ K.K. v. *The State (Govt. of N.C.T. of Delhi)* *4704*

— Section 397—For attracting the provision Under Section 397 IPC the individual role of the accused has to be considered in relation to the use or carrying of a weapon at the time of robbery.

Mukesh Kumar v. *State Govt. of N.C.T. of Delhi* ... *4712*

— Sec. 376—Sentence—Sentencing for any offence has a social goal—Sentence is to be imposed regard being had to the nature of the offence and the manner in which the offence has been committed—It serves as a deterrent—The principle of proportionality between an offence committed and the penalty imposed are to be kept in view it is obligatory on the part of the Court see the impact of the offence on the society as a whole and its ramifications as well as its repercussions on the victim.

— Rape is one of the most heinous crimes committed against a woman—It insults womanhood—It dwarfs her personality and reduces her confidence level—It violates her right to life guaranteed under Article 21 of the Constitution of India.

— A minimum of seven years sentence is provided under Section 376(1) of the Indian Penal code (IPC—Sentence for a term of less than seven years can be imposed by a court only after assigning adequate and special reasons for such reduction—Thus, ordinarily sentence for an offence of rape shall not be less than seven years—When the legislature provides for a minimum sentence and makes it clear that for any reduction from the minimum sentence of seven years, adequate and special reasons have to be assigned in the judgment, the courts must strictly abide by this legislative command—Whether there exists any "special and adequate reason" would depend upon a variety of factors and the peculiar facts and circumstances of each case—No hard and fast rule can be laid down in that behalf for universal application

Md. Taskeen v. *The State (Govt. of NCT) Delhi* *4812*

— Section 419, 420, 467, 468, 471 & 120B—Prevention of Corruption Act, 1988—Section 13 (2), 13 (1) (d)—Framing of Charge—Prosecution case that, Mansarowar Co-operative Group Housing Ltd. was fraudulently managed by Madhu Aggarwal and her husband G.C. Aggarwal, the accused, on strength of forged documents and fake members—Bisht, dealing assistant, Man Singh, AR and Devakar, RCS all co-accused conspired with Madhu Aggarwal and G.C. Aggarwal and orders without making proper verification regarding existence of society and its office bearers/members and approved list of fictitious/non-existing members of the society—Address of the society belonged to accused/petitioner

Ajit Singh who confirmed having received communication from DDA—Trial Court framed charges u/s 419, 420, 467, 468, 471, r.w. S. 120B IPC and S. 13 (2), 13 (1) (d) of P.C. Act—Held, well settled that charge cannot be framed merely on suspicion against accused however, at stage of framing charge, court is only to take a tentative view on the basis of material on record—If court of view that accused might have committed offence, it would be justified in framing charge against the accused—On facts held, material collected raises strong suspicion that petitioner part of conspiracy to obtain allotment of land by main accused G.C. Aggarwal—Special Judge fully Justified in framing charges—Petition dismissed.

Ajit Singh v. *CBI* *4552*

LAND ACQUISITION ACT, 1894—Alternative Alltoment—Petitioner sought quashing of letter dated 01.09.1999 whereby his request for allotment of alternative plot was rejected after his land was acquired—Held, since the rejection letter dated 01.09.1999 was duly received by the petitioner and he kept sleeping over the issue till December, 2008, on account of inordinate delay of 14 years, petition is bad for laches—Dismissed.

Dal Chand v. *Govt. of N.C.T. of Delhi & Ors.* *4723*

LIMITATION ACT, 1963—Section 14—Constitution of India, 1950—Article 226—Duly authorized Income Tax Officer carried out search and seizure operations at residential and business premises of Respondent No. 1 Seven pay orders for Rs. 50.40 Lakhs prepared from accounts were found—Income Tax officials issued a demand seizure order with respect to seven pay orders and served it upon Manager, PNB—Original pay orders were in control and possession of Respondent No. 1 who approached Income Tax Authorities with respect to same—Efforts of Respondent No. 1 at securing release from income tax authorities ended with order by CIT rejecting their application u/s 132 (11)—Writ petition challenging order dismissed relegating Respondent No. 1 to a civil court for its remedies by way of a suit through a consent order—Suit filed by Respondent No. 1 was decreed ex parte, in full—Judgment challenged in appeal—Plea taken, suit was barred u/s 293 of Income Tax Act and there was no ground to give benefit of Section 14 of Limitation Act—Held—There can be no dispute that question of liability itself, as a matter of a contractual agreement between parties, is a matter properly reserved for jurisdiction of civil court—Question, here, however does not concern private

remedies that lie between two parties in this case, but whether, ownership seven pay orders seized by income tax authorities u/s 132, can be subject matter of present suit—Section 132 (11) provides third person (in this case M/s Bansal Commodities), with necessary opportunity to present its case or claim that it is real and true owner or beneficial owner of proceeds (or amounts) under seven pay orders, before income tax authorities—That was, in fact, done in this case—M/s. Bansal Commodities clearly had recourse to Section 132 (11), which they took advantage of, though ultimately their view was rejected by income tax authorities in accordance with statutory discretion vested in it—Thus, Section 293 clearly comes into operation in this case—Order u/s 132 effecting a deemed seizure of pay orders as against tax dues of RKA continues to operate till date, having never been set aside in any writ proceeding before this court or Special Leave Petition before SC—Therefore, effect of Present suit would be that order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits present action—Impugned judgment of Learned Single Judge that ownership of seven pay orders lies with M/s. Bansal Commodities and order of CIT i.e. that seven pay Orders are to be utilized as against tax dues of RKA, can't stand together—Writ proceedings u/s 132 having been initiated in 1989 and having attained finality in terms of procedure within that provision being complied with, Section 293 mandates that jurisdiction of civil court with respect to present suit is barred—As far as question of applicability of Section 14 of Limitation Act is concerned, there is sufficient material on record disclosing that plaintiff had been pursuing its remedies under IT Act diligently and Division Bench recorded that proper forum to agitate disputed questions about ownership of seven pay order would be civil court—There has been indeed no lack of bonafides on part of Respondent in filing suit, after said order—In facts of this case, view taken by this judgment will operate harshly on plaintiff—Therefore, liberty granted to said plaintiffs to seek leave to revive writ petition previously disposed off through appropriate application—Appeals allowed subject to liberty reserved to respondents.

Rakesh Kumar Agarwal v. *Bansal Commodities & Ors.* *4579*

MOTOR ACCIDENT CLAIM—Claimant was working as Hawaldar in Indian Army—The Claims Tribunal awarded compensation of Rs.12,34,260/- —Both sides filed appeals i.e. the claimant claiming that compensation was less and the insurance company claiming

that the compensation excessive. The Claimant was liable to be discharged from his service on completion of 24 years of service—The same was however extendable by 2 years by the Screening Committee—Thus the claimant was entitled to an extension of 2 years if he had not suffered the injury resulting in placing him in low medical category—Held, claimant would be entitled to loss of income for two years. Despite opportunities the claimant did not produce reliable evidence to prove extent of his functional disability suffered by him even after grant of opportunity to lead additional evidence—From the disability certificate seen that there was shortening of left leg by 1.5 cm—Functional disability of claimant taken to be 30%, as after his retirement he could have got an employment as a Security Supervisor or a Similar job in any security agency or private sector.

Tek Bahadur v. *Ram Bharose & Ors.* *4804*

NARCOTIC DRUGSAND PSYCHOTROPIC SUBSTANCESACT, 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*

— Section 13 (2), 13 (1) (d)—Framing of Charge—Prosecution case that, Mansarowar Co-operative Group Housing Ltd. was fraudulently managed by Madhu Aggarwal and her husband G.C. Aggarwal, the accused, on strength of forged documents and fake members—Bisht, dealing assistant, Man Singh, AR and Devakar, RCS all co-accused conspired with Madhu Aggarwal and G.C. Aggarwal and orders without making proper verification regarding existence of society and its office bearers/members and approved

list of fictitious/non-existing members of the society—Address of the society belonged to accused/petitioner Ajit Singh who confirmed having received communication from DDA—Trial Court framed charges u/s 419, 420, 467, 468, 471, r.w. S. 120B IPC and S. 13 (2), 13 (1) (d) of P.C. Act—Held, well settled that charge cannot be framed merely on suspicion against accused however, at stage of framing charge, court is only to take a tentative view on the basis of material on record—If court of view that accused might have committed offence, it would be justified in framing charge against the accused—On facts held, material collected raises strong suspicion that petitioner part of conspiracy to obtain allotment of land by main accused G.C. Aggarwal—Special Judge fully Justified in framing charges— Petition dismissed.

Ajit Singh v. *CBI* *4552*

— Sec. 5(1)(d)—Held, In the light of conflicting versions and suspicious features on crucial aspects, complainant's version does not appear to be wholly reliable—Neither the demand nor the acceptance alone is sufficient to establish the offence—Mere recovery of tainted money divorced form the circumstances under which it was paid is not sufficient to convict the accused—The complainant's testimony is lacking to prove that A-1 accepted the bribe amount with the tacit approval of A-2. No other independent public witness was associated in the investigation from the office of the accused where the alleged transaction took place. The prosecution was unable to establish that A-1 and A-2 shared common intention to demand and accept the bribe amount from the complainant. Conviction of the appellants cannot be founded on the basis of inference.

Om Parkash v. *State NCT of Delhi* *4668*

— State has come in appeal to question the correctness of a judgment—By which the respondent—Devender Singh was acquitted of the charges. The respondent has contested the appeal.—On 29.03.2001, Ram Kumar lodged a complaint in Anti Corruption Bureau alleging demanded of Rs.11,000/- as bribe by Mr. Panwar, AE, DDA to clear payment for execution of work order in the sum of Rs. 21.950/-, The complainant was able to arrange Rs. 6,000/- for payment. Insp.N.S.Minhas carried out pre-raid formalities and associated Rs. Chopra as panch witness. Statement of the witnesses conversant with the fact were recorded. After completion of investigation, a charge-Sheet under Section 7/ 13 POC Act and 120 B IPC was submitted in the Court in Which

both Devender Singh and Harpal Singh were Charge-sheeted. During the proceedings, Harpal Singh expired and proceedings against him were dropped as abated. The prosecution examined fifteen witnesses to prove the charges. In 313 statement, the appellant pleaded false implication. After appreciation of evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted the appellant as the prosecution was not able to establish the charges beyond reasonable doubt.—The moot question before the Trial Court was if complainant—Ram Kumar was entitled to receive Rs.21,950/- from DDA for execution of work order for the payment of which demand of Rs. 11,000/- was allegedly made as illegal gratification. The burden was heavily upon the prosecution to establish that it was legal remuneration which the complainant—Ram Kumar was entitled to receive and the respondent or his associate—Harpal Singh was legally competent in their official capacity to sanction or clear the payment. In the complaint (Ex.PW-13/A) Complainant did not give detailed information as to when the work order for boring a tube-well was awarded to him, when it was executed. PW-2 (R.K. Bhandari), who accorded section under 19, POC Act for Devender Singh's prosecution admitted in the cross-examination that he had not seen examined if any work was entrusted to the complainant or it was executed by him. He revealed that some documents were on record to show that no work was entrusted or executed by the complainant. PW-6 (Mam Chand), So, Horticulture from October, 1994 to 17.04.2000/- Rs.700/-.—The work for which payment was being claimed by the complainant had already been done by other contractor—Ved Prakash. Apparently, there was no cogent and worthwhile evidence on record to establish if pursuant to work order (Ex.PW-10/A) dated 04.01.2001 any work was carried out by the complainant to claim payment of Rs.21,950/-.—No doubt, a public officer has no right to demand any bribe; but when he is hauled up to answer a charge of having taken illegal gratification, the question whether any motive, for payment or acceptance of bribe at all existed is certainly relevant and material fact for consideration. It is an important factor bearing on the question as to whether the accused had received the gratification as a motive or reward for doing or forbearing to do any official act or for showing any favour or disfavour in the exercise of his official functions.—The prosecution witnesses have given divergent version as to when and by whom the bribe amount was demanded.—The delay in claiming the payment and lodging the report has remained unexplained. Complainant,s statement could

not be corroborated by any independent public witness as PW-13 (Ram Swaroop Chopra) joined as panch witness expired before he could be cross-examined by the appellant.—In the absence of demand of bribe which the prosecution could not establish beyond reasonable doubt, there was no cogent material to base conviction under Section 7/13 POC Act. The demanded and acceptance of the money for doing a favour in discharge of official duties is sine qua to the conviction. Mere recovery of tainted money from the accused by itself is not enough in the absence of substantive of the demand and acceptance. It is also acceptance. It is also settled in law that statutory presumption under Section 20 of the Act can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that the money was accepted other then the motive or reward as stipulated under Section 7 of the Act. It is obligatory on the part of the Court to consider the explanation offered the accused under Section 20 of the explanation has to be on the anvil of preponderance of probability. It is not to be proved all reasonable doubt. From the very inception, the defence of the appellant was that the money was thrusted in the pocket and was not meant as bribe for clearance of the bill. Appeal against the acquittal is considered on slightly different parameters to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this court is cautious in taking away that right. The presumption of innocence of the accused is further strengthened by his acquittal after a full trial, which assumes critical importance in our jurisprudence. The Court have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, should be adopted.—The appeal is unmerited and is consequently dismissed.

State (NCT of Delhi) v. *Devender Singh*..... *4511*

SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTREST ACT, 2002—Section 14(2)—Petitioner sought quashing of orders passed by ACMM under Section 14(2) of the Act directing the receiver to take possession of the petitioner's land—Petitioner claimed that the land in question is agricultural land so the provision of SARFAESI Act not applicable—Respondent contended that the impugned order is amenable to appeal under Section 17 of the Act—Held, since no agricultural activity is being carried out on the land in question and rather a banquet hall has been constructed on the land and commercial activity being done, It ceases to be land under Section

31 (i) of the Act, so provisions of the Act are applicable—Further Held, in view availability of alternative efficacious remedy, the writ petition is not maintainable.

Bijender Kr Gupta v. *Corporation Bank of India*.... *4730*

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 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.

Narender Singh v. *Union of India & Anr. 4213*

— 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.

Mastan Singh v. *Union of India & Anr. 4223*

— 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.

Baldev Singh v. *Union of India & Anr. 4234*

— 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.

R.A.S. Yadav v. *Union of India & Anr. 4246*

— 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.

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*

— Selection Process—Rejection of candidature to the post of Naik GD in the Indian Coast Guard on the medical grounds—Petition filed under Article 226 of the Constitution of India for issuance of writ of certiorari and direction to quash the order dated 12th February, 2013 passed by respondent No. 3/Recruiting Officer Coast Guard whereby the candidature of the petitioner for the post of Naik GD in the Indian Coast Guard pursuant to a Selection Process conducted in 2012 was rejected on the medical grounds—Being aggrieved, the petitioner assails the result of the medical examination conducted at INS Chilka, Nivarani Hospital on 12th February, 2013 whereby he was found medically unfit for enrolment on the ground that he was suffering form 'NYSTAGMUS'—Petitioner placed reliance on reports of his medical fitness—He also complains of failure of the respondents to grant review to him—Court directed the petitioner to appear before the Commandant, Army Hospital (Research and Referral), Delhi Cantt pertaining to his medical examination with all records in his possession—Pursuant to the above directions, the petitioner was medically examined by the Board of officers of the Army Hospital, (Research and Referral)—Board examined the candidate and findings are as follows:—(a) His neurological evaluation shows normal visual acuity and colour vision. (b) His pupils are bilaterally equal and reacting to light with normal accommodation reflex. His extra ocular movements are full. (c) There is no esotropic or exotropic eye defect. His saccades and pursuits are normal. There is no primary of gaze evoked nystagmoid movements. There is no motor, sensory or cerebellar bysfunction—Opinion of the Bord of officers:—(a) A case of nystagmus (Inv)—NAD (b) he is fit for nystagmus".

— Held—It is manifest from the above that no abnormality detected and the petitioner did not have the problem of nystagmus—In view of the above, no objection remains to petitioner's recruitment to the post of Navik GD in the Indian Coasts Guard—In view of thereof, order dated 12th February, 2013 passed by respondent No. 3 cancelling the petitioner's candidature to the post of Navik GD in the Indian Coast Guard is hereby set aside and quashed—Respondents are directed to proceed in the matter of petitioner's recruitment in accordance with prescribed procedure and to pass

appropriate orders in this regard within a period of two weeks from today—Respondents shall ensure that full opportunity of training is facilitated to the petitioner and he is permitted to complete his training at the earliest—Petitioner shall be entitled to notional seniority and he shall be placed above his batch mate who was immediately below him in the order of merit list that was prepared at the time of original recruitment—Petitioner shall be entitled to the benefit of seniority for his pay fixation—Petitioner shall not be entitled to back wages—Orders in this regard shall be passed within four weeks and communicated to the petitioner—Writ petition is allowed in the above terms.

Satish v. *Union of India & Ors.* *4561*

— Armed Forces—Assured Career Progression Scheme—Failure to grant benefits form the date of completion of 12 years of regular service without promotion—Brief Facts—Petitioner who was appointed as Constable on the 3rd of August, 1983 with the respondents completed 12 years of service in the year 1995. ACP Scheme was introduced on 9th August, 1999 by the respondents, benefit whereof were extended to the CISF personnel effectuating the recommendations of the Fifth Central Pay Commission—The same becomes applicable for the CISF personnel pursuant to CISF Cricular No.ESTT—I/16/2000 dated 18th February, 2000 Disciplinary proceedings against the petitioner culminated in passing of the order dated 16th June, 2000 imposing the penalty on the petitioner for dismissal from service—Petitioner invoked the writ jurisdiction of the Madras High Court wherein the orders passed by the disciplinary authority, appellate authority and the revisional authority were set aside and quashed—Respondents were directed to reinstate the petitioner in service forthwith "with back-wages, continuity of service and all order attendant benefits"—Because of the intervention of this order of dismissal, petitioner was prevented from undergoing the promotion cadre course—While the disciplinary proceedings were on by an order dated 24th April, 2000, the respondents made an offer to the petitioner to undergo the promotion cadre course for the first time to which petitioner showed his unwillingness—After resumption of duties, the respondents made a second offer to the petitioner to participate in the promotion cadre course being conducted from 21st May, 2007 to 7th July, 2007—Petitioner undertook the course but was unsuccessful in the drill and weapon training and consequently was declared failed—The last and final opportunity available to the petitioner to undertake the promotion cadre course was successfully

availed by the petitioner between 24th June, 2008 to 27th June, 2008—Case of the petitioner was considered by the Screening Committee and he was given the first financial upgradation under the ACP Scheme vide order dated 7th February, 2009 with effect from 27th January, 2009—Petitioner is primarily aggrieved by the fact that the respondents failed to grant him the benefit of ACP Scheme with effect from 9th August, 1999 when it was promulgated and when the petitioner had already completed all eligibility conditions—On 19th May, 2009, the modified ACP Scheme was promulgated with effect from 1st of September, 2008 which was also extended to the personnel of the CISF—Screening Committee considered the case of the petitioner on 24th February, 2010 but found him unfit for grant of MACP benefit due to deferment of his first financial upgradation for the period between 9th August, 1999 to 1st September, 2008, i.e., for a period of 9 years and 23 days. Held—Petitioner was eligible for PCC on the 9th of August, 1999 when the ACP Scheme came into force and on 18th February, 2000 when it became applicable to the CISF—No circumstance has been pointed out which would render the Petitioner ineligible to grant of the benefit with effect from 18th February, 2000 and as such the benefit thereof has to be given to the petitioner from that date—So far as petitioner's unwillingness in undertaking the PCC on 24th April, 2000 is concerned, for the reasons recorded in WP(C)No.6937/2010 *Hargovind Singh v. Central Industrial Security Force* the same would not be a disqualification to grant of such benefit to the petitioner—The same reasons would apply upon the failure of the petitioner to successfully complete the PCC in the second opportunity given to him between 21st May, 2007 to 7th July, 2007—Petitioner has Successfully completed the PCC in the third attempt between 24th June, 2008 to 14th July, 2008—Petitioner has therefore, satisfied all essential conditions which were notified by the respondents under the ACP Scheme which entitles him to the continuation of the benefits—By the judgement dated 12th December, 2006, the Madras High Court directed reinstatement of the petitioner in service with all benefits which included backwages, continuity of service and all other attendant benefits—It has also to be held that grant of ACP Scheme from the relevant date is an integral part of the relief which had been granted by the court to the petitioner—Impugned order date 12th March, 2011 passed by the respondent no.3 and 3rd August, 2011 by the respondent no.2 are not sustainable and are hereby set aside and quashed—Petitioner is entitled to the benefits of ACP Scheme with effect from 18th February, 2000 as applicable to the

CISF—Writ petition is allowed in the above terms.

B. Padmaiah v. *Union of India & Ors.* *4566*

— Armed Forces—Assured career Progression Scheme——Article 226—Petitioner had completed 12 years of service on 28th February, 2004 and was offered opportunity to undergo PCC Pursuant to offer made only in January, 2006—Petitioner was compelled to express his unwillingness to undergo PCC, as he was to proceed to his native place on leave due to some domestic problems of serious nature—Petitioner qualified PCC in second chance and result of same was informed on June, 2006 by respondent—Petitioner was granted financial upgradation by respondents w.e.f. 22.08.2006— Petitioner's representation for grant of first financial upgradation w.e.f. 28.02.2004 to respondents were of no avail—Petitioner approached HC for restoration of first financial upgradation as per Assured Career Progression Scheme w.e.f. 28th February, 2004—Plea taken, effective date for consideration of person for entitlement of grant of financial upgradation is date on which he acquires requisite number of years of service in a post without any promotional opportunities being made available to him—Completion of actual PCC would have no effect on effective date of grant of financial benefits inasmuch as all employees undergo PCC only after having become eligible for grant of ACP Scheme and are given three chances to complete PCC—Held—A person is entitled to financial benefit on date he completes required twelve years of service without a promotional opportunity—Completion of PCC is akin to completion of requisite training upon appointment/promotion—It does not change date of appointment or date of his promotion—Unwillingness certificate was restricted to Petitioner's inability to undergo PCC which commenced in January, 2006—Petitioner was offered his second chance and has successfully undertaken PCC commencing w.e.f. 05.06.2006 to 22.07.2006—In this background, Petitioner can't be denied of his rightful dues till date—As per Scheme, every employee is entitled to three chances to complete PCC—In case, Petitioner had undertaken PCC course when he was first offered same but had failed to course, respondents would not have then deprived him of benefits of financial upgradation but would have offered him a second; and thereafter, even a third chance to successfully complete same—This being position, a person who was prevented by just and sufficient cause from undertaking PCC at first option cannot be deprived of benefit of financial upgradation in this matter—Petitioner has in fact cleared PCC course at second chance,

when he underwent same—This writ petition has to be allowed holding that Petitioner would be entitled to grant of first financial upgradation under ACP Scheme benefit w.e.f with 28th February, 2004—In case, Petitioner was entitled to benefit of financial upgradation as per modified ACP Scheme as well, respondent shall consider claim of petitioner in accordance with scheme in light of forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

Ghansham Singh v. *Union of India and Ors.* *4656*

— Armed Forces—Assured Career Progression Scheme—Constitution of India, 1950—Article 226—Petitioner completed 12 years of service on 17th June, 2003 and was offered opportunity to undergo promotional cadre course (PCC) pursuant to offer made only in October, 2004—Petitioner was compelled to express his unwillingness to undergo this PCC on ground of his availing leave to proceed to his native place on account of death of one of his family member—Petitioner was granted financial upgradation by respondents w.e.f. 17th June, 2003—Petitioner was informed result of successfully qualifying PCC in second chance in April, 2006—Prior thereto, respondents issued order dated 20.05.2005 whereby ACP benefit granted to Petitioner w.e.f. 17th June, 2003 was cancelled due to submission of unwillingness to undergo PCC which was held in 2004 and respondents proceeded to recover amount paid to petitioner towards his financial upgradation w.e.f. June, 2003—Respondent however proceeded to re-grant ACP upgradation to Petitioner effective From 13th April, 2006—Order challanged before HC—Plea taken, effective date for consideration of person for entitlement of grant of financial upgradation is date on which he acquires requisite number of years of service in a post without any promotional opportunities being made available to him—Completion of actual PCC would have no effect on effective date of grant of financial benefits inasmuch as all employees undergo PCC only after having become eligible for grant of ACP Scheme and are given three chances to complete PCC—Held—A Person is entitled to financial benefit on date he completes required twelve years of service without a promotional opportunity—Completion of PCC is akin to completion of requisite training upon appointment/promotion—It does not change date of appointment or date of his promotion—Unwillingness certificate was restricted to Petitioner's inability to undergo PCC which commenced on 11.10.2004 and non other—There is nothing before us to show that Petitioner was detailed to undergo any other PCC for which it had expressed his

unwillingness—After October, 2004, present Petitioner was detailed for undertaking PCC only in January, 2005—Petitioner accepted this offer and has successfully undertaken PCC which was conducted between 09.01.2006 to 25.02.2006—In this background, Petitioner can't be denied of his rightful dues till date—As per Scheme, every employee is entitled to three chances to complete PCC—In case, Petitioner had undertaken PCC course when he was first offered same but had failed to clear course, respondents would not have then deprived him of benefits of financial upgradation but would have offered him a second; and thereafter even a third chance to successfully complete same—This being position a person who was prevented by just and sufficient cause form undertaking PCC at first option cannot be deprived of benefit of financial upgradation in this matter—Petitioner has in fact cleared PCC course at first chance, when he underwent same—This writ petition has to be allowed holding that Petitioner would be entitled to grant of first financial upgradation under ACP Scheme w.e.f. 17.06.2003—In case, Petitioner was entitled to benefit of second financial upgradation as per modified ACP Scheme as well, respondent shall consider claim of Petitioner in accordance with scheme in light of forgoing discussion and pass appropriate orders in regard thereto within a period of three months.

Nishan Singh v. *Union of India and Ors.* *4672*

— Armed Forces—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 successfully undertaken Promotional Cadre Course—Petitioner became eligible for grant of financial upgradation on 05.08.2000 and the same was granted to him but to undergo PCC, petitioner was given an opportunity for the first time in September, 2003 but petitioner became unsuccessful and, thereafter, in second chance, petitioner cleared PCC in 2004—However, vide impugned order dated 29.01.2005, the ACP benefit granted to the petitioner was cancelled on account of his PCC failure and respondent proceeded to recover the said amount which is challenged in writ—Held, view of law laid down by the Court in WP(C) 6937/10, act of respondent in recovering the amount was not justified since admittedly petitioner had three chances to clear PCC.

Katta. Yedukondala Rao v. *Union of India &Ors.* *4684*

— Armed Forces—Constitution of India, 1950—Petitioner chargesheeted, disciplinary proceedings held and he was ordered to be removed from service—Order upheld by Appellant Authority and by Revisionist Authority—Aggrieved petitioner preferred writ and punishment awarded is grossly disproportionate to charge levelled against him. Held:—When order passed on admissions and detailed consideration of facts and circumstances it cannot be faulted.

Manjeet Kumar v. *Union of India and Ors.* *4748*

— Armed Forces—Constitution of India, 1950—Armed Forces Tribunal (Procedure) Rule 2008-Rule 6-Petitioner challenged order passed by Armed Forces Tribunal Holding, Tribunal did not have territorial jurisdiction to entertain and adjudicate upon subject matter of the case as no Part of cause of action arose in Delhi—According to petitioner, he made representation on which order was passed at Delhi. Held:—The choice of selecting forum in case of matters covered by the Armed Forces Tribunal is wider unlike in the case of Section 20 of CPC. If competent authority rejected representation in Delhi, then the Principal Bench of Armed Forces Tribunal had the jurisdiction to adjudicate the dispute.

Wing Commander Ravi Mani (Retd.) v. *Union of India & Ors.* *4751*

— Armed Forces—Armed Forces Tribunal (Procedure) Rules, 2008—Rule 6 (1) (ii) and (2)—Original Application of Petitioner challenging amendment to his Pension Payment Orders (PPOs) resulting in reduction of pension rejected by Armed Forces Tribunal (AFT) on ground that Petitioner was not residing within jurisdiction of Principal Bench at New Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—order challenged before HC–Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held—A bare reading of Rule 6 would show that Sub-Rule 1 (ii) of Rule, in fact, confers discretion upon a retired force person to file petition before a bench within whose jurisdiction he is ordinarily residing at time of filing of application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before Bench within whose jurisdiction cause of action wholly or in part has arisen—In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon

subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Wing Commander V. Gouripathi (Retd.) v. *Union of India & Ors.* *4757*

— Armed Forces—Armed Forces Tribunal (Procedure) Rules, 2008—Rule 6 (1) (ii) and (2)—Original Application of Petitioner challenging amendment to his Pension Payment Orders (PPOs) resulting in reduction of pension rejected by Armed Forces Tribunal (AFT) on ground that Petitioner was not residing within jurisdiction of principal Bench at New Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Order challenged before HC—Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held —A bare reading of Rule 6 would show that Sub—Rule 1 (ii) of Rule, in fact confers discretion upon a retired force person to file petition before a bench within whose Jurisdiction he is ordinarily residing at time of filing of application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before bench within whose jurisdiction cause of action wholly or in part has arisen—In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Wing Commander E.K. Vijayan (Retd.) v. *Union of India & Ors.* *4763*

— Armed Forces—Armed Forces Tribunal (Procedure) Rules, 2008—Rule 6 (1) (ii) and (2)—Original Application of Petitioner challenging amendment to his Pension Payment Orders (PPOs) rejected by Armed Forces Tribunal (AFT) on ground that Petitioner was not residing within jurisdiction of Principal Bench at New Delhi and therefore, Bench did not have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Order challenged before HC—Plea taken, impugned orders have been passed at Delhi, therefore, cause of action for filing petition had arisen wholly within jurisdiction of Principal Bench, New Delhi—Held—A bare reading of Rule 6 would show that Sub-Rule 1 (ii) of Rule, in fact, confers discretion upon a retired force person to file petition before a bench within whose jurisdiction he is ordinarily residing at time of filing

a application—Even otherwise, Sub Rule 1 (ii) of Rule 6 mandates that application shall ordinarily be filed before Bench within whose jurisdiction cause of action wholly or in part has arisen—In instant case, both impugned orders have been passed at Delhi—Therefore, Principal Bench, New Delhi would have territorial jurisdiction to entertain and adjudicate upon subject matter of case—Impugned order set aside—Matter remanded to AFT for hearing on merits of rival contentions.

Wing Commander J. Ramani (Retd.) v. *Union of India & Ors.* *4768*

— Armed Forces—Constitution of India, 1950—Aggrieved petitioner for rejection of his candidature in selection process undertaken by respondent no. 1 preferred writ petition—It was urged that petitioner qualified physical endurance test, written examination as well as medical examination tests—At time of interview, petitioner relied upon OBC certificate which was rejected by respondent No.1 as not being in requisite format—According to respondent, certificate produced was beyond cut off date prescribed Held:— An OBC certificate beyond cut off date did not meet with requisite stipulations. Creamy layers have to be excluded, thus, there being a requirement of OBC certificates to be issued within 3 years prior on date of receipt of applications.

Anil Kumar v. *State Selection Commission (North Region) and Anr.* *4773*

— Armed Forces—Constitution of India, 1950—Petition Regulation for Army Act, 1961—Regulations 72 & 197—Petitioner filed petition challenging order passed by Armed Forces Tribunal rejecting his prayer for direction to respondent to pay invalid pension to him from date of his release from service along with arrears and interest thereon—Also, respondent to add period of leave pending retirement for 108 days with 12% interest thereon—According to petitioner, he had served for more than 15 ½ years, therefore, was entitled to invalid pension which was applicable to all ranks on completion of 10 years of service under Regulation 12 and other circulars issued by Ministry of Defence—As per respondent, petitioner was not invalidated out of service because of exigency of service or low medical category—On the contrary, he had sought voluntary retirement from service.

J.S. Punia v. *Union of India* *4780*

— Armed Forces—Constitution of India, 1950—Regulations for

Army (1987 Edition) Regulations 364 and 381—Petitioner challenged findings and sentence of Summary Court Martial ordering imprisonment for 28 days in military custody and to be reduced to ranks from Hawildar to Sepoy—As per petitioner, Summary Court Martial by Depot Regiment, Jabalpur was without jurisdiction to try his case. Held:—In case of deserter Regulation 381 of Regulations for Army is applicable. Also according to Regulation 364, Intermediary Authority had the jurisdiction to close the case under information to the higher authority in chain.

Naik Manikandan R v. *Union of India and Ors.* *4794*

— CCS (Pension) Rules, 1972—Rule 9—Respondent was assigned duty of inspection of consignment present for export—Directorate of Revenue Intelligence initiated inquiry in availment of duty drawback and issued notice to exporter—After 12 years, Petitioners forwarded a note to CVC for its first stage advice for initiation of regular departmental action for major penalty proceedings—On date of retirement of respondent, chargesheet issued—CAT held departmental proceedings would be exercise in futility and result in harassment meted out to employee after retirement—Order challenged before HC—Held—DRI had permitted several officers against whom similar allegations have been made without initiation of any disciplinary proceedings—Petitioners have themselves therefore not treated matters as of any import effecting discipline of department—Inordinate and unexplained delay of almost 12 years occurred in commencing disciplinary proceedings would disentitle Petitioners from proceeding in matter—Such delay manifests lack of seriousness on part of disciplinary authority in pursuing charges against employee—While evaluating impact of delay, Court must consider nature of charge, its complexity and for what reason delay has occurred—It is not case of present Petitioners that respondent had colluded or connived with offending exporter in effecting fraudulent exportation of goods in violation of provisions of Customs Act—Since Respondent had already retired, no punishment can be awarded if delinquency alleged may not be of grave misconduct or negligence—If case is only of Supervisory lapses and not of grave negligence, Respondent cannot be punished—Issuance of Chargesheet after inordinate delay cannot be said to be fair to Delinquent Officer—Since it would also make task of proving charges difficult, it would also not be in interest of administration—If delay is too long and remains unexplained, Court may interfere and quash charges—Writ Petition dismissed.

Union of India & Anr. v. *Madan Lal*..... *4822*

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*