* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision : July 04th, 2018

\+ CRL.A. 902/2013

STATE NCT OF DELHI ..... Appellant

Through: Ms. Aashaa Tiwari, Additional Public Prosecutor for the State with ACP Dharam Pal and Inspector Shailendra Singh, Police Station Kanjhawala, Delhi.

Mr. H.K. Chaturvedi, Mr. Sagar Chaturvedi, Advocates for complainant.

versus

AMIT SHARMA & ORS. ..... Respondents

Through: Mr.D.K. Sharma, Advocate for respondent No.1.

Mr.B.S. Rana, Ms. Babita Ahlawat, Mr.Satyam Sisodia, Mr.Manish Awasthi, Advocate for respondent No. 2.

Mr.Arun Sharma, Advocate for respondent No. 3 to 5.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE P.S.TEJI

JUDGMENT

P.S. TEJI, J.

1. The present appeal has been filed by the State under Section 378 Cr.P.C. against the judgment dated 24.07.2012 passed by learned ASJ–II, (Outer) Rohini Court, Delhi whereby the respondents/ accused persons have been acquitted for the offence punishable under Section 302/364-A/201/120B/34 IPC, in a case registered as FIR No.227/2003, P.S. Kanjhawla, Delhi.

2. The factual matrix, as emerging from the record, is that on 25.09.2003 a DD No. 35 A (Ex. PW-25/A) was received in the police station regarding kidnapping of the deceased Tarun Kumar for ransom. SI Balbir Singh along with Constable Rajbir Singh reached the house of the complainant, namely, Satish Bhardwaj who in his statement stated that his son Tarun Kumar @ Chintu aged about 18 years, student of B.A(Pass) 1st year in Satyawati Evening College went missing. On 25.09.2003 he left the house as usual and did not return at the usual time of 7:30 pm. They called on the mobile phone of Tarun bearing no. 9891102594. Initially, phone was not attended, but after some time when his nephew Hemant Bhardwaj called from his mobile phone no.011-32332151 on the mobile phone of Tarun, someone picked the phone and informed that Tarun was with them. He asked Hemant to arrange a sum of Rs. 20 Lakhs. The complainant raised apprehension that his son had been kidnapped for ransom of Rs. 20 Lakhs. On the basis of the statement of the complainant an FIR (Ex. PW-1/B) was initially registered under Section 364A IPC on 26.09.2003. Mobile phone of the complainant was kept under observation. Tarun's

associates were asked about his whereabout in his college. During investigation it was revealed that Tarun was having a friend Amit Sharma in the college, and on 25.09.2003 he went away along with the accused Amit Sharma. The investigatin officer, however, did not identify any person who may have witnessed/seen Tarun go with the accused Amit Sharma. During interrogation, Amit Sharma stated that he had nothing to do with Tarun.

3. On 28.09.2003 an information regarding recovery of a dead body matching with the details of Tarun was received and it was revealed that the same was lying in PG IMS, Rohtak. The IO along with the complainant Satish Bhardwaj (PW-3) and neigbour Raj Kumar (PW-15) went to PG IMS, Rohtak where ASI Ram Rattan, PS Gannor, Haryana met them and the dead body was identified as that of Tarun by the complainant (PW-3) vide Ex.PW3/B. Post-mortem on the dead body was got conducted and then it was handed over to his relatives. The complainant Satish Bhardwaj in his statement Ex. PW-3/B stated that this son Tarun was wearing a gold chain with a Shri Ram locket, sports shoes, having mobile phone and diary with the NIT I-card, I-card of Satyawati College and a few other papers, which were not found on the dead body. Penal Sections 302/201 IPC were added to the case. Call details of mobile phones of deceased bearing nos.9810872071 (Ex.PW22/A) and 9891102594 (Ex.PW21/A), and of mobile phone no.35228221(Ex PW-24/1) of accused Devender Kumar were collected. During investigation it was revealed that on 25.09.2003 at 10:30 pm a call from no. 27781472 was made on the mobile phone

of accused Devender, which was found to be of the STD booth near the house of accused Amit Sharma. It was also revealed that on the night intervening 25/26.09.2003, in the early morning at 04:06 am, 04:13 am, and 06:09 am three outgoing call were made from the mobile phone of accused on phone no. 27781824 installed at the house of the accused Amit Sharma.

4. According to the prosecution, on 02.10.2003 accused Amit Sharma was interrogated and he confessed in his disclosure statement (Ex.PW16/C) that on 21.09.2003 he along with his co-accused Devender Kumar, Vivek Gaur @ Lovely, Shiv Kumar @ Shiva and Amit Khatri @ Ramlu had planned to kidnap Tarun and, in pursuance of the same, on 25.09.2003 he took Tarun on his scooter to the shop of Devender and Shiv Kumar at Bakhtawar Pur, Samey Singh Market. Accused Amit Khatri demanded money from the relatives of deceased. On 26.09.2003 they all killed the deceased and then his dead body was taken in the car and was thrown on the road side near Gannor. Mobile phone and purse of deceased were thrown by Amit Khatri in a pond. Accused Amit Sharma was arrested and he got recovered one gold chain along with Shri Ram locket of deceased which was lying in an iron box in his room which were seized vide Ex.PW16/E.

5. Accused Amit Khatri was personally searched vide Ex.PW16/G and was arrested vide Ex.PW16/F on 02.10.2003; and, from his pocket a ring of the deceased was seized vide Ex.PW26/I. On the pointing out of accused Amit Khatri (Ex.PW16/L), a Maruti car

bearing no. DL 3CT 1804-which was used to ferry the dead body was checked, in which one blood stained sack and one blood stained plywood board were found. Photographer was called on the spot and the spot was got photographed by PW8. Thereafter, the sack was seized vide Ex.PW16/J and a piece of plywood was seized vide Ex.PW16/K. One scooter bearing no. HR 10E 6665-which was allegedly used by accused Amit Sharma to take away the deceased, lying parked in front of house of accused Amit Khatri, was seized vide Ex.PW16/M. Accused Vivek Gaur @ Lovely, Devender Kumar and Shiv Kumar were arrested from Vandana Studio vide arrest memos Ex.PW16/R, Ex.PW16/P and Ex.PW16/N respectively. Mobile phone no. 35228221 recovered from accused Devender Kumar was seized vide Ex.PW16/W. Accused persons pointed out the place inside Vandana Studio, where they had committed the murder of deceased. One Titan Watch-which was worn by accused Vivek Gaur, belonging to deceased was seized vide memo Ex.PW16/X, and a pair of shoes recovered from the accused Shiv Kumar from his shop, were seized vide Ex.PW16/Y. One bag was produced by accused Amit Sharma, disclosing that with the said bag deceased was smothered. The said blood stained bag was seized vide Ex.PW16/Z and the blood stained wall was seized vide Ex.PW16/ZA and the same were got photographed. All the accused persons pointed out the place of throwing the dead body vide Ex.PW16/A1 to A5. All the exhibits were deposited in the Malkhana on 03.10.2003. On 03.10.2003, on the pointing out of accused Amit Sharma vide Ex.PW16/ZC and Amit Khatri vide Ex.PW16/ZB, purse and mobile phone of deceased were

searched in the pond of Tikri Khurd Village and the diver (PW4) recovered the purse containing I-Cards, DTC Bus Passes, Driving License and Cash Receipt of NIIT belonging to deceased which were seized vide Ex.PW4/A. However, the mobile phone could not be recovered. All the exhibits were deposited in the Malkhana on 03.10.2003.

6. After completion of investigation final report under Section 173 Cr.P.C. was filed and on 29.07.2004, charge under Section 120-B IPC and under Sections 364-A/302/201/120-B IPC were framed against the respondents/ accused herein to which they pleaded not guilty and claimed trial.

7. In order to prove the accused guilty, the prosecution examined 26 witnesses, star witnesses being PW-3, PW-9, PW-11. After completion of prosecution evidence, statements of the accused persons under Section 313 Cr.P.C. were recorded in which they claimed innocence and denied the entire case of the prosecution.

8. On appreciation of evidence and material brought on record, the trial court acquitted the respondents for the offences charged against them. Feeling aggrieved by the judgment of acquittal, the State preferred leave to appeal against the impugned judgment, which was allowed by this Court vide order dated 18.07.2013.

9. Argument advanced by the learned APP for the State is that the present case is based upon circumstantial evidence and the prosecution has proved the entire chain of circumstances to bring home

the guilt of the accused persons. Accused Amit Sharma got recovered gold chain with Shri Ram locket and also the wallet belonging to the deceased. Both these articles were recovered on the basis of disclosure statement made by the accused Amit Sharma. The wallet was recovered by the diver Abdul Sattar (PW4). Accused Amit Sharma also got recovered blood stained bag of grams with which the deceased was smothered. Regarding recovery made at the behest of accused Amit Khatri, it is submitted that he disclosed about the commission of offence and got recovered blood stained gunny bag and blood stained plywood from the car used in the crime. It is further submitted that accused Shiv Kumar got recovered sports shoes of the deceased. Accused Vivek Kumar Gaur got recovered wrist watch of the deceased which the accused was wearing at the time of his apprehension. Learned counsel for the complainant has argued that the articles belonging to the deceased were recovered from the accused persons and as per the call details, they all were in touch with each other and with the deceased, which clearly points towards their guilt in the commission of murder of the deceased. It is further submitted that recovery of articles of the deceased from the accused persons raises a presumption under Section 114 of the Indian Evidence Act against the accused persons. In support of the above contentions, reliance has been placed on *Ranjeet Kumar Ram @ Ranjeet Kumar Das versus State of Bihar, 2015 (3) JCC 2065; Mahavir Singh versus State of Haryana, (2014) 6 SCC 716;Mritunjoy Biswas versus Pranab @Kuti Biswas, (2013) 12 SCC 796;Hema versus State Through Inspector of Police, Madras, AIR 2013 SC 1000;State Government of NCT of Delhi*

versus Sunil & Anr., 88 (2000) Delhi Law Times 630 (SC);State of Maharashtra versus Damu, (Crl. Appeal of 992-993 of 1999, decided by Supreme Court of India on 01.05.2000); Chandrakanta Jha verus State (Govt. of NCT of Delhi) (Crl. Appeal No. 655/2013 & Death Reference 3/2013, decided by High Court of Delhi on 27.01.2016); Chatpal @ Satpal versus State, 2011 (123) DRJ 131 (DB); Gulab Chand versus State of Madhya Pradesh, AIR 1995 Supreme Court 1598; Geejaganda Somaiah versus State of Karnataka, (2007) 9 Supreme Court Cases 315; Bablu Kumar and Others versus State of Bihar and Another, (2015) 8 SCC 787; State of Gujarat versus Kishanbhai and Others, (2014) 5 SCC 108; Pooja Pal versus Union of India and Ors., AIR 2016 SC 1345; Prithvi Pal Singh @ Munna versus State, 2000 (53) DRJ 201.

10. Learned counsel for the accused argued that in the present case, the prosecution has not been able to prove all the circumstances on record convincingly. There are several missing links in the story put forth by the prosecution. Consequently, the trial court has rightly acquitted the accused persons. It is submitted that there are several material contradictions in the documents prepared and the testimonies of the witnesses, which go to the root of the matter. It is submitted that the description of clothes of the deceased given in the DD entry is different from those found on the dead body of the deceased. There is no mention of wrist watch in the recovery memo of the dead body, but the same was allegedly worn by the deceased at the time of his death. Witness Abdul Sattar (PW-4) has not referred to preparation of

pointing out memo. The call details of the mobile phones of the deceased, Hemant (nephew of PW3) and accused Devender have been produced on record, but the same do not, in any way, connect any of the accused with the alleged offence. The call details do not reflect that any of the accused made any call from his mobile phone or landline phone to the phone of the deceased or his family members from the time the deceased went missing till the recovery of the dead body. It is further submitted that the call details produced on record were not supported by mandatory certificate as per Section 65-B of the Indian Evidence Act and thus, the same cannot be read in evidence. Public witness Karan Singh (PW-17), the owner of the two shops in Samai Singh Market, Bakhtawar Pur has turned hostile and did not support the case of the prosecution. There is no evidence on record to establish that the shops were taken on rent by accused Devender and Shiv Kumar, and from those shops they were running Vandana Studio, or a General store. Even the STD booth owner Rajesh (PW20) has not supported the case of the prosecution. It is further submitted that though the inquest proceedings were done on 27.09.2003, but name and address of the deceased were later on added on 29.09.2003. It is further submitted that the prosecution has alleged that the accused persons got recovered gunny/plastic bag, but the recovery memo mentions that what was recovered was a bag (bori). It is further submitted that no recovery, as alleged, has ever been made from the accused persons or at their instance and the same are planted. No public witness was joined in the recovery proceedings. It is further submitted that there is contradiction regarding the watch worn by the

deceased inasmuch, as, PW13-Ramesh stated that he had seen the wrist watch on the dead body, but the same has been alleged to have been recovered from one of the accused persons. It is argued that the post-mortem report of the deceased Ex.PW13/ A does not mention any specific cause of death. The injuries mentioned in the post-mortem report Ex.PW23/A are the following:

> "*(1) There was a defused contusion of 5x2 cm on right parito temparoal region. The underline skull bones were showing infilatration of blood in it. The brain matter was pinkish grey in colour.*
>
> *(2) There was defused contusion of thigh 3x2 cm on the right occipital region. The underline skull bone was showing infilatration of blood in it. The brain matter was pinkish grey in colour.*
>
> *(3) There was a contusion of thigh 5x4 cm on the left sternal border at the level of 4/5 ribs.*
>
> *(4) There was a contusion of thigh 7x4 cm on the right side of chest just below the right nipple."*

The cause of death was opined as :

> "*The cause of death are the injuries described which are ante-mortam and sufficient to caused death in ordinary course of nature. The time between death and post-mortem examination is between 3-7 days.*"

However, after recording the disclosure statement of the accused, a second opinion was sought from the doctor vide Ex.PW26/F and dated 12.12.2003, and a further opinion was obtained vide Ex. PW23/B- which mentions the cause of death as :

> "*the injuries described which can be caused by chest compression and hitting head on some hard surface. The combined factors, chest compression and head injuries can cause death*."

Thus, the subsequent opinion has been obtained to match the disclosure statement and there is no independent opinion that the death had been caused in the manner described in the disclosure statement. In support of the above contentions, learned counsel for accused persons/respondents relied upon *Shekhar and Anr. Versus The State of NCT of Delhi, 2008 (2) JCC 871; Ravinder Singh versus Govt. of NCT of Delhi, 2009 (1) JCC 91; Chatpal @ Satpal versus State, 2011 (123) DRJ 131 (DB); Mustkeem @ Sirajudeen versus State of Rajasthan, 2011 AIAR (Criminal) 667; Hira Lal versus State, 2011 (3) LRC 262 (Del) (DB); Surjit Singh and Anr versus State of Punjab, AIR 1994 SC 110; C.K. Raveendran vs. State of Kerala, 2000 Cri.LJ 497; Murlidhar & Ors vs. State of Rajasthan, 2005 AIAR (Criminal) 617; Jasmer Singh vs. State of Delhi, 2007 (4) JCC 2861; State of Punjab vs. Sarup Singh, 1998 (1) JCC (SC) 57; Babudas vs. State of M.P., 2003 Cri.LJ 2536; Order dated 08.11.2011, passed by Delhi High Court in Crl. A. No.757/2009, titled as Chand Mohammad @ Anish Ahmed & Ors. vs. State; Mani vs. State of Tamil Nadu, 2008 (1) C.C. Cases (SC) 217; A.M. Perumal vs star Tours and Travels (India) Ltd., 2011 (2) JCC (NI) 124; Order dated 20.04.2011, passed by Delhi High Court in Crl. A. No.1335/2010, titled as Prem Singh vs. State; Parmanand Yadav vs. State, 2010 (2) C.C. Cases (HC) 374.*

11. In rebuttal, Ms.Aashaa Tiwari, learned APP for the State has argued that the missing report of the deceased after the ransom call was made vide DD No.35A (Ex.PW25/A) which was got lodged on 25.09.2003. The statement of PW3-Satish Bhardwaj Ex.PW3/A, the father of the deceased i.e. the Rukka was recorded on the same day vide Ex.PW25/B (also exhibited as EX PW-3/ A). The FIR was initially registered under Section 364A vide Ex.PW1/B on 26.09.2003 at 12:30AM. On the next day i.e. on 27.09.2003, the dead body of the deceased was seen by PW13-Ramesh, who then informed of the same to PW14-ASI Ram Ratan. Statement of Ramesh is Ex.PW14/B. Statement of PW3 i.e. father of the deceased was recorded on 29.09.2003 vide Ex.PW3/B in which he gave the description of the missing items of the deceased. The accused Amit Sharma was arrested on 2.10.2003 at about 2.10 p.m. vide Ex.PW16/A. Accused Amit Khatri was arrested on the same date at 4.00 p.m. vide Ex.PW16/F whereas accused Vivek was arrested at 7.20 p.m. vide Ex.PW16/R. Accused Shiv Kumar was arrested at 7.40 p.m. vide Ex.PW16/N and accused Devender was arrested at 8.00 p.m. vide Ex.PW16/P on the same day.

12. Though it is submitted that there is no last seen evidence on record, but the recoveries affected from the accused persons of the belongings of the deceased clearly make out a case against them. The recovery of purse had been made by the diver Abdul Sattar (PW4) from the pond upon the pointing out of the location by the accused Amit Sharma and he has duly supported the case of the prosecution

and even the presence of accused Amit Sharma and Amit Khatri at the time of said recovery has not been disputed. The gold chain of the deceased was got recovered by accused Amit Sharma from his residence vide Ex.PW16/E, whereas ring of the deceased was recovered from the wearing pant of the accused Amit Khatri vide Ex.PW16/F. In the statement Ex.PW3/B, there is mention of Ram locket in the said gold chain. In the TIP proceedings, the articles recovered from the accused belonging to the deceased were correctly identified by PW3. It is further submitted that the pointing out memo Ex.PW26/B2 of the place of dumping the dead body matches with the statement of PW14 –ASI Ram Rattan and the statement of PW13-Ramesh regarding the place from where the dead body was recovered. It is further submitted that there is enough evidence on record to convict the accused persons and the trial court has committed an error in acquitting them.

13. We have heard the submissions made by the learned APP for the State assisted by learned counsel for the complainant and the learned counsel for the respondents. We have also gone through the evidence led by the parties.

14. PW3-Satish Bhardwaj is the complainant and father of the deceased. He deposed that on 25.09.2003, his son did not return from college and he could not be contacted on his mobile phone. PW3 called his nephew Hemant (PW9), to call the mobile phone of the deceased. At about 10 p.m., Hemant made a call on the mobile phone of the deceased and the receiver of the call informed that they had

kidnapped the deceased and asked them to arrange a sum of Rs.20 lakhs. On the next day, the mobile phone of the deceased was found to be not working initially. PW3 further deposed that on 26.09.2003 when his brother Sanjay Kumar (PW-11) made a call on the mobile phone of the deceased, the person on the other side asked whether the money had been arranged or not, to which Sanjay informed that the money had been arranged and asked for the place of its delivery. On the intervening night of 28/29.09.2003, he received a message from the police and on receipt of same, he along with his neighbor Raj Kumar (PW-15) went to PS Kanjhawala. Thereafter, PW3 along with Raj Kumar was taken to Rohtak Medical Hospital and in the mortuary they met ASI Ram Rattan (PW-14). A dead body was shown to him which he identified as of his son Tarun @ Chintu vide Ex.PW3/B. He further deposed that his son was wearing shoes, having a purse, having a diary with I-card of Satyawati College, I-card of NIIT and some documents, and a gold chain with locket of Shri Ram. The said articles were not found on the dead body.

15. It was alleged against the accused persons that accused Amit Sharma was lastly seen in the company of the deceased. PW25-SI Balbir Singh was the IO of the case who had deposed that on enquiries made from the college of the deceased, it was revealed from the students of his class that deceased Tarun was lastly seen with accused Amit Sharma and that deceased was also canvassing for accused Amit Sharma who was contesting students election.

16. Apart from the testimony of PW25, there is no evidence on record to establish that the deceased was lastly seen with accused Amit Sharma. The IO (PW25) did not name any of the students, or the source from which he came to know about the deceased being lastly in the company of the accused Amit Sharma on the day he had gone missing. The IO did not care to record the statement of any of such witnesses under Section 161 Cr.P.C. to make out a case that it was the accused Amit Sharma who was lastly seen with the deceased. The statement of the IO (PW25) is a hearsay evidence and is not an admissible evidence.

17. We may observe that the failure of the I.O.-S.I. Balbir Singh (PW25) in not identifying the individual who had lastly seen the deceased in the company of accused Amit Sharma, and not recording his statement point to glaring incompetence and shoddy investigation, which should be looked into by the concerned authorities administratively. We are of the considered opinion that the prosecution has failed to establish on record the circumstance of deceased being lastly seen in the company of any of the accused persons.

18. Next circumstance brought on record by the prosecution is that the call details produced on record prove that the accused persons knew each other and the deceased, and that there were conversations between them on the night when the deceased went missing. It is alleged that there were conversations between accused Amit Sharma and Devender on the early hours of 26.09.2003. It was also alleged

that a call was made on the fateful night of 25.09.2003 at 10.04 p.m. from the mobile phone of Hemant (PW9) to the mobile phone of the deceased, on which ransom was demanded. On the next day at about 11.49 a.m., conversation took place between the accused persons and Sanjay Bhardwaj-uncle of the deceased, when Sanjay Kumar (PW11) had called the mobile number of the deceased with regard to arrangement of ransom money. It was also alleged that since the deceased was kidnapped by the accused persons, mobile phone of the deceased also remained with them on which the conversations were made with PW9 Hemant and Sanjay Kumar (PW-11).

19. The call details of the mobile phone of the deceased bearing nos.9891102594 and 9810872071 were exhibited as Ex.PW21/A and Ex.PW22/A respectively, without any objection. However, when PW-24 sought to exhibit the CDR of phone no.35228221 of accused Devender as Ex.PW24/1, and of Hemant bearing no.32332151 (exhibited as Ex.PW24/12) he was cross-examined on the aspect of his not producing the certificate in terms of Section 65B of the Evidence Act. In view of the judgment of the Supreme Court in SONU alias AMAR v. State of Haryana (2017) 8 SCC 570, the objection now raised for the first time to the mode of proof of the CDR Ex.PW21/A and Ex.PW22/A cannot be permitted to be raised. However, the CDR of accused Devender Ex.PW24/1 and that of Hemant Ex.PW24/12 are not admissible in evidence as they were not proved since the certificates under Section 65-B of the Evidence Act were not produced. There is force in the contention of

the learned counsel for the accused that the said call details proved on record cannot be read in evidence, as the certificate under Section 65B of the Evidence Act has been appended with them.

20. In any event, in our considered view, the above call details in no way connect the accused persons with the commission of the crime in the present case. As per the call details, though it is apparent that there were conversations between the accused Amit Sharma and Devender with the deceased before the day of his going missing, but that does not establish anything-apart from the fact that the deceased and accused Amit Sharma were students of the same class in the same college. They were known to each other. There is no dispute with regard to proximity of the accused with the deceased, but the call details in no way establish that-in the kidnapping of the deceased, any of the accused were involved. There is nothing to show that the deceased and the accused were together after the kidnapping. Once again we find that the investigation was sloppy, as no endeavor appears to have been made to find out the location of the mobile phones of the deceased and all the accused. Had the location charts been obtained, it may have been possible to establish that they were together- and that would have been an incriminating circumstance. The I.O. of the case has botched up the investigation on this aspect as well, and it is too late in the day to take any remedial steps at this stage.

21. So far as the calls made at early hours of 26.09.2003 between the co-accused are concerned, the same are between accused

Amit Sharma and Devender, and the same cannot be said to be doubtful, or such as to raise any suspicion against them since there is no evidence of the deceased being with any of the accused after he went missing, or at the time when the said calls were made. As per the call details of the phones of the deceased; his cousin Hemant, and, accused Devender, there is no call from any of the accused's phone number to the phone number of the deceased, or to the phone number of any of the relative of the deceased, during the time since when the deceased went missing, and till the discovery of his dead body.

22. So far as the recovery affected from the accused persons is concerned, it is alleged against the accused Amit Sharma that from his possession or at his instance, one gold chain with Shri Ram locket of the deceased, purse of the deceased, mobile phone (number: 35376199) and blood stained bag and grams were recovered. From the possession of accused Amit Khatri, one gold ring of the deceased, blood stained jute bag from car, blood stained plywood from the car, scooter and Maruti car were recovered. From the possession of accused Shiv Kumar, a pair of shoes of the deceased was recovered. From the possession of accused Vivek Gaur, one Titan watch of the deceased was recovered and from the accused Devender, one mobile phone was recovered. It is argued by the learned APP for the State that the recovery of articles of the deceased from the accused persons or at their instance makes out a case against them that they are responsible for commission of murder of the deceased. The said contention of the learned APP has been contested by the learned counsel for the accused

persons that no such recovery had been affected from the accused persons or at their instance and the same have been planted upon them.

23. To deal with the rival contentions of the parties with regard to the recoveries effected, we have gone through the evidence available on record. It was alleged against the accused Amit Sharma and Amit Khatri that after their apprehension they led the police party to Shivam General Store and Vandana Store where their co-accused persons were arrested and accused Amit Sharma got recovered one blood stained bag having grams. SI Ram Kumar (PW16) had deposed that accused Amit Sharma got recovered blood stained bag having kabuli chana from General Store, Samai Singh Market which was seized vide memo Ex.PW16/Z after transferring the grams in some other bag. As per the case of the prosecution, Vandana Studio and Shivam General Store were belonging to accused Devender and Shiv Kumar. SI Balbir Singh (PW25) had deposed on the similar lines of PW16 regarding recovery of a blood stained bag containing grams from Shivam General Store which was seized vide memo Ex.PW16/Z after converting the grams from the said bag to another bag. The IO of the case Insp. Dharampal Singh (PW26) had deposed that accused Devender Kumar, Shiv Kumar and Vivek Gaur were arrested at the instance of accused Amit Sharma and Amit Khatri from Vandana Studio. Accused Amit Sharma produced one blood stained bag containing grams which was seized vide memo Ex.PW16/Z. He further deposed that he noticed some blood stains on the wall which were scratched and seized vide memo Ex.PW16/ZA. He recorded the

statement of Karan Singh, owner of Shivam General Store and Vandana Studio who stated that the said shops were given on rent to accused Shiv Kumar and Devender Kumar. In his cross-examination, he had admitted that there was no proof with respect to the business carried out in the said shops belonging to the accused persons.

24. PW17-Karan Singh had not supported the case of the prosecution. In his testimony, PW17 had deposed that he was owner of the two shops in Samai Singh Market. He had stated to have given the said shops on rent to one Arun about 8-10 years ago which were later on got vacated by him. During cross-examination by the learned APP for the State, PW17 had denied having made any statement to the police to the effect that the two shops were given by him on rent to accused Devender and Shiv Kumar. He denied having acquaintance with accused Devender and Shiv Kumar. Apart from the testimony of police witnesses (PW16, PW25 and PW26), there is no evidence or material on record to show that accused Devender and Shiv Kumar were having the possession of the shops in question from where the blood stained bag was allegedly got recovered by the accused Amit Sharma. Even the owner of the shop Karan Singh (PW17) had not supported the case of the prosecution that he had given the said shops on rent to both these accused.

25. There are material contradictions with regard to the recovered bag Ex.P21. As per the testimony of PW25, a gunny bag was recovered, but during his examination in the Court, he was shown a plastic bag which he identified to be the same bag which was got

recovered by accused Amit Sharma. PW16 who was a witness to the recovery of said bag at the instance of accused Amit Sharma was not shown the bag during his testimony before the Court. The IO (PW26) had stated that a bag was got recovered by accused Amit Sharma, but he identified it to be a plastic bag during his testimony. All these witnesses have stated that the said bag was having blood stains, but the FSL report Ex.PW26/L negates this statement, which states that no human blood was detected on the plastic bag. Thus, there are material contradictions with regard to the bag, which go to the root of the matter.

26. It was alleged against accused Amit Khatri that from his possession one gold ring belonging to the deceased was recovered and at his instance one blood stained jute bag and one blood stained plywood were recovered from the Maruti Car bearing No. DL 3CT 1804. As per the testimony of PW25-SI Balbir Singh and PW26-Insp. Dharampal Singh, when accused Amit Khatri was arrested, his disclosure statement was recorded and then the ring was seized which was lying in his jeans pocket. The story put forth by the prosecution is doubtful for the reasons that, it is not expected of an accused that he would keep the stolen articles with him and on his person. As per the case of the prosecution, accused Amit Khatri was personally searched vide memo Ex.PW16/G. This memo Ex.PW16/G shows that nothing except Rs.115/- was recovered from the personal search of the accused Amit Khatri. When accused was searched and nothing except the money was recovered, how could it be inferred that the ring-which was

kept by him in his pant pocket, was found. According to the prosecution, it was only on his disclosure that the ring was found in his pant pocket which he was wearing, and which was seized vide Ex.PW16/F. Thus, there is doubt about the recovery of ring from the possession of the accused Amit Khatri.

27. It was alleged against the accused persons that the dead body of Tarun was disposed of by keeping it in a jute bag which was kept in the dickey of the car. It was also alleged that another jute bag was recovered from the car was got recovered by accused Amit Khatri, which was seized vide memo Ex.PW16/J. The recovery of the said jute bag had been proved by PW16-SI Ram Kumar, who had deposed that the accused Amit Khatri took the police party to a nearby place of his house and pointed out towards a Maruti Car. From the dickey of the car, one blood stained gunny bag was found and it was seized. PW25-SI Balbir Singh was also associated with the recovery of car and gunny bag. It has also been stated by PW16, PW25 and PW26-Investigating Officer that from the said car, apart from a blood stained bag, one blood stained plywood was also recovered. All these witnesses have not stated anything about the association of any public witness in the recovery of car, bag and plywood. There are material contradictions regarding the recovery of these articles. PW16 had not stated about the arranging of keys of the car. PW25 and PW26 have stated that the said keys were brought from the house of accused Amit Khatri. The sister of the accused Amit Khatri, namely, Meena (PW19) was examined by the prosecution, but she did not support the case of

the prosecution. She had deposed that she was the registered owner of the said car and that the accused Amit Khatri never took that car from her or from her in-laws. It is also apparent from the record that the place from where the said car was recovered was a public place but the IO had not made any effort to join any independent public witness in the recovery of either the car, or the bag and plywood from the same. Thus, a doubt is raised about the seizure of car, bag and plywood as alleged.

28. It is further the case of the prosecution that the shoes of the deceased were got recovered by the accused Shiv Kumar who produced the said shoes from Shivam General Store. PW3, father of the deceased in his cross-examination had admitted that he had not given any specification of the shoes in his statement made to the police. It has not come on record that the said shoes were of the size of the deceased. The size of the foot of the accused Shiv Kumar has also not been disclosed and it is not the case of the prosecution that the recovered shoe was not of the size of the accused Shiv Kumar. There is no basis in believing the story of the prosecution, for the reason that the prosecution had failed to establish that Shivam General Store was in possession of the accused Shiv Kumar, or; that he was inducted in the said shop as a tenant. There is no evidence on record to connect the accused Shiv Kumar with Shivam General Store from where the shoes of the deceased were allegedly recovered. Secondly, no justifiable explanation has been given by the prosecution as to why accused would keep the said shoes in his possession after many days of

the death of the deceased which may not be any of his use. Thus, the recovery of shoes of the deceased at the pointing out of the accused Shiv Kumar is full of doubts.

29. It was also the case of the prosecution that one Titan wrist watch Ex.P2 of the deceased was recovered from the accused Vivek Gaur. Learned counsel for the accused has argued that no such recovery was affected from the accused Vivek Gaur and the same has been planted upon him.

30. It is important to mention that the dead body of the deceased was firstly discovered by PW13-Ramesh. He had deposed that on 27.09.2003, at about 7-8 p.m., he was coming from Gannaur to Delhi side on foot. When he reached near Picrik, he saw one dead body of a boy lying in a ditch. He informed the police about the dead body. During cross-examination, PW13 categorically stated that the body was having a wrist watch on his wrist. Even PW3-father of the deceased had not stated anything with regard to Titan Watch being worn by the deceased in his statements Ex.PW3/A and Ex.PW3/B recorded by the police under Section 161 Cr.P.C. No description of the watch was given by the father of the deceased and in view of the statement of PW13-Ramesh, that he found a wrist watch on the dead body, the plantation of the wrist watch in the present case cannot be ruled out when it is admitted case of the prosecution that no wrist watch was found on the dead body of the deceased when it was recovered. It is also evident from the record that the personal search of accused Vivek Gaur was conducted vide memo Ex.PW16/S after his

arrest in which there is mention of recovery of a sum of Rs.133/- from his personal search. There is no mention of wearing of any wrist watch by the accused Vivek Gaur at the time of his arrest or taking his personal search. When at the time of his arrest, as per the case of the prosecution, the accused Vivek Gaur was wearing the wrist watch belonging to the deceased, what prevented the IO from recording the same in the personal search memo, has not been explained.

31. So, keeping in view the statement of PW13-Ramesh that he found a wrist watch on the dead body, and the fact that the IO had failed to record the recovery of wrist watch in the personal search memo of the accused Vivek Gaur, a doubt is raised about the manner and recovery of alleged wrist watch from the person of the accused.

32. Apart from the above articles of the deceased, it is also the case of the prosecution that one black purse of the deceased was got recovered by accused Amit Sharma from a pond. As per the prosecution case, on 03.10.2003 accused Amit Sharma took the police party to Tikri Khurd, Delhi and pointed towards a pond in which the purse of the deceased was thrown. Accused Amit Sharma threw a stone in the middle of the pond to point out the place of throwing the purse. One diver Abdul Sattar (PW4) retrieved the purse which was seized vide memo Ex.PW4/A. PW4 had stated that he-on the pointing out of accused Amit Sharma, got recovered the purse containing some documents which was seized vide memo Ex.PW4/A.

33. The father of the deceased i.e. PW3 had not stated anything in his statements recorded under Section 161 Cr.P.C. being Ex.PW3/A and Ex.PW3/B regarding the description of the purse of the deceased. In his statement Ex.PW3/B, though PW3 stated about the missing articles of his deceased son, but he had not stated that his son was having a purse. So, in view of this position of the matter, we are of the view that the manner of recovery and seizure of purse of the deceased as alleged is doubtful and it is not safe to rely upon the same.

34. In view of the totality of discussion made above, we are of the view that though the prosecution has been able to raise doubts about the involvement of the accused persons, it has failed to prove beyond reasonable doubt the guilt of the accused for the offences charged against them. The respondents are entitled to the benefit of doubt. Accordingly, the judgment passed by the Court below is upheld.

35. Accordingly, the present appeal is dismissed.

P.S. TEJI, J

VIPIN SANGHI, J

JULY 04, 2018
dd

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision : 30th August, 2017

W.P.(C) 8448/2007

D.T.C. ..... Petitioner

Through Mr. Santosh Kumar Tripathi, Standing Counsel

versus

PRITAM LAL ..... Respondent
(through LRs) Through Mr. H.K. Chaturvedi, Mr. Sagar Chaturvedi, Advs.

W.P.(C) 8469/2007

D.T.C. ..... Petitioner

Through Mr. Santosh Kumar Tripathi, Standing Counsel

versus

PRITAM LAL ..... Respondent

Through Mr. H.K. Chaturvedi, Mr. Sagar Chaturvedi, Advs.

CORAM:
HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT
(ORAL)

ANU MALHOTRA, J.

1. Both these petitions W.P.(C) 8448/2007 and W.P.(C) 8469/2007 relate to claim of the workman, i.e. Sh. Pritam Lal (since deceased and now represented by his legal heirs) in relation to I.D. No. 186/1995, upheld vide Award dated 09.06.1998, and implementation that of LCA No. 78/2000, disposed of vide order dated 28.02.2006, and thus both these petitions W.P.(C) 8448/2007

and W.P.(C) 8469/2007 are taken up together for the judgment.

2. Submissions made on behalf of either side.

3. Vide the petition, the petitioner assails the impugned order dated 28.02.2006 of the learned Presiding Officer, Labour Court No. VII, Delhi in LCA No. 78/2000 whereby the application under Section 33 C (2) of the Industrial Disputes Act, 1947 filed by the workman i.e. the respondent herein now succeeded by his legal heirs as per the amended memo of the parties on record, who were brought on record in terms of the order dated 12.02.2013, vide which the workman i.e. the respondent herein since deceased had claimed that an Award dated 09.06.1998 had been passed in his favour in I.D. No. 186/2005 titled as Pritam Lal Vs. Management DTC but despite repeated applications to the management, he had not been paid his back wages w.e.f. 01.01.1999 till 31.08.2000 and that he claims that his back wages as given in the annexure with the application amounting to Rs.2,85,676/- be directed to be paid by the management. The management had contested the application and had filed its written statement contending that the workman was not entitled to any amount and that the award had been duly complied with and the full and final payment had been made to him on 12.10.1989 and it was contended that the workman was not entitled to wages after 01.01.1999 and that the workman had already taken the amount.

4. The workman filed his rejoinder to the said written statement denying all the contents of the management i.e. the petitioner herein and in relation thereto, two issues were framed to the effect : -

(i) Whether the workman has any existing right to claim the present amount?"

(ii) Whether what amount, if any, the workman is entitled?

5. It was held vide the impugned Award that the affidavit of the workman placed on record claiming the amount of Rs.2,85,676/- as arrears of back wages in terms of the Award dated 09.06.1998 had remained unchallenged as the management had not cross-examined him and rather admitted that the amount was due to the workman and that in view of the factum that the amount had been claimed by the workman on the basis of the Award dated 09.06.1998, the workman was held entitled to receive the amount of Rs.2,85,676/-.

6. Vide the Award dated 09.06.1998 in I.D. No. 186/1995 between the workman Sh. Pritam Lal i.e. since deceased and the management of the Delhi Transport Corporation, which is found placed as submitted on behalf of either side by the learned counsel present on the record of W.P.(C) 8469/2007 between the same parties wherein the reference to the effect that *whether the workman Sh. Pritam Lal had been illegally and / or unjustifiably removed from the services of the management and as to what relief he was entitled* had been answered vide the said Award dated 09.06.1998 in view of the unchallenged version of the workman which had not been refuted by the management i.e. the Delhi Transport Corporation that no notice nor notice pay had been given to him at the time of the termination of his services and that no compensation pay had been given and that the workman had worked continuously for more than one year and thus

the requisite notice in terms of Section 25-F of the Industrial Disputes Act, 1947 having not been given and thus his termination tantamounted to retrenchment and as such his removal from service was illegal and unjustified and the workman was held entitled for reinstatement with full back wages.

7. Vide order dated 26.08.2009 in the petition bearing no. W.P.(C) 8469/2007 between the same parties, it was directed that the same to be taken up with the petition bearing no. W.P.(C) 8448/2007 in which the impugned order dated 28.02.2006 in LCA No. 78/2000 was impugned.

8. A bare perusal of the impugned Award dated 09.06.1998 in I.D. No. 186/95 makes it apparent that the version of the workman which had not been refuted by the management i.e. Delhi Transport Corporation that no notice or notice pay had been given to him at the time of the termination of his services and that no compensation pay had been given and that the workman had worked continuously for more than one year and thus the requisite notice in terms of Section 25-F of the Industrial Disputes Act, 1947 had not been given, makes it apparent that there is no infirmity whatsoever in the impugned Award dated 09.06.1998 in I.D. No. 186/95 of the of the learned Presiding Officer, Labour Court No. VII, Delhi directing the reinstatement of the workman with full back wages.

9. The W.P.(C) 8469/2007 is thus accordingly dismissed.

10. The W.P.(C) 8469/2007 as directed hereinabove having been dismissed against the impugned Award dated 09.06.1998 in I.D. No. 186/95, and the factum that the workman vide LCA No. 78/2000 had

sought the disposal of his application under Section 33 C (2) of the Industrial Disputes Act, 1947 bearing his claim on the Award dated 09.06.1998 in I.D. No. 186/95, complied with the factum that the claim in LCA No. 78/2000 was also not opposed on behalf of the management i.e. the Delhi Transport Corporation, there is no infirmity found in the impugned order dated 28.02.2006 of the learned Presiding Officer, Labour Court No. VII, Delhi in LCA No. 78/2000 as well.

11. *Inter-alia*, on behalf of the petitioner it was submitted during the course of the proceedings dated 17.05.2017 on behalf of either side that W.P. (C) 8468/2007 between the management of the Delhi Transport Corportion and the respondent since deceased and now represented by his legal heirs had already been disposed of vide judgment dated 20.04.2015. The order dated 20.04.2015 in W.P. (C) 8468/2007 makes it apparently clear that the application under Section 33 (2) (b) of the Industrial Disputes Act, 1947 being registered as O.P. No. 166/1994 had been dismissed as withdrawn on the statement made on behalf of Delhi Transport Corporation and vide order dated 20.04.2015 in W.P. (C) 8468/2007 categorically observed to the effect that there was no illegality in order of permitting the petitioner to withdraw the W.P. (C) 8468/2007 and that was held to be utterly frivolous petition.

12. A perusal of the record of W.P.(C) 8469/2007 indicates that it was instituted in November, 2007 assailing the impugned Award dated 09.06.1998 in I.D. No. 186/1995. Subsequent thereto the W.P.(C) 8448/2007 was filed against the impugned order dated

28.02.2006 of the learned Presiding Officer, Labour Court No. VII, Delhi in LCA No. 78/2000 in relation to the claim passed on the very same Award dated 09.06.1998 in I.D. No. 186/2005. Apparently, there is no infirmity in the impugned order dated 28.02.2006 in LCA No. 78/2000 nor in the impugned Award dated 09.06.1998 in I.D. No. 186/1995.

13. It is thus apparent that both W.P.(C) 8448/2007 and W.P.(C) 8469/2007 are to be dismissed and are thus dismissed with directions to the petitioner to comply with the impugned order dated 28.02.2006 in LCA No. 78/2000 whereby the workman since deceased now represented by his legal heirs is entitled to the amount of received of Rs.2,85,676/- in LCA No. 78/2000 with the interest @12% per annum as directed thereby.

ANU MALHOTRA, J

AUGUST 30, 2017/*mk*

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Order: 13.02.2019*

\+ **Tr. P. (C) No.125/2018**

KAVITA JAIN ..... Petitioner

Through: Mr.H.K. Chaturvedi, Advocate with Mr.Sagar Chaturvedi, Advocate.

versus

MUNNA LAL SHARMA ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE VINOD GOEL

CM No.6161/2019 (for early hearing)

1. Despite the advance copy of the application having been served, there is no appearance on behalf of the respondent.

2. Learned counsel for the applicant states that the next date of hearing before the trial court is 18.02.2019. In the circumstances, the application is allowed.

TR.P.(C.) 125/2018

3. Notice of the Transfer Petition for 14.08.2018 has been served on the respondent, who did not put in his appearance. Therefore, next date in this petition i.e. 14.03.2019 is cancelled. I proceed to dispose of this petition.

4. The petitioner seeks transfer of her Civil Suit No.2077/2016 filed by her from the court of Ms.Shuchi Laler, learned Additional District Judge-04, East District, Karkardooma Courts, Delhi ('ADJ') to the court of District/Additional District Judge, North-East District, Karkardooma Courts, Delhi.

5. Learned counsel for the petitioner in support of his contention has drawn the attention of the court to the order dated 23.01.2018 passed by the learned ADJ, wherein she observed that *'The present is a suit for recovery of possession with respect to the property bearing no.K-631, Gali No.3, Gautam Vihar, Ghonda, Gujran, Khadar, Delhi. Prima facie the court is of the opinion that the suit property is situated within the territorial jurisdiction of North East District.'*

6. Since the suit property is situated within the territorial jurisdiction of North-East District, the said civil suit no.2077/2016 is ordered to be transferred from the court of learned ADJ-04, East District, Delhi to North-East District, Karkardooma Courts, Delhi. The learned District Judge, North-East District is requested to assign the case to any court of competent jurisdiction in his district for disposal in accordance with law.

7. The petition is disposed of.

(VINOD GOEL)
JUDGE

FEBRUARY 13, 2019
"shailendra"

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **LPA 472/2017**

VIR BAHADUR ..... Appellant

Through: Mr. H.K. Chaturvedi, Advocate with Mr. Sagar Chaturvedi, Advocate.

versus

FOOD CORPORATION OF INDIA & ANR. ..... Respondents

Through: Mr. Ajit Pudussery, Advocate with Mr. Ajeet Singh Verma, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE SANJEEV NARULA

O R D E R

% 06.12.2018

Dr. S. Muralidhar, J.:

1. This appeal is directed against the orders dated 26th July, 2016 passed by the learned Single Judge, dismissing the Writ Petition (Civil) 4564/1997 and subsequent decision dated 5th May, 2017 dismissing the review petition No.482/2016.

2. This is the third round of litigation. The background facts are that the Appellant joined Food Corporation of India (FCI) – Respondent No.1 herein as Assistant Grade-III (AG-III) on 27th June, 1973. In due course, he was promoted to the post of AG-I (Ministerial) in 1991. According to the Appellant, while working in the Ministerial cadre, he worked in the Movement Cadre on being transferred there between 1974 and 1977. By

Office Order dated 19th May, 1982, FCI directed that the Appellant would be relieved as AG-II (Ministerial) and would report to the Joint Manager (Establishment) for further deployment. Thereafter, the Appellant was promoted from AG-II (Ministerial) to AG-I (Ministerial) against the 1991 panel.

3. One Vijay Kumar Kaushal who was selected in movement cadre in October, 1995, was promoted from AG-II (Ministerial) to AG-I (Ministerial) against the 1993 panel. One other person, Smt. Vijay Laxmi Lalla @ Vijay Laxmi Bhatia was selected from movement cadre in 1995. She was promoted from AG-II (Ministerial) to AG -I (Ministerial) against the 1994 panel.

4. On 21st February, 1994, the Appellant submitted his option for lateral deployment in the Movement Cadre for the post of AG-I from AG-I (Ministerial). On 21st September, 1994, FCI proposed lateral deployment in AG-I, Movement Cadre by 50% lateral deployment from the Godown Cadre and 50% from General Administration Cadre (Ministerial Cadre). By an Office Order dated 21st/25th October 1995, FCI invited options for formation of Movement Cadre.

5. According to the Appellant his claim for lateral deployment in the Movement Cadre on the basis of seniority and experience was ignored by FCI. In other words, according to the Appellant, his juniors were promoted illegally by FCI by the afore-mentioned Office Order to the Movement Cadre. The Appellant submitted representations on 8th May and 6th

December, 1996 for induction into the Movement Cadre. By Memorandum dated 5th May, 1997, they were rejected.

6. Thereafter, the Appellant filed Writ Petition (Civil) 4564/1997, in which an order was passed by the learned Single Judge of this Court on 27th October, 1997, the relevant portion of which reads as under:

> "……..The respondent should specifically explain why in the rules, there is no condition of experience mentioned and why the petitioners junior had been selected and not the petitioner. Matter be listed on 26.03.1998. In the meantime, any appointment made will be subject to the outcome of the Writ petition".

7. Admitting that Vijay Laxmi Lalla was junior to the Appellant and had been wrongly inducted in the movement cadre, FCI cancelled her induction. This was stated by the FCI in its counter affidavit dated 25th March, 1998.

8. On 11th February, 2014, the learned Single Judge passed a detailed order in which, *inter alia*, it was observed as under:

> "11. Petitioner No.2, thus, in effect, seeks appointment on the basis of his right for consideration of lateral movement from general administration cadre, in which he was positioned at that relevant point in time, to the Movement cadre, in Assistant Grade-I, w.e.f. 1993.
>
> 12. What has emerged in the course of the arguments is that, though in the first instance, respondent no.1 had appointed, one Ms.Vijay Laxmi Lalla (whose actual date of promotion as AG-I has been shown as 27.12.1997) in movement cadre, based on lateral movement, her induction was subsequently cancelled. I am informed that, the induction of Ms.Vijay Laxmi Lalla, was cancelled in 1998. The aspect considering Ms.Vijay Laxmi

Lalla's induction and subsequent cancellation of appointment is referred to in paragraph 10 of the counter affidavit filed by respondent no.1.

13. It is argued by the learned counsel for petitioner no.2 that consequent thereto, the petitioner no.2 should have been inducted into the movement cadre, immediately, on cancellation of induction of Ms. Vijay Laxmi Lalla, which according to respondent no.1, occurred in 1998.

14. At this stage, Mr. Puddusery says that he would have to ascertain the correct position as to whether there were any other persons, who were senior to petitioner no.2 at that point of time. Let an affidavit be filed in that behalf, within two weeks from today".

9. An additional affidavit was thereafter filed by FCI dated 10th March, 2014, in which in paragraph 3, it was stated as under:

"3. In the Rejoinder filed by the Petitioner in fact other than a general averment that a junior has been inducted there is no real denial of this factual averment made in the counter affidavit which is evident from a perusal of the same. The Petitioner is seeking to rely on the seniority list which was prepared and saw the light of the day only on 3.11.1995 after the induction was finalized. In fact as pointed out above, only Mrs.Vijay Laxmi Lalla who was junior to the Petitioner was inadvertently inducted in Movement Cadre but when the same was noticed her induction was subsequently cancelled. Copy of the agenda for induction of employees to the Ministerial Cadre for purposes of induction to the Movement Cadre is Annexure AA/1. Copy of the Minutes of the Screening Committee held on 28.9.1995 for considering candidates for induction into the Movement cadre is Annexure AA/2".

10. It was additionally pointed out as under:

> "4. I say that the induction to the movement cadre is not a promotion and does not confer any monetary or additional benefit on the employee concerned. It is only a lateral deployment or a transfer. It is submitted that an employee has consequently no right to demand induction to the Movement cadre. The prime consideration is the interest of the corporation. As admitted by the Petitioner only the chances of promotion improve upon posting to the movement cadre".

11. Another detailed order came to be passed by the learned Single Judge on 4th December, 2014, which reads as under:

> "1. At the outset, it may be noted that though the present petition has been filed by two petitioners, Mr. Chaturvedi, Advocate states that he has been engaged by the Delhi High Court Legal Services Committee to appear only on behalf of the petitioner No.2 and the petitioner No.1 has not contacted him.
>
> 2. Counsel for the respondents/FCI states that as per the records, the petitioner No.1 had not exercised his option for being placed in the seniority list for lateral movement and therefore, he would not be entitled to any relief.
>
> 3. The relief in the present petition is confined to petitioner No.2 alone.
>
> 4. Counsel for the respondents/FCI relies on the Office Order dated 3.11.1995 to state that the said order was passed so as to revise/recast the zonal seniority by implementing the judgment of the High Court in connected matters pronounced on 11.1.1994 and confirmed by the Supreme Court by dismissing the SLP preferred by the FCI. He states that the said Office Order does not upset the lateral movement list prepared by the respondent/FCI in the year 1993 and therefore the contention of the learned counsel for the petitioner that the list of AG-II approved for the notional empanelment by promotion to the post of AG-I (Ministerial) in

the year 1991, upon revision under the Office Order dated 3.11.1995, will not have any bearing on those persons who were appointed on the basis of lateral movement options that were submitted by them in the year 1993.

5. Learned counsel for the respondents/FCI states that before proceeding further in the matter, he may be permitted to interact with the department and redraw the lateral movement list for the year 1993, based on the revision/recasting of the zonal seniority list in terms of the Office Order dated 3.11.1995, so as to assess the placement of the petitioner in the said list. He further states that as the matter is very old and it will take time to collect the records and prepare such a statement, some reasonable time may be granted to undertake the said task.

6. The aforesaid exercise shall be completed by the respondent/FCI within four weeks and an affidavit filed within the same timeline along with the relevant list and the circulars that the counsel for the respondents/FCI proposes to rely upon, with an advance copy to the other side.

7. List this petition in the category of 'senior citizens' in the regular cause list in the week commencing from 8th January, 2015, as per its own seniority".

12. Thus, it is seen that the relief in Writ Petition (Civil) No.4564/1997 which had been filed by the present Appellant (who was Petitioner No.2) and one Ram Kishore Vashisht, who was being pursued only by the present Appellant from the above date onwards.

13. Pursuant to the above order, a further additional affidavit was filed by FCI on 8th January, 2015, wherein *inter alia*, it was stated that the list prepared for induction even as per the recast seniority list showed "that the Petitioner would not have been selected for the induction to the movement

cadre". Enclosed with this affidavit as Annexure-C was copy of a circular No.44 of 1979 laying down procedure for induction to AG-I (Movement Cadre). It is again emphasized as under:

> "3. I say that the induction to the movement cadre is not a promotion and does not confer any monetary or additional benefit on the employee concerned. It is only a lateral deployment or a transfer. It is submitted that an employee has consequently no right to demand induction to the Movement cadre. The prime consideration is te interest of the Corporation. As admitted by the Petitioner only the chances of promotion improve upon posting to the movement cadre. It being settled law that chances of promotion do not confer a legal right the Petitioner is not entitled to a writ of mandamus directing induction to the Movement Cadre".

14. By an order dated 15th January, 2015, the learned Single Judge dismissed Writ Petition (C) 4564/1997. The learned Single Judge, *inter alia*, observed that if the relief sought by the present Appellant of being placed in the Movement Cadre at the post he was working in the Ministerial Cadre in the year 1993 was granted, then it might severely prejudice him because he would be effectively demoted and he would have to refund the monetary benefits that he had received so far in the promotional post that he got in the ministerial cadre since 1993. Accordingly, the writ petition was dismissed.

15. An application C.M.No.28896/2015 was filed by the Appellant for recalling of the above order. In this application, an order was passed by the learned Single Judge on 11th December, 2015 recording the statement of the Appellant that he was ready to give up all the monetary benefits earned by him in the Ministerial Cadre from 1993 onwards, once he was allowed to

join the Movement Cadre. He was asked to file an affidavit to the effect that he would be refunding all monetary benefits received including of promotions received in the Administrative Cadre from 1993 till the Appellant retired in 2010. The Appellant had to simultaneously state in the affidavit that he does not want any automatic promotion, except benefit of an Assured Career Progression (ACP) Scheme, if any, of the FCI, on the Appellant being posted as AG-I (Movement) with effect from 1993.

16. In terms of the above order, the Appellant filed an affidavit dated 23rd December, 2015 which was replied to by the FCI on 17th February, 2016. The Appellant then filed rejoinder thereto on 8th March, 2016. In the light of all these affidavits, the application for recall of the order was allowed and the writ petition was restored to file by the learned Single Judge by order dated 18th March, 2016.

17. Thereafter, on 26th July, 2016, the learned Single Judge dismissed the writ petition holding as under:

(i) According to FCI, in the panel of 1991, the name of the Appellant figured at Sl.No.17.

(ii) The Movement Cadre started from AG-I whereas the Appellant was holding the lower rank of AG-III. That could not have been counted as experience in the movement cadre, particularly since the work assigned to him was diary and dispatch work. The only relevant experience was at the level of AG-I.

(iii) There were 16 vacancies for 1993 and 52 options were received from the depot cadre and 18 from the general administration cadre.

8 persons from the General Administration cadre, who were senior to the Appellant, were appointed.

(iv) Although, Ms. Vijay Laxmi Lalla, who was junior to the Appellant was appointed, her reduction later was cancelled. The vacancy that arose could not have been filled by the Appellant, inasmuch as three persons senior to the Appellant, viz., Jitender Mohan Bhardwaj, Gyaneshwar Rai Deepak and Bala Sahai Meena had a prior right for the appointment in the movement cadre.

(v) In the absence of relevant experience at the AG-I level, the case of the Appellant could not have been considered for appointment in the movement cadre that too by overlooking the prior right of persons who were senior to him.

18. The learned Single Judge, while dismissing the writ petition, also noted that the Appellant had retired in the month of February, 2010.

19. Aggrieved by the order dated 26th July, 2016, the Appellant filed LPA No.516/2016. By order dated 19th July, 2016, the said LPA was dismissed as withdrawn with liberty to the Appellant to file a review application. Consequent thereto, the Appellant filed review petition No.482/2016 where the principle contention was that the two officers, that is, Gyaneshwari Rai Deepak and Bala Sahai Meena, who were senior to the Appellant had never challenged their non-placement in the movement cadre in the AG-I and, therefore, their seniority above the Appellant would not come in the way of the Court granting him relief.

20. The learned Single Judge, in the second impugned order dated 5th May, 2017, rejected this contention and observed that in paragraph-12 of the order dated 26th July, 2016, this fact was already noted and, therefore, there was no error apparent on the face of the record. When this appeal was heard first by this Court on 17th July, 2017, the Court passed the following order:

> "The submission of Mr. Chaturvedi, learned counsel for the appellant is that the respondents be asked to clarify whether Gyaneshwar Rai Deepak and Bala Sahai Meena who were admittedly senior to the appellant had given their consent to the transfer to the Movement Cadre. He does not dispute the fact that, in case, the said officers had given their consent for appointment in the Movement Cadre, he would have no - claim and only in case, they have not given their consent, this case would need consideration. Limited to the aforesaid aspect, issue notice to the respondents, returnable on 08.11.2017.

21. A detailed reply has been filed even in the LPA by the FCI wherein, inter alia, it is pointed out as under:

> (I) Transfer to the Movement Cadre is not a promotion but a lateral deployment.
>
> (II) While chances of promotion in the movement cadre are brighter, mere chances of promotion do not confer a legal right.
>
> (III) Circular No.44 dated 22nd March, 1979 of the FCI lays down a detailed procedure for induction in the movement cadre. It provides for a time-bound mode of transfer to the movement cadre. It clearly provides that the panel prepared would lapse at the end of the year. In the present case, the 1991 panel clearly lapsed at the end of the particular selection year.

(IV) A expert committee drew up the panel for induction which showed that there were officers senior to the Appellant who would have a prior right over him for induction into the movement cadre. The Appellant was at Sl.No.17 in the said list and there were 8 vacancies and, therefore, he could not have been inducted into movement cadre.

(V) The seniority was revised by the seniority list dated 3rd November, 1995 whereas induction to the movement cadre was done on 6th September, 1994. At the time of his induction, he did not have any chance of induction. Even after the revision of the seniority list, his position only improved to Sl.No.14. There were still other eligible candidates who were denied selection to the movement cadre. Therefore, even as per the re-cast seniority list, the Appellant could not have been selected for induction.

(VI) The working experience claimed by the Appellant in the movement cadre while being posted to the claim cell was done at the AG-III level and this was different from the duties performed in the AG cadre. He did not have the requisite work experience. It is further pointed out that:

> "The Appellant in the ministerial cadre was working on the post of Assistant Grade-I (AG-I) and was considered and promoted to the post of Manager in his own cadre on which post he was working till his superannuation from service. Had the Appellant been transferred to the Movement Cadre, he would have continued as AG-I. The next post of Manager and all other posts above are selection posts and there is no certainty that the Appellant would have got promotions above the level of AG-I in the movement cadre".

22. Pursuant to the order passed by the Court on 8th November, 2017, the FCI has produced the copy of the options submitted by the two officers, who were senior to the Appellant, namely, Bala Sahai Meena and Gyaneshwar Rai Deepak. This further diminishes his chances of being considered for placement in the movement cadre.

23. This Court has heard the submissions of Mr. H.K. Chaturvedi, learned counsel for the Appellant and Mr. Ajit Pudusseri, learned counsel for the Respondent.

24. Mr. Chaturvedi submitted that with Mr. Kaushal who was junior to the Appellant being wrongly placed in the Movement Cadre and once the revised seniority list placed Mr. Kaushal junior to the Appellant, right of the Appellant to be selected and appointed prior to Mr. Kaushal automatically matured. In other words, he stated that if relief could have been granted to Mr. Kaushal, who was junior to the Appellant, the same relief also ought to have been granted to the Appellant. He referred to an interim order dated 27th October, 1997 passed by the learned Single Judge in the W.P. (C) No.4564/1997 requiring the Respondent to specifically explain why in the rules, there is no condition of experience mentioned and why the Appellant's junior had been selected and not the Appellant.

25. Mr. Chaturvedi pointed out that it was clarified by the learned Single Judge any appointment made in the meanwhile would be subject to the outcome of the writ petition and, therefore, the mere fact that the Appellant

superannuated in April, 2010 could come in the way of his being granted the relief prayed for in the writ petition. The Court notices that what the Appellant is seeking is in a sense a right of negative equality. Merely because a person who is also junior has been inducted in the movement cadre will not mean that the Appellant should have also been inducted particularly when there were at least two persons senior to him, namely Gyaneshwar Rai Deepak and Bala Sahai Meena, who had also given their options for being placed in the movement cadre and whose rights, who were superior to him, could not have been overlooked.

26. The question is whether at the time the placement in the Movement Cadre took place, i.e. in 1994, the Appellant stood a chance for being placed there. There were 8 vacancies and he was at Sl.No.17 in the panel. There were at least two seniors above him who had given their options. Even assuming the vacancy created by the exit of Mrs. Vijay Laxmi Lalla and even assuming for a minute that Mr. Kaushal was also to made to vacate his seat, the two persons senior to the Appellant, having given their options, would have occupied those vacancies and not the Appellant.

27. The position in the revised seniority list only shows that the Appellant was at Sl.No.14 and even in the revised seniority list, as such a copy of which has been placed on record by the FCI, it is clear that Gyaneshwari Rai Deepak and Bala Sahai Meena were at Sl.No.12 & 13, i.e. seniors to the Appellant. The Appellant could not have possibly made the cut. It is futile, therefore, for the Appellant to contend that his claims for being placed in the Movement Cadre were wrongly overlooked. His reliance on the interim

order of the learned Single Judge is to no avail for the simple reason that in any event he did not have a valid claim for being placed in the Movement Cadre as AG-I.

28. There is no ground made out for interference with the impugned order of the learned Single Judge. The appeal is accordingly dismissed.

CM APPL. 24558/2018 (delay)

29. For the reasons stated in the application, the delay in filing the appeal is condoned and the application is disposed of.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

DECEMBER 06, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 1234/2013

RATAN PRABHA TIWARI ..... Plaintiff
Through Mr. H.K. Chaturvedi with Mr. Sagar Chaturvedi, Advocates

versus

PADAM PRABHA MUDGAL & ORS ..... Defendants
Through Mr. H.N. Pandey, Advocate for D-2.
Mr. Puran Sharma, Advocate for D-3.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

O R D E R

% 23.10.2018

The present suit has been filed for partition and grant of injunction.

On 30th July, 2018, the present suit was referred to the Delhi High Court Mediation and Conciliation Centre.

Mediation in the present case has been successful through the efforts of Mr. Manu Nayar, Advocate-Mediator.

A Settlement Agreement has been executed between the parties on 4th September, 2018.

It is pertinent to mention that the Supreme Court in ***Afcons Infrastructure Ltd. Vs. Cherian Varkey Construction Co. (P) Ltd., (2010) 8 SCC 24*** while dealing with Section 89 of the CPC observed that the settlement agreement will have to be placed before the Court for recording it

and in disposing of the suit in its terms, the Court should apply the principle of Order 23 Rule 3 of the CPC and make a decree in terms of the settlement in regard to the subject matter of the suit, to make such settlement effective.

This Court is satisfied that the compromise between the parties contained in the aforesaid Settlement Agreement satisfies the requirements of Order 23 Rule 3 CPC. The compromise contained in the aforesaid Settlement Agreement is lawful and therefore, this Court does not find any impediment in decreeing the present suit in terms of the aforesaid Settlement Agreement.

Consequently, present suit is decreed in terms of the aforesaid Settlement Agreement dated 4th September, 2018 executed between the parties, which is marked as Ex.C-1. Registry is directed to prepare a decree sheet in terms thereof.

With the aforesaid observations, present suit is disposed of and the interim order dated 5th December, 2013 stands vacated.

MANMOHAN, J

OCTOBER 23, 2018
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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: ***22nd December, 2018***
Pronounced on: ***05th April, 2018***

\+ W.P. (C) 14302/2004

DEV NARAYAN ..... Petitioner

Through: Mr. H.K.Chaturvedi and
Mr.Sagar Chaturvedi, Advocates

versus

THE MGMT.OF M/S AUTO PRECISION ..... Respondent

Through: None.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

% JUDGMENT

C. HARI SHANKAR, J.

1. The industrial dispute, which has led to the passing of the impugned Award, dated 16th October, 2003, by the Labour Court, was initiated by the petitioner, claiming to be aggrieved by his unceremonious verbal removal from service, by the respondent, on 28th May, 1991.

2. Subsequent thereto, on 24th June, 1991, the Okhla Industrial Workers Union (hereinafter referred to as "OIWU") addressed a representation to the Regional Labour Officer (Ex. WW-1/4 before the Labour Court), complaining that the petitioner, who had been serving the respondent since 1983, had been verbally removed from service on 28th May, 1991, merely because he had protested against the respondent extracting, from its employees, twice the work which they were supposed to perform. The representation, therefore, requested that the petitioner be reinstated in service with full back wages. The Regional Labour Officer/Labour Inspector responded, *vide* letter dated 26th June, 1991 (Ex. WW-1/3) addressed to the OIWU, stating that the matter had been discussed, with the respondent, who had stated that the petitioner had not been removed from service, but had remained absent from service, of his own accord, from 28th May, 1991, and that the respondent was prepared to take him back in service. As such, the OIWU was advised to immediately direct the petitioner to rejoin duty with the respondent.

3. Iterating the above facts, the petitioner contended, in his Statement of Claim filed before the Labour Court, that the verbal termination of his services, by the respondent, on 28th May, 1991, was *ex facie* illegal, and pointed out, in this regard, that he had neither been visited with any notice prior to the said removal from service,

nor paid any amount, by the respondent, at the time of such removal. The petitioner further contended that the respondent had misrepresented facts to the Regional Labour Officer, and submitted that, when he reported at the office of the respondent for work, the respondent refused to entertain him. The allegation that the petitioner had, of his own will and volition, chosen to remain absent from work with effect from 28th May, 1991, was categorically denied. Alleging that these acts of the respondent amounted to unfair labour practice, the petitioner prayed that he be reinstated in service with full back wages.

4. It may be noted, here, that, while referring the industrial dispute, raised by the petitioner, for adjudication to the Labour Court, the Secretary (Labour), Delhi Administration framed the following single term of reference:

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

5. The respondent, in its Written Statement filed before the Labour Court, submitted, as a "preliminary objection", that, as the respondent had not terminated the services of the petitioner, he "should be directed to report for duty", albeit with the clear understanding that he would not be entitled to any back wages with effect from 28th May,

1991. Legally, it was contended that, as the petitioner had absented himself from duty without any prior information or sanction of leave, and despite been repeatedly advised, by the respondent, in writing, to report for duty, had failed to do so, no "industrial dispute", within the meaning of Section 2(k) of the Industrial Disputes Act, 1947 (hereinafter referred to as "the ID Act"), arose. The submission, of the petitioner, that, after the visit of the Labour Inspector at the premises of the respondent, he had reported for work, but was not allowed to do so, was denied.

6. Before the Labour Court, the petitioner filed his affidavit-in-evidence, on 23rd May, 1994, reiterating his contention that the respondent had verbally terminated his services on 28th May, 1991. It may be noted, here, that the petitioner averred, in para 7 of his affidavit, that, as the respondent was not taking him back in service, the Labour Inspector had, *vide* his report, exhibited as Ex. WW-1/3, advised the petitioner to initiate an industrial dispute, whereas, as a matter of fact, Ex. WW-1/3 does not contain any such advice; rather, the said communication, from the Labour Inspector, pointedly stated that the respondent was willing to take the petitioner back in service, and advised the OIWU to send the petitioner back to work immediately. The petitioner, however, reiterated his stance that the respondent was entirely unwilling to take him back on work. In these circumstances, it was submitted, in the affidavit-in-evidence of the

petitioner, that his termination, from service, infracted Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the ID Act"), as the petitioner had worked continuously for over 240 days in each year during which he served the respondent.

7. The petitioner was cross-examined, by the respondent, on the above affidavit-in-evidence, on 26th August, 1998. He denied the suggestions, put to him, to the effect that he had absented from duty with effect from 28th May, 1991, and that he had been offered to be taken back on duty, by the respondent, but did not join the same.

8. The respondent led the evidence of Mr. Vipin Jain, Accountant with the respondent, as MW-1. Mr. Jain filed his affidavit-in-evidence, dated 7th May, 1999 by way of examination-in-chief, on behalf of the respondent, before the Labour Court. It was categorically stated, therein, that the respondent was ready and willing to take the petitioner on duty even as on that date, but on the clear understanding that he would not be entitled to any back wages w.e.f. 28th May, 1991, till the date when he would report for duty. It was reiterated that the respondent had not terminated the petitioner, but that the petitioner had himself remained absent from duty w.e.f. 28th May, 1991, without any information or prior sanction of leave. It was further asserted that, even after the visit of the Labour Inspector, at the premises of the respondent, the petitioner never turned up to report for work.

9. MW-1 Mr. Vipin Jain was cross-examined, on the above-mentioned affidavit-in-evidence, tendered by him, on 7th May, 1999. He admitted the fact that the respondent had not served any warning or chargesheet on the petitioner, but denied the allegation that the respondent was extracting more work, from the workmen, including the petitioner, than was required to be done by them. The allegation of termination, of the services of the petitioner, by the respondent, was also categorically denied, and it was asserted that the respondent had never refused to take the petitioner on duty or after 28th May, 1991, or after the visit of the Labour Inspector at the respondent's premises.

10. The Labour Court adjudicated the above industrial dispute by means of the impugned Award, dated 16th October, 2003.

11. On the basis of the facts that had emerged, the Labour Court framed the following two questions, as arising for its consideration, on 30th March, 1996:

> "1. Whether the workman abandoned the job as stated, if so, it effect?
>
> 2. As per the terms of reference."

12. With respect to Issue No. 1, as framed above by the Labour Court, the petitioner strenuously objected to the very framing of the

said issue, or to the jurisdiction of the Labour Court to decide the same, on the ground that the issue was beyond the reference made by the appropriate Government under Section 10(1)(c) read with Section 12 (5) of the ID Act. Reliance was placed for the said purpose, on the following judicial pronouncements:

(i) ***Delhi Cloth and General Mills Co. Ltd vs Workmen, AIR 1967 SC 469***,

(ii) ***I.T.D.C. vs Delhi Administration, 1982 Lab IC 1309 (Del)***,

(iii) ***Mool Chand Khairati Ram Hospital Kar. Union vs Labour Commissioner, 1997 (76) FLR 12 (Del)***,

(iv) ***Eagle Fashions vs Secretary (Labour), 1998 (78) FLR 371 (Del)*** and

(v) ***Bhagwan Hosiery vs Principal Officer, Labour Court, 2001 (89) FLR 701 (Del)***.

13. Responding to the said preliminary submission, it was contended, on behalf of the respondent, before the Labour Court, that Issue No. 1 framed by the Labour Court was not beyond the scope of the reference made to it by the appropriate Government, as it was incidental and ancillary to the said reference, and did not result in enlargement of the ambit thereof. The respondent relied, for this purpose, on the following decisions:

(i) ***Hindustan Petroleum Corporation Ltd vs Presiding Officer, Industrial Tribunal, 2002 (95) FLR 1195***,

(ii) ***J. K. Synthetics v. Rajasthan Trade Union Kendra, (2001) 2 SCC 87*** and

(iii) ***Harris Engineers Ltd vs Govt of N.C.T. of Delhi, 2002 (III) LLJ 246***.

14. The Labour Court rejected the above noted preliminary objection voiced by the petitioner, holding that there was no admission, on the part of the respondent, of the factum of termination of the petitioner's services by it. Further, it was noted that the "foundation of the reference" was not shaken or violated while considering the plea of the respondent "that it was not a case of the termination but a case of termination of service by abandonment of services by the claimant". Reliance was placed, by the Labour Court, for arriving at its findings, on ***Ashoka Hotel vs Govt of Karnataka, 1984 (64) FJR 176*** [which relied, in turn, on the judgement of the Supreme Court in ***Express Newspapers (P) Ltd vs Their Workmen, (1963) 23 FJR 1***], and ***Sheshrao Bhaduji Hatwar vs P.O., 1st Labour Court, 1992 (II) LLC 672 (Bom)***, as well as the judgements of the Supreme Court in ***Delhi Cloth and General Mills Co Ltd vs Their Workmen, 1967 (I) LLJ 423*** and ***Sitaram Shirodkar vs Administrator, Govt of Goa, 1985 (I) LLJ 480***.

15. Proceeding to examine Issue No 1, as framed by it, on merits, the Labour Court noted that (i) MW-1 had deposed, on oath, that the services of the petitioner were never terminated and that, in fact, he absented himself from duty with effect from 28th May, 1991, (ii) the Labour Inspector, who visited the respondent, was also requested, by it, to direct the petitioner to report for duty (though, admittedly, the respondent did not examine the Labour Inspector), (iii) the petitioner himself proved, on record, the report of the Labour Inspector (Ex. WW-1/3), to the effect that the petitioner had himself absented from duty on 28th May, 1991, while the respondent was ready to take him back on duty, (iv) the Labour Inspector also wrote, on 26th June, 1991, to the OIWU, requesting it to direct the petitioner to report for duty, and (v) there was neither any averment, nor any deposition, by the petitioner, in his affidavit-in-evidence, to the effect that he ever reported for duty, in compliance with the said direction; rather, the petitioner only relied on the demand notice sent through the OIWU on 27th June, 1991 which, too, did not aver that the petitioner had again reported for duty at the office of the respondent after 27th June, 1991. These facts, cumulatively seen, it was held, lent sustenance to the plea of the respondent, that the petitioner had abandoned his job, by *suo motu* remaining absent from work and not reporting for duty, despite the direction of the Labour Inspector. As such, it was held that there was no evidence of termination, of the petitioner, by any act of the

respondent. Issue No 1 was, therefore, decided in favour of the respondent, and against the petitioner.

16. Having thus decided Issue No. 1 against the petitioner, the Labour Court held, with respect to Issue No. 2, i.e., the entitlement, of the petitioner, to reinstatement with back wages, that, in view of the absence of any evidence, to indicate that the respondent had ever terminated the services of the petitioner, and in view of the lack of evidence of any effort, on the part of the petitioner, to rejoin duty, he was not entitled to reinstatement or back wages. Reliance was placed, for this purpose, on ***Sonal Garments vs Trimbak Shankar Karve, 2003 LLR 5 (Bom)***.

17. In view of the above, the Labour Court answered the reference, made to it by the appropriate Government, by holding that there was no termination, by the respondent, of the services of the petitioner and that the petitioner stood disentitled to the relief of reinstatement or back wages.

18. The petitioner assails the said decision, by means of the present writ petition.

19. There was no appearance on behalf of the respondent, before me; accordingly, I have heard detailed submissions advanced by Mr.

H. K. Chaturvedi, learned counsel for the petitioner, and proceeded to decide the present petition taking into account the said submissions and the material on record.

20. Mr. Chaturvedi advanced, as his first plank of attack against the impugned Award of the Labour Code, the preliminary objection, voiced by his client before the Labour Court as well, regarding the jurisdiction of the Labour Court to enter into the issue of supposed abandonment, by the petitioner, of his services. Mr. Chaturvedi emphatically submitted that the term of reference, contained in the order, whereby the matter stood referred for adjudication to the Labour Court, was only regarding the legality of the termination, by the respondent, of the petitioner, and submitted, therefore, that the Labour Court was proscribed, in law, from framing an issue as to whether the petitioner had, or had not, abandoned his services. He sought to place reliance, for this purpose, on the judgement of this court in ***I.T.D.C. (supra)*** and the judgement of the Bombay High Court in ***Sitaram Vishnu Shirodkar (supra)***. He, therefore, submitted that, the Labour Court having proceeded to examine an issue which was outside the pale of its jurisdiction, the matter necessarily had to be remanded to the Labour Court for decision afresh. He also placed reliance on Section 10(4) of the ID Act, to contend that the issue of abandonment could not be regarded as incidental to that of termination. In his submission, once the Labour Court held that there

had been no termination, of the services of his client, by the respondent, the matter had to rest there, and the Labour Court had no jurisdiction to return any finding, adverse to his client, on the presumption that his client had abandoned his service.

21. On merits, Mr. Chaturvedi relied on the well-known decision of the Supreme Court in ***G. T. Lad vs Chemicals and Fibres of India Ltd, AIR 1979 SC 582***, which clearly holds that there could be no abandonment of service in the absence of animus to abandon. Mr. Chaturvedi submits that the facts of the present case would emphatically militate against any presumption of animus, on the part of his client, to abandon his service, and draws my attention, in this regard, to (i) the affidavit, dated 23rd May, 1994, of the petitioner, especially the assertion, in para 8 thereof, that the petitioner had, on 24th June, 1991, again requested, through the OIWU, that he be taken back in service, but to no avail (ii) letter, dated 26th June, 1991 (Ex. WW-1/3 *supra*) from the Labour Inspector to the OIWU, which indicated that the allegation of abandonment, by the petitioner, of his service, was a defence raised by the respondent, (iii) notice, dated 27th June, 1991 (Ex. WW-1/1 *supra*) by the OIWU to the respondent, which bore the signature of the petitioner at the foot thereof, and (iv) the application, filed by the petitioner before the Conciliation Officer (Ex. WW-1/7) in June 1991, wherein, too, it was averred that, after 24th June, 1991, the petitioner had again visited the premises of the

respondent, for being taken back in service, but the respondent refused to oblige. Mr. Chaturvedi would urge that it was for this reason that the term of reference, in the order, dated 26th August, 1992, whereby the dispute was referred, by the Delhi Administration for adjudication to the Labour Court, was only with respect to termination, and not abandonment. Mr. Chaturvedi submitted that the Labour Court was entirely in error in failing to direct reinstatement of his client, once it had held that the respondent had not terminated his services. He further submitted that the finding, of the Labour Court, that there was no averment, in the affidavit of the petitioner, to the effect that he had ever reported for duty, in compliance with the direction of the Labour Inspector, was incorrect, and that there was, in fact, a specific submission, to this effect, in the said affidavit, to which he drew my attention. In these circumstances, Mr. Chaturvedi would submit that there was no evidence, whatsoever, to support the finding, of the Labour Court, that his client had abandoned his service.

Analysis and decision

22. I would first address the preliminary submission, of Mr. Chaturvedi, regarding the propriety and legality of the examination, by the Labour Court, of the question of abandonment, by the petitioner, of his services, and the framing of Issue No. 1, to that effect, by the Labour Court.

23. It is necessary to understand, at the outset, that there is no half-way house between "termination" and "abandonment". The territory between the two is no-man's land. That, with effect from 28th May, 1991, the petitioner ceased to serve the respondent, is not in dispute. Only one, of two, inferences, could be drawn therefrom, and no third, i.e., either – as the petitioner would aver – that the respondent did not allow the petitioner to work after the said date, which would tantamount to "termination", or – as the respondent would contend – that the petitioner, of his own volition, stopped working from the said date, which would tantamount to "abandonment".

24. Abandonment and termination are both positive acts, with the former requiring positive intent, on the part of the workman, not to work, and the latter requiring positive intent, on the part of the management, not to allow the workman to work. Requisite animus is the *sine qua non* in either case. There is, however, the subtle jurisprudential distinction between termination (at the instance of the employer) and abandonment, in that, in the former case, it would always be possible for the employer to unequivocally indicate, to the employee, that his services were no longer required and, therefore, that they stood "terminated", whereas, in the latter case, often, the intention not to continue working for the employer has to be presumed from the conduct of the employee. It is only for this reason that a jural

concept of "deemed abandonment" has evolved over a period of time. I have, in a recent decision in ***Engineers India Ltd vs Labour Court, 2018 SCC Online 572 (Del),*** had occasion to examine the concept of "abandonment", and the law that has evolved, by various pronouncements of the Supreme Court [including ***G. T. Lad (supra)***] in that regard. I had called out certain guiding principles, on the issue of "abandonment", in the said decision, among which are the following:

(i) Intention, or animus, to abandon, is the necessary *sine qua non*, for any case of "abandonment" to be said to exist. In the absence of intention, there is no abandonment.

(ii) Whether intention to abandon exists, or not, is a question of fact, to be determined in each case.

(iii) Termination, or removal, from service, is a positive act of the employer; *per contra*, abandonment is a positive act of the employee.

(iv) Any evidence, to indicate that the employee, or workman, desired to join duty, but was prevented from doing so, would, by itself, militate against any presumption of "abandonment".

25. In each case, the onus, to prove that termination, or abandonment, had taken place, would be on the party so contending.

26. Once this is understood, it becomes immediately apparent that the preliminary objection, of Mr. Chaturvedi, regarding the propriety

of Issue No 1, as framed by the Labour Court, and the jurisdiction of the Labour Court to adjudicate thereon, is fundamentally bereft of substance. In my view, there is no necessity to refer, for the purpose, to any judicial pronouncements. The plea of abandonment, by the petitioner, of his services, was the defence put up, by the respondent, to the plea of termination, by the respondent, of the services of the petitioner, as urged by the latter. It is a matter of simple common sense that a *lis* cannot be adjudicated merely by referring to the stand of one of the parties thereto, without appreciating the merits of the stand, put up by the other, by way of rebuttal. The plea of abandonment, in the present case, being the response, by the respondent, to the plea of termination, urged by the petitioner, it was incumbent, on the Labour Court, to examine the merits of the said plea. Expressed otherwise, it would have been impossible – as well as impermissible – for the Labour Court to render a verdict, in the matter, merely by examining whether the respondent had, or had not, terminated the services of the petitioner, without addressing, equally, the plea of the respondent that it was the petitioner who had, in fact, abandoned his services. It is appropriate, in this context, to understand that abandonment also results, in the ultimate consequence, in termination. Though established abandonment, by an employee, of his service, would result in snapping of the jural link between him and his employer, the sequitur would be termination of the employee's employment with the employer.

27. "Termination" is not an expression of art. In some ways, it is merely a constriction of the expression "determination". Determination of the employer-employee relationship, therefore, would result, *ipso facto*, in termination of the employee, whether it takes place because of the act of the employer in terminating the relationship, or the act of the employee in choosing not to attend work. As such, abandonment, by the employee, of his service, would also result in termination thereof.

28. The jurisdiction of the Labour Court or Industrial Tribunal, under the ID Act, is not limited to the points referred to it for decision/adjudication, in the order of reference made by the appropriate Government, but extends to "matters incidental thereto", by virtue of Section 10 (4) of the ID Act, which reads as under:

> "(4) Where in an order referring an industrial dispute to a Labour Court, Tribunal or National Tribunal under this section or in a subsequent order, the appropriate Government has specified the points of dispute for adjudication, the Labour Court or the Tribunal or the National Regular, as the case may be, shall confine its adjudication to those points *and matters incidental thereto.*"
>
> (Emphasis supplied)

The expression "matters incidental thereto" is, by its very nature, wide and comprehensive in equal measure. A leading authority on the ambit of the said expression, as it occurs in section 10 (4) of the ID

Act, is the judgement of the Supreme Court in ***Delhi Cloth and General Mills Co. Ltd vs Workmen, AIR 1967 SC 469***, and a careful study of the said decision would substantially answer the objection raised by the petitioner. Before adverting to the factual matrix in which Section 10 (4) of the ID Act came up for consideration in that case, it would be apposite to extract the law, relating to the expression "matters incidental thereto", as expostulated in para 21 of the report, thus:

> " From the above it therefore appears that while it is open to the appropriate Government to refer the dispute or any matter appearing to be connected therewith for adjudication, the Tribunal must confine its adjudication to the points of dispute referred and matters incidental thereto. In other words, the Tribunal is not free to enlarge the scope of the dispute referred to it but must confine its attention to the points specifically mentioned and anything which is incidental thereto. The word "incidental" means according to *Webster's New World Dictionary*:
>
> > 'happening or likely to happen as a result of or in connection with something more important; being an incident; casual; hence, secondary or minor, but usually associated:"
>
> "Something incidental to a dispute" must therefore mean something happening as a result of or in connection with the dispute or associated with the dispute. The dispute is the fundamental thing while something incidental thereto is an adjunct to it. Something incidental, therefore, cannot cut at the root of the main thing to which it is an adjunct.'

In the case before the Supreme Court, the above issue arose in the context of the third and fourth terms of reference, as contained in the order, under Section 10 (1) and 12 (5) of the ID Act, whereby the

Delhi Administration referred the disputes for adjudication to the Industrial Tribunal. They read thus:

> "3. Whether the strike at the Delhi Cloth Mills and the lockout declared by the management on the 24-2-1966 are justified in legal and whether the workmen are entitled to wages for the period of the lockout?
>
> 4. Whether the 'sit-down' strike at the Swatantra Bharat Mills from 23-2-1966 is justified and legal and whether the workmen are entitled to wages during the period of the strike?"

The Supreme Court was concerned, in that matter, with the issue of whether it was open to the Industrial Tribunal, on the basis of the pleadings of the parties, to hold that there was no strike at all. The Supreme Court answered the issue in the negative, opining that, despite the wide scope of the expression "matters incidental thereto", the Tribunal, in that case, was bound by the terms of reference, which, plainly read, proceeded on the premise that the strike had taken place, and required the Tribunal to adjudicate whether the strike was justified and legal, or not. The Supreme Court held that, in view of the fact that the reference by the appropriate Government proceeded on the premise that the strike had taken place, it was not open to the Tribunal to hold otherwise, i.e., that there was no strike at all. Applying this principle to the present case, it would be seen that the point of reference, contained in the referral order of the Delhi Administration, specifically refers the issue of *whether the services of*

the petitioner had been terminated illegally and/or unjustifiably by the respondent, and not *merely whether the termination was illegal or unjustified*. In other words, the issue of whether the respondent had, in fact, terminated the services of the petitioner, or not, squarely arises for consideration, in the words of the reference, as crafted by the referral order of the Delhi Administration. Per sequitur, where the case of the respondent-management was that there had been no termination of the petitioner's services, on its part, as it was the petitioner himself who voluntarily abandoned his services, the issue of whether such abandonment had, or had not, taken place, was clearly a "matter incidental" to the issue referred for adjudication. It cannot, therefore, be said that the Labour Court exceeded its jurisdiction in framing Issue No 1 as it did, or in adjudicating the same. The preliminary objection, voiced by learned counsel for the petitioner has, therefore, necessarily to be rejected.

29. Coming, now, to the meat of the matter, it is true that intention to abandon is the necessary prerequisite to a finding that the employee abandoned his services, as contended by Mr. Chaturvedi. It is the contention of Mr. Chaturvedi that the existence of intention to abandon, on the part of the petitioner, had to be proved as a positive fact, and that the evidence on record, in the present case, rather indicated to the contrary. Having said that, the "evidence", on which Mr. Chaturvedi seeks to place reliance, to support his submission that

the requisite intention to abandon, on the part of his client, could not be said to exist, in my view, does not really advance the case of the petitioner. Mr. Chaturvedi has placed reliance on (i) the affidavit, dated 23rd May, 1994, of the petitioner, (ii) the letter, dated 26th June, 1991, from the Labour Inspector to the OIWU, (iii) the notice, dated 27th June, 1991, by the OIWU to the respondent, which bore the signature of the petitioner, and (iv) the application filed by the petitioner before the Conciliation Officer in June 1991. These documents, however, whether viewed individually or collectively, cannot, in my opinion, be said to establish the *absence of intention*, on the part of the petitioner, to abandon his services.

30. It must be remembered that there is no dispute about the fact that, with effect from 28th May, 1991, the petitioner ceased working for the respondent. The petitioner has not placed, on record, a single document, indicating that the respondent discontinued his services, or asked him to quit. Rather, the respondent, even in its written statement before the Labour Court, maintained that it was willing to take the petitioner back on work, subject only to the condition that he would not be entitled to back wages. Though the petitioner has stated, on one or two occasions, that he had reported in the office of the respondent for work, after 27th June, 1991, and had not been permitted to resume duty, no evidence, to that effect, is forthcoming, as rightly held by the Labour Court. *Neither, it appears, did the petitioner take any remedial*

steps, even by way of a communication, to the respondent, whether by himself or through the OIWU, to the effect that the respondent had resiled from its undertaking to take the petitioner back on duty, by refusing to allow him to work, despite his turning up at its office for the said purpose. There is, therefore, no material, whatsoever, on the basis of which it could be held that the petitioner had, in fact, reported for work, at the office of the respondent, after 27th June, 1991, but had not been allowed to rejoin duty.

31. As the facts stand, therefore, the petitioner, apparently, stopped working for the respondent with effect from 28th May, 1991, and never chose to turn up for work thereafter, despite the respondent expressing its readiness and willingness to take him back on its rolls.

32. In that backdrop, the reliance, by Mr. Chaturvedi, on the aforementioned four documents, can take his case thus far and no further. While the letter, dated 26th June, 1991, from the Labour Inspector to the OIWU, is actually counter-productive to the case of the petitioner – as it exhorts the OIWU to direct the petitioner to report back, at the office of the respondent, to resume duty – the other three documents merely contain a bald averment, to the effect that the petitioner had reported for duty after 27th June, 1991, but was not allowed to resume work. Such a bald statement, unsubstantiated by any evidence in support, could not possibly have been regarded as

establishing intention, on the part of the petitioner, to resume duty, and, consequently, it is not possible for this court to fault the Labour Court in refusing to accept the submission, of the petitioner, that there was no intention, on his part, to abandon his services.

33. For the same reason, the contention, of Mr. Chaturvedi, that, having found that the respondent had not terminated the services of the petitioner, the Labour Court had no option but to direct the petitioner's reinstatement, and that it seriously erred in law in failing to do so, has merely to be stated to be rejected. It was no part of the duty of the Labour Court to direct the respondent to take back, on its rolls, an employee who had abandoned his services, or expressed his intention, overtly or covertly, not to work for the respondent. The Labour Court or Industrial Tribunal are, no doubt, required to adopt a labour-friendly approach; at the same time, once it was found that a workman had abandoned his services, or did not evince any intention to work for the management, the brief of the Labour Court stood discharged, and it could not be expected to force, on the management, the services of an unwilling worker.

34. One may, in this connection, usefully refer to the following passage, from para 3 of the report in ***State of Haryana vs Om Prakash, (1998) 8 SCC 733***, which is self-speaking in nature:

> "Therefore, the authority was wrong in coming to the conclusion that there was a violation of Section 25-F of the Act besides, *as stated earlier, he himself voluntarily ceased to report for duty and there was no act on the part of the employer nor is there anything on record to suggest that the employer had refused work to him.* Retrenchment within the meaning of Section 2(*oo*) means termination by the employer of the service of the workman for any reason whatsoever. Therefore, *it contemplates an act on the part of the employer which puts an end to service to fall within the definition of the expression "retrenchment" in Section 2(oo) of the Act. There was nothing of the sort in the instant case. It was the workman who ceased to report for duty and even after he ceased to report for duty, it is not his case that at any point of time he reported for duty and he was refused work.* He straightaway proceeded to invoke the provisions of the Act and, therefore, this is a case in which the employer has done nothing whatsoever to put an end to his employment and hence the case does not fall within the meaning of Section 2(oo) of the Act. Therefore, the case does not attract Section 2(oo), nor does it satisfy the requirements of Section 25-F."

True, in the above decision, there is an observation, by the Supreme Court, that it was not the case of the workman, before it, that, after ceasing to report for duty, he had, thereafter, in fact reported for duty and was refused work, whereas, in the present case, the petitioner has sought to contend that, after 27th June, 1991, he had reported to the office of the respondent, but was not allowed to work. As already noted by me hereinabove, however, the submission is effectively made *in vacuo*, without an iota of material to support it; neither is there any evidence that the petitioner never made any protest in this regard, even by means of a representation to the respondent itself.

35. Viewed any which way, therefore, the petition has to fail. There is no evidence, whatsoever, to indicate that the respondent had ever terminated the services of the petitioner. Worse, even after the petitioner petitioned the Labour Court, the respondent repeatedly undertook to take the petitioner back on its rolls, but there is nothing to indicate that the petitioner ever obliged, or reported for work at the premises of the respondent. The submission, of the petitioner, that he, in fact, did so, but was not taken back on work, is too facile to merit acceptance, especially in the absence of any evidence that the petitioner raised any protest in this regard, either by seeking judicial redress, or even by way of a protest representation. Justice to labour, cannot be at the cost of injustice to industry. I am constrained, therefore, to observe that the petitioner has not made out any case which would entitle him to relief, either from the Labour Court, or from this Court.

36. It has to be remembered, in this context, that this Court, exercising its jurisdiction under Article 227 of the Constitution of India, does not sit in appeal over the decision of the Labour Court or Industrial Tribunal, but interferes therewith only where the findings of the Labour Court or industrial Tribunal are perverse, or suffer from some manifest error of law or fact. No such infirmity, in the opinion

of this Court, can be said to plague the impugned Award, dated 16th October, 2003, passed by the Labour Court.

37. In the result, I am unable to find any cause or reason to interfere with the impugned Award passed by the Labour Court.

38. The writ petition is, consequently, dismissed, without any order as to costs.

C.HARI SHANKAR, J

APRIL 5, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 2905/2013**

SHISH RAM ..... Petitioner

Through: Mr. H.K. Chaturvedi, Advocate with Mr. Sagar Chaturvedi, Advocate.

versus

UOI AND ORS ..... Respondents

Through: Mr. Anuj Aggarwal, ASC with Ms. Sakshi Kalia, Advocate for R-BSF.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE SANJEEV NARULA

O R D E R

% 12.11.2018

CM APPL. 46643/2018

1. With the consent of parties, the application is allowed, and the writ petition is taken up for early hearing.

W.P.(C) 2905/2013

2. The challenge in the present writ petition is to the order dated 10th October 1998 passed by the Commandant, 129 Battalion, Border Security Force, dismissing the Petitioner from service.

3. There were two charges for which the Petitioner was subjected to a trial by Summary Security Forces Court ('SSFC'). The charges pertained to two acts of insubordination committed on the same day against one Sub-

Inspector (SI) S. N. Singh. It is stated that at around 12:30 pm on 23rd September 1998, he used objectionable language when he was refused liquor which he had asked for on behalf of one cook, Ajit Sheel. The second charge is on the same day around at 1:30 pm, he again used objectionable language challenging SI S. N. Singh to use his power against the Petitioner.

4. According to the Respondents, the Petitioner pleaded guilty to the first charge but claimed trial for the second charge. He was, at his request, permitted to engage one Mr. A. S. Malik as his Defence Assistant to assist him in the trial. It is the case of the Respondents that he was given the full opportunity to defend himself. By the end of the proceedings, he was awarded the punishment as noted hereinbefore. His appeal against the said order was initially dismissed, leading to him challenging that order before this Court.

5. Although, initially, this Court set aside the dismissal order, the Respondents took that order in appeal to the Supreme Court which then restored W.P.(C) 24/2000 filed by the Petitioner to the High Court for a fresh consideration. By an order dated 7th August 2012, a Division Bench of this Court disposed of the writ petition by directing the Respondents to supply to the Petitioner the complete record of the trial conducted before the SSFC and that on receipt of such record, the Petitioner would be permitted to file an appeal before the Appellate Authority.

6. Pursuant thereto, the Appellate Authority passed a fresh order dated 11th January 2013, rejecting the Petitioner's submissions and confirming his dismissal from service. It is this order of the Appellate Authority that has

been challenged by the Petitioner in the present writ petition.

7. The Petitioner questioned, in the first instance, the stand of the Respondents that he pleaded guilty to the first charge. It is pointed out by him that there was no signature of the Petitioner on the proceedings where it was noted that he had pleaded guilty to the first charge.

8. The case of the Respondents as per its counter affidavit is that Petitioner did in fact plead guilty to the first charge. It is further pointed out by the Respondents that at the relevant point of time in 1998, Rule 142 (2) of the Border Security Force Rules 1969 ('BSF Rules') had not been inserted. Therefore, there was no legal requirement for obtaining such signature.

9. The Court indeed finds that there was no legal requirement at the relevant time of the person pleading guilty having to sign the proceedings. This requirement was inserted only on 25th November 2011. This being a disputed question of fact which cannot be examined in the present petition, the Court proposes to proceed on the basis that the Petitioner had in fact plead guilty to the first charge framed against him. Further, the Appellate Authority noted in the impugned order that even according to the Petitioner, he had been "directed to plead guilty of first charge and accordingly he wrote application dated 10th October 1998 when he was under custody for trial". Consequently, the Court does not accept this plea of the Petitioner.

10. It is then pleaded that the person who was engaged by the Petitioner as his Defence Assistant was not permitted to cross-examine the prosecution witnesses. In reply, it is pointed out by the Respondents that he was indeed

given a full opportunity to defend himself. This again is a disputed question of fact and, therefore, it is not possible for this Court to determine whether in fact, when the inquiry took place in 1998, the Petitioner's Defence Assistant was provided such opportunity.

11. It is next submitted that the Petitioner was not informed that he had the right to engage a legal practitioner in terms of Rule 63 of the BSF Rules. A reference is made in particular to Rule 63(1) read with 63(5) of the BSF Rules. While Rule 63(1) states that an accused shall be an afforded a proper opportunity to prepare his defence and be allowed proper communication with his defending officer or counsel and with his witnesses. Rule 63(5) pertains to a request having been made by the accused for examination of a witness that he may wish to call in his defence and the Commandant having to accede to such request. There is no specific rule that mandates that the accused must be informed that he has right to a legal practitioner to defend him. Consequently, the Court is unable to find any illegality on this basis.

12. Finally, learned counsel for the Petitioner contends that the punishment of dismissal from service is disproportionate, considering the actual acts of insubordination for which the Petitioner was held guilty. Learned counsel for the Respondents, on the other hand, refers to the fact that the Petitioner had been punished summarily on seven previous occasions and it was the cumulative effect of his past record as well as him pleading guilty in the present instance to the first charge and being found to be guilty of both charges that has warranted the punishment.

13. Having considered the above submissions, this Court is of the view that

the punishment of dismissal from service for the aforementioned two acts of insubordination does appear to be wholly disproportionate. The Court finds merit in the contention of the learned counsel for the Petitioner that on the aspect of punishment, the Respondent authorities should once again consider the case of the Petitioner in accordance with law.

14. Consequently, the impugned order of the Appellate Authority confirming the dismissal of the Petitioner form service is hereby set aside and to the above limited extent of the appropriate penalty, the matter is remanded to the Appellate Authority for reconsideration. The Appellate Authority will, preferably after hearing the Petitioner, pass a fresh order on the issue of punishment uninfluenced by the earlier orders and communicate to the Petitioner the fresh decision not less than eight weeks from today. If the Petitioner is aggrieved by the said decision, it will be open to him to seek appropriate remedies in accordance with law.

15. The petition is disposed of accordingly.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

NOVEMBER 12, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 6549/2018

COURT ON ITS MOTION ..... Petitioner
Through: On its own motion.

versus

NEW DELHI MUNICIPAL COUNCIL & ORS ..... Respondents
Through: Mr. Tarunvir Singh Kehar and Mr. Vishal Tripathi, Advs.
Mr. H.K. Chaturvedi and Mr. Sagar Chaturvedi, Advs. /Amici Curiae for R2

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% 07.12.2018

This petition is taken up at Court on its Own Motion being concerned by news item bearing in the newspaper dated 25th May, 2018 wherein garbage was found spread on the road and are depicted in the pictures available in the news items.

Notice were issued to the Chairperson, NDMC and Sh. Ravinder Nath Bharti, President of the Joint Action Committee, New Delhi Municipal Council. Sh. Ravinder Nath Bharti, has filed the additional affidavit. As far as the New Delhi Municipal Council is concerned, it is stated in the short

affidavit filed by them that they are not able to identify some of the persons, who are responsible for spreading of garbage on the road. The video clippings and all other materials have been collected and the complaint has been filed and the material has been handed over to the Delhi Police and now the Delhi Police has to investigate into the matter. As far as Sh. Ravinder Nath Bharti is concerned, he states that he has nothing to do with the garbage spread on the road. He indicates that it has been done by certain persons without his knowledge and without his concurrence or authority. Taking note of the fact that NDMC has already taken action into the matter and on the identification of the persons indicated in the video clippings, has already made a complaint to the Delhi Police, we direct the Delhi Police to investigate into the matter in accordance with law.

With the aforesaid, the petition stands disposed of.

Respondent no.1 is directed to hand over a copy of this order to the Delhi Police for proceeding further into the matter.

CHIEF JUSTICE

V. KAMESWAR RAO, J

DECEMBER 07, 2018*/jg*

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 09th January, 2018

\+ R.C. REV. 7/2018

SUN N SHADE OPTICIANS & ORS. .... PETITIONERS
Through: Mr. H.K. Chaturvedi and Mr. Sagar Chaturvedi, Advocates

versus

SHYAM SUNDER BUDHIRAJA ..... RESPONDENT
Through: Mr. Pradeep K. Bakshi, Mr. Sachin Setia and Mr. Puneet Khurana, Advocates

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

CAV 13/2018

1. Since the learned counsel for the caveator has entered appearance, the caveat stands discharged.

R.C. REV. 7/2018 and CM 884/2018 (stay) and CM 885/2018 (Exemption)

2. The petitioners are admittedly the tenants in premises described as shop bearing no.6 in property no.13/9, W.E.A. Ajmal Khan Road, Karol Bagh, New Delhi, admeasuring 9 x 25ft. (hereinafter referred to as the demised property), having been let out originally for commercial purposes by late Sh. Chaman Lal Budhiraja, the father of

the respondent, during his lifetime, in favour of Sh. Vidya Sagar Churamani, the father of the second and third petitioners, who stepped into his shoes upon his death. It is not disputed that the respondent has inherited the right, title and interest in the property in question upon the death of the erstwhile owner.

3. The respondent (landlord) had instituted the case (E-416/2017) seeking an order of eviction on the ground of bonafide need invoking clause (e) of sub-section (1) of Section 14 of Delhi Rent Control Act, 1958 primarily on the averments that his son Vineet Bhudhiraja, engaged in legal practice in United Kingdom wanted to come back to India to set up practice here to support his father (respondent / landlord) in his old age, particularly after the demise of his wife on 18.08.2016 and that for purposes of the son setting up his legal practice here, the demised premises was required bonafide, there being no other suitable alternative accommodation available for such purposes. The Additional Rent Controller issued special summons under Sections 25 B of Delhi Rent Control Act, 1958, in response to which the petitioner submitted an application for leave to defend supported by the affidavits of the second and third petitioners. The Additional Rent Controller after securing reply from the respondent / landlord considered the said request but declined it by order dated 23.10.2017 and on such basis passed an eviction order which is assailed through the petition at hand.

4. The petitioners had pleaded in the application seeking leave to contest that there is no relationship of landlord and tenant between the parties as the premises had been let out by the father of the respondent

after whose death the property had devolved on his legal heirs, the respondent being only one of them. It was further stated that property no.13/9, W.E.A. Ajmal Khan Road, Karol Bagh, New Delhi comprised of three floors which had more than 17-18 shops, the other shops also being referred to in the context of the plea that the respondent had suitable alternative accommodation available to him. It was pleaded that besides this property, the respondent was owner of several other properties including 5/18, W.E.A. Ajmal Khan Raod, Karol Bagh, New Delhi admeasuring 275 sq.yds.; 16-A/13, W.E.A. Ajmal Khan Road, Karol Bagh, New Delhi, admeasuring 275 sq. yds.; D-4, Prashant Vihar, Rohini built over plot of land admeasuring 400 sq. yds.; another shop in South Delhi; and several other properties which are jointly or individually owned. It was pleaded that the petitioner was in the habit of filing false cases to get the shop vacated by hook or by crook reference being made to another eviction case, it bearing no.79036/16, which was pending before the Additional Rent Controller at the stage of consideration of the application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC). The petitioners also submitted in the application for leave to defend that the site plan filed was not correct.

5. All the above contentions have been considered by the Additional Rent Controller and rejected. It has been noted in the impugned order that the petitioners had admitted that the respondent is one of the legal heirs of Chaman Lal Budhiraja, who had inducted them as tenant in the demised premises. Referring to the rulings of the Supreme Court in *Kanta Goel V. B.P. Pathak, (1977) 2 SCC 814*; and

Mohinder Prasad Jain v. Manohar Lal Jain, (2006) 2 SCC 724, the Additional Rent Controller has repelled the objection on the ground that one of the co-owners can also maintain a petition under Section 14(1)(e) of the Delhi Rent Control Act. She has also noted that the respondent had placed on record copies of the relinquishment deed dated 07.02.2001 executed by his father and a gift deed dated 22.07.2010 executed by his brother Ashok Budhiraja, by virtue of which he had acquired the title over the entire property, having become the sole owner. She also noted that the petitioners had tendered rent in favour of the respondent and his brother at one stage and thereby having attorned in their favour, he consequently being estopped in terms of Section 116 of Indian Evidence Act from denying the title of the respondent qua the subject property.

6. The respondent has explained by the averments in the eviction petition and in reply to the application for leave to defend that though the property bearing no.13/9, W.E.A. Ajmal Khan Road, Karol Bagh, comprised of three floors, there are only two shops at the ground floor one being the demised premises in possession of the petitioners herein and the other, smaller in size under the occupation of a different tenant (Metro Watch Company). The petitioners were unable to show any other vacant portion in possession of the respondent / landlord which could be considered as suitable alternative accommodation. The respondent had explained by way of reply that property no.5/18, W.E.A. Ajmal Khan Road, Karol Bagh, New Delhi is a residential premises in use and occupation for such purposes of the respondent / landlord, though presently under renovation. The respondent has

denied having any connection with the other properties referred to in the leave to defend application. The petitioners were unable to bring on record to even prima facie show any connection between such other properties and the respondent / landlord or existence of any commercial space in the property no.5/18, W.E.A. Ajmal Khan Road, Karol Bagh, New Delhi. No site plan was filed by the petitioners to demonstrate as to how the site plan filed by the respondent with the eviction petition was wrong or fallacious and, thus, the said plea was also found not to be giving rise to any triable issue.

7. The Additional Rent Controller accepted the case of the respondent that after the demise of his wife on 18.08.2016, his only son Vineet Budhiraja wants to shift from United Kingdom to India to set up his legal practice here and be by his side in his old age.

8. In bringing a challenge by the revision at hand to the order dated 23.10.2017, the petitioners have pressed only one of the above mentioned grounds taken in the application for leave to defend viz. that the son of the respondent has a roaring legal practice in United Kingdom and has been well settled there for the last ten years with his family and, therefore, it is inconceivable that he would like to shift base to India. Reliance is placed on *Charan Dass Duggal Vs. Brahma Nand, (1983) 1 SCC 301* to contend that mere expression of desire to shift cannot be accepted on its face value and that the landlord must be called upon to prove the necessary facts at the trial.

9. Having heard the learned counsel on both sides and having gone through the record, this court finds no substance in the revision petition. There cannot be any thumb or unexceptional rule that a

person who is well settled abroad would never wish to come back to India. The son of the respondent may have pursued the course of study leading to the degree of Bachelor of Law in United Kingdom and he may have set up practice and been there with his family for the last ten years. But, as the facts narrated in the eviction petition, and in the reply to the leave to defend application show, the circumstances have undergone change. Vineet Budhiraja is the only son of the respondent /landlord and his wife having died on 18.08.2016, it is quite natural that he needs the company of his child, the only son, alongwith his immediate family, to be beside him in the evening of his life. If the son is ready and willing to fulfil the desires and needs of his aged father at this stage of his life where he is without a companion, the same ought not be doubted. Obviously, in order to shift his base from United Kingdom to India, the son would need suitable commercial space for setting up his office as a legal practitioner. For meeting such needs of the son for his legal practice, it is the obligation of the landlord to provide the necessary space. After all, he holds the property for the benefit of self and the family. In these circumstances, the conclusion reached by the Additional Rent Controller that the respondent / landlord bonafide requires the demised premises cannot be faulted.

10. Thus, the petition is found devoid of substance and is dismissed. The pending application also stands dismissed.

R.K.GAUBA, J.

JANUARY 09, 2018//yg

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.M.C. 2577/2017

PYARE LAL ..... Petitioner

Through: Mr. Pawan Sharma, Adv.

versus

THE STATE & ANR ..... Respondents

Through: Dr. M.P. Singh, APP for State with SI Vivek Gautam, P.S. Mayur Vihar.
Mr. H.K. Chaturvedi and Mr. Sagar Chaturvedi, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE A.K. PATHAK

O R D E R

% 10.12.2018

Learned counsel for the petitioner submits that appropriate steps would be taken against the order dated 18.03.2017, if advised under the law. He seeks leave to withdraw the petition.

Petition is disposed of as withdrawn.

A.K. PATHAK, J.

DECEMBER 10, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **LPA 162/2018 and CM. APPL. 12177/2018**

MAHESH CHAND ..... Appellant

Through: Mr. H. K. Chaturvedi and Mr. Sagar Chaturvedi, Advocates

versus

DELHI TRANSPORT CORPORATION ..... Respondent

Through: Mr. Aldanish Rein and Ms. Maheravish Rein, Advocates

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE SANJEEV NARULA

O R D E R

% 26.10.2018

CM. APPL. 12177/2018

1. For the reasons stated therein, the delay is condoned. The application is allowed.

LPA 162/2018

2. This appeal is directed against the order dated 15th January, 2013 in W.P. (C) 47/2009 and the order dated 12th January, 2018 in Review Petition 395/2017, passed by the learned Single Judge dismissing both petitions.

3. The challenge in the writ petition was to the Award dated 27th March, 2008 passed by the Labour Court holding that the inquiry that had resulted in the termination of the Appellant from service was not illegal or

unjustified.

4. The Appellant was employed as a Sweeper in the respondent organization. He was charge sheeted for his absence from duty between 1st and 15th August, 1994. Earlier he was absent for 117 days in 1993 and 73 days in 1994. The penalty on those occasions imposed was stoppage of four increments and denial of pay for the period of absence concerned.

5. As far as the absence between 1st and 15th August, 1994, the case of the Appellant that he was down with typhoid during that period. What is significant to note is that till 15 August, 1994 no prior intimation was sent by the Appellant to the organization about his illness. It was only after he was issued a notice dated 10 August, 1994 asking him to report for duty, that the Appellant reported on 16th August, 1994. There is nothing to indicate, as is being urged by Mr. Chaturvedi that the medical certificates produced by the Appellant were not considered by the Inquiry Officer (IO). In fact even the learned Single Judge has in para 7 of the impugned order dated 15th January, 2013 noted that the IO did consider the medical certificates produced by the Appellant.

6. It is another matter that Appellant filed a review petition before the learned Single Judge 1633 days after the dismissal of his writ petition. The only ground urged in the review petition was that the Appellant was not aware of the fact that he had being removed by the DTC without approval. The ground in the review petition was not that the medical certificates produced by the Appellant had not been considered by the IO before passing

the order of termination of his service.

7. Having heard Mr. Chaturvedi, learned counsel for the Appellant, and having perused the record, this Court is unable to find any legal error in either of the impugned orders passed by the learned Single Judge.

8. The appeal is dismissed.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

OCTOBER 26, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 11606/2018

SH. HARKRISHAN KUMAR NARULA ..... Petitioner
Through : Mr. H.K. Chaturvedi, Mr.Sagar Chaturvedi, Advocates.

versus

AIRPORT AUTHORITY OF INDIA AND ANR. ..... Respondents
Through : Mr. Digvijay Rai, Mr.Kustubh Singh, Advocates for R1.
Ms.Anjana Gosain, Advocate for R2.

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

O R D E R

% 26.10.2018

1. Vide the present petition, the petitioner seeks direction to respondents for upgradation/promotion of the petitioner from the post of Additional General Manager (Cartography) (Designation/Pay Scale Level E-7)/Joint General Manager (Cartography) (Designation/Pay Scale Level E-7) to the post of General Manager (Cartography) (Designation/Pay Scale Level E-8) as per the Gazette of India, Extra Ordinary Part-III, notified on 23.05.2003, Regulation on "Airport Authority of India (General Conditions of Service & Remuneration of Employees) Regulations, 2003" and direct to correct the seniority list and further seniority, inter se seniority of the petitioner and subsequent all further promotions along with consequential financial benefits and retiral benefits etc.

2. Issue notice.

3. Learned counsel appearing for the respondent No. 1 accepts notice and points out that for the relief sought in the present writ petition, the petitioner has made a representation dated 19.02.2018 which is since pending decision.

4. Keeping in view the averments made in the instant writ petition and submissions of learned counsel for the petitioner, I hereby, dispose of the present writ petition directing the respondent No. 1 to decide the representation made by the petitioner dated 19.02.2018 within a period of three weeks from the date of receipt of this order.

5. I hereby make it clear that while deciding the representation made by the petitioner, the respondent shall take into consideration the recommendation dated 07.12.2015 which is at page 417 of this present writ petition.

6. Respondent No. 1 is further directed to convey the decision to the petitioner taken on his representation in writing within a period of three days from the passing of such an order.

7. With the above directions, the present writ petition is disposed of as such.

SURESH KUMAR KAIT, J

OCTOBER 26, 2018

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CS(OS) 66/2016 & I.A. 12147/2016

MR SHUBH GAUTAM ..... Plaintiff
Through: Mr. Sagar Chaturvedi, Advocate.

versus

ANJANI TECHNOPLAST LIMITED & OTHERS ..... Defendants
Through: Mr. Sushil K. Tekriwal, Advocate.

% Date of Decision: 11th January, 2018.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

J U D G M E N T

MANMOHAN, J: (Oral)

1. Present summary suit has been filed under Order XXXVII of the Code of Civil Procedure, 1908, for recovery of Rs.4,38,00,617/- along with pendente lite and future interest @24% per annum till the date of full realisation of the entire amount.

2. It has been averred in the present plaint that under the Loan Agreement dated 24th February, 2010, defendants had borrowed Rs.2,50,00,000/- for a period of two months. Defendants No.2 and 3 are stated to have executed Deed of Guarantee to secure loan.

3. The repayment cheques issued by the defendants admittedly were

dishonoured by the bank with the remarks 'funds insufficient'.

4. In a proceeding under Sections 138, 141 and 142 of the Negotiable Instruments Act, the defendants proposed a settlement under which they offered to pay Rs.3,22,02,660/- along with pendente lite and future interest @24% per annum till the date of full realisation of the entire amount. During the pendency of said proceeding, the parties duly executed a Compromise Deed/Contract dated 31st August, 2013 wherein the defendants undertook to pay Rs.3,22,02,660/- and a post-dated cheque for the said amount was handed over.

5. However, the aforesaid cheque of Rs.3,22,02,660/- was also dishonoured with the remarks 'funds insufficient'.

6. Since the defendants did not pay any amount thereafter, the plaintiff filed the present summary suit for recovery of Rs.3,22,02,660/- along with admitted interest @24% per annum totalling to Rs.4,38,00,617/- under Order XXXVII CPC.

7. Though learned counsel for the defendants states that he has filed the leave to defend application, yet till date, no such application is on record.

8. In fact, before the learned Predecessor of this Court, another Compromise Deed dated 23rd December, 2016 executed between the parties was placed on record wherein the defendants undertook to pay Rs.2,38,61,907 by way of two post-dated cheques dated 31st December, 2017. The relevant terms of the Compromise Deed dated 23rd December, 2016 is reproduced hereinbelow:-

> *"10. <u>Terms of Settlement:</u>*
>
> *10.1 It is agreed that the defendants having admitted their liability jointly and severally in the present suit for entire amount as prayed but for the purpose of this settlement they have agreed*

to pay to the plaintiff a sum of Rs.2,38,61,907/- (Rupees Two Crores Thirty Eight Lakhs Only) as full and final settlement amount against all claims of the plaintiff in this suit; whereas the plaintiff has also agreed and consented to accept aforesaid full and final settlement amount of Rs.2,38,61,907/- (Rupees Two Crores Thirty Eight Lakhs Sixty One Thousand Nine Hundred Seven Only) against his all claims which he raised in the present suit but subject to encashment of two cheques mentioned hereunder and as will be given by the defendants to the plaintiff in furtherance of this settlement; if said cheques will return unpaid by any reason whatsoever, then full amount of the suit as prayed in the plaint, shall be decreed against all the defendants jointly and severally as admitted by the all defendants in earlier settlement/compromise dt. 31.08.2013.

10.2 It is further agreed that the defendants will pay aforesaid settlement amount of Rs.2,38,61,907/- (Rupees Two Crores Thirty Eight Lakhs Sixty One thousand Nine Hundred Seven Only) by way of following cheques as under:-

1. Cheque No.000130 for Rs.1,00,00,000/- (Rs. One Crore Only); dated 31st Dec. 2017.

2.Cheque No.000132 for Rs.1,38,61,907/- (Rs. One Crore thirty eight lacs sixty one thousand nine hundred seven Only); dated 31st Dec. 2017.

10.3 It is further agreed and undertaken by the all defendants that aforesaid cheques shall be honoured on their due dates on presentation; failing which it will be presumed and proved that defendants have not good intention to honour the cheques as was done in past.

10.4 It is further agreed by the defendants that they shall be liable jointly and severally for the entire amount of plaint as prayed for; in case aforesaid cheques will be returned unpaid; and also accordingly a decree will be drawn against all the defendants jointly and severally by this Hon'ble Court on the basis of Original Compromise dt. 31.08.2013 as prayed in this

suit against all the defendants jointly and severally."

(emphasis supplied)

9. Keeping in view the aforesaid terms of Settlement, the learned Predecessor of this Court adjourned the matter for nearly one year.

10. However, admittedly, the cheques issued under the Compromise Deed/Settlement Agreement dated 23rd December, 2016 have once again been dishonoured by the bank on the ground of 'funds insufficient'.

11. Though the learned counsel for defendants has tried to argue various issues like jurisdiction and the plaintiff being a money lender, yet this court is of the view that such pleas cannot be entertained as no leave to defend has been placed on record till date.

12. Further, in view of the Compromise Deed/Settlement Agreement which provides the consequence for default of repayment, this court is of the view that the suit has to be decreed in accordance with the prayer clause and the default clause in the Compromise Deed/Settlement Agreement.

13. Accordingly, the present suit is decreed against the defendants jointly and severally for a sum of Rs.4,38,00617/- along with interest @24% per annum from 01st February, 2016 (date of filing of suit) along with pendente lite and future interest till the date of actual payment of the full amount after deducting payment of Rs.25 lacs paid by the defendants to the plaintiff on 06th January, 2018.

14. Since the defendants have not honoured their commitment despite Compromise Agreements being executed before various judicial forums, this Court is of the view that the defendants need to be saddled with exemplary costs of Rs.5 lacs, which should be paid to the plaintiff. Ordered

accordingly. Registry is directed to prepare a decree sheet accordingly.

MANMOHAN, J

JANUARY 11, 2018
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.M.C. 4184/2015 & Crl.M.A. 14969/2015 (stay)

SHALABH KUMAR SHARMA ..... Petitioner

Through: Mr. H.K. Chaturvedi with Mr. Sagar Chaturvedi, Advs.

versus

INTEC CAPITAL LTD ..... Respondent

Through: Mr. K.K. Sharma and Mr. Sanjeev Pathak, Advs.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

O R D E R

% 10.09.2018

After some hearing, the learned counsel for the petitioner, on instructions, submits that he may be allowed to withdraw the present petition and the application filed therewith, reserving the contentions of the petitioner to be agitated before the trial court.

The petition and the application filed therewith are dismissed as withdrawn.

R.K.GAUBA, J.

SEPTEMBER 10, 2018/*uj*

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.M.C. 4185/2015 & Crl.M.A. 14971/2015 (stay)

SMT SARIKA SHARMA ..... Petitioner

Through: Mr. H.K. Chaturvedi with Mr. Sagar Chaturvedi, Advs.

versus

INTEC CAPITAL LTD ..... Respondent

Through: Mr. K.K. Sharma and Mr. Sanjeev Pathak, Advs.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

O R D E R

% 10.09.2018

After some hearing, the learned counsel for the petitioner, on instructions, submits that he may be allowed to withdraw the present petition and the application filed therewith, reserving the contentions of the petitioner to be agitated before the trial court.

The petition and the application filed therewith are dismissed as withdrawn.

R.K.GAUBA, J.

SEPTEMBER 10, 2018/*uj*

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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 21.08.2018

\+ CRL.M.C. 730/2018 & CRL.M.A. 2632/2018

B VENKATESHWARA RAO ..... Petitioner

versus

STATE & ANR ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr.Dayan Krishnan, Sr.Adv. with Mr.Gurpreet Singh and Ms.Aakash Lodha, Advs.

For the Respondent: Mr.Raghuvinder Verma, Addl. PP for the State with SI Brijesh Kumar, P.S.Lodhi Colony. Mr.H.K.Chaturvedi, Adv. for R-2.

CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT
21.08.2018

SANJEEV SACHDEVA, J. (ORAL)

1. The petitioner impugns judgment dated 30.11.2017 passed by the Revisional Court whereby the revision petition impugning order dated 12.08.2016 of the Trial Court taking cognizance of the offence under Section 352/323/509 IPC has been dismissed.

2. Learned senior counsel for the petitioner points out that on the

complaint investigation was carried out by the prosecution and statement of several witnesses was recorded under Section 161 Cr.P.C. Thereafter a closure report was filed, however none of the statements were annexed with the closure report.

3. It is submitted that in the impugned summoning order dated 12.10.2016 the Trial Court has stated that *the closure report and other materials available on record including statements of witnesses and victim as well as complainant have been carefully perused*.

4. Learned senior counsel points out that on inspection none of these documents were found on record. An application was filed before the Trial Court under Section 207 Cr.P.C which was disposed of by order dated 23.12.2017 wherein the Trial Court has noticed that statements of witnesses under Section 161 Cr.P.C are not found in the judicial record.

5. Learned senior counsel points out that the order dated 23.12.2017 shows that the impugned order of the Trial Court dated 12.08.2016 summoning the petitioner was without examination of the material including the statement of witnesses which admittedly as per the Court was not found on the judicial record.

6. Learned senior counsel points out to the closure report which specifically refers to the statement of several witnesses recorded under Section 161 Cr.P.C. However, the said statements are not filed along

with the closure report and are not part of the judicial record. It is not disputed by learned counsel appearing for the respondent No.2 as well as learned APP under instructions from the IO that the statements are not available on the judicial record.

7. In view of the fact that the Trial Court has specifically noticed in the impugned order dated 12.08.2016 that *the closure report and other materials available on record including statements of witnesses and victim as well as complainant have been carefully perused*, and the same are admittedly not on record, clearly the impugned summoning order is without consideration of the material and is not sustainable.

8. Accordingly, the impugned order dated 12.08.2016 as well as the order of the Revisional Court dated 30.11.2017 are set aside. The matter is remitted to the Trial Court

9. The Deputy Commission of Police concerned is directed to conduct an enquiry with regard to the missing record inter alia the relevant statements under Section 161 Cr.P.C and to have the same traced out and placed before the Trial Court.

10. Enquiry be conducted and concluded and the documents traced and placed before the Trial Court within a period of four weeks from today.

11. Once the material is placed before the Trial Court, the Trial

Court shall reappraise the same and pass appropriate order in accordance with law, without being influenced by anything stated in this order. It is clarified that this Court has neither examined nor commented upon the merits of the case of either party.

12. The petition is disposed of in the above terms.

13. Keeping in view the fact that this is a third round of litigation to this Court, the Trial Court is directed to expedite the proceedings.

14. Order *Dasti* under signatures of the Court Master.

AUGUST 21, 2018 **SANJEEV SACHDEVA, J**
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High Court of Delhi

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S. No	Diary No. / Case No.[STATUS]	Petitioner Vs. Respondent	Listing Date / Court No.
1.	W.P.(C) 2758/2013 [DISPOSED OFF] Order(s) Judgement(s)	BRAHM SINGH Vs. MANAGEMENT, M/S THE HINDUSTAN TIMES LTD. & ANR. Advocate : HK CHATURVEDI	DISPOSED OFF on 09/07/2018

Page : 1

Address: Registrar General, Delhi High Court,
Sher Shah Road, New Delhi - 110503

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: May 18, 2017*

\+ **CM(M) No.330/2017**

M/S SRIRAM COMPOUNDS PVT LTD
(EARLIER KNOWN AS SRIRAM COMPOUNDS) ..... Petitioner
Through: Mr.H.K.Chaturvedi, Advocate

versus

VINOD MITTAL (PROPRIETOR OF
M/S GLOBE GENERAL INDUSTRIES) ..... Respondent
Through: Mr.Avadh Kaushik, Advocate

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

CM(M) 330/2017

1. The petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India feeling aggrieved by the order dated 20th January, 2017 whereby the application filed by him seeking amendment of the written statement has been dismissed by learned Trial Court.

2. Learned counsel for the petitioner has submitted that the Civil Suit No.594430/16 (549/14) was filed by the respondent/plaintiff for recovery of sum of Rs.56,977/- together with costs and interests towards the balance price of goods lift. The costs of lift was claimed to be Rs.2,13,200/- out of which a sum of Rs.1,65,000/- was paid and for the balance sum of

Rs.50,200/-, the civil suit was filed.

3. In the written statement the petitioner/defendant took preliminary objections, replied the paras on merits and also raised a counter claim for a sum of Rs.9,13,100/- in para 30 of the written statement. The Court fee on counter claim of Rs.9,13,100/- was paid in terms of order of learned Trial Court dated 20th April, 2013. The pecuniary jurisdiction of learned Civil Judge being to Rs.3,00,000/-, although the Civil Suit No.594430/2016 (Old No.549/14) was instituted against M/s. Sri Ram Compounds and since the constitution of the firm was changed to that of a Private Limited company, the Director of the defendant Company restricted the counter claim to Rs.3,00,000/- by making statement to this effect before learned Trial Court.

4. Thereafter, the application under Order VI Rule 17 CPC was filed seeking the following amendments:-

> *"Para 1: That M/s Sriram Compounds Pvt. Ltd. (Earlier known as M/s Sriram Compounds situated at C-15 & 16, Sector-63, Noida U.P. hereinafter referred to as defendant was a proprietorship concern duly registered under the Act & enactment of the Companies Act, 1956 and also Rules made thereunder.) is a Private Limited Company incorporated under the provisions of Companies Act, 1956 having its registered office at A-15, Flatted Factory Complex, Okhla-New Delhi. Ms.Sharmistha Sharma is a authorized director on behalf of defendant company to prosecute present case before this Hon'ble Court as per Board authorization.*
>
> *Para 30: That the total cost of business losses as well as mental, physical, financial, defamation and legal expenses comes to Rs.3,00,000/- (Rupees Three Lakhs) for which the plaintiff is not ready to answer due to malafide intention and to get some ulterior motive. The Counter Claimant Claims the same."*

5. Learned counsel for the Trial Court did not allow the amendment to bring on record the change in the constitution of the defendant firm by amending para 1 of the written statement. The prayer to amend para 30 in respect of the counter claim was also declined observing that in the written statement no basis of the counter claim was made and it has not been separately registered.

6. The learned counsel for the respondent/plaintiff has submitted that he has no objection if the petitioner/defendant is allowed to amend para no.1 of the written statement with regard to change in constitution of the defendant firm i.e. from proprietorship firm to a private limited company incorporated under the Companies Act, 1956.

7. While adopting the reasoning given by the learned Trial Court in the impugned order while declining amendment in para 30 of the written statement, learned counsel or the respondent/plaintiff has submitted that this Court should not interfere with the impugned order in exercise of jurisdiction under Article 227 of the Constitution of India.

8. I have considered the submission made on behalf of the parties and carefully gone through the record.

9. The learned Trial Court while dismissing the application under Order VI Rule 17 CPC failed to take note of the following facts:-

(i) The amendment in para 1 was necessitated due to change in constitution of the defendant firm i.e. from proprietorship firm to a Private Ltd. Company, which was a subsequent event.

(ii) When the written statement was filed in the year 2006, counter claim was pleaded in para no.30 of the written statement as under:-

"30. That the total costs of business losses as well as mental, physical, financial, defamation and legal expenses comes to Rs.9,13,100/- for which the plaintiff is not ready to answer due to the malafide intention and to get some ulterior motive."

(iii) The Court fee on the counter claim was paid as per order of the Court.

(iv) The defendant/counter claimant had no role to play so far as registration of counter claim was concerned as the counter claimant was only required to pay the requisite Court fee and thereafter directions for registration of the counter claim was to be issued by the learned Trial Court.

10. While dismissing the application under Order VI Rule 17 CPC, the learned Trial Court did not consider that except reduction of the claim towards damages, no other change was sought by way of amendment.

11. Order VI Rule 17 CPC stands amended vide Civil Procedure Code (Amendment Act), 2002. The provision to Order VI Rule 17 CPC (after amendment) reads as under:-

'Order VI Rule 17.
Rule 17. Amendment of Pleadings : *The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties:*
Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.'

12. The power to allow the amendment is wife and can be exercised at any stage of proceedings in the interest of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the Courts while deciding such prayers should not adopt a hyper technical

approach. (Rel. *2000 1 SCC 712*)

13. Legal position is well settled that power under Article 227 of Constitution of India which vests extra ordinary jurisdiction in this Court, needs to be exercised only in a case where the impugned order suffer from any illegality, irregularity or perversity and if the impugned order is not interfered with, a grave injustice would be caused.

14. Since the proposed amendment which are nothing except to bring on record the change in the constitution of the defendant firm and amendment in para 30 to incorporate the counter claim to the restricted amount i.e. Rs.3,00,000/-, the impugned order by learned Trial Court is based against all the settled principles governing law of amendment.

15. Having noted above the nature of the amendments which is sought in the written statement, it would be noted that the amendment in para 30 of the written statement is only clarificatory in nature in respect of the amount of damages claimed. Such amendments which are directed towards putting forth and seeking determination of the real question in controversy between the parties are permitted under the law.

16. The impugned order, therefore, is not tenable and is hereby set aside.

17. The petitioner/defendant is allowed to make amendment in paras No.1 and 30 of the written statement which have been necessitated in view of the fact that the proprietorship concern is now a Private Ltd. Company and the amendment sought in the prayer clause is just to reduce the amount of damages upto Rs.3 lacs.

18. The above amendments are allowed without any order as to cost as in view of the nature of the amendment sought, it should not have been declined by the learned Trial Court as by claiming a lesser amount towards damages, the petitioner/defendant was reducing his claim towards damages

which does not have the effect of causing any kind of prejudice to the respondent/plaintiff so as to compensate him by awarding cost.

19. With above observations, the petition is allowed.

20. A copy of this order be sent to the concerned Court for information and be also given dasti to learned counsel for the parties.

CM No.11361/2017

Dismissed as infructuous.

PRATIBHA RANI, J.

MAY 18, 2017
'pg'

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) No. 11043/2016**

Reserved on: 25th August, 2017
% **Date of Decision:** 8th September, 2017

NITIN KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

WRIT PETITION (CIVIL) No. 11044/2016

AVINASH KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

WRIT PETITION (CIVIL) No. 11045/2016

ASHISH KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

The three aforestated writ petitions impugn the order dated 16th July, 2016 passed by the Principal Bench of the Central Administrative Tribunal (Tribunal, for short) in OA No. 1899/2016.

2. The dispute pertains to recruitment to the post of Head Constable, Assistant Wireless Operator/Tele Printer Operator (AWO/TPO) by way of direct recruitment vide two advertisements published in February, 2013. Initially, 142 vacancies of Head Constable, AWO/TPO were advertised, which figure was revised to 475 with the stipulation that the vacancies were subject to further change.

3. The applicants were first required to undergo a Physical Endurance Test, which was conducted in February, 2014 and those qualifying had appeared in the written examination held in March, 2014. In May, 2014 results were announced and 2453 candidates i.e. five times the number of vacancies advertised, were declared as qualified. These candidates underwent a trade test in August, 2014 and a typing test in October, 2014. The final result selecting 381 candidates with 15 candidates in waiting list was declared in December, 2014. The petitioners herein, who were the applicants before the Tribunal, were declared successful in the result declared in

December, 2014. Thereafter, police verification and medical examination were conducted between February and April, 2015, but appointment letters were not issued.

4. Another list of 247 candidates who had qualified in the written test, was published on 30th September, 2015 and these candidates thereafter had undertaken the trade test and typing test. On 16th May, 2016, the revised list of selected candidates, 376 in number, was published. As noticed above, in the first list published in December, 2014, 381 candidates had been selected and 15 others had been placed on the waiting list against non-joining of selected candidates. In the revised result declared on 16th May, 2016, 53 out of 381 of the earlier selected candidates, including the three petitioners, did not figure.

5. Aggrieved, the petitioners made a representation dated 21st May, 2016 and thereafter filed the aforesaid OA praying for quashing and setting aside the revised final result of selected candidates published on 16th May, 2016 and for direction to the authorities to consider and appoint them as Head Constable, AWO/TPO.

6. The respondents have explained the reason for the publication of the revised or second list. On the basis of complaints received pertaining to the questions, the answer key, and wrong evaluation, an expert committee was constituted to look into the anomalies. The expert committee found errors in nine questions, of which six were deleted/cancelled and declared null. The answer key of three questions was changed. On the basis of the recommendations of the expert committee, answer sheets of each candidate were re-evaluated. In

respect of six deleted questions, each candidate was awarded one mark. In view of the revised marks on revaluation, 247 new candidates were selected to undergo the trade test and typing test.

7. The Tribunal has rejected the challenge to the findings of the expert committee, revaluation, etc. observing that revaluation exercise was warranted and justified once six questions were deleted, and the answer key of three questions was changed. Preparation of the revised merit list, in terms of the revaluation, was justified and mandated.

8. The petitioners have challenged grant of additional marks to each candidate for the six deleted questions as arbitrary and contrary to law. The contention is that the candidates who had 'correctly' answered the questions have been equated and erroneously treated at par with those who had not answered or had given incorrect answers. There were ninety multiple choice questions in total and each question was assigned one mark. Candidates had four options to choose from and there was no negative marking. Even if there were two correct answers to a question, a candidate who had marked either of the two correct answers was entitled to one mark. It was unjust and unfair to give an additional mark to all candidates, whether or not they had attempted to answer the six deleted questions.

9. The Tribunal in the impugned order has elaborately dealt with the said contention making reference to each question and the anomaly noticed. We are entirely in agreement with the findings of the Tribunal on the said aspects, and for the sake of clarity and as the

reasoning is sound and acceptable, we would reproduce the relevant portion of the order of the Tribunal, which reads:-

> "6. The applicants have stated that Question No. 55 in Set-C reads as follows:-
>
> "Who among the following was 10th President of India?
>
> A) Giani Zail Singh
>
> B) Pranab Mukherjee
>
> C) Neelam Sanjeeva Reddy
>
> D) R. Venkataraman"
>
> They had answered 'A' as the correct option. In the pre-revised answer key, the respondents had also taken this as the right answer since Giani Zail Singh was actually the 10th President although he was Acting President. However, now the Expert Committee has cancelled this question on the ground that 10th President of India was Sh. K.R. Narayanan and since this option was not available in any of the 04 choices given to the candidates, the question deserves to be cancelled. Learned counsel for the applicants argued that the candidates were required to choose the correct option only from the choices given. Since Sh. K.R. Narayanan was not an option, candidates had rightly assumed that the correct answer would be Sh. Giani Zail Singh even though he was only Acting President. It would, therefore, be unfair to cancel this question and not give any benefit to the applicants, who had rightly answered the questions on the basis of options given.
>
> 7. Next, the applicants have challenged the findings of the Committee regarding Question No. 59 of Set-C, which reads as follows:-
>
> "In which year was the land acquisition act passed?
>
> A) 2000

B) 2013

C) 2014

D) 1894”

7.1 The respondents had initially taken option ‘C’ as the right answer but later on revised it to option ‘D’. The reasons recorded by the Expert Committee are as follows:-

> “Land Acquisition Act was passed in the year 1894. Another Act was passed in the year 2013, which was named “The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Hence, the correct answer is 1894.”

7.2 The applicants have submitted that the 2013 Act was popularly called the Land Acquisition Act. Moreover, the Land Acquisition Act was first passed in 1870 as Act No. X of 1870 passed by the Governor General of India. They have even attached a copy of this. The applicants have submitted that the Land Acquisition Act, 1870 was repealed by an Act of 1894. It was further repealed by the 2013 Act. As such, this question deserves to be cancelled.

8. Next, the applicants have challenged the Committee’s findings regarding Question No. 65 in Set-C. The aforesaid question reads as follows:-

“Find the odd one out

A) Pear

B) Apple

C) Litchi

D) Orange”

The Expert Committee has cancelled this question because they felt that more than one character answer was possible. Thus, orange was possible as correct answer because it was

the only citrus fruit whereas litchi was also possible as correct answer because it was the only fruit with a single seed. The applicants' contention is that in various other competitive examinations, such as Allahabad Bank Clerical Examination, 2009 (Question No. 7), Bank PO Exam 2003 and Bank of PO Exam, 2004 the correct answer to this question has been taken to be 'orange' being the only citrus fruit. Thus, the respondents herein should also have followed the same instead of cancelling the question.

8.1 Further, the applicants have challenged the findings of the Expert Committee on Question No. 22 of Set-C. It reads as follows:-

"If two pieces of ice are mutually pressed against each other then these pieces stick because

A) at higher pressure the melting point of ice decreases.

B) at higher pressure the melting point of ice increases.

C) at higher pressure the melting point of ice firstly decreases and then increases.

D) there exists no relation between the pressure and melting point of the ice."

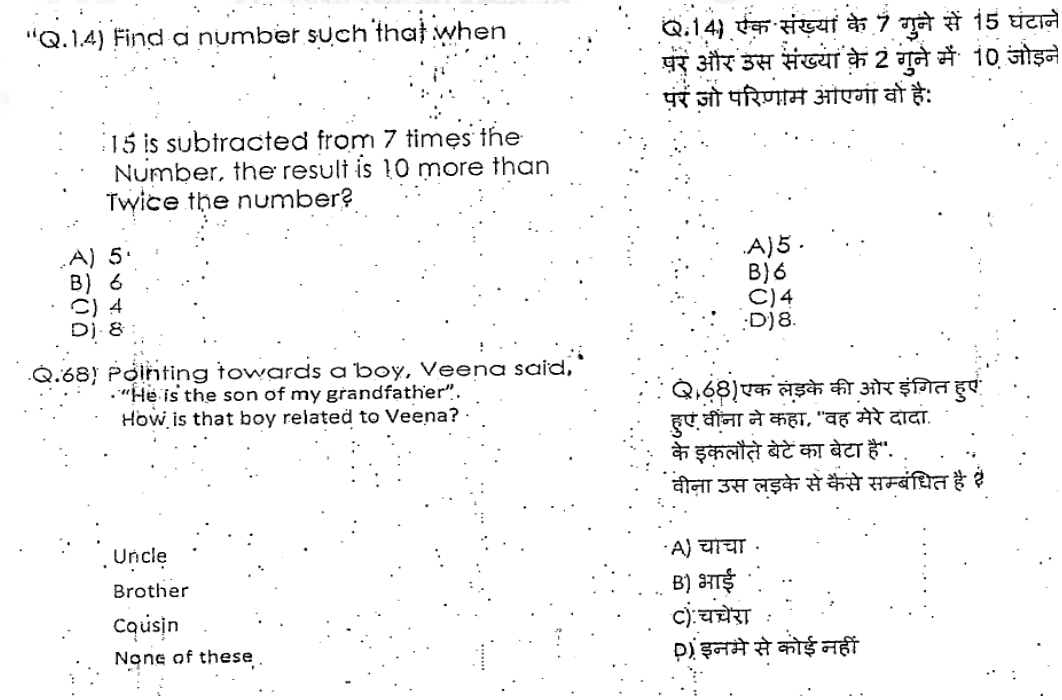
8.2 The respondents had initially taken option 'C' as the correct answer but later on decided to cancel it on the recommendations of the Expert Committee. The Expert Committee has given the following reasons for cancelling the question:-

> "The correct answer would be "with higher pressure the melting point of ice would decrease. As a result, some ice at the joint would melt. The re-adjustment of water molecules would momentarily cause lowering of pressure due to which melting-point would increase and the water at the joint would convert to ice again, thus,

making the two pieces of ice stick." Options 'A' & 'C' are both nearly correct options, but, not entirely correct either. Hence, the question needs to be cancelled."

8.3 The applicants have submitted that the Expert Committee has gone wrong in arriving at the aforesaid conclusion. They have relied on the text authored by Dr. K.L. Gomber and K.L. Gogia-Pradeep's Fundamental Physics (Class XI) as also on Wikipedia to say that this process is called 'Regelation' and, therefore, option-C should be regarded as the correct answer.

9. Next, the applicants have challenged the findings of the Expert Committee regarding Questions No. 14 and 68 of set-C. The same is reproduced as hereunder:-


"Q.14) Find a number such that when

15 is subtracted from 7 times the Number, the result is 10 more than Twice the number?

A) 5
B) 6
C) 4
D) 8

Q.68) Pointing towards a boy, Veena said, "He is the son of my grandfather". How is that boy related to Veena?

Uncle
Brother
Cousin
None of these

Q.14) एक संख्या के 7 गुने से 15 घटाने पर और उस संख्या के 2 गुने में 10 जोड़ने पर जो परिणाम आएगा वो है:

A) 5
B) 6
C) 4
D) 8

Q.68) एक लड़के की ओर इंगित हुए हुए वीना ने कहा, "वह मेरे दादा के इकलौते बेटे का बेटा है". वीना उस लड़के से कैसे सम्बंधित है ?

A) चाचा
B) भाई
C) चचेरा
D) इनमे से कोई नहीं

9.1 The Expert Committee has recommended that English and Hindi versions of these questions do not match. Hence, they deserve to be cancelled. The applicants have submitted that in the instructions given to the candidates on

the first page of the question booklet itself following is mentioned:-

"Note: In case of variation of any kind in the English and Hindi versions of any question(s), English version will be considered as final.

XXXXX

11. The respondents have disputed the assertions of the applicant regarding composition and the findings of the Committee. They argued that the entire selection process had been conducted departmentally. Even the question paper setter was a police officer. The Committee comprised of officers, who were not only senior to the paper setter but were also distinguished officers. Further, they asserted that it was not necessary for them to form a Committee comprising of academicians or special experts as this was no where prescribed in the rules. In a similar case regarding recruitment of Constable Executives, on the directions of this Tribunal they had constituted Committee of police officers only.

11.1 As regards the findings of the Committee the respondents have stated that as far as question No. 55 of Set-C is concerned, the question asked was who was the 10th President of India. The candidates were required to name the 10th President of India. A simple google search would reveal that the 10th President of India was Sh. K.R. Narayan (sic. Narayanan). However, since his name did not figure in the 04 options given to the applicants, the Committee had rightly recommended that this question should be cancelled.

11.2 Regarding Question No. 59 of Set-C the Committee has opined that the Land Acquisition Act was passed in the year 1894. The Act passed in 2013 was for fair compensation, Transparency in Land Acquisition, Rehabilitation and Resettlement of affected parties. Hence, the correct answer to the question was 1894. The

respondents have also produced at the time of hearing a document to show that the 1894 Act was called Act No. 1 of 1894. Hence, according to them, the Committee has rightly recommended that the correct answer was 1894. Hence, option-D should be taken to be correct.

11.3 Regarding Question No. 65 the Committee has given reasons why both orange and litchi can be regarded as correct answers, one being the only citrus fruit in the lot and the other being the only single seed fruit in the lot. The applicants' counsel argument that orange be regarded as correct answer as has been done in some other competitive examinations cannot be accepted.

11.4 As far as Question No. 22 of Set-C was concerned, the Committee found that two answers were nearly correct and hence recommended cancellation of the question. Detailed reasons have been given for doing so, which have been reproduced in the earlier part of the order.

11.5 As far as Question No. 68 and 14 are concerned in which the Committee had found mismatch in the English and Hindi versions, the respondents argued that a mere reading of these questions would reveal that question asked in English versions was different from the question asked in the Hindi version. The applicants have not disputed that there was variation. They have, however, stated that as per instructions given in the first page of the booklet itself, English version should have been relied upon. By not doing so, the respondents have changed the rules of the game midway and were, therefore, hit by directions of Hon'ble Supreme Court in the case of **K. Manjusree** (supra). The respondents argued that they have not changed the Scheme of the Examination, which was the issue in K. Manjusree's case (supra). Hence, it cannot be said that they were going against the directions of Hon'ble Supreme Court as given in the aforesaid case. In their support, they relied on a judgment of Hon'ble High Court of Madras in the case of D. Shylaja Vs. The Secretary to Government (Writ Petition No. 14587/2004) dated 15.06.2004 in which finding a

difference in English and Tamil versions, the Hon'ble High Court had upheld the decision of the university to cancel the questions after noting that from the answer sheets, it would not have been possible to decipher as to which candidate had attempted the English version of the question and which candidate had attempted Tamil version. The respondents contended that the instant case was squarely covered by the aforesaid judgment.

12. We have heard both sides and have perused the material on record. In our opinion, following two issues arise for our consideration:-

(i) Whether the respondents were justified in ordering re-evaluation of answer sheets of the written test?

(ii) Whether the findings of the Expert Committee and the re-evaluation done on the basis of the same leading to preparation of revised merit list are acceptable or not?

12.1 As far as the first issue is concerned, it is clear from the records of the respondents that they received representation from certain candidates that there were discrepancies in the answer key as well as evaluation of certain questions in the written test. Finding some substance in the complaint, they sought comments from the paper setter and thereafter examined the issue in details. They then decided to constitute a Committee of Senior Police Officers to examine whether there were discrepancies in certain questions asked from the candidates in the written test. The Committee found that 06 of the questions needed to be cancelled and in 03 questions the answer given in the answer key needed to be changed. We find that the applicants have disputed findings of the Committee regarding 06 of the 09 questions. They have not questioned the findings of the Committee in other 03 questions. In one such questions (Question No. 52 of the Set-C) the paper setter answer according to which the model answer key was set was option-B whereas the Committee found the correct answer to be option-C. Similarly, for

Question No. 19, the Committee found the correct answer to be option-B instead option-A given in the model answer key by the paper setter. Again for Question No. 29 while the model key had suggested option-D as the answer whereas the Committee had recommended cancellation of the question finding none of the options given to be correct. These findings have not been questioned by the applicants, meaning thereby that the applicants have themselves accepted that atleast in these three question there were discrepancies. It cannot be disputed that even if there was deficiency in one question then re-evaluation would alter the merit list. Herein discrepancies in at least 03 questions have been accepted by the applicants themselves leading to the conclusion that re-evaluation was definitely warranted. Hence, the respondents cannot be faulted for not acting on the earlier merit list and ordering re-evaluation of the answer sheets of the written test to prepare a revised merit list. This is irrespective of the findings given by the Committee in the remaining 06 questions.

12.2 As far as the findings of the Committee are concerned, we are not convinced by the arguments advanced by the applicants to dispute the same. Thus, for Question No. 55, the applicants have contended that Sh. Giani Zail Singh was the right answer as he was the 10th President of India even though he was only "Acting". We do not know when Sh. Giani Zail Singh acted as President of India as he was the Home Minister of India and it is the Vice-President who acts as President in absence of the President. In any case, we agree with the respondents that the 10th President of India was Sh. K.R. Narayanan and, therefore, the findings of the Committee are, in our opinion, correct. Similarly, for Question No. 59, we are not convinced by the argument of the applicants that 2013 be taken as the right answer. It is common knowledge that the Land Acquisition Act was passed in 1894. The applicants' contention that an Act was also passed in 1870 cannot be accepted because 1870 was not one of the options given in the question. Hence, Committee is right when it has opined

that Option-D i.e. 1894 be taken as the right answer. Again, we agree with the logic advanced by the Committee that for Question No. 65 both orange and litchi can be regarded as correct answer. We are not convinced by the argument of the applicants that since in several other competitive examinations orange has been taken as the right answer in this question, the same should be followed here. Candidates appearing in this test may or may not be aware of what was done in other competitive examinations. They were not expected to answer the question on the basis of practice followed in other selections.

12.3 Next the applicants have questioned the findings of the Committee regarding Question No. 22. They have relied on the text authored by Dr. K.L. Gomber and K.L. Gogia, the extracts of which they have annexed with their annexures. We have perused the material presented. According to this, the process of melting under pressure and then reprocessing is called regelation. However, the material presented does not in any way lead us to conclude what the right answer out of the 04 options given in Question No. 22 would be. The finding of the Committee that two answers were nearly correct appears to be justified and is backed by sound reasoning reproduced in earlier part of the judgment.

12.4 Lastly, the applicants have disputed the findings of the Committee regarding Question Nos. 68 and 14 in which there was mis-match in English and Hindi versions. The applicants have argued that in terms of the instructions given in the question booklet English version should have prevailed in the event of variation between two versions. However, on examining this issue, we find that this was not a case of variation. Rather the question asked in English version was entirely different from the question asked in Hindi version. Thus, in Question No. 68 in the English version, the relationship of the boy to the Veena has been asked for whereas in the Hindi version relationship of Veena to the boy has been asked. Similar is the situation in

> Question No. 14 which becomes obvious by mere reading of the same. Under these circumstances, we are of the opinion that the Committee has rightly recommended that these 02 questions be cancelled. If applicants' contention is accepted and English version is allowed to prevail, it would be grossly unfair to those applicants who attempted questions in Hindi. This is because they were not expected to read the English version and their answer would have been marked wrong even if they had answered the question correctly as per the Hindi version.
>
> XXXX "

10. On the aforesaid aspect, we do not think the finding of the Tribunal upholding the findings of the expert committee could be faulted. These findings are cogent and refer to specific and relevant facets necessary to answer the question. The findings of the committee are not perverse or absurd, which would merit interference. The submission that the expert committee consisted of three police officers, and that the respondent authorities have not relied on or sought the opinion from academicians, has to be rejected once we accept that the reasoning given by the committee was compelling, rational, and objective.

11. Objective type multiple choice questions must be carefully selected to ensure that the question does not have more than one correct suggested answer. In case of more than one correct suggested answer, confusion is bound to arise and candidates may falter, either by marking a wrong option or by not attempting to answer the said question. In the present case there was no negative marking, but regardless and nevertheless, it would be unfair to expect a candidate to

dwell and spend time on a question when options or suggested answers are confusing and faulty. A sharp candidate would, more than likely, skip the question and go on to the next question. In such cases, the benefit of doubt or error should normally be granted to candidates who have either marked the incorrect option or not attempted to answer the question. When benefit in such circumstances is given by the authorities themselves, others should not protest unless the action of the authorities is *mala fide* or was illogical and could be categorized as arbitrary. The choice exercised should not affect sanctity of the examination. We would hesitate to hold that sanctity has been compromised in the present case. It is no doubt possible that the questions could have been treated as zero mark questions, however in such event as well, the final result declared in December, 2014, would have required recompilation. Possibly, many included in the first list of 2453 candidates who had qualified in the written examination, would not have made it in the revised list. The respondents, in the present case, had applied the criteria of giving one mark to each candidate whether or not the candidate had attempted the question. In this manner, each candidate has been treated alike.

12. At times, two or more options are available to the authorities to deal with the situation which has arisen. Each option can be just and proper. As long as the choice adopted by the authorities, in their wisdom, is fair, just, has taken into account relevant facets, and has ignored inconsequential and irrelevant aspects, a Writ Court or a Tribunal would not interfere. The Court or the Tribunal does not

exercise the right of choice but exercises the power of judicial review, which focuses on the decision making process and not the decision itself. This view has been applied and noted by this Court in Writ Petition (C) No. 8055/2015, ***Prabha Devi and Others versus Government of NCT of Delhi and Others***, decided on 12th May, 2016, where reference was made to several judgments of the Supreme Court and the Delhi High Court and it was observed as under:-

> "19. A reading of the aforesaid judgments would reflect that there are four possible options available to the authorities, when they are confronted with the situation where the question(s) included in the multiple choice objective type tests is found to be incorrect, ambiguous or the answers themselves are found to be incorrect, ambiguous or capable of dual answers. The options are; (i) the question can be deleted and treated as a zero mark question; (ii) the question though deleted, each candidate is awarded marks as if the answer was correct and without negative marking; (iii) the question is not deleted and the candidates who have given the right answer are awarded marks, but there is no negative marking; and (iv) if there are two correct suggested answers, candidates who have given any of the two answers are awarded full marks. In the latter case, possibly negative marking may not be mandated. The aforesaid options can be divided into two categories, where the question is deleted, and the question is not deleted but option Nos. (iii) or (iv) are exercised. Which of the two categories would be applicable would depend upon the question and the suggested answers. The option to be selected has to be question-wise, i.e., with reference to each question. Lastly, while selecting the option, the authorities must take into consideration two factors, first, the sanctity of the selection process should be maintained and second, the students/candidates who have appeared should not suffer objectionable prejudice and disadvantage. In the

present case, the authorities have exercised the first option, the question has been deleted and treated as zero mark question. It is possible to urge that award of additional marks, i.e., the second option is the most suited and preferred option, for least possible prejudice is caused to the students/candidates when an additional mark is awarded. However, it cannot be said that the said option is the only valid and acceptable option or when the said option is adopted, no prejudice is caused to any students/candidates. Prejudice may still be caused because students who have correctly answered the question in spite of ambiguity, etc., are denied the benefit of the correct answer. As held in ***Abhijit Sen*** (supra), all the students/candidates were placed in a similar position and had felt and faced the same difficulty. In ***Kanpur University*** (supra) and ***Gunjan Sinha Jain*** (supra), the Supreme Court and High Court have preferred to adopt the first option, i.e., to delete the question and treat the question as a no mark question. Hence, the exercise of the first option per se would not be wrong or contrary to law. The onus in such cases would be on the candidate to show that deleting the question and exercise of the first option has caused prejudice. To establish the prejudice, the question and suggested answers, the model key and the answer given by the candidate have to be adverted to and examined. Only when the answer given it is observed, is correct or should be accepted, that additional mark(s) can be awarded. In the present case, the petitioners have alleged prejudice, but have not been able to demonstrate and show how and in what manner the method adopted, i.e., treating the two questions as zero mark questions, is required to be interfered. It would not be appropriate to reject and overturn the criteria/option exercised, by referring and relying on the general perception that the second option is the most fair and just criteria. The power of judicial review is not an alternative or an appellate power. It is only when there is an error in the decision making process, which has to be shown and established by the petitioner, that the power is exercised."

13. Read in this light, we do not think the first contention of the petitioner has any merit and, therefore, to this extent we are not inclined to interfere with the impugned order.

14. In the present case, five times the number of candidates against the vacancies were to be called for trade and typing tests. In case of candidates securing same cut-off marks in the written test, all of them were treated as eligible. While publishing the first list of eligible candidates and the second list after the written examination, the respondents did not breach the said mandate as stipulated by the Standing Order No. Rec.-6, Standing Order for Recruitment of Assistant Wireless Operator/Tele-Printer Operator (Head Constable) in Delhi Police. Breach of this mandate would have possibly invited objections for it would have meant a change in the terms of selection. In view of the aforesaid position, we would reject the contention of the petitioners that the revised list of 2382 candidates, based on revaluation of answer sheets, could have or rather should have exceeded the stipulation of five times the number of candidates against vacancies should be called for trade and typing test. If the contention of the petitioners is accepted, it would be in breach and violation of the aforesaid stipulation of the standing order for recruitment. This would amount to change in terms of selection during the course of the selection process. Others prejudicially affected would have protested and objected to the same.

15. As there were 71 open Scheduled Castes vacancies, the number of candidates required to be called for the trade and the typing tests in

the said category was to be restricted to 355 in the result declared in May, 2014. The cut-off marks, by default, in the written test, in the Scheduled Caste category, was fixed at 59. 388 candidates had secured 59 marks or more and in terms of the advertisment were eligible to participate in the trade and typing test. The petitioners had secured 59, 60, and 62 marks, respectively, in the written test and were, therefore, called for trade test alongwith 2450 other candidates. 1581 candidates had qualified the trade test and were asked to appear for the typing test, which carried 10 marks. The final list published in December, 2014 was based on the marks obtained in the written test, which carried 90 marks, and the marks obtained in the typing test, which carried 10 marks. The list comprised of 381 successful candidates. There were 71 vacancies in the open Scheduled Castes category. 55 candidates had qualified in the said category and were selected. 16 vacancies were to be carried forward on account of non-availability of scheduled caste candidates.

16. In view of the re-calculation the second revised list, on the basis of written examination, was published on 30th September, 2015. The revised list was restricted to five times the number of vacancies. Post re-valuation, 2382 candidates were found qualified. 247 candidates, who were earlier disqualified and had secured lower ranks, had moved up, and 318 candidates, who had earlier qualified the written test, were found disqualified and had moved down. 318 candidates, therefore, were treated as disqualified despite having appeared in the trade and typing test. Of these 318 candidates, 145 candidates, including the

petitioners, belonged to the Scheduled Caste category. On the basis of the re-valuation, the revised cut-off marks in the written test was increased from 59 to 63 marks in the Scheduled Caste category. Nitin Kumar, Ashish Kumar, and Avinash Kumar, upon re-valuation, had secured 62 marks, whereas the cut-off was 63 and therefore the petitioners had not made it to the cut off list. After conducting the trade and typing tests and on the basis of marks obtained by the qualified candidates, a revised selection list was published. As per the said list, for 71 open vacancies in the Scheduled Castes category, 51 candidates were selected. The unfilled vacancies, 20 in number, were carried forward.

17. Learned counsel for the petitioners has drawn our attention to the decision of the Supreme Court in Civil Appeal No. 4794/2012, ***Pallav Mongia versus Registrar General, Delhi High Court and Another*** and Division Bench decision of this Court in ***Gunjan Sinha Jain and others versus Registrar General, High Court of Delhi***, 188 (2012) DLT 627 (DB). In ***Gunjan Sinha Jain*** (supra), the Delhi High Court held that legitimately the top candidates after re-valuation should be declared as having qualified even if there was an earlier merit list of top candidates. However, in the said case, it was observed that the requirement and stipulation relating to the number of candidates should be moderated keeping in view the requirements of justice, fairness, and equity. In this manner, those who were declared qualified would retain their declared status even if they were lower down and had not qualified after re-valuation. The Court declared that

the final number of qualified candidates may, therefore, exceed the figure, but this should be accepted. However, the case of ***Pallav Mongia*** (supra) is slightly different. The Supreme Court noticed that the candidates in the first eligible list had not been excluded from the list of eligible candidates for appearing in the main examination, even if the candidate had come down in rank in view of deletion of some question or change in the model answer key. In these circumstances, it was directed that other candidates, who pursuant to re-valuation, had secured more marks than the last candidate should be allowed to appear in the main examination vide revised list. These candidates would be treated as qualified and included in the list. The decision in ***Pallav Mongia*** (supra) has no relevance to the present case. In ***Sumit Kumar versus High Court of Delhi and Another***, W.P. (C) No. 3453/2016, decided on 9th May, 2016, after referring to these two decisions, it was left to the High Court Administration to adopt an appropriate and proper method after deleting certain questions and issue of the corrigendum. However, the decisions passed in ***Pallav Mongia*** (supra) and ***Gunjan Sinha Jain*** (supra) would be kept in mind.

18. When we turn to the order passed by the Tribunal, in the present case, we find the Tribunal was conscious and aware of the problem and, therefore, had issued the following directions:-

> "15. At the same time, we cannot over look the fact that the applicants had been subjected to a long and drawn out process of selection lasting 2 ½ years and were on the verge of being appointed when the respondents decided to prepare

a revised merit list. As per respondents' own submission 53 persons, who figured in the earlier merit list, have been ousted in the revised list. Learned counsel for the applicants stated that many of the applicants have suffered as they had resigned from their previous jobs in preparation to join their new assignments. Many others have become over age to be appointed elsewhere.

16. We also notice that earlier respondents had advertised 142 vacancies of the post of Head Constable (AWO/TPO). Subsequently, this number was increased to 475 with further stipulation that number of vacancies may undergo a change. Under these circumstances, we dispose of this O.A. with a direction to the respondents to consider whether additional vacancies are available to appoint the applicants as well in addition to those figuring in the revised merit list. We are conscious of the fact that there may be some other candidates in between those figuring in the revised merit list and the applicants herein. That number is not known to us. Such candidates would also have to be appointed. Let the respondents examine and see whether without violating the merit of the selection process the applicants can be accommodated. This will, of course, be subject to availability of vacancies. The respondents may do so within next 08 weeks from the date of receipt of a certified copy of this order. No costs."

The directions given in paragraphs 15 and 16 were challenged before us in Writ Petition (C) No. 10748/2016, ***Raj Kumar Vaswan and Others versus Commissioner of Police and Others***, decided on 27th January, 2017 and the following directions were issued:-

"8. The respondents have filed affidavit dated 2nd December, 2016 wherein they have stated that 137 open unreserved category and 204 open OBC category vacancies for the posts were advertised. The number of vacancies for the open unreserved category and open OBC category was, as per paragraph 8 of the affidavit, subsequently revised to

123 and 184, respectively. However, the total number of posts advertised remained the same. Accordingly, on the basis of the second merit or final list, 123 open unreserved category and 184 open OBC category candidates were selected. In addition, six candidates belonging to the open unreserved category and nine candidates belonging to open OBC category were kept in the additional or waiting list. Candidates in the additional list are to be accommodated in case the open unreserved category or open OBC category candidates do not join or for some other reason not appointed.

9. The petitioners on the other hand have referred to the reply dated 24th August, 2016 received by them under the Right to Information Act as per which some of the selected open unreserved category candidates or open OBC candidates have not joined.

10. Counsel for the respondents has obtained instructions and accepts that 246 selected candidates have joined the training course. Some of the selected candidates were declared unfit in the medical examination or have not been issued appointment letters due to adverse police verification reports. Petitioners submit that there have been self cancellation also.

11. Learned counsel for the respondents, on instructions, accepts that they have not challenged the directions given in paragraph 16 of the order dated 16th July, 2016 and would abide and comply with the same. We take the said statement on record and would dispose of the present writ petition on the basis of the said statement and reiterating the directions given in paragraph 16 of the Tribunal's order dated 16th July, 2016.

12. We do acknowledge and would accept that the completion of the exercise in terms of paragraph 16 quoted above may take a little time as some of the rejected candidates can challenge their rejection and may also obtain stay orders. This would require a policy decision, by the

> respondents in accordance with the guidelines issued by Department of Personnel and Training. However, an expeditious and early decision in such matters and in terms of the directions given in paragraph 16 is desirable and always appreciated. It would curtail and prevent another round of litigation.
>
> 13. With the aforesaid observations, the writ petition is disposed of."

The aforesaid writ petition related to the open unreserved category and the open OBC category. In the two categories, vacant posts had been filled up. In the present case, however, the petitioners belong to the open Scheduled Caste category and, as noticed above, there were 20 vacancies, which have been carried forward. The respondents have to accordingly, in terms of the directions issued in paragraph 16 of the order dated 16th July, 2016, examine the issue keeping in mind different perspectives, including the contention of the petitioners as well as others in the same position as petitioners. It does appear that the respondents have decided not to accept the claim of the petitioners. However, due to the pendency of the present petition, it is apparent that no orders have been communicated and informed to the petitioners.

19. As the respondents have not challenged the directions given in paragraph 16 of the order dated 16th July, 2016, we dispose of the writ petition in terms of directions given in paragraphs 11 and 12 of the order dated 27th January, 2017 passed in ***Raj Kumar Vaswan and Others*** (supra). We would not like to comment or give any further directions in this regard as this is a complex issue, which will require

examination of not one facet, but several competing and different aspects. Whatever decision is taken by the respondents, the same would be communicated to the petitioners, who, if aggrieved, can take action as per law.

20. With the aforesaid observations and findings, the writ petition is disposed of. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

September 8th, 2017
VKR

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 8275/2017

MANJU JAIN

..... Petitioner

Through: Mr. H.K. Chaturvedi, Adv. with
Mr. Sagar Chaturvedi, Adv.

versus

THE DIRECTOR, DIRECTORATE OF EDUCATION & ORS

..... Respondent

Through: Ms. Shilpa Dewan, Adv. for R-1 with
Mr. A.K. Nagar, LA (Z-26)

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

O R D E R

% 17.10.2017

Mr. H.K. Chaturvedi, learned counsel for the petitioner states, in view of the statement made by the learned counsel for the respondent No.1 that the services of the petitioner have been terminated, even though the petitioner has not received the order, he would seek appropriate remedy before the appropriate Forum and wishes to withdraw the writ petition. The same is dismissed as withdraw, with liberty to the petitioner to approach the appropriate Forum.

V. KAMESWAR RAO, J

OCTOBER 17, 2017*/ak*

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) No. 11043/2016**

Reserved on: 25th August, 2017
% **Date of Decision:** 8th September, 2017

NITIN KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

WRIT PETITION (CIVIL) No. 11044/2016

AVINASH KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

WRIT PETITION (CIVIL) No. 11045/2016

ASHISH KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

The three aforestated writ petitions impugn the order dated 16th July, 2016 passed by the Principal Bench of the Central Administrative Tribunal (Tribunal, for short) in OA No. 1899/2016.

2. The dispute pertains to recruitment to the post of Head Constable, Assistant Wireless Operator/Tele Printer Operator (AWO/TPO) by way of direct recruitment vide two advertisements published in February, 2013. Initially, 142 vacancies of Head Constable, AWO/TPO were advertised, which figure was revised to 475 with the stipulation that the vacancies were subject to further change.

3. The applicants were first required to undergo a Physical Endurance Test, which was conducted in February, 2014 and those qualifying had appeared in the written examination held in March, 2014. In May, 2014 results were announced and 2453 candidates i.e. five times the number of vacancies advertised, were declared as qualified. These candidates underwent a trade test in August, 2014 and a typing test in October, 2014. The final result selecting 381 candidates with 15 candidates in waiting list was declared in December, 2014. The petitioners herein, who were the applicants before the Tribunal, were declared successful in the result declared in

December, 2014. Thereafter, police verification and medical examination were conducted between February and April, 2015, but appointment letters were not issued.

4. Another list of 247 candidates who had qualified in the written test, was published on 30th September, 2015 and these candidates thereafter had undertaken the trade test and typing test. On 16th May, 2016, the revised list of selected candidates, 376 in number, was published. As noticed above, in the first list published in December, 2014, 381 candidates had been selected and 15 others had been placed on the waiting list against non-joining of selected candidates. In the revised result declared on 16th May, 2016, 53 out of 381 of the earlier selected candidates, including the three petitioners, did not figure.

5. Aggrieved, the petitioners made a representation dated 21st May, 2016 and thereafter filed the aforesaid OA praying for quashing and setting aside the revised final result of selected candidates published on 16th May, 2016 and for direction to the authorities to consider and appoint them as Head Constable, AWO/TPO.

6. The respondents have explained the reason for the publication of the revised or second list. On the basis of complaints received pertaining to the questions, the answer key, and wrong evaluation, an expert committee was constituted to look into the anomalies. The expert committee found errors in nine questions, of which six were deleted/cancelled and declared null. The answer key of three questions was changed. On the basis of the recommendations of the expert committee, answer sheets of each candidate were re-evaluated. In

respect of six deleted questions, each candidate was awarded one mark. In view of the revised marks on revaluation, 247 new candidates were selected to undergo the trade test and typing test.

7. The Tribunal has rejected the challenge to the findings of the expert committee, revaluation, etc. observing that revaluation exercise was warranted and justified once six questions were deleted, and the answer key of three questions was changed. Preparation of the revised merit list, in terms of the revaluation, was justified and mandated.

8. The petitioners have challenged grant of additional marks to each candidate for the six deleted questions as arbitrary and contrary to law. The contention is that the candidates who had 'correctly' answered the questions have been equated and erroneously treated at par with those who had not answered or had given incorrect answers. There were ninety multiple choice questions in total and each question was assigned one mark. Candidates had four options to choose from and there was no negative marking. Even if there were two correct answers to a question, a candidate who had marked either of the two correct answers was entitled to one mark. It was unjust and unfair to give an additional mark to all candidates, whether or not they had attempted to answer the six deleted questions.

9. The Tribunal in the impugned order has elaborately dealt with the said contention making reference to each question and the anomaly noticed. We are entirely in agreement with the findings of the Tribunal on the said aspects, and for the sake of clarity and as the

reasoning is sound and acceptable, we would reproduce the relevant portion of the order of the Tribunal, which reads:-

> "6. The applicants have stated that Question No. 55 in Set-C reads as follows:-
>
> "Who among the following was 10th President of India?
>
> A) Giani Zail Singh
>
> B) Pranab Mukherjee
>
> C) Neelam Sanjeeva Reddy
>
> D) R. Venkataraman"
>
> They had answered 'A' as the correct option. In the pre-revised answer key, the respondents had also taken this as the right answer since Giani Zail Singh was actually the 10th President although he was Acting President. However, now the Expert Committee has cancelled this question on the ground that 10th President of India was Sh. K.R. Narayanan and since this option was not available in any of the 04 choices given to the candidates, the question deserves to be cancelled. Learned counsel for the applicants argued that the candidates were required to choose the correct option only from the choices given. Since Sh. K.R. Narayanan was not an option, candidates had rightly assumed that the correct answer would be Sh. Giani Zail Singh even though he was only Acting President. It would, therefore, be unfair to cancel this question and not give any benefit to the applicants, who had rightly answered the questions on the basis of options given.
>
> 7. Next, the applicants have challenged the findings of the Committee regarding Question No. 59 of Set-C, which reads as follows:-
>
> "In which year was the land acquisition act passed?
>
> A) 2000

B) 2013

C) 2014

D) 1894”

7.1 The respondents had initially taken option ‘C’ as the right answer but later on revised it to option ‘D’. The reasons recorded by the Expert Committee are as follows:-

> “Land Acquisition Act was passed in the year 1894. Another Act was passed in the year 2013, which was named “The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Hence, the correct answer is 1894.”

7.2 The applicants have submitted that the 2013 Act was popularly called the Land Acquisition Act. Moreover, the Land Acquisition Act was first passed in 1870 as Act No. X of 1870 passed by the Governor General of India. They have even attached a copy of this. The applicants have submitted that the Land Acquisition Act, 1870 was repealed by an Act of 1894. It was further repealed by the 2013 Act. As such, this question deserves to be cancelled.

8. Next, the applicants have challenged the Committee’s findings regarding Question No. 65 in Set-C. The aforesaid question reads as follows:-

“Find the odd one out

A) Pear

B) Apple

C) Litchi

D) Orange”

The Expert Committee has cancelled this question because they felt that more than one character answer was possible. Thus, orange was possible as correct answer because it was

the only citrus fruit whereas litchi was also possible as correct answer because it was the only fruit with a single seed. The applicants' contention is that in various other competitive examinations, such as Allahabad Bank Clerical Examination, 2009 (Question No. 7), Bank PO Exam 2003 and Bank of PO Exam, 2004 the correct answer to this question has been taken to be 'orange' being the only citrus fruit. Thus, the respondents herein should also have followed the same instead of cancelling the question.

8.1 Further, the applicants have challenged the findings of the Expert Committee on Question No. 22 of Set-C. It reads as follows:-

"If two pieces of ice are mutually pressed against each other then these pieces stick because

A) at higher pressure the melting point of ice decreases.

B) at higher pressure the melting point of ice increases.

C) at higher pressure the melting point of ice firstly decreases and then increases.

D) there exists no relation between the pressure and melting point of the ice."

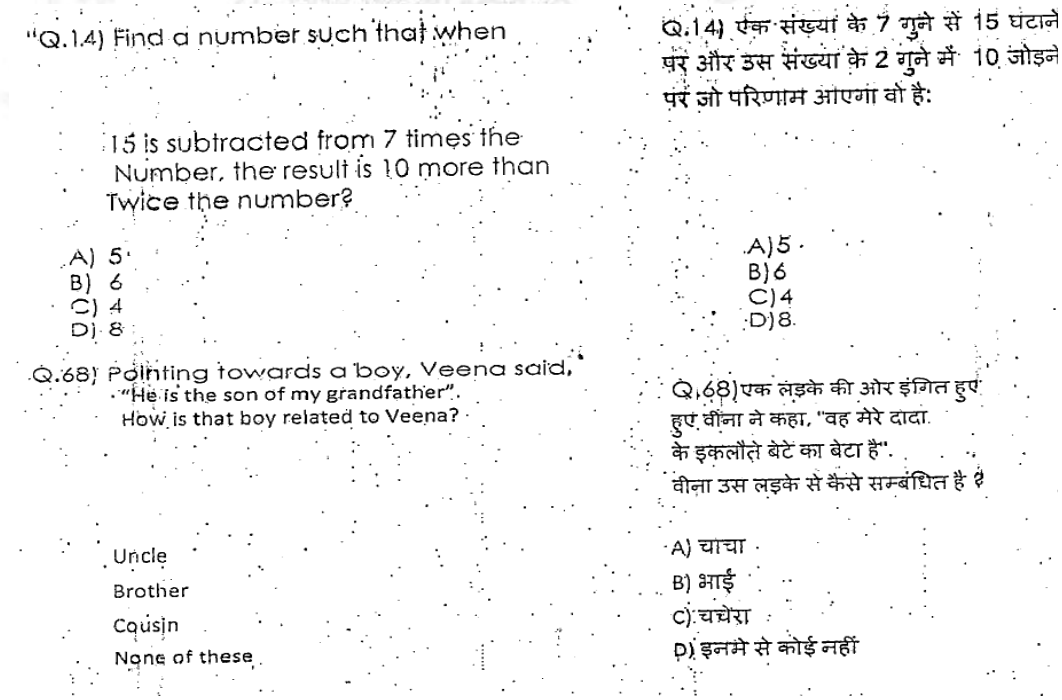
8.2 The respondents had initially taken option 'C' as the correct answer but later on decided to cancel it on the recommendations of the Expert Committee. The Expert Committee has given the following reasons for cancelling the question:-

> "The correct answer would be "with higher pressure the melting point of ice would decrease. As a result, some ice at the joint would melt. The re-adjustment of water molecules would momentarily cause lowering of pressure due to which melting-point would increase and the water at the joint would convert to ice again, thus,

making the two pieces of ice stick." Options 'A' & 'C' are both nearly correct options, but, not entirely correct either. Hence, the question needs to be cancelled."

8.3 The applicants have submitted that the Expert Committee has gone wrong in arriving at the aforesaid conclusion. They have relied on the text authored by Dr. K.L. Gomber and K.L. Gogia-Pradeep's Fundamental Physics (Class XI) as also on Wikipedia to say that this process is called 'Regelation' and, therefore, option-C should be regarded as the correct answer.

9. Next, the applicants have challenged the findings of the Expert Committee regarding Questions No. 14 and 68 of set-C. The same is reproduced as hereunder:-


"Q.14) Find a number such that when

15 is subtracted from 7 times the Number, the result is 10 more than Twice the number?

A) 5
B) 6
C) 4
D) 8

Q.68) Pointing towards a boy, Veena said, "He is the son of my grandfather". How is that boy related to Veena?

Uncle
Brother
Cousin
None of these

Q.14) एक संख्या के 7 गुने से 15 घटाने पर और उस संख्या के 2 गुने में 10 जोड़ने पर जो परिणाम आएगा वो है:

A) 5
B) 6
C) 4
D) 8

Q.68) एक लड़के की ओर इंगित हुए हुए वीना ने कहा, "वह मेरे दादा के इकलौते बेटे का बेटा है". वीना उस लड़के से कैसे सम्बंधित है ?

A) चाचा
B) भाई
C) चचेरा
D) इनमे से कोई नहीं

9.1 The Expert Committee has recommended that English and Hindi versions of these questions do not match. Hence, they deserve to be cancelled. The applicants have submitted that in the instructions given to the candidates on

the first page of the question booklet itself following is mentioned:-

"Note: In case of variation of any kind in the English and Hindi versions of any question(s), English version will be considered as final.

XXXXX

11. The respondents have disputed the assertions of the applicant regarding composition and the findings of the Committee. They argued that the entire selection process had been conducted departmentally. Even the question paper setter was a police officer. The Committee comprised of officers, who were not only senior to the paper setter but were also distinguished officers. Further, they asserted that it was not necessary for them to form a Committee comprising of academicians or special experts as this was no where prescribed in the rules. In a similar case regarding recruitment of Constable Executives, on the directions of this Tribunal they had constituted Committee of police officers only.

11.1 As regards the findings of the Committee the respondents have stated that as far as question No. 55 of Set-C is concerned, the question asked was who was the 10th President of India. The candidates were required to name the 10th President of India. A simple google search would reveal that the 10th President of India was Sh. K.R. Narayan (sic. Narayanan). However, since his name did not figure in the 04 options given to the applicants, the Committee had rightly recommended that this question should be cancelled.

11.2 Regarding Question No. 59 of Set-C the Committee has opined that the Land Acquisition Act was passed in the year 1894. The Act passed in 2013 was for fair compensation, Transparency in Land Acquisition, Rehabilitation and Resettlement of affected parties. Hence, the correct answer to the question was 1894. The

respondents have also produced at the time of hearing a document to show that the 1894 Act was called Act No. 1 of 1894. Hence, according to them, the Committee has rightly recommended that the correct answer was 1894. Hence, option-D should be taken to be correct.

11.3 Regarding Question No. 65 the Committee has given reasons why both orange and litchi can be regarded as correct answers, one being the only citrus fruit in the lot and the other being the only single seed fruit in the lot. The applicants' counsel argument that orange be regarded as correct answer as has been done in some other competitive examinations cannot be accepted.

11.4 As far as Question No. 22 of Set-C was concerned, the Committee found that two answers were nearly correct and hence recommended cancellation of the question. Detailed reasons have been given for doing so, which have been reproduced in the earlier part of the order.

11.5 As far as Question No. 68 and 14 are concerned in which the Committee had found mismatch in the English and Hindi versions, the respondents argued that a mere reading of these questions would reveal that question asked in English versions was different from the question asked in the Hindi version. The applicants have not disputed that there was variation. They have, however, stated that as per instructions given in the first page of the booklet itself, English version should have been relied upon. By not doing so, the respondents have changed the rules of the game midway and were, therefore, hit by directions of Hon'ble Supreme Court in the case of **K. Manjusree** (supra). The respondents argued that they have not changed the Scheme of the Examination, which was the issue in K. Manjusree's case (supra). Hence, it cannot be said that they were going against the directions of Hon'ble Supreme Court as given in the aforesaid case. In their support, they relied on a judgment of Hon'ble High Court of Madras in the case of D. Shylaja Vs. The Secretary to Government (Writ Petition No. 14587/2004) dated 15.06.2004 in which finding a

difference in English and Tamil versions, the Hon'ble High Court had upheld the decision of the university to cancel the questions after noting that from the answer sheets, it would not have been possible to decipher as to which candidate had attempted the English version of the question and which candidate had attempted Tamil version. The respondents contended that the instant case was squarely covered by the aforesaid judgment.

12. We have heard both sides and have perused the material on record. In our opinion, following two issues arise for our consideration:-

(i) Whether the respondents were justified in ordering re-evaluation of answer sheets of the written test?

(ii) Whether the findings of the Expert Committee and the re-evaluation done on the basis of the same leading to preparation of revised merit list are acceptable or not?

12.1 As far as the first issue is concerned, it is clear from the records of the respondents that they received representation from certain candidates that there were discrepancies in the answer key as well as evaluation of certain questions in the written test. Finding some substance in the complaint, they sought comments from the paper setter and thereafter examined the issue in details. They then decided to constitute a Committee of Senior Police Officers to examine whether there were discrepancies in certain questions asked from the candidates in the written test. The Committee found that 06 of the questions needed to be cancelled and in 03 questions the answer given in the answer key needed to be changed. We find that the applicants have disputed findings of the Committee regarding 06 of the 09 questions. They have not questioned the findings of the Committee in other 03 questions. In one such questions (Question No. 52 of the Set-C) the paper setter answer according to which the model answer key was set was option-B whereas the Committee found the correct answer to be option-C. Similarly, for

Question No. 19, the Committee found the correct answer to be option-B instead option-A given in the model answer key by the paper setter. Again for Question No. 29 while the model key had suggested option-D as the answer whereas the Committee had recommended cancellation of the question finding none of the options given to be correct. These findings have not been questioned by the applicants, meaning thereby that the applicants have themselves accepted that atleast in these three question there were discrepancies. It cannot be disputed that even if there was deficiency in one question then re-evaluation would alter the merit list. Herein discrepancies in at least 03 questions have been accepted by the applicants themselves leading to the conclusion that re-evaluation was definitely warranted. Hence, the respondents cannot be faulted for not acting on the earlier merit list and ordering re-evaluation of the answer sheets of the written test to prepare a revised merit list. This is irrespective of the findings given by the Committee in the remaining 06 questions.

12.2 As far as the findings of the Committee are concerned, we are not convinced by the arguments advanced by the applicants to dispute the same. Thus, for Question No. 55, the applicants have contended that Sh. Giani Zail Singh was the right answer as he was the 10th President of India even though he was only "Acting". We do not know when Sh. Giani Zail Singh acted as President of India as he was the Home Minister of India and it is the Vice-President who acts as President in absence of the President. In any case, we agree with the respondents that the 10th President of India was Sh. K.R. Narayanan and, therefore, the findings of the Committee are, in our opinion, correct. Similarly, for Question No. 59, we are not convinced by the argument of the applicants that 2013 be taken as the right answer. It is common knowledge that the Land Acquisition Act was passed in 1894. The applicants' contention that an Act was also passed in 1870 cannot be accepted because 1870 was not one of the options given in the question. Hence, Committee is right when it has opined

that Option-D i.e. 1894 be taken as the right answer. Again, we agree with the logic advanced by the Committee that for Question No. 65 both orange and litchi can be regarded as correct answer. We are not convinced by the argument of the applicants that since in several other competitive examinations orange has been taken as the right answer in this question, the same should be followed here. Candidates appearing in this test may or may not be aware of what was done in other competitive examinations. They were not expected to answer the question on the basis of practice followed in other selections.

12.3 Next the applicants have questioned the findings of the Committee regarding Question No. 22. They have relied on the text authored by Dr. K.L. Gomber and K.L. Gogia, the extracts of which they have annexed with their annexures. We have perused the material presented. According to this, the process of melting under pressure and then reprocessing is called regelation. However, the material presented does not in any way lead us to conclude what the right answer out of the 04 options given in Question No. 22 would be. The finding of the Committee that two answers were nearly correct appears to be justified and is backed by sound reasoning reproduced in earlier part of the judgment.

12.4 Lastly, the applicants have disputed the findings of the Committee regarding Question Nos. 68 and 14 in which there was mis-match in English and Hindi versions. The applicants have argued that in terms of the instructions given in the question booklet English version should have prevailed in the event of variation between two versions. However, on examining this issue, we find that this was not a case of variation. Rather the question asked in English version was entirely different from the question asked in Hindi version. Thus, in Question No. 68 in the English version, the relationship of the boy to the Veena has been asked for whereas in the Hindi version relationship of Veena to the boy has been asked. Similar is the situation in

> Question No. 14 which becomes obvious by mere reading of the same. Under these circumstances, we are of the opinion that the Committee has rightly recommended that these 02 questions be cancelled. If applicants' contention is accepted and English version is allowed to prevail, it would be grossly unfair to those applicants who attempted questions in Hindi. This is because they were not expected to read the English version and their answer would have been marked wrong even if they had answered the question correctly as per the Hindi version.
>
> XXXX "

10. On the aforesaid aspect, we do not think the finding of the Tribunal upholding the findings of the expert committee could be faulted. These findings are cogent and refer to specific and relevant facets necessary to answer the question. The findings of the committee are not perverse or absurd, which would merit interference. The submission that the expert committee consisted of three police officers, and that the respondent authorities have not relied on or sought the opinion from academicians, has to be rejected once we accept that the reasoning given by the committee was compelling, rational, and objective.

11. Objective type multiple choice questions must be carefully selected to ensure that the question does not have more than one correct suggested answer. In case of more than one correct suggested answer, confusion is bound to arise and candidates may falter, either by marking a wrong option or by not attempting to answer the said question. In the present case there was no negative marking, but regardless and nevertheless, it would be unfair to expect a candidate to

dwell and spend time on a question when options or suggested answers are confusing and faulty. A sharp candidate would, more than likely, skip the question and go on to the next question. In such cases, the benefit of doubt or error should normally be granted to candidates who have either marked the incorrect option or not attempted to answer the question. When benefit in such circumstances is given by the authorities themselves, others should not protest unless the action of the authorities is *mala fide* or was illogical and could be categorized as arbitrary. The choice exercised should not affect sanctity of the examination. We would hesitate to hold that sanctity has been compromised in the present case. It is no doubt possible that the questions could have been treated as zero mark questions, however in such event as well, the final result declared in December, 2014, would have required recompilation. Possibly, many included in the first list of 2453 candidates who had qualified in the written examination, would not have made it in the revised list. The respondents, in the present case, had applied the criteria of giving one mark to each candidate whether or not the candidate had attempted the question. In this manner, each candidate has been treated alike.

12. At times, two or more options are available to the authorities to deal with the situation which has arisen. Each option can be just and proper. As long as the choice adopted by the authorities, in their wisdom, is fair, just, has taken into account relevant facets, and has ignored inconsequential and irrelevant aspects, a Writ Court or a Tribunal would not interfere. The Court or the Tribunal does not

exercise the right of choice but exercises the power of judicial review, which focuses on the decision making process and not the decision itself. This view has been applied and noted by this Court in Writ Petition (C) No. 8055/2015, ***Prabha Devi and Others versus Government of NCT of Delhi and Others***, decided on 12th May, 2016, where reference was made to several judgments of the Supreme Court and the Delhi High Court and it was observed as under:-

> "19. A reading of the aforesaid judgments would reflect that there are four possible options available to the authorities, when they are confronted with the situation where the question(s) included in the multiple choice objective type tests is found to be incorrect, ambiguous or the answers themselves are found to be incorrect, ambiguous or capable of dual answers. The options are; (i) the question can be deleted and treated as a zero mark question; (ii) the question though deleted, each candidate is awarded marks as if the answer was correct and without negative marking; (iii) the question is not deleted and the candidates who have given the right answer are awarded marks, but there is no negative marking; and (iv) if there are two correct suggested answers, candidates who have given any of the two answers are awarded full marks. In the latter case, possibly negative marking may not be mandated. The aforesaid options can be divided into two categories, where the question is deleted, and the question is not deleted but option Nos. (iii) or (iv) are exercised. Which of the two categories would be applicable would depend upon the question and the suggested answers. The option to be selected has to be question-wise, i.e., with reference to each question. Lastly, while selecting the option, the authorities must take into consideration two factors, first, the sanctity of the selection process should be maintained and second, the students/candidates who have appeared should not suffer objectionable prejudice and disadvantage. In the

present case, the authorities have exercised the first option, the question has been deleted and treated as zero mark question. It is possible to urge that award of additional marks, i.e., the second option is the most suited and preferred option, for least possible prejudice is caused to the students/candidates when an additional mark is awarded. However, it cannot be said that the said option is the only valid and acceptable option or when the said option is adopted, no prejudice is caused to any students/candidates. Prejudice may still be caused because students who have correctly answered the question in spite of ambiguity, etc., are denied the benefit of the correct answer. As held in ***Abhijit Sen*** (supra), all the students/candidates were placed in a similar position and had felt and faced the same difficulty. In ***Kanpur University*** (supra) and ***Gunjan Sinha Jain*** (supra), the Supreme Court and High Court have preferred to adopt the first option, i.e., to delete the question and treat the question as a no mark question. Hence, the exercise of the first option per se would not be wrong or contrary to law. The onus in such cases would be on the candidate to show that deleting the question and exercise of the first option has caused prejudice. To establish the prejudice, the question and suggested answers, the model key and the answer given by the candidate have to be adverted to and examined. Only when the answer given it is observed, is correct or should be accepted, that additional mark(s) can be awarded. In the present case, the petitioners have alleged prejudice, but have not been able to demonstrate and show how and in what manner the method adopted, i.e., treating the two questions as zero mark questions, is required to be interfered. It would not be appropriate to reject and overturn the criteria/option exercised, by referring and relying on the general perception that the second option is the most fair and just criteria. The power of judicial review is not an alternative or an appellate power. It is only when there is an error in the decision making process, which has to be shown and established by the petitioner, that the power is exercised."

13. Read in this light, we do not think the first contention of the petitioner has any merit and, therefore, to this extent we are not inclined to interfere with the impugned order.

14. In the present case, five times the number of candidates against the vacancies were to be called for trade and typing tests. In case of candidates securing same cut-off marks in the written test, all of them were treated as eligible. While publishing the first list of eligible candidates and the second list after the written examination, the respondents did not breach the said mandate as stipulated by the Standing Order No. Rec.-6, Standing Order for Recruitment of Assistant Wireless Operator/Tele-Printer Operator (Head Constable) in Delhi Police. Breach of this mandate would have possibly invited objections for it would have meant a change in the terms of selection. In view of the aforesaid position, we would reject the contention of the petitioners that the revised list of 2382 candidates, based on revaluation of answer sheets, could have or rather should have exceeded the stipulation of five times the number of candidates against vacancies should be called for trade and typing test. If the contention of the petitioners is accepted, it would be in breach and violation of the aforesaid stipulation of the standing order for recruitment. This would amount to change in terms of selection during the course of the selection process. Others prejudicially affected would have protested and objected to the same.

15. As there were 71 open Scheduled Castes vacancies, the number of candidates required to be called for the trade and the typing tests in

the said category was to be restricted to 355 in the result declared in May, 2014. The cut-off marks, by default, in the written test, in the Scheduled Caste category, was fixed at 59. 388 candidates had secured 59 marks or more and in terms of the advertisment were eligible to participate in the trade and typing test. The petitioners had secured 59, 60, and 62 marks, respectively, in the written test and were, therefore, called for trade test alongwith 2450 other candidates. 1581 candidates had qualified the trade test and were asked to appear for the typing test, which carried 10 marks. The final list published in December, 2014 was based on the marks obtained in the written test, which carried 90 marks, and the marks obtained in the typing test, which carried 10 marks. The list comprised of 381 successful candidates. There were 71 vacancies in the open Scheduled Castes category. 55 candidates had qualified in the said category and were selected. 16 vacancies were to be carried forward on account of non-availability of scheduled caste candidates.

16. In view of the re-calculation the second revised list, on the basis of written examination, was published on 30th September, 2015. The revised list was restricted to five times the number of vacancies. Post re-valuation, 2382 candidates were found qualified. 247 candidates, who were earlier disqualified and had secured lower ranks, had moved up, and 318 candidates, who had earlier qualified the written test, were found disqualified and had moved down. 318 candidates, therefore, were treated as disqualified despite having appeared in the trade and typing test. Of these 318 candidates, 145 candidates, including the

petitioners, belonged to the Scheduled Caste category. On the basis of the re-valuation, the revised cut-off marks in the written test was increased from 59 to 63 marks in the Scheduled Caste category. Nitin Kumar, Ashish Kumar, and Avinash Kumar, upon re-valuation, had secured 62 marks, whereas the cut-off was 63 and therefore the petitioners had not made it to the cut off list. After conducting the trade and typing tests and on the basis of marks obtained by the qualified candidates, a revised selection list was published. As per the said list, for 71 open vacancies in the Scheduled Castes category, 51 candidates were selected. The unfilled vacancies, 20 in number, were carried forward.

17. Learned counsel for the petitioners has drawn our attention to the decision of the Supreme Court in Civil Appeal No. 4794/2012, ***Pallav Mongia versus Registrar General, Delhi High Court and Another*** and Division Bench decision of this Court in ***Gunjan Sinha Jain and others versus Registrar General, High Court of Delhi***, 188 (2012) DLT 627 (DB). In ***Gunjan Sinha Jain*** (supra), the Delhi High Court held that legitimately the top candidates after re-valuation should be declared as having qualified even if there was an earlier merit list of top candidates. However, in the said case, it was observed that the requirement and stipulation relating to the number of candidates should be moderated keeping in view the requirements of justice, fairness, and equity. In this manner, those who were declared qualified would retain their declared status even if they were lower down and had not qualified after re-valuation. The Court declared that

the final number of qualified candidates may, therefore, exceed the figure, but this should be accepted. However, the case of ***Pallav Mongia*** (supra) is slightly different. The Supreme Court noticed that the candidates in the first eligible list had not been excluded from the list of eligible candidates for appearing in the main examination, even if the candidate had come down in rank in view of deletion of some question or change in the model answer key. In these circumstances, it was directed that other candidates, who pursuant to re-valuation, had secured more marks than the last candidate should be allowed to appear in the main examination vide revised list. These candidates would be treated as qualified and included in the list. The decision in ***Pallav Mongia*** (supra) has no relevance to the present case. In ***Sumit Kumar versus High Court of Delhi and Another***, W.P. (C) No. 3453/2016, decided on 9th May, 2016, after referring to these two decisions, it was left to the High Court Administration to adopt an appropriate and proper method after deleting certain questions and issue of the corrigendum. However, the decisions passed in ***Pallav Mongia*** (supra) and ***Gunjan Sinha Jain*** (supra) would be kept in mind.

18. When we turn to the order passed by the Tribunal, in the present case, we find the Tribunal was conscious and aware of the problem and, therefore, had issued the following directions:-

> "15. At the same time, we cannot over look the fact that the applicants had been subjected to a long and drawn out process of selection lasting 2 ½ years and were on the verge of being appointed when the respondents decided to prepare

a revised merit list. As per respondents' own submission 53 persons, who figured in the earlier merit list, have been ousted in the revised list. Learned counsel for the applicants stated that many of the applicants have suffered as they had resigned from their previous jobs in preparation to join their new assignments. Many others have become over age to be appointed elsewhere.

16. We also notice that earlier respondents had advertised 142 vacancies of the post of Head Constable (AWO/TPO). Subsequently, this number was increased to 475 with further stipulation that number of vacancies may undergo a change. Under these circumstances, we dispose of this O.A. with a direction to the respondents to consider whether additional vacancies are available to appoint the applicants as well in addition to those figuring in the revised merit list. We are conscious of the fact that there may be some other candidates in between those figuring in the revised merit list and the applicants herein. That number is not known to us. Such candidates would also have to be appointed. Let the respondents examine and see whether without violating the merit of the selection process the applicants can be accommodated. This will, of course, be subject to availability of vacancies. The respondents may do so within next 08 weeks from the date of receipt of a certified copy of this order. No costs."

The directions given in paragraphs 15 and 16 were challenged before us in Writ Petition (C) No. 10748/2016, ***Raj Kumar Vaswan and Others versus Commissioner of Police and Others***, decided on 27th January, 2017 and the following directions were issued:-

"8. The respondents have filed affidavit dated 2nd December, 2016 wherein they have stated that 137 open unreserved category and 204 open OBC category vacancies for the posts were advertised. The number of vacancies for the open unreserved category and open OBC category was, as per paragraph 8 of the affidavit, subsequently revised to

123 and 184, respectively. However, the total number of posts advertised remained the same. Accordingly, on the basis of the second merit or final list, 123 open unreserved category and 184 open OBC category candidates were selected. In addition, six candidates belonging to the open unreserved category and nine candidates belonging to open OBC category were kept in the additional or waiting list. Candidates in the additional list are to be accommodated in case the open unreserved category or open OBC category candidates do not join or for some other reason not appointed.

9. The petitioners on the other hand have referred to the reply dated 24th August, 2016 received by them under the Right to Information Act as per which some of the selected open unreserved category candidates or open OBC candidates have not joined.

10. Counsel for the respondents has obtained instructions and accepts that 246 selected candidates have joined the training course. Some of the selected candidates were declared unfit in the medical examination or have not been issued appointment letters due to adverse police verification reports. Petitioners submit that there have been self cancellation also.

11. Learned counsel for the respondents, on instructions, accepts that they have not challenged the directions given in paragraph 16 of the order dated 16th July, 2016 and would abide and comply with the same. We take the said statement on record and would dispose of the present writ petition on the basis of the said statement and reiterating the directions given in paragraph 16 of the Tribunal's order dated 16th July, 2016.

12. We do acknowledge and would accept that the completion of the exercise in terms of paragraph 16 quoted above may take a little time as some of the rejected candidates can challenge their rejection and may also obtain stay orders. This would require a policy decision, by the

> respondents in accordance with the guidelines issued by Department of Personnel and Training. However, an expeditious and early decision in such matters and in terms of the directions given in paragraph 16 is desirable and always appreciated. It would curtail and prevent another round of litigation.
>
> 13. With the aforesaid observations, the writ petition is disposed of."

The aforesaid writ petition related to the open unreserved category and the open OBC category. In the two categories, vacant posts had been filled up. In the present case, however, the petitioners belong to the open Scheduled Caste category and, as noticed above, there were 20 vacancies, which have been carried forward. The respondents have to accordingly, in terms of the directions issued in paragraph 16 of the order dated 16th July, 2016, examine the issue keeping in mind different perspectives, including the contention of the petitioners as well as others in the same position as petitioners. It does appear that the respondents have decided not to accept the claim of the petitioners. However, due to the pendency of the present petition, it is apparent that no orders have been communicated and informed to the petitioners.

19. As the respondents have not challenged the directions given in paragraph 16 of the order dated 16th July, 2016, we dispose of the writ petition in terms of directions given in paragraphs 11 and 12 of the order dated 27th January, 2017 passed in ***Raj Kumar Vaswan and Others*** (supra). We would not like to comment or give any further directions in this regard as this is a complex issue, which will require

examination of not one facet, but several competing and different aspects. Whatever decision is taken by the respondents, the same would be communicated to the petitioners, who, if aggrieved, can take action as per law.

20. With the aforesaid observations and findings, the writ petition is disposed of. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

September 8th, 2017
VKR

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) No. 11043/2016**

Reserved on: 25th August, 2017
% **Date of Decision:** 8th September, 2017

NITIN KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

WRIT PETITION (CIVIL) No. 11044/2016

AVINASH KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

WRIT PETITION (CIVIL) No. 11045/2016

ASHISH KUMAR ....Petitioner
Through Mr. H.K. Chaturvedi, Advocate.

Versus

COMMISSIONER OF POLICE & OTHERS ..…Respondents
Through Mr. Anuj Aggarwal, ASC for GNCTD.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.

The three aforestated writ petitions impugn the order dated 16th July, 2016 passed by the Principal Bench of the Central Administrative Tribunal (Tribunal, for short) in OA No. 1899/2016.

2. The dispute pertains to recruitment to the post of Head Constable, Assistant Wireless Operator/Tele Printer Operator (AWO/TPO) by way of direct recruitment vide two advertisements published in February, 2013. Initially, 142 vacancies of Head Constable, AWO/TPO were advertised, which figure was revised to 475 with the stipulation that the vacancies were subject to further change.

3. The applicants were first required to undergo a Physical Endurance Test, which was conducted in February, 2014 and those qualifying had appeared in the written examination held in March, 2014. In May, 2014 results were announced and 2453 candidates i.e. five times the number of vacancies advertised, were declared as qualified. These candidates underwent a trade test in August, 2014 and a typing test in October, 2014. The final result selecting 381 candidates with 15 candidates in waiting list was declared in December, 2014. The petitioners herein, who were the applicants before the Tribunal, were declared successful in the result declared in

December, 2014. Thereafter, police verification and medical examination were conducted between February and April, 2015, but appointment letters were not issued.

4. Another list of 247 candidates who had qualified in the written test, was published on 30th September, 2015 and these candidates thereafter had undertaken the trade test and typing test. On 16th May, 2016, the revised list of selected candidates, 376 in number, was published. As noticed above, in the first list published in December, 2014, 381 candidates had been selected and 15 others had been placed on the waiting list against non-joining of selected candidates. In the revised result declared on 16th May, 2016, 53 out of 381 of the earlier selected candidates, including the three petitioners, did not figure.

5. Aggrieved, the petitioners made a representation dated 21st May, 2016 and thereafter filed the aforesaid OA praying for quashing and setting aside the revised final result of selected candidates published on 16th May, 2016 and for direction to the authorities to consider and appoint them as Head Constable, AWO/TPO.

6. The respondents have explained the reason for the publication of the revised or second list. On the basis of complaints received pertaining to the questions, the answer key, and wrong evaluation, an expert committee was constituted to look into the anomalies. The expert committee found errors in nine questions, of which six were deleted/cancelled and declared null. The answer key of three questions was changed. On the basis of the recommendations of the expert committee, answer sheets of each candidate were re-evaluated. In

respect of six deleted questions, each candidate was awarded one mark. In view of the revised marks on revaluation, 247 new candidates were selected to undergo the trade test and typing test.

7. The Tribunal has rejected the challenge to the findings of the expert committee, revaluation, etc. observing that revaluation exercise was warranted and justified once six questions were deleted, and the answer key of three questions was changed. Preparation of the revised merit list, in terms of the revaluation, was justified and mandated.

8. The petitioners have challenged grant of additional marks to each candidate for the six deleted questions as arbitrary and contrary to law. The contention is that the candidates who had 'correctly' answered the questions have been equated and erroneously treated at par with those who had not answered or had given incorrect answers. There were ninety multiple choice questions in total and each question was assigned one mark. Candidates had four options to choose from and there was no negative marking. Even if there were two correct answers to a question, a candidate who had marked either of the two correct answers was entitled to one mark. It was unjust and unfair to give an additional mark to all candidates, whether or not they had attempted to answer the six deleted questions.

9. The Tribunal in the impugned order has elaborately dealt with the said contention making reference to each question and the anomaly noticed. We are entirely in agreement with the findings of the Tribunal on the said aspects, and for the sake of clarity and as the

reasoning is sound and acceptable, we would reproduce the relevant portion of the order of the Tribunal, which reads:-

> "6. The applicants have stated that Question No. 55 in Set-C reads as follows:-
>
> "Who among the following was 10th President of India?
>
> A) Giani Zail Singh
>
> B) Pranab Mukherjee
>
> C) Neelam Sanjeeva Reddy
>
> D) R. Venkataraman"
>
> They had answered 'A' as the correct option. In the pre-revised answer key, the respondents had also taken this as the right answer since Giani Zail Singh was actually the 10th President although he was Acting President. However, now the Expert Committee has cancelled this question on the ground that 10th President of India was Sh. K.R. Narayanan and since this option was not available in any of the 04 choices given to the candidates, the question deserves to be cancelled. Learned counsel for the applicants argued that the candidates were required to choose the correct option only from the choices given. Since Sh. K.R. Narayanan was not an option, candidates had rightly assumed that the correct answer would be Sh. Giani Zail Singh even though he was only Acting President. It would, therefore, be unfair to cancel this question and not give any benefit to the applicants, who had rightly answered the questions on the basis of options given.
>
> 7. Next, the applicants have challenged the findings of the Committee regarding Question No. 59 of Set-C, which reads as follows:-
>
> "In which year was the land acquisition act passed?
>
> A) 2000

B) 2013

C) 2014

D) 1894”

7.1 The respondents had initially taken option ‘C’ as the right answer but later on revised it to option ‘D’. The reasons recorded by the Expert Committee are as follows:-

> “Land Acquisition Act was passed in the year 1894. Another Act was passed in the year 2013, which was named “The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013. Hence, the correct answer is 1894.”

7.2 The applicants have submitted that the 2013 Act was popularly called the Land Acquisition Act. Moreover, the Land Acquisition Act was first passed in 1870 as Act No. X of 1870 passed by the Governor General of India. They have even attached a copy of this. The applicants have submitted that the Land Acquisition Act, 1870 was repealed by an Act of 1894. It was further repealed by the 2013 Act. As such, this question deserves to be cancelled.

8. Next, the applicants have challenged the Committee’s findings regarding Question No. 65 in Set-C. The aforesaid question reads as follows:-

“Find the odd one out

A) Pear

B) Apple

C) Litchi

D) Orange”

The Expert Committee has cancelled this question because they felt that more than one character answer was possible. Thus, orange was possible as correct answer because it was

the only citrus fruit whereas litchi was also possible as correct answer because it was the only fruit with a single seed. The applicants' contention is that in various other competitive examinations, such as Allahabad Bank Clerical Examination, 2009 (Question No. 7), Bank PO Exam 2003 and Bank of PO Exam, 2004 the correct answer to this question has been taken to be 'orange' being the only citrus fruit. Thus, the respondents herein should also have followed the same instead of cancelling the question.

8.1 Further, the applicants have challenged the findings of the Expert Committee on Question No. 22 of Set-C. It reads as follows:-

"If two pieces of ice are mutually pressed against each other then these pieces stick because

A) at higher pressure the melting point of ice decreases.

B) at higher pressure the melting point of ice increases.

C) at higher pressure the melting point of ice firstly decreases and then increases.

D) there exists no relation between the pressure and melting point of the ice."

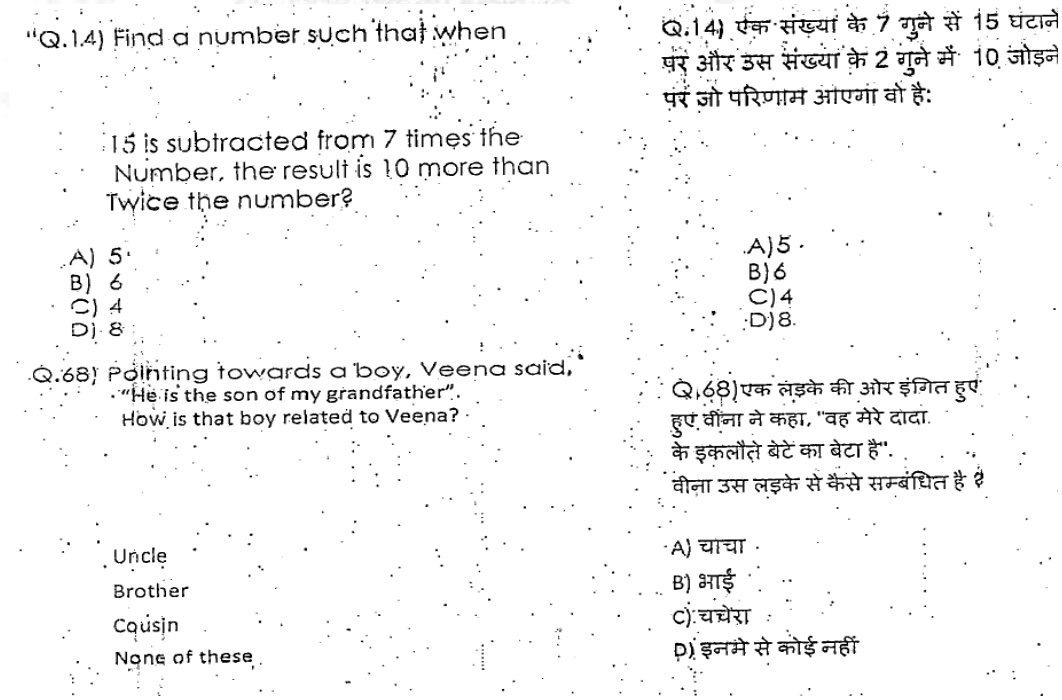
8.2 The respondents had initially taken option 'C' as the correct answer but later on decided to cancel it on the recommendations of the Expert Committee. The Expert Committee has given the following reasons for cancelling the question:-

> "The correct answer would be "with higher pressure the melting point of ice would decrease. As a result, some ice at the joint would melt. The re-adjustment of water molecules would momentarily cause lowering of pressure due to which melting-point would increase and the water at the joint would convert to ice again, thus,

making the two pieces of ice stick." Options 'A' & 'C' are both nearly correct options, but, not entirely correct either. Hence, the question needs to be cancelled."

8.3 The applicants have submitted that the Expert Committee has gone wrong in arriving at the aforesaid conclusion. They have relied on the text authored by Dr. K.L. Gomber and K.L. Gogia-Pradeep's Fundamental Physics (Class XI) as also on Wikipedia to say that this process is called 'Regelation' and, therefore, option-C should be regarded as the correct answer.

9. Next, the applicants have challenged the findings of the Expert Committee regarding Questions No. 14 and 68 of set-C. The same is reproduced as hereunder:-


"Q.14) Find a number such that when

15 is subtracted from 7 times the Number, the result is 10 more than Twice the number?

A) 5
B) 6
C) 4
D) 8

Q.68) Pointing towards a boy, Veena said, "He is the son of my grandfather". How is that boy related to Veena?

Uncle
Brother
Cousin
None of these

Q.14) एक संख्या के 7 गुने से 15 घटाने पर और उस संख्या के 2 गुने में 10 जोड़ने पर जो परिणाम आएगा वो है:

A) 5
B) 6
C) 4
D) 8

Q.68) एक लड़के की ओर इंगित हुए हुए वीना ने कहा, "वह मेरे दादा के इकलौते बेटे का बेटा है". वीना उस लड़के से कैसे सम्बंधित है ?

A) चाचा
B) भाई
C) चचेरा
D) इनमे से कोई नहीं

9.1 The Expert Committee has recommended that English and Hindi versions of these questions do not match. Hence, they deserve to be cancelled. The applicants have submitted that in the instructions given to the candidates on

the first page of the question booklet itself following is mentioned:-

"Note: In case of variation of any kind in the English and Hindi versions of any question(s), English version will be considered as final.

XXXXX

11. The respondents have disputed the assertions of the applicant regarding composition and the findings of the Committee. They argued that the entire selection process had been conducted departmentally. Even the question paper setter was a police officer. The Committee comprised of officers, who were not only senior to the paper setter but were also distinguished officers. Further, they asserted that it was not necessary for them to form a Committee comprising of academicians or special experts as this was no where prescribed in the rules. In a similar case regarding recruitment of Constable Executives, on the directions of this Tribunal they had constituted Committee of police officers only.

11.1 As regards the findings of the Committee the respondents have stated that as far as question No. 55 of Set-C is concerned, the question asked was who was the 10th President of India. The candidates were required to name the 10th President of India. A simple google search would reveal that the 10th President of India was Sh. K.R. Narayan (sic. Narayanan). However, since his name did not figure in the 04 options given to the applicants, the Committee had rightly recommended that this question should be cancelled.

11.2 Regarding Question No. 59 of Set-C the Committee has opined that the Land Acquisition Act was passed in the year 1894. The Act passed in 2013 was for fair compensation, Transparency in Land Acquisition, Rehabilitation and Resettlement of affected parties. Hence, the correct answer to the question was 1894. The

respondents have also produced at the time of hearing a document to show that the 1894 Act was called Act No. 1 of 1894. Hence, according to them, the Committee has rightly recommended that the correct answer was 1894. Hence, option-D should be taken to be correct.

11.3 Regarding Question No. 65 the Committee has given reasons why both orange and litchi can be regarded as correct answers, one being the only citrus fruit in the lot and the other being the only single seed fruit in the lot. The applicants' counsel argument that orange be regarded as correct answer as has been done in some other competitive examinations cannot be accepted.

11.4 As far as Question No. 22 of Set-C was concerned, the Committee found that two answers were nearly correct and hence recommended cancellation of the question. Detailed reasons have been given for doing so, which have been reproduced in the earlier part of the order.

11.5 As far as Question No. 68 and 14 are concerned in which the Committee had found mismatch in the English and Hindi versions, the respondents argued that a mere reading of these questions would reveal that question asked in English versions was different from the question asked in the Hindi version. The applicants have not disputed that there was variation. They have, however, stated that as per instructions given in the first page of the booklet itself, English version should have been relied upon. By not doing so, the respondents have changed the rules of the game midway and were, therefore, hit by directions of Hon'ble Supreme Court in the case of **K. Manjusree** (supra). The respondents argued that they have not changed the Scheme of the Examination, which was the issue in K. Manjusree's case (supra). Hence, it cannot be said that they were going against the directions of Hon'ble Supreme Court as given in the aforesaid case. In their support, they relied on a judgment of Hon'ble High Court of Madras in the case of D. Shylaja Vs. The Secretary to Government (Writ Petition No. 14587/2004) dated 15.06.2004 in which finding a

difference in English and Tamil versions, the Hon'ble High Court had upheld the decision of the university to cancel the questions after noting that from the answer sheets, it would not have been possible to decipher as to which candidate had attempted the English version of the question and which candidate had attempted Tamil version. The respondents contended that the instant case was squarely covered by the aforesaid judgment.

12. We have heard both sides and have perused the material on record. In our opinion, following two issues arise for our consideration:-

(i) Whether the respondents were justified in ordering re-evaluation of answer sheets of the written test?

(ii) Whether the findings of the Expert Committee and the re-evaluation done on the basis of the same leading to preparation of revised merit list are acceptable or not?

12.1 As far as the first issue is concerned, it is clear from the records of the respondents that they received representation from certain candidates that there were discrepancies in the answer key as well as evaluation of certain questions in the written test. Finding some substance in the complaint, they sought comments from the paper setter and thereafter examined the issue in details. They then decided to constitute a Committee of Senior Police Officers to examine whether there were discrepancies in certain questions asked from the candidates in the written test. The Committee found that 06 of the questions needed to be cancelled and in 03 questions the answer given in the answer key needed to be changed. We find that the applicants have disputed findings of the Committee regarding 06 of the 09 questions. They have not questioned the findings of the Committee in other 03 questions. In one such questions (Question No. 52 of the Set-C) the paper setter answer according to which the model answer key was set was option-B whereas the Committee found the correct answer to be option-C. Similarly, for

Question No. 19, the Committee found the correct answer to be option-B instead option-A given in the model answer key by the paper setter. Again for Question No. 29 while the model key had suggested option-D as the answer whereas the Committee had recommended cancellation of the question finding none of the options given to be correct. These findings have not been questioned by the applicants, meaning thereby that the applicants have themselves accepted that atleast in these three question there were discrepancies. It cannot be disputed that even if there was deficiency in one question then re-evaluation would alter the merit list. Herein discrepancies in at least 03 questions have been accepted by the applicants themselves leading to the conclusion that re-evaluation was definitely warranted. Hence, the respondents cannot be faulted for not acting on the earlier merit list and ordering re-evaluation of the answer sheets of the written test to prepare a revised merit list. This is irrespective of the findings given by the Committee in the remaining 06 questions.

12.2 As far as the findings of the Committee are concerned, we are not convinced by the arguments advanced by the applicants to dispute the same. Thus, for Question No. 55, the applicants have contended that Sh. Giani Zail Singh was the right answer as he was the 10th President of India even though he was only "Acting". We do not know when Sh. Giani Zail Singh acted as President of India as he was the Home Minister of India and it is the Vice-President who acts as President in absence of the President. In any case, we agree with the respondents that the 10th President of India was Sh. K.R. Narayanan and, therefore, the findings of the Committee are, in our opinion, correct. Similarly, for Question No. 59, we are not convinced by the argument of the applicants that 2013 be taken as the right answer. It is common knowledge that the Land Acquisition Act was passed in 1894. The applicants' contention that an Act was also passed in 1870 cannot be accepted because 1870 was not one of the options given in the question. Hence, Committee is right when it has opined

that Option-D i.e. 1894 be taken as the right answer. Again, we agree with the logic advanced by the Committee that for Question No. 65 both orange and litchi can be regarded as correct answer. We are not convinced by the argument of the applicants that since in several other competitive examinations orange has been taken as the right answer in this question, the same should be followed here. Candidates appearing in this test may or may not be aware of what was done in other competitive examinations. They were not expected to answer the question on the basis of practice followed in other selections.

12.3 Next the applicants have questioned the findings of the Committee regarding Question No. 22. They have relied on the text authored by Dr. K.L. Gomber and K.L. Gogia, the extracts of which they have annexed with their annexures. We have perused the material presented. According to this, the process of melting under pressure and then reprocessing is called regelation. However, the material presented does not in any way lead us to conclude what the right answer out of the 04 options given in Question No. 22 would be. The finding of the Committee that two answers were nearly correct appears to be justified and is backed by sound reasoning reproduced in earlier part of the judgment.

12.4 Lastly, the applicants have disputed the findings of the Committee regarding Question Nos. 68 and 14 in which there was mis-match in English and Hindi versions. The applicants have argued that in terms of the instructions given in the question booklet English version should have prevailed in the event of variation between two versions. However, on examining this issue, we find that this was not a case of variation. Rather the question asked in English version was entirely different from the question asked in Hindi version. Thus, in Question No. 68 in the English version, the relationship of the boy to the Veena has been asked for whereas in the Hindi version relationship of Veena to the boy has been asked. Similar is the situation in

> Question No. 14 which becomes obvious by mere reading of the same. Under these circumstances, we are of the opinion that the Committee has rightly recommended that these 02 questions be cancelled. If applicants' contention is accepted and English version is allowed to prevail, it would be grossly unfair to those applicants who attempted questions in Hindi. This is because they were not expected to read the English version and their answer would have been marked wrong even if they had answered the question correctly as per the Hindi version.
>
> XXXX "

10. On the aforesaid aspect, we do not think the finding of the Tribunal upholding the findings of the expert committee could be faulted. These findings are cogent and refer to specific and relevant facets necessary to answer the question. The findings of the committee are not perverse or absurd, which would merit interference. The submission that the expert committee consisted of three police officers, and that the respondent authorities have not relied on or sought the opinion from academicians, has to be rejected once we accept that the reasoning given by the committee was compelling, rational, and objective.

11. Objective type multiple choice questions must be carefully selected to ensure that the question does not have more than one correct suggested answer. In case of more than one correct suggested answer, confusion is bound to arise and candidates may falter, either by marking a wrong option or by not attempting to answer the said question. In the present case there was no negative marking, but regardless and nevertheless, it would be unfair to expect a candidate to

dwell and spend time on a question when options or suggested answers are confusing and faulty. A sharp candidate would, more than likely, skip the question and go on to the next question. In such cases, the benefit of doubt or error should normally be granted to candidates who have either marked the incorrect option or not attempted to answer the question. When benefit in such circumstances is given by the authorities themselves, others should not protest unless the action of the authorities is *mala fide* or was illogical and could be categorized as arbitrary. The choice exercised should not affect sanctity of the examination. We would hesitate to hold that sanctity has been compromised in the present case. It is no doubt possible that the questions could have been treated as zero mark questions, however in such event as well, the final result declared in December, 2014, would have required recompilation. Possibly, many included in the first list of 2453 candidates who had qualified in the written examination, would not have made it in the revised list. The respondents, in the present case, had applied the criteria of giving one mark to each candidate whether or not the candidate had attempted the question. In this manner, each candidate has been treated alike.

12. At times, two or more options are available to the authorities to deal with the situation which has arisen. Each option can be just and proper. As long as the choice adopted by the authorities, in their wisdom, is fair, just, has taken into account relevant facets, and has ignored inconsequential and irrelevant aspects, a Writ Court or a Tribunal would not interfere. The Court or the Tribunal does not

exercise the right of choice but exercises the power of judicial review, which focuses on the decision making process and not the decision itself. This view has been applied and noted by this Court in Writ Petition (C) No. 8055/2015, ***Prabha Devi and Others versus Government of NCT of Delhi and Others***, decided on 12th May, 2016, where reference was made to several judgments of the Supreme Court and the Delhi High Court and it was observed as under:-

> "19. A reading of the aforesaid judgments would reflect that there are four possible options available to the authorities, when they are confronted with the situation where the question(s) included in the multiple choice objective type tests is found to be incorrect, ambiguous or the answers themselves are found to be incorrect, ambiguous or capable of dual answers. The options are; (i) the question can be deleted and treated as a zero mark question; (ii) the question though deleted, each candidate is awarded marks as if the answer was correct and without negative marking; (iii) the question is not deleted and the candidates who have given the right answer are awarded marks, but there is no negative marking; and (iv) if there are two correct suggested answers, candidates who have given any of the two answers are awarded full marks. In the latter case, possibly negative marking may not be mandated. The aforesaid options can be divided into two categories, where the question is deleted, and the question is not deleted but option Nos. (iii) or (iv) are exercised. Which of the two categories would be applicable would depend upon the question and the suggested answers. The option to be selected has to be question-wise, i.e., with reference to each question. Lastly, while selecting the option, the authorities must take into consideration two factors, first, the sanctity of the selection process should be maintained and second, the students/candidates who have appeared should not suffer objectionable prejudice and disadvantage. In the

present case, the authorities have exercised the first option, the question has been deleted and treated as zero mark question. It is possible to urge that award of additional marks, i.e., the second option is the most suited and preferred option, for least possible prejudice is caused to the students/candidates when an additional mark is awarded. However, it cannot be said that the said option is the only valid and acceptable option or when the said option is adopted, no prejudice is caused to any students/candidates. Prejudice may still be caused because students who have correctly answered the question in spite of ambiguity, etc., are denied the benefit of the correct answer. As held in ***Abhijit Sen*** (supra), all the students/candidates were placed in a similar position and had felt and faced the same difficulty. In ***Kanpur University*** (supra) and ***Gunjan Sinha Jain*** (supra), the Supreme Court and High Court have preferred to adopt the first option, i.e., to delete the question and treat the question as a no mark question. Hence, the exercise of the first option per se would not be wrong or contrary to law. The onus in such cases would be on the candidate to show that deleting the question and exercise of the first option has caused prejudice. To establish the prejudice, the question and suggested answers, the model key and the answer given by the candidate have to be adverted to and examined. Only when the answer given it is observed, is correct or should be accepted, that additional mark(s) can be awarded. In the present case, the petitioners have alleged prejudice, but have not been able to demonstrate and show how and in what manner the method adopted, i.e., treating the two questions as zero mark questions, is required to be interfered. It would not be appropriate to reject and overturn the criteria/option exercised, by referring and relying on the general perception that the second option is the most fair and just criteria. The power of judicial review is not an alternative or an appellate power. It is only when there is an error in the decision making process, which has to be shown and established by the petitioner, that the power is exercised."

13. Read in this light, we do not think the first contention of the petitioner has any merit and, therefore, to this extent we are not inclined to interfere with the impugned order.

14. In the present case, five times the number of candidates against the vacancies were to be called for trade and typing tests. In case of candidates securing same cut-off marks in the written test, all of them were treated as eligible. While publishing the first list of eligible candidates and the second list after the written examination, the respondents did not breach the said mandate as stipulated by the Standing Order No. Rec.-6, Standing Order for Recruitment of Assistant Wireless Operator/Tele-Printer Operator (Head Constable) in Delhi Police. Breach of this mandate would have possibly invited objections for it would have meant a change in the terms of selection. In view of the aforesaid position, we would reject the contention of the petitioners that the revised list of 2382 candidates, based on revaluation of answer sheets, could have or rather should have exceeded the stipulation of five times the number of candidates against vacancies should be called for trade and typing test. If the contention of the petitioners is accepted, it would be in breach and violation of the aforesaid stipulation of the standing order for recruitment. This would amount to change in terms of selection during the course of the selection process. Others prejudicially affected would have protested and objected to the same.

15. As there were 71 open Scheduled Castes vacancies, the number of candidates required to be called for the trade and the typing tests in

the said category was to be restricted to 355 in the result declared in May, 2014. The cut-off marks, by default, in the written test, in the Scheduled Caste category, was fixed at 59. 388 candidates had secured 59 marks or more and in terms of the advertisment were eligible to participate in the trade and typing test. The petitioners had secured 59, 60, and 62 marks, respectively, in the written test and were, therefore, called for trade test alongwith 2450 other candidates. 1581 candidates had qualified the trade test and were asked to appear for the typing test, which carried 10 marks. The final list published in December, 2014 was based on the marks obtained in the written test, which carried 90 marks, and the marks obtained in the typing test, which carried 10 marks. The list comprised of 381 successful candidates. There were 71 vacancies in the open Scheduled Castes category. 55 candidates had qualified in the said category and were selected. 16 vacancies were to be carried forward on account of non-availability of scheduled caste candidates.

16. In view of the re-calculation the second revised list, on the basis of written examination, was published on 30th September, 2015. The revised list was restricted to five times the number of vacancies. Post re-valuation, 2382 candidates were found qualified. 247 candidates, who were earlier disqualified and had secured lower ranks, had moved up, and 318 candidates, who had earlier qualified the written test, were found disqualified and had moved down. 318 candidates, therefore, were treated as disqualified despite having appeared in the trade and typing test. Of these 318 candidates, 145 candidates, including the

petitioners, belonged to the Scheduled Caste category. On the basis of the re-valuation, the revised cut-off marks in the written test was increased from 59 to 63 marks in the Scheduled Caste category. Nitin Kumar, Ashish Kumar, and Avinash Kumar, upon re-valuation, had secured 62 marks, whereas the cut-off was 63 and therefore the petitioners had not made it to the cut off list. After conducting the trade and typing tests and on the basis of marks obtained by the qualified candidates, a revised selection list was published. As per the said list, for 71 open vacancies in the Scheduled Castes category, 51 candidates were selected. The unfilled vacancies, 20 in number, were carried forward.

17. Learned counsel for the petitioners has drawn our attention to the decision of the Supreme Court in Civil Appeal No. 4794/2012, ***Pallav Mongia versus Registrar General, Delhi High Court and Another*** and Division Bench decision of this Court in ***Gunjan Sinha Jain and others versus Registrar General, High Court of Delhi***, 188 (2012) DLT 627 (DB). In ***Gunjan Sinha Jain*** (supra), the Delhi High Court held that legitimately the top candidates after re-valuation should be declared as having qualified even if there was an earlier merit list of top candidates. However, in the said case, it was observed that the requirement and stipulation relating to the number of candidates should be moderated keeping in view the requirements of justice, fairness, and equity. In this manner, those who were declared qualified would retain their declared status even if they were lower down and had not qualified after re-valuation. The Court declared that

the final number of qualified candidates may, therefore, exceed the figure, but this should be accepted. However, the case of ***Pallav Mongia*** (supra) is slightly different. The Supreme Court noticed that the candidates in the first eligible list had not been excluded from the list of eligible candidates for appearing in the main examination, even if the candidate had come down in rank in view of deletion of some question or change in the model answer key. In these circumstances, it was directed that other candidates, who pursuant to re-valuation, had secured more marks than the last candidate should be allowed to appear in the main examination vide revised list. These candidates would be treated as qualified and included in the list. The decision in ***Pallav Mongia*** (supra) has no relevance to the present case. In ***Sumit Kumar versus High Court of Delhi and Another***, W.P. (C) No. 3453/2016, decided on 9th May, 2016, after referring to these two decisions, it was left to the High Court Administration to adopt an appropriate and proper method after deleting certain questions and issue of the corrigendum. However, the decisions passed in ***Pallav Mongia*** (supra) and ***Gunjan Sinha Jain*** (supra) would be kept in mind.

18. When we turn to the order passed by the Tribunal, in the present case, we find the Tribunal was conscious and aware of the problem and, therefore, had issued the following directions:-

> "15. At the same time, we cannot over look the fact that the applicants had been subjected to a long and drawn out process of selection lasting 2 ½ years and were on the verge of being appointed when the respondents decided to prepare

a revised merit list. As per respondents' own submission 53 persons, who figured in the earlier merit list, have been ousted in the revised list. Learned counsel for the applicants stated that many of the applicants have suffered as they had resigned from their previous jobs in preparation to join their new assignments. Many others have become over age to be appointed elsewhere.

16. We also notice that earlier respondents had advertised 142 vacancies of the post of Head Constable (AWO/TPO). Subsequently, this number was increased to 475 with further stipulation that number of vacancies may undergo a change. Under these circumstances, we dispose of this O.A. with a direction to the respondents to consider whether additional vacancies are available to appoint the applicants as well in addition to those figuring in the revised merit list. We are conscious of the fact that there may be some other candidates in between those figuring in the revised merit list and the applicants herein. That number is not known to us. Such candidates would also have to be appointed. Let the respondents examine and see whether without violating the merit of the selection process the applicants can be accommodated. This will, of course, be subject to availability of vacancies. The respondents may do so within next 08 weeks from the date of receipt of a certified copy of this order. No costs."

The directions given in paragraphs 15 and 16 were challenged before us in Writ Petition (C) No. 10748/2016, ***Raj Kumar Vaswan and Others versus Commissioner of Police and Others***, decided on 27th January, 2017 and the following directions were issued:-

"8. The respondents have filed affidavit dated 2nd December, 2016 wherein they have stated that 137 open unreserved category and 204 open OBC category vacancies for the posts were advertised. The number of vacancies for the open unreserved category and open OBC category was, as per paragraph 8 of the affidavit, subsequently revised to

123 and 184, respectively. However, the total number of posts advertised remained the same. Accordingly, on the basis of the second merit or final list, 123 open unreserved category and 184 open OBC category candidates were selected. In addition, six candidates belonging to the open unreserved category and nine candidates belonging to open OBC category were kept in the additional or waiting list. Candidates in the additional list are to be accommodated in case the open unreserved category or open OBC category candidates do not join or for some other reason not appointed.

9. The petitioners on the other hand have referred to the reply dated 24th August, 2016 received by them under the Right to Information Act as per which some of the selected open unreserved category candidates or open OBC candidates have not joined.

10. Counsel for the respondents has obtained instructions and accepts that 246 selected candidates have joined the training course. Some of the selected candidates were declared unfit in the medical examination or have not been issued appointment letters due to adverse police verification reports. Petitioners submit that there have been self cancellation also.

11. Learned counsel for the respondents, on instructions, accepts that they have not challenged the directions given in paragraph 16 of the order dated 16th July, 2016 and would abide and comply with the same. We take the said statement on record and would dispose of the present writ petition on the basis of the said statement and reiterating the directions given in paragraph 16 of the Tribunal's order dated 16th July, 2016.

12. We do acknowledge and would accept that the completion of the exercise in terms of paragraph 16 quoted above may take a little time as some of the rejected candidates can challenge their rejection and may also obtain stay orders. This would require a policy decision, by the

> respondents in accordance with the guidelines issued by Department of Personnel and Training. However, an expeditious and early decision in such matters and in terms of the directions given in paragraph 16 is desirable and always appreciated. It would curtail and prevent another round of litigation.
>
> 13. With the aforesaid observations, the writ petition is disposed of."

The aforesaid writ petition related to the open unreserved category and the open OBC category. In the two categories, vacant posts had been filled up. In the present case, however, the petitioners belong to the open Scheduled Caste category and, as noticed above, there were 20 vacancies, which have been carried forward. The respondents have to accordingly, in terms of the directions issued in paragraph 16 of the order dated 16th July, 2016, examine the issue keeping in mind different perspectives, including the contention of the petitioners as well as others in the same position as petitioners. It does appear that the respondents have decided not to accept the claim of the petitioners. However, due to the pendency of the present petition, it is apparent that no orders have been communicated and informed to the petitioners.

19. As the respondents have not challenged the directions given in paragraph 16 of the order dated 16th July, 2016, we dispose of the writ petition in terms of directions given in paragraphs 11 and 12 of the order dated 27th January, 2017 passed in ***Raj Kumar Vaswan and Others*** (supra). We would not like to comment or give any further directions in this regard as this is a complex issue, which will require

examination of not one facet, but several competing and different aspects. Whatever decision is taken by the respondents, the same would be communicated to the petitioners, who, if aggrieved, can take action as per law.

20. With the aforesaid observations and findings, the writ petition is disposed of. There will be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

September 8th, 2017
VKR

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(CRL) 978/2017 and Crl.M.A.5480/2017 (stay)

M/S CELEBI GROUND HANDLING DELHI PVT LTD & ANR

..... Petitioner

Through: Mr. H.K. Chaturvedi, Advocate with Petitioners in person.

versus

EMPLOYEES PROVIDENT FUND ORGANISATION & ANR

..... Respondent

Through: Ms.Inderjeet Sidhu, Advocate

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

O R D E R

% 18.04.2017

Heard for some time.

By the petition at hand, the petitioners question the prosecution on the basis of complaint instituted by the respondents alleging offence punishable under Section 14 (2) of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 primarily on the ground that the sanction accorded on 18.08.2015 by the Regional Provident Fund Commissioner-(II), Delhi (South) was bad and premature in as much as the order dated 22.06.2015 whereby certain directions under para 78(3) of the Employees Provident Fund Scheme, 1952 were issued would not come into effect prior to the wage month of September, 2015. It is submitted by the counsel for the petitioners that the trial is yet to commence.

The contentions of the petitioners on the above aspect are reserved and may be agitated before the learned trial court at the stage of consideration of the case for putting the petitioners to notice under Section 251 Cr.P.C.

With these directions the petition and the application are disposed of.

R.K.GAUBA, J.

APRIL 18, 2017
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ RSA 223/2017 & CM Nos. 33402-04/2017

P N PANDEY ..... Appellant

Through: Mr. H.K.Chaturvedi and Mr. Sagar Chaturvedi, Advs.
Appellant in person.

versus

VIJENDER KUMAR ..... Respondent

Through

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

O R D E R

% 13.09.2017

1. After arguments, this appeal is disposed of as not pressed but appellant prays for and is granted time to vacate the suit premises on or before 31.8.2018 subject to the appellant clearing arrears of mesne profits within a period of four months from today and to keep on regularly paying month by month mesne profits charges as determined by the judgments of the trial court and the first appellate court. Appellant will clear all charges towards electricity, water etc as payable for the suit premises till the time the appellant remains in possession of the suit premises.

2. Let the appellant file an affidavit of undertaking in terms of the present order within a period of two weeks from today and on the appellant filing the undertaking and complying with the terms of the undertaking appellant will not be evicted from the suit premises on or before 31.8.2018.

3. The appeal is disposed of as not pressed in terms of the aforesaid observations.

Dasti to counsel for the appellant.

VALMIKI J. MEHTA, J

SEPTEMBER 13, 2017
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 1342/2013 & CM No.2550/2013**

SIMRAN CHAUDRI AND ORS ..... Petitioners
Through: Mr.H.K.Chaturvedi, Advocate.

Versus

DEPUTY COMMISSIONER (SOUTH) & ORS ..... Respondents
Through: Ms.Sakshi Popli, Advocate for Respondents No.1 and 2.
Mr.N.S.Vashishth and Ms.Jyoti Kataria, Advocates for Respondents No. 4 to 6.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

O R D E R

% 07.09.2016

1. This writ petition has sought setting aside of the Recovery Certificate dated 03.10.2011 issued by the Deputy Labour Commissioner (South District) Govt. of NCT of Delhi and another letter dated 22.01.2013 issued by the Assistant Collector, Delhi, M.B. Road, Saket, Delhi.

2. The respondents/Government of NCT of Delhi through its affidavit of 19.10.2015 filed by Mr.Anuj Kumar Gupta, Assistant Collector Grade-II, Sub-Division Hauz Khas, New Delhi, has stated that:-

> "3. That a recovery certificate was issued by Asstt. Labour Commissioner south vide ID no. 1252/2004 dated 19/11/2009 and a request was made to Deputy Commissioner South to recover the amount of Rs 6,56,765 (Rupees Six Lac Fifty Six Thousand Seven Hundred And Sixty Five) along with interest of 6% P.A w.e.f 16/01/2013 from M/S Choudhary International

(P) Ltd., S-272, Panchshila Park, New Delhi 110017 in favour of Sh. Kedar Nath Malka.

4. That in response to the request of recovery certificate received from Labour Deptt., a notice dated 21/1/2013 was issued to M/S Choudhary International (P) Ltd., S 272, Panchshila Park, New Delhi 110017 at the address given in the recovery certificate which is annexed herein as Annextire Rl.

5. That in response to the above notice, a legal notice was received on 25/2/2013 on behalf of the petitioners in the present writ petition.

6. That it was stated in the legal notice that that Ms. Mohini Choudhary was the director of the M/S Choudhary International (P) Ltd. but she resigned from Board of Directors on 30/6/2001 and the photocopy of the said resignation was enclosed with the legal notice.

7. That it was further informed that Ms.Mohini Choudhary who was the director of the M/S Choudhary International (P) Ltd. but she resigned later, expired on 27/11/2011 and the copy of death certificate was annexed.

8. That it was also informed that there was no company in the name of M/S Choudhary International (P) Ltd. operating from the address S-272, Panchshila Park, New Delhi 110017.

9. That in view of the facts as stated above no action on the recovery notice dated 21/1/2013 was taken and the file was closed at the part of answering Respondent.

10. That no further clarification or request has been received from the ROC in the matter."

3. Since the Government itself has not taken any further action in the matter and has closed the file apropos the petitioner, no further orders are required in terms of the recovery notice.

4. In the circumstances, the petition has become *infructuous* and is disposed off accordingly. The pending application also stands disposed off.

NAJMI WAZIRI, J.

SEPTEMBER 07, 2016
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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: September 01, 2015

% *Judgment Delivered on: September 03, 2015*

\+ **LPA 697/2014**

THE MANAGEMENT OF RAMJAS PUBLIC SCHOOL (DAY BOARDING) REPRESENTED BY: ITS CHAIRMAN ..... Appellant

Represented by: Mr.H.K.Chaturvedi and Mr.B.K.Singh, Advocates.

versus

DHARMENDER & ORS ..... Respondents

Represented by: Mr.Anil Kumar Chandel, Advocate for R-1 to 8.
Mr.Pradeep Derodya, proxy counsel for Mr.Jitinder Mehta, Advocate for R-9.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Respondent Nos.1 to 8 raised an industrial dispute against M/s Ramjas Public School (Day Boarding), Anand Parbat, New Delhi and Smt.Promila Mehta, Proprietor of M/s Promila Mehta Caterers alleging illegal termination of their services on July 01, 2002 without any notice and without being paid any bonus for the last three years, EL and arrears of minimum wages w.e.f August 01, 2000.

2. It was the claim of respondent Nos.1 to 8 that they were appointed by Ramjas Public School however, the wages were paid to them through the contractor Vishwanath Mehta, Proprietor of M/s Karan Caterers. The workmen were protesting against this illegal contract policy of the

Management of Ramjas Public School. When Vishwanath Mehta died in May 2002 Ramjas Public School terminated their services as noted above. After the death of Vishwanath Mehta Ramjas Public School started taking work from the newly appointed workmen through Management No.2, that is, M/s Promila Mehta Caterers run by daughter-in-law of late Vishwanath Mehta, Proprietor of Karan Caterers. Ramjas Public School and M/s Karan Caterers were registered under the Abolition of Contract Act as principal employer and registered contractor, this contract, if any, was not valid under the law and the respondents No.1 to 8 were actually employees of Ramjas Public School.

3. After the evidence was led the learned Labour Court vide the award dated November 20, 2010 held that the services of respondent Nos.1 to 8 were illegally terminated granting the relief of reinstatement with continuity of service and 70% back wages. Challenging the award dated November 20, 2010 Ramjas Public School filed a writ petition being W.P.(C) No.3495/2011 which was dismissed vide the impugned order dated September 26, 2014 hence the present appeal.

4. Learned counsel for Ramjas Public School submits that no evidence was led by the workmen respondent Nos.1 to 8 to show that the salary was paid directly by the appellant. The only evidence led was of the payment of provident fund which was deposited by Ramjas Public School being the principal employer as per the Section 8A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (in short 'the EPF Act') and as the contractor Vishwanath Mehta was not registered with the Employees Provident Fund. Merely by depositing the provident fund Ramjas Public School could not be fastened with the liability of reinstatement and back

wages in respect of respondent Nos.1 to 8. Learned counsel urged that under Section 8A of the EPF Act, even for contract labour the management of the school had to deposit the provident fund of the contract labour and could recover the same from the contractor while making payment to the contractor. Section 8A referred to by learned counsel, reads as under:-

> *"**8A. Recovery of moneys by employers and contractors –***
>
> *(1) The amount of contribution (that is to say the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme, and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of any employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.*
>
> *(2) A contractor from whom the amounts mentioned in sub-Section (1) may be recovered in respect of any employee employed by or through him, may recover from such employee the employee's contribution under any Scheme by deduction from the basic wages, dearness allowance and retaining allowance if any payable to such employee.*
>
> *(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to in sub-Section (1) from the basic wages, dearness allowance, and retaining allowance (if any) payable to an employee employed by or through him or otherwise to recovery such contribution or charges from such employee."*

5. Respondent Nos.1 to 8 in their affidavits assert that they were appointed by the management of Ramjas Public School though the salary was paid through the contractor. Further no notice was given at the time of termination of the services on July 01, 2002 nor was the bonus amount paid for the last three years nor the minimum wages w.e.f August 01, 2000. There was no break in the service of the workmen and Ramjas Public School had full control and supervision on the day-to-day work of the respondent Nos.1 to 8 and the contractor was only kept to save itself from the stringent provisions of labour law.

6. In cross-examination respondent No.8 also pointed out that Shri Vishwanath Mehta was the father of the Principal of Ramjas Public School and after his death the daughter-in-law, that is, the sister-in-law of the Principal continued with the catering business. The evidence adduced by respondent Nos.1 to 8 which is reaffirmed by them in their cross-examination would reveal their stand that their supervision and control was with the Ramjas Public School. They were supposed to mark their attendance in school register which was separately maintained.

7. The workmen had called upon Ramjas Public School Management to produce the decision taken to invite offers from contractors to run the canteen, the contract if any entered into and the terms thereof. Vide order dated March 13, 2008 the Tribunal directed the management to produce the said record, which was not produced.

8. Whilst it may be true that under Section 8A of the EPF Act the principal employer is obliged to deposit the provident fund of the contract labour with the Employees Provident Fund Commissioner and can adjust the same while making the payment to the contractor, but no evidence has been

led by the appellant to prove that it adjusted the amount while making payment to the contractor. It also assumes importance that the appellant withheld best evidence i.e. the decision to invite offers from contractors to manage the canteen. It led no evidence to prove payments made to the contractor. This withholding of evidence assumes importance because concededly the so called contractor Sh.Vishwanath Mehta was admittedly the father of the principal of the school. The non-production of the record by the school certainly suggests that to siphon away some funds of the school payments were being made to Sh.Vishwanath Mehta but the canteen was being directly run by the management of the school.

9. From the evidence on record it can safely be held that the Ramjas Public School Management had the control and supervision over the respondent Nos.1 to 8 and were not merely paying provident fund being the principal employers as per Section 8A of the EPF Act, thus the contract if any between Ramjas Public School and the contractor is sham and a camouflage.

10. The Supreme Court in 2009 (13) SCC 374 *International Airport Authority of India vs.International Air Cargo Workers' Union & Anr.* dealing with Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 (in short 'CLRA Act') held:

> *"20. But where there is no abolition of contract labour under Section 10 of CLRA Act, but the contract labour contend that the contract between principal employer and contractor is sham and nominal, the remedy is purely under the ID Act. The principles in Gujarat Electricity Board continue to govern the issue. The remedy of the workmen is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct*

employees of the principal employer and the agreement is sham, nominal and merely a camouflage, even when there is no order under Section 10(1) of CLRA Act. The industrial adjudicator can grant the relief sought if it finds that contract between principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short who has direction and control over the employee. But where there is no notification under Section 10 of the CLRA Act and where it is not proved in the industrial adjudication that the contract was sham/nominal and camouflage, then the question of directing the principal employer to absorb or regularize the services of the contract labour does not arise. The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends

the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

11. Looked at from any angle there is no merit in the appeal which is dismissed but without any order as to costs.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

SEPTEMBER 03, 2015
'vn'

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: September 01, 2015

% *Judgment Delivered on: September 03, 2015*

\+ **LPA 697/2014**

THE MANAGEMENT OF RAMJAS PUBLIC SCHOOL (DAY BOARDING) REPRESENTED BY: ITS CHAIRMAN ..... Appellant

Represented by: Mr.H.K.Chaturvedi and Mr.B.K.Singh, Advocates.

versus

DHARMENDER & ORS ..... Respondents

Represented by: Mr.Anil Kumar Chandel, Advocate for R-1 to 8.
Mr.Pradeep Derodya, proxy counsel for Mr.Jitinder Mehta, Advocate for R-9.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Respondent Nos.1 to 8 raised an industrial dispute against M/s Ramjas Public School (Day Boarding), Anand Parbat, New Delhi and Smt.Promila Mehta, Proprietor of M/s Promila Mehta Caterers alleging illegal termination of their services on July 01, 2002 without any notice and without being paid any bonus for the last three years, EL and arrears of minimum wages w.e.f August 01, 2000.

2. It was the claim of respondent Nos.1 to 8 that they were appointed by Ramjas Public School however, the wages were paid to them through the contractor Vishwanath Mehta, Proprietor of M/s Karan Caterers. The workmen were protesting against this illegal contract policy of the

Management of Ramjas Public School. When Vishwanath Mehta died in May 2002 Ramjas Public School terminated their services as noted above. After the death of Vishwanath Mehta Ramjas Public School started taking work from the newly appointed workmen through Management No.2, that is, M/s Promila Mehta Caterers run by daughter-in-law of late Vishwanath Mehta, Proprietor of Karan Caterers. Ramjas Public School and M/s Karan Caterers were registered under the Abolition of Contract Act as principal employer and registered contractor, this contract, if any, was not valid under the law and the respondents No.1 to 8 were actually employees of Ramjas Public School.

3. After the evidence was led the learned Labour Court vide the award dated November 20, 2010 held that the services of respondent Nos.1 to 8 were illegally terminated granting the relief of reinstatement with continuity of service and 70% back wages. Challenging the award dated November 20, 2010 Ramjas Public School filed a writ petition being W.P.(C) No.3495/2011 which was dismissed vide the impugned order dated September 26, 2014 hence the present appeal.

4. Learned counsel for Ramjas Public School submits that no evidence was led by the workmen respondent Nos.1 to 8 to show that the salary was paid directly by the appellant. The only evidence led was of the payment of provident fund which was deposited by Ramjas Public School being the principal employer as per the Section 8A of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (in short 'the EPF Act') and as the contractor Vishwanath Mehta was not registered with the Employees Provident Fund. Merely by depositing the provident fund Ramjas Public School could not be fastened with the liability of reinstatement and back

wages in respect of respondent Nos.1 to 8. Learned counsel urged that under Section 8A of the EPF Act, even for contract labour the management of the school had to deposit the provident fund of the contract labour and could recover the same from the contractor while making payment to the contractor. Section 8A referred to by learned counsel, reads as under:-

> *"**8A. Recovery of moneys by employers and contractors –***
>
> *(1) The amount of contribution (that is to say the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme, and any charges for meeting the cost of administering the Fund paid or payable by an employer in respect of any employee employed by or through a contractor may be recovered by such employer from the contractor, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.*
>
> *(2) A contractor from whom the amounts mentioned in sub-Section (1) may be recovered in respect of any employee employed by or through him, may recover from such employee the employee's contribution under any Scheme by deduction from the basic wages, dearness allowance and retaining allowance if any payable to such employee.*
>
> *(3) Notwithstanding any contract to the contrary, no contractor shall be entitled to deduct the employer's contribution or the charges referred to in sub-Section (1) from the basic wages, dearness allowance, and retaining allowance (if any) payable to an employee employed by or through him or otherwise to recovery such contribution or charges from such employee."*

5. Respondent Nos.1 to 8 in their affidavits assert that they were appointed by the management of Ramjas Public School though the salary was paid through the contractor. Further no notice was given at the time of termination of the services on July 01, 2002 nor was the bonus amount paid for the last three years nor the minimum wages w.e.f August 01, 2000. There was no break in the service of the workmen and Ramjas Public School had full control and supervision on the day-to-day work of the respondent Nos.1 to 8 and the contractor was only kept to save itself from the stringent provisions of labour law.

6. In cross-examination respondent No.8 also pointed out that Shri Vishwanath Mehta was the father of the Principal of Ramjas Public School and after his death the daughter-in-law, that is, the sister-in-law of the Principal continued with the catering business. The evidence adduced by respondent Nos.1 to 8 which is reaffirmed by them in their cross-examination would reveal their stand that their supervision and control was with the Ramjas Public School. They were supposed to mark their attendance in school register which was separately maintained.

7. The workmen had called upon Ramjas Public School Management to produce the decision taken to invite offers from contractors to run the canteen, the contract if any entered into and the terms thereof. Vide order dated March 13, 2008 the Tribunal directed the management to produce the said record, which was not produced.

8. Whilst it may be true that under Section 8A of the EPF Act the principal employer is obliged to deposit the provident fund of the contract labour with the Employees Provident Fund Commissioner and can adjust the same while making the payment to the contractor, but no evidence has been

led by the appellant to prove that it adjusted the amount while making payment to the contractor. It also assumes importance that the appellant withheld best evidence i.e. the decision to invite offers from contractors to manage the canteen. It led no evidence to prove payments made to the contractor. This withholding of evidence assumes importance because concededly the so called contractor Sh.Vishwanath Mehta was admittedly the father of the principal of the school. The non-production of the record by the school certainly suggests that to siphon away some funds of the school payments were being made to Sh.Vishwanath Mehta but the canteen was being directly run by the management of the school.

9. From the evidence on record it can safely be held that the Ramjas Public School Management had the control and supervision over the respondent Nos.1 to 8 and were not merely paying provident fund being the principal employers as per Section 8A of the EPF Act, thus the contract if any between Ramjas Public School and the contractor is sham and a camouflage.

10. The Supreme Court in 2009 (13) SCC 374 *International Airport Authority of India vs.International Air Cargo Workers' Union & Anr.* dealing with Section 10 of the Contract Labour (Regulation and Abolition) Act, 1970 (in short 'CLRA Act') held:

> *"20. But where there is no abolition of contract labour under Section 10 of CLRA Act, but the contract labour contend that the contract between principal employer and contractor is sham and nominal, the remedy is purely under the ID Act. The principles in Gujarat Electricity Board continue to govern the issue. The remedy of the workmen is to approach the industrial adjudicator for an adjudication of their dispute that they are the direct*

employees of the principal employer and the agreement is sham, nominal and merely a camouflage, even when there is no order under Section 10(1) of CLRA Act. The industrial adjudicator can grant the relief sought if it finds that contract between principal employer and the contractor is sham, nominal and merely a camouflage to deny employment benefits to the employer and that there is in fact a direct employment, by applying tests like: who pays the salary; who has the power to remove/dismiss from service or initiate disciplinary action; who can tell the employee the way in which the work should be done, in short who has direction and control over the employee. But where there is no notification under Section 10 of the CLRA Act and where it is not proved in the industrial adjudication that the contract was sham/nominal and camouflage, then the question of directing the principal employer to absorb or regularize the services of the contract labour does not arise. The tests that are applied to find out whether a person is an employee or an independent contractor may not automatically apply in finding out whether the contract labour agreement is a sham, nominal and is a mere camouflage. For example, if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a direct employee of the principal employer, if the salary is paid by contractor, if the right to regulate employment is with the contractor, and the ultimate supervision and control lies with the contractor. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/allotted to the principal employer or used otherwise. In short worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends

the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor."

11. Looked at from any angle there is no merit in the appeal which is dismissed but without any order as to costs.

(MUKTA GUPTA)
JUDGE

(PRADEEP NANDRAJOG)
JUDGE

SEPTEMBER 03, 2015
'vn'

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Order delivered on: 23rd November, 2015*

\+ **CS (OS) No.2857/2014**

SRIRAM COMPOUNDS PVT. LTD. .....Plaintiff
Through Mr. H.K.Chaturvedi, Adv.

versus

SANJAI GUPTA & ORS. ..... Defendants
Through Defendants are ex parte.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The plaintiff has filed a summary suit under Order XXXVII CPC for recovery of a sum of Rs.21,80,596/- along with pendent lite and future interest @ 24% per annum.

2. Brief facts of the case as per plaint are that the plaintiff is a private limited company registered under the provisions of the Companies Act, 1956. Defendant Nos. 1 to 3 are the partners of M/s Shivam Industries having their factory at Sector-A, Plot No.301, 325, Pitampur, District Dhar, Madhya Pradesh. Defendant No.4 is a partnership firm and is being prosecuted through defendant No.1.

3. It is averred in the plaint that the defendants purchased materials from the plaintiff against purchase order No.SRG/SH/04 dated 6th November, 2008 for which the plaintiff raised invoice No. 383 dated 17th November,2008 and invoice No.400 dated 27th November, 2008 for a total sum of Rs.15,76,380/-. Out of the aforesaid principal amount of Rs.15,76,380/-, the defendants had made a part payment through

online transactions of Rs.3,00,000/- in two parts i.e. Rs.2,00,000/- on 28th December, 2008 and Rs.1,00,000/- on 12th January, 2009 which has already been adjusted. On 31st March, 2009 the plaintiff further had given a discount of Rs.16,100/- to the defendants. Hence, a sum of Rs.12,60,280/- [Rs.15,76,380/- (Principal Amount) – Rs.3,16,100/- (Adjusted Amount)] is due and recoverable from the defendants with interest @ 24% per annum.

4. Thereafter, the defendants in discharge of their liabilities issued 7 cheques on two occasions. On the first occasion, the defendants issued 4 cheques along with a covering letter dated 20th March, 2009 bearing Nos. 611351 dated 25th April, 2009 for Rs.2,00,000/-, 611352 dated 19th May,2009 for Rs.2,00,000/-, 611353 dated 10th June, 2009 for Rs.2,18,007/- and 611354 dated 20th June, 2009 for Rs.1,42,273/- all drawn on Union Bank of India, Sindhi Colony, Indore-452001. On the second occasion , the defendants further issued 3 more post dated cheques i.e. 603241 dated 7th May, 2011 for Rs.2,00,000/-, 603242 dated 9th May, 2011 for Rs.2,00,000/- and 603243 dated 10th May, 2011 for Rs.1,00,000/- all drawn on Union Bank of India, Sindhi Colony, Indore-452001 in favour of the plaintiff.

5. The plaintiff presented the said cheques issued on the first occasion for encashment to its banker but all the cheques were returned unpaid vide Memo(s) dated 15th July, 2009, 15th July, 2009, 19th June, 2006 and 30th June, 2006 with the remarks 'insufficient funds'. The plaintiff also presented the cheques issued on the second occasion by the defendants with its bankers which were also returned unpaid vide memo dated 12th May, 2011.

6. Thereafter, the plaintiff issued legal notices dated 24th July, 2009 and 14th July, 2009 under Section 138 of the Negotiable Instruments Act, 1881 to M/s Shivam Industries. However, the defendants despite receiving the legal notice failed to make the payment of the unpaid cheques. The plaintiff also filed a complaint under Section 138 Negotiable Instruments Act, 1881 against the defendants which is pending in the court of Chief Judicial Magistrate, Gautam Budh Nagar.

7. It is further stated that the defendants admitted its liability vide email dated 26th October, 2012 for Rs.15,10,280/- payable by them to the plaintiff as under:-

Admitted amount (as per email dated 26th October, 2012 of the defendant)	Rs.15,10,280/-
Interest on the above @24% p.a. on principal amount (as per invoice dated 17th November,2008 and 27th November,2008) (Interest from 26th October, 2012 to 1st September, 2014)	Rs.6,70,316/-
Total	Rs.21,80,596/-

8. When the matter was listed before the Court, no one appeared on behalf of the defendants nor an application for leave to defend was filed and consequently, they were proceeded *ex parte* vide order dated 24th February, 2015.

9. Thereafter, Mr. Sameer Kaushik working as Manager Legal of the plaintiff Company filed his affidavit wherein he deposed that as per email dated 26th October, 2012 sent by Shivam Industries to him as well

as to the plaintiff Company and also to the Board of Directors, the defendants admitted its total payable amount of a sum of Rs. 15,10,280/- as full and final amount. The plaintiff Company, in view of the full and final settlement amount as admitted by the defendants did not re-file its 4 criminal complaints under Section 138 of Negotiable Instruments Act,1881 before the competent court after receiving the original complaint from the Gautam Budh Nagar court. The original 4 complaints along with original cheques and other original documents have been filed as per order dated 24th February, 2015.

10. He deposed that as per the plaintiff's books of accounts maintained against the defendants, a sum of Rs.32,32,868/- is payable by the defendants as on 15th May, 2015. However, the suit has been filed on the basis of admitted amount of Rs.15,10,280/- as per email dated 26th October, 2012 and interest has been calculated on the above admitted amount of Rs.15,10,280/- from 26th October, 2012 @ 24% p.a. as per invoices of the plaintiff.

11. He further deposed that as per email dated 23rd October, 2012 through which the defendants emailed 6 scanned copies of demand drafts totalling to Rs.13,60,280/- which was immediately replied and objected by the plaintiff through him vide his email dated 26th October, 2012 sent to the defendants in which he specifically pointed out *"The amount in the trailing mail is not the amount of settlement agreed by Mr. Sanjai Gupta and Mr. Aas Mohd. Advocate"*. Thereafter, he reminded the defendants that Rs.13,60,280/- was not the amount which was settled. The full and final settled amount of Rs.15,10,280/- was admitted by the defendants vide email dated 26th October, 2012 wherein the defendants emailed 2 more demand drafts of Rs.15,10,280/- which was agreed to be handed over by the defendants

to the plaintiff on 4th November, 2012. However, the defendants backed out from the settlement.

12. Mr. Sameer Kaushik also filed his additional affidavit dated 19th November, 2015 wherein he deposed that the defendants as per their settlement with the plaintiff got prepared 8 demand drafts for the amount of Rs.15,10,280/- which was exactly the same amount of the settlement. He also deposed that the plaintiff Company has only received the scanned copies of all the 8 demand drafts from the defendants and till date no original demand drafts have been received by the plaintiff Company from the defendants. Thus, original demand drafts have not been placed on records.

13. The plaintiff has filed original documents pertaining to the complaints filed by him under Section 138 Negotiable Instruments Act, 1881 against the defendants as well as the legal notices issued to the defendants. Besides, the plaintiff has also placed on record the original cheques issued by the defendants to the plaintiff.

14. The claim raised by the plaintiff is uncontested. In view of the above, the suit of the plaintiff is decreed for a sum of Rs. 21,80,596/- against the defendants. The plaintiff is also entitled for pendent lite and future interest @ 12% per annum from the date of filing of the suit till the date of payment as the rate of interest @ 24% claimed by the plaintiff in the plaint is on the higher side.

15. The plaintiff is also entitled for costs.

16. Decree be drawn accordingly.

(MANMOHAN SINGH)
JUDGE

NOVEMBER 23, 2015

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 05th October, 2016**

\+ FAO 213/2013 and CM No.5279/2015 & 9492/2015

N K VERMA ..... Appellant

Through: Mr. H.K. Chaturvedi, Advocate

versus

BABITA & ORS. ..... Respondents

Through: Mr. R.K. Tarun and Mr. Deepak Kumar, Advocates for respondent No.1
Mr. K.P. Mavi, Advocate for respondent No.4.

CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT (ORAL)

1. The appellant has challenged the order of Commissioner, Employees' Compensation whereby compensation of Rs.3,98,800/- has been awarded to respondents No.1 to 3.

2. On 31st May, 2007, Ram Rattan suffered an accident resulting in 100% burn injuries during the course of his employment with M/s Pieco International Engineering Company. Ram Rattan was taken to G.T.B. Hospital where he remained for five days. Ram Rattan succumbed to the burn injuries on 04th June, 2007. Ram Rattan was survived by his widow and two minor children who filed the application for compensation before Commissioner, Employees'

Compensation.

3. M/s Pieco International Engineering Company, contested the claim petition mainly on the ground that the deceased was covered under ESI Act vide Insurance No.11638310.

4. Learned counsel for the appellant urged at the time of hearing that the Commissioner, Employees' Compensation has not dealt with the appellant's objection in the impugned order dated 18th February, 2013.

5. Vide order dated 15th April, 2015, this Court impleaded ESI Corporation as respondent No.4 and directed them to produce the relevant record and confirm whether the deceased was covered under the ESI Act.

6. ESI Corporation have filed an affidavit dated 15th March, 2016 in which they have taken the stand that deceased Ram Rattan was not covered under the ESI Act.

7. Learned counsel for the appellant disputes the averments made by ESI Corporation in the affidavit dated 15th March, 2016.

8. This Court is of the *prima facie* view that the issue as to whether the deceased Ram Rattan was covered under the ESI Act or not warrants adjudication after recording of the evidence.

9. In the facts and circumstances of this case, following issue is framed for adjudication of Commissioner, Employees' Compensation:-

(a) Whether the deceased Ram Rattan was covered under the ESI

Act on the date of the accident as alleged by the appellant? If so, its effect.

10. The case is remanded back to the Commissioner, Employees' Compensation for adjudication of the aforesaid issue.

11. The appellant has already deposited Rs.7,70,995/- (Rs.6,78,000/- + Rs.92,995/-) in terms of the award of the Commissioner, Employees' Compensation and the said amount is lying in fixed deposit with UCO Bank, Delhi High Court Branch.

12. UCO Bank, Delhi High Court Branch is directed to release 25% of the amount to respondent No.1 by transferring the same to her individual savings bank account. The balance amount be kept in three FDRs of 25% each, in the following manner:-

(i) FDR in respect of 25% amount in the name of respondent No.1 for a period of 1 year.

(ii) FDR in respect of 25% amount in the name of respondent No.2 till she attains majority.

(iii) FDR in respect of 25% amount in the name of respondent No.3 till she attains majority.

13. At the time of maturity, the fixed deposit amount shall be credited in the individual savings bank accounts of the beneficiaries/respondents.

14. Monthly interest on the FDRs of respondents shall be credited in the individual savings bank account of respondent No.1.

15. All the original FDRs shall be retained by UCO Bank, Delhi High Court Branch. However, the photocopies of the same shall be

provided to the claimants/respondents.

16. No cheque book or debit card be issued to the claimants/respondents without permission of this Court.

17. No loan or advance or pre-mature discharge shall be permitted without the permission of this Court.

18. The claimants/respondents shall approach the UCO Bank, Delhi High Court Branch for completing the formalities for the disbursement of the award amount in terms of this order.

19. UCO Bank, Delhi High Court Branch shall ensure that the savings bank accounts of respondents are individual accounts and not joint accounts.

20. The claimants/respondents are at liberty to approach this Court for release of further amount in case of any financial exigency.

21. In the event of appellant succeeding in the issue framed by this Court, the appellant shall be entitled to claim the aforesaid amount from ESI Corporation.

22. List before Commissioner, Employees' Compensation on 28th November, 2016 when the Commissioner shall fix the case for the appellant's evidence on the issue framed. ESI Corporation shall file the copy of the affidavit dated 15th March, 2016 along with the documents before Commissioner, Employees' Compensation on the date fixed. The aforesaid affidavit shall be considered as pleadings of ESI Corporation on the issue and the appellant shall file the reply thereto within a period of three weeks thereafter. The appellant shall

first lead the evidence and thereafter, Commissioner, Employees' Compensation shall afford an opportunity of evidence to ESI Corporation.

23. All pending applications are disposed of.

24. Copy of this judgment be given *dasti* to counsels for the parties under signatures of the Court Master.

J.R. MIDHA, J.

OCTOBER 04, 2016
rsk

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ LPA 47/2013

MUNNA PRASAD

..... Appellant

Through Mr H.K. Chaturvedi, Adv.

versus

MANAGEMENT OF SAWHNEY RUBBER INDUSTRIES

..... Respondent

Through Mr Saurabh Chadda, Adv. for ESIC

\+ LPA 186/2013

SAWHNEY RUBBER INDUSTRY

..... Appellant

Through Mr H.K. Chaturvedi, Adv.

versus

MUNNA LAL

..... Respondent

Through Mr Saurabh Chadda, Adv. for ESIC

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MS. JUSTICE SUNITA GUPTA

O R D E R

% 16.09.2016

Learned counsel appearing for ESIC submits that the affidavit was filed on 15.09.2016. Copy of the said affidavit has been furnished to counsel for the petitioners.

Learned counsel for the appellants submits that he will obtain instructions whether the appellant wants to take recourse to appropriate remedy in accordance with law for challenging the regulations.

It is also submitted by learned counsel for the appellants that an amount of Rs.2 lacs and the interest accrued of Rs.60,000/- has not been released.

The Registry will examine this aspect and if payment has not been made, the payment should be immediately made.

The appeals stand already disposed of.

SANJIV KHANNA, J

SUNITA GUPTA, J

SEPTEMBER 16, 2016/*rd*

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 2292/2014 and C.M. APPL. No.4812/2014

D.N. SINGH ..... Petitioner

**Through: Mr. Dushyant K. Mahant, Advocate
along with petitioner in person.**

versus

MANAGEMENT OF M/S HOTEL THE OBEROI ..... Respondent

Through: Mr. Anil Bhat, Advocate.

CORAM:

HON'BLE MR. JUSTICE V.P.VAISH

O R D E R

20.02.2015

This is a petition under Articles 226 and 227 of the Constitution of India against order dated 05.03.2014 passed by learned Presiding

Officer, Labour Court, Karkardooma Courts, Delhi whereby the application under Order XII Rule 6 CPC read with Section 11 of Industrial Disputes Act, 1947 filed on behalf of the petitioner was dismissed.

After some arguments, learned counsel for the petitioner submits that petitioner does not want to press the present petition as well as the application and the same be dismissed as withdrawn.

In this regard, the statement of petitioner has been recorded separately.

As prayed, the petition as well as application are dismissed as withdrawn.

V.P.VAISH, J

FEBRUARY 20, 2015

hs

W.P.(C) 2292/2014

Statement of Mr. D.N. Singh, S/o. Shri S.S. Shastri, aged about 57 years, R/o. F-99, Pandav Nagar, New Delhi ? 110091

ON S.A.

I have filed the petition bearing W.P.(C) No.2292/2014. I do not want to pursue the present petition as well as application bearing C.M. Appl. No.4812/2014 and the same be dismissed as withdrawn.

(VED PRAKASH VAISH)

JUDGE

RO and AC

20.02.2015

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1.	LPA 486/2013 [DISPOSED OFF] Order(s) Judgement(s)	ROMI SHARMA & ANR Vs. SECRETARY LABOUR & ORS. Advocate : H.K. CHATURVEDI & ANJALI CHATURVEDI	Court No. : 5 DISPOSED OFF on 05/11/2015

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.REV.P. 99/2015 & Crl.M.A.2471/2015

RITESH GULSHANMAL VASWANI

..... Petitioner

Through : Mr.H.K.Chaturvedi, Advocate.

versus

UMA RANI

..... Respondent

Through : Mr.Rakesh Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

O R D E R

% 04.12.2015

(1) Learned counsel for the petitioner seeks permission to withdraw the revision petition as the matter has been settled before Mediation Centre, Saket.

(2) The revision petition is dismissed as withdrawn.

(3) All pending application(s) also stand disposed of.

S.P.GARG, J

DECEMBER 04, 2015 / sa

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ LPA 302/2015

VIR BAHADUR ..... Appellant
Represented by: Mr.H.K.Chaturvedi, Advocate

versus

FOOD CORPORATION OF INDIA & ANR ..... Respondents
Represented by: Mr.Ajit Pudussery, Advocate with
Ms.Shruti Sarna Hazarka, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

O R D E R

% 25.08.2015

1. Learned counsel for the appellant states that he has been instructed by the appellant to withdraw the appeal and file an appropriate application before the learned Single Judge concerning the impugned judgment and order dated January 15, 2015.

2. The appeal is dismissed as withdrawn.

3. Needless to state if the appellant were to file an application before the learned Single Judge concerning the order dated January 15, 2015 the same shall be decided as per law.

4. No costs.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

AUGUST 25, 2015/*mamta*

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 3rd December, 2015

\+ W.P.(C) 3912/2011

DTC ..... Petitioner

Through: Mr Sunil Kumar Ojha, Advocate

Versus

RAJENDER KUMAR ..... Respondent

Through: Mr H.K. Chaturvedi, Advocate

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. By virtue of this writ petition under Article 226 r/w Article 227 of the Constitution of India, the petitioner seeks quashing/setting aside of the impugned award dated 9th December, 2009 in ID No. 251/08/92 passed by the Presiding Officer, Labour Court, KKD Courts, Delhi.

2. The respondent (hereinafter referred to as 'the workman') was working as a sweeper/cleaner with the petitioner/Delhi Transport Corporation (hereinafter referred to as 'Corporation') since April, 1983. His services were terminated vide letter dated 6th July, 1990. As such, an industrial dispute was raised by him which was referred by the Govt. of NCT of Delhi to Labour Court vide reference No. F.24(938)/92-Lab./12378-83 dated 30th April, 1992 with following terms of reference:-

> *"Whether the removal of Sh. Rajender Kumar from service by the management is illegal and/or unjustified and if so to what relief is he entitled and what directions are necessary in this respect?"*

3. The workman filed a statement of claim alleging *inter alia* that he was working as a sweeper cleaner. He was given a charge sheet dated 29th November, 1988 on the ground that he was availing leave without wages. The workman replied the charges and explained that he submitted leave applications due to his own sickness and that of his son and wife during November, 1987 to October, 1988. Inquiry was held and the findings were in favour of the workman but management rejected the findings of the inquiry officer. Without giving any reasons, *de novo* enquiry was ordered. Thus, the second inquiry is illegal which held the workman guilty of the charges. He was removed from service by letter dated 6th July, 1990.

4. Management contested the claim by stating that workman was not showing any interest in work. He availed 118 days leave without pay. He submitted medical certificate for 41 days only. It was admitted that second inquiry was conducted since first inquiry was not satisfactory. The inquiry officer had afforded full opportunities to the workman. Workman accepted the charges without any pressure. The order of removal is justified.

5. On the basis of above reference, the Labour Court-I in ID 183/92, passed an award dated 25th May, 1999 holding the termination to be illegal and that the workman was entitled for reinstatement with full back wages.

6. The award was challenged by the management by filing WP No.4030/2001. Vide order dated 10.11.2004, this Court set aside the award and remanded the matter back to the Labour Court to proceed in accordance with law.

7. The workman filed WP No. 7620/2000 for implementation of the award in ID No.183/92 and for initiating penal action against the management. This Court vide order dated 3rd February, 2005, directed that the workman be

reinstated in terms of the award.

8. CMP No.6143/05 was filed by the Corporation in aforesaid writ petition bearing WP No.7620/2000 and the High Court vide order dated 3rd February, 2005 passed the following order:-

> "*Be that as it may, once the writ petition filed by the DTC against the award dated 25.05.1999, was remanded back for fresh adjudication, therefore, the order dated 03.02.2005, could not have been passed giving directions for the implementation of the same very award."*

9. Parties were directed to appear before the Labour Court on 25.05.2009 in terms of the order in WP No.4030/2001.

10. Pursuant to the directions given by the Court, the parties led their evidence and vide impugned award dated 9th December, 2009, the management was directed to reinstate the workman with continuity of service in the same post by paying the workman a lump sum amount of Rs.50,000/- towards back wages.

11. Challenging this award, present writ petition has been filed.

12. Learned counsel for the petitioner submits that the workman remained absent from his duty without intimation/prior approval for 118 days during the period November, 1987 to October, 1988 which reflected his complete indifference and carelessness towards duty and his action amounted to misconduct within the meaning of paras 4 and 19 (h) & (m) of Standing Orders governing the conduct of the DTC employees. The reply submitted by the workman was not found to be satisfactory. As such, the disciplinary inquiry was conducted against him. The first inquiry report was submitted whereby the workman was let off, as such, *de novo* inquiry was conducted wherein the workman admitted having taken leave without pay due to his illness and illness of his children. He was found guilty in the second inquiry. Pursuant thereto after affording opportunity to the

workman of showing cause as to why he should not be removed from service of the Corporation, vide letter dated 6th July, 1990 he was removed from service. Counsel submits that mere making leave application does not tantamount to sanction of leave. Moreover, it was admitted by the workman that for a period of 37 days he did not submit any application for grant of leave. Reference was also made to his past conduct which was not found to be unblemished. As such there was no justification for directing the reinstatement of the workman along with lumpsum compensation amount towards back wages. Reliance was placed on ***DTC vs. Sardar Singh***, (2004) 7 SCC 574 and a judgment passed by this Court in WP No.3798/2011, ***Delhi Transport Corporation vs. Nain Singh*** on 20th October, 2015.

13. Rebutting the submission, learned counsel for the respondent submits that the first award was passed on 25th May, 1999 whereby the workman was ordered to be reinstated with full back wages. The workman applied for implementation of the award by filing writ petition No.7620/2000. This Court took into consideration the findings recorded by the Labour Court to the first inquiry conducted against the workman where it was recorded as under:-

> *"Besides in the findings of the 1st Enquiry Officer, Shri A.S. Bains, proved as Ex.MW1/8 by the claimant he has also taken the same view when he observed as under:-*
>
> > *"So the charges levelled against the D.E. that he availed leave without pay for 118 days, is not proved and established as the leave have been regularized and has been duly sanctioned. Clause 19(h) is not applicable to the D.E."*
>
> *It is a case of conduct of enquiry against an employee without misconduct. The enquiry as such is vitiated and so is the fate of the findings of the 2nd Enquiry Officer who found the claimant guilty of the charges on which basis the management removed the claimant from service."*

Relying upon these findings, it was observed that the leave without pay for 118 days was sanctioned and regularized by the management. If the leave was

sanctioned and regularized in accordance with rules by the competent authority then it would not have the element of misconduct and, therefore, the case of ***Sardar Singh***(supra) was distinguished. Counsel further submits that in the first inquiry, the workman was exonerated of the charges levelled against him, there was no occasion to have *de novo* fresh inquiry. Moreover, as per the charge sheet itself, there is no allegation of the workman remaining absent from duty. Referring to the scope of interference by this Court while exercising writ jurisdiction, it is submitted that there is no warrant for interference with the findings of the Labour Court and, as such, the petition deserves to be dismissed.

14. In response, counsel for the petitioner submits that the workman cannot get any benefit from the observations made in the Writ Petition No.7620/2000 filed by the workman for implementation of the earlier award since this order was set aside pursuant to the review application filed by the petitioner/Corporation.

15. I have given my considerable thoughts to the respective submissions of the learned counsel for the parties and have perused the record. It is not in dispute that after the charge sheet dated 29th November, 1988 was served upon the workman for availing leave without wages during the period November, 1987 to October, 1988, a domestic inquiry was conducted against him and the findings were given in favour of the workman. None of the parties have placed on record the findings of the first inquiry. However, as stated above, in writ petition No.7620/2000, the findings of the first inquiry officer which were referred by the Labour Court while passing the award dated 25th May, 1999 were reproduced which reflected that the leave for the period 118 days was regularized and was duly sanctioned. That being so, clause 19(h) of the standing order was not applicable. No reason has been assigned by the petitioner/Corporation as to why this inquiry report was not accepted and what was the reason for conducting a *de novo* inquiry which gave a finding against the workman. That is not the end of the

matter. After the matter was remanded back by this Court to the Labour Court setting aside the earlier award dated 25th May, 1999, both the parties led their evidence. The charge against the workman was that of availing 118 days leave without pay and thereby showing lack of interest in the working of the Corporation. However, the evidence reflected that the workman had submitted medical certificates for 41 days. Except for 37 days for which no leave application was moved, for the balance period, leave was taken for different reasons. In view of this evidence coming on record, the Labour Court opined that the order of penalty of removal from service passed by the management is not justified for the following reasons:-

> *a) The explanation given by the workman that he was suffering and was made to take leave is proved by the very documents of leave application and copies of medical certificates produced by the management.*
>
> *b) The period of leave for which leave applications were submitted is covering the period of accusation in the charge sheet.*
>
> *c) The workman cannot be said to have availed intentional leave so as to exhibit lack of interest for the entire period of 118 days as contained in the charges, since the workman had submitted leave applications for a part period.*
>
> *d) The evidence reveals that the management could only establish that the workman had not submitted the leave applications for 37 days. In the present case, this is not precise charge to impute lack of interest on the part of the workman in the duties of the corporation.*
>
> *e) The charge as it is framed is not proved to the hilt except for a period of 37 days.*
>
> *f) The documents and the explanation given by the workman to the charge sheet and that of the contention of the workman in the rebuttal evidence are seemingly probable that he was suffering from ailment which cannot be held as showing lack of interest.*
>
> *h) The rebuttal evidence of the workman that he had never lost interest in the working of the corporation is to be reckoned in view of the above which shows that the charges as framed by the management are not proved completely before this Court. Hence, for the aforesaid reasons, I find that the order of*

removal is not justified and the workman is entitled for reinstatement.

16. No fault can be found with these findings of the Labour Court. As per the report of first inquiry officer, the leave was regularized and was duly sanctioned, that being so, it cannot be said that clause 19(h) is applicable. Under the circumstances, ***Sardar Singh's*** case is distinguishable. The petitioner does not get any help from ***Nain Singh's*** case where on the peculiar facts and circumstances of the case, the termination was held to be legal. Moreover, keeping in view the fact that the charge against the workman remain confined to not submitting leave application for 37 days coupled with the past conduct showing obtaining excessive leave during the year 1986 for which he suffered minor penalty, instead of awarding back wages, the workman was granted only a lump sum compensation of Rs.50,000/- towards back wages. The aforesaid finding cannot be said to be perverse which warrants interference by this Court.

17. Moreover, this Court in exercise of writ jurisdiction would interfere with the orders of the Tribunals/Authorities under its jurisdiction only on finding the order to be in excess of jurisdiction vested in such Tribunal or Authority or in failure to exercise jurisdiction. The writ jurisdiction is not intended to be the same as an appellate jurisdiction. (See ***Veerappa Pillai v. Raman and Raman Ltd.,*** AIR 1952 SC 192; ***Syed Yakoob v. K.S. Radhakrishnan,*** AIR 1964 SC 477 and ***Sadhu Ram v. Delhi Transport Corporation***, AIR 1984 SC 1467). Ordinarily, an order of the Tribunal/Authority if within its power and if based on reasons would not be interfered merely because this Court may have formed a different opinion.

18. The Hon'ble Supreme Court in ***Ashok Kumar v. Sita Ram,*** (2001) 4 SCC 478 held as under:-

> *"The question that remains to be considered is whether the High Court in exercise of writ jurisdiction under Article 226 of the Constitution was justified in setting aside the*

order of the Appellate Authority. The order passed by the Appellate Authority did not suffer from any serious illegality, nor can it be said to have taken a view of the matter which no reasonable person was likely to take. In that view of the matter, there was no justification for the High Court to interfere with the order in exercise of its writ jurisdiction. In a matter like the present case where orders passed by the statutory authority vested with power to act quasi-judicially is challenged before the High Court, the role of the Court is supervisory and corrective. In exercise of such jurisdiction, the High Court is not expected to interfere with the final order passed by the statutory authority unless the order suffers from manifest error and if it is allowed to stand, it would amount to perpetuation of grave injustice. The Court should bear in mind that it is not acting as yet another appellate court in the matter. We are constrained to observe that in the present case the High Court has failed to keep the salutary principles in mind while deciding the case."

19. In the case of Iswarlal ***Mohanlal Thakkar v. Paschim Gujarat Vij Co. Ltd. and Anr.,*** (2004) 6 SCC 434, it was held as under:

"15. We find the judgment and award of the labour court well reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power Under Article 227 of the Constitution of India to annul the findings of the labour court in its award as it is well settled law that the High Court cannot exercise its power Under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the Appellant. The High Court had no reason to interfere with the same as the award of the Labour Court was based on sound and cogent reasoning, which has served the ends of justice."

20. In the instant case, it cannot be said that the impugned award suffers from any perversity or suffers from any manifest error. That being so, there is no warrant for interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution. That being so, the petition is dismissed, however, with no order as to costs.

(SUNITA GUPTA)
JUDGE

DECEMBER 03, 2015/*rs*

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 4639/2014

SUSHILA ..... Petitioner

Through: Mr H. K. Chaturvedi, Advocate.

versus

DELHI URBAN SHELTER IMPROVEMENT

BOARD AND ORS ..... Respondents

Through: Mr Jagat Rana, Advocate for R-1.

Ms Shobhana Takiar and Mr Udayan Khandelwal, Advocate for R-2.

Mohammad Yunus proxy Advocate for Ms Shabana, Advocate for DDA.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R

10.11.2014

The petitioner has filed the present petition impugning an order dated 21.10.2013 rejecting the petitioner?s claim for allotment of an alternative plot. The principal ground for rejection as stated in the impugned order is that the petitioner?s ration card was found to be invalid after verification.

The petitioner asserts that her ration card was valid before the cut off date. The learned counsel for the petitioner has also drawn the attention of this Court to a judgment dated 09.11.2005 in CCP No. 499/2004 titled ?Sushila and Anr. v. S. C. Batra. In paragraph 15 of the said judgment this Court had specifically noted that the petitioner was entitled to an alternate plot. Paragraph 15 of the said judgment is quoted below:-

?15. Though the respondents may be in breach of the orders passed by this Court, but I do not find any contumacious conduct. Additionally for the reason that the writ petition itself stands disposed of and contempt alleged is of interim orders passed therein as also the fact that petitioner No.1 has been held entitled to an alternative accommodation and petitioner NO.2 has not raised any grievance pertaining to his entitlement to an alternative plot, I discharge the notice of contempt.?

However, it would be important for the respondents to verify the veracity of the petitioner?s claim.

In view of the aforesaid finding the impugned order rejecting the petitioner?s application for an alternative plot is set aside and the matter is remanded to the concerned officer of DUSIB to decide afresh after affording the petitioner an opportunity to be heard.

The petitioner shall produce all original documents before the concerned officer. The respondents will examine the original documents and ascertain whether the petitioner?s name is listed on the voters list and also examine the original ration card. In the first instance, the petitioner shall present the documents before the concperned officer on 14.11.2014. The concerned officer shall pass a speaking order within six weeks from today.

The petitioner is at liberty to apply in case an adverse order is passed.

Dasti under the signatures of the Court Master.

VIBHU BAKHRU, J

NOVEMBER 10, 2014

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IN THE HIGH COURT OF DELHI AT NEW DELHI

CS(OS) 3034/2014

SHALABH KUMAR SHARMA AND ORS ..... Plaintiffs

Through: Mr.H.K. Chaturvedi with Dr. B.K. Dash, and Mr. Pawan Kumar, Advs.

versus

ENGINEERS WORKES LAL JHANDA AND ORS ..... Defendants

Through: Mr. S.K. Rout and Mr. Pramod Kumar, Advs. for D-1.

SI Bineet Pandey, PS Vijay Vihar and SI Vijay Kumar, PS Prasant Vihar for D-3 to D-5.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

O R D E R

20.11.2014

I.A.22842/2014

This is an application filed by the plaintiffs and defendant No.1 for recording the terms of compromise. The application is signed by the parties and their counsel and duly supported by the affidavits of the plaintiffs No.1, 2 and 3 and also the affidavit of the Secretary of

defendant No.1. Settlement application is marked as Ex.-C-1. As prayed, the present suit is decreed in favour of the plaintiffs and against the defendant No.1 in terms of Ex.C-1.

Application stands disposed of.

CS(OS) 3034/2014

Defendants No.2 to 5 are served. Despite service none has chosen to appear on behalf of defendant No.2. Defendants No.3 to 5 are represented by their representatives SI Bineet Pandey, PS Vijay Vihar and SI Vijay Kumar, PS Prasant Vihar. Representatives of defendants No.3 to 5 submit that they are not proper and necessary parties and they should be deleted. In view of their submissions, counsel for the plaintiff prays that defendants No.3 to 5 be deleted from the array of parties. Let the amended memo of parties be filed.

Mr. Chaturvedi, counsel for the plaintiffs submits that since defendant No.2 has chosen not to appear despite service since the plaint is duly supported by the affidavit of the plaintiffs it should be read in evidence as well and he shall be satisfied if the present suit is decreed in terms of interim order.

Plaintiffs have filed the present suit for permanent injunction and mandatory injunction. On 29.9.2014 the following order was passed:

?Plaintiff has filed the present suit for permanent injunction and mandatory injunction. Counsel for the plaintiffs submits that 189 workers were discharged from their services on account of financial condition of the plaintiff company against whom winding up proceedings are pending. Counsel submits that plaintiffs have received a notice on 26.9.2014 from defendant nos.1 and 2 Union who are representing the workers informing the management that in case their demands are not met within 7 days they should be ready to face the consequences and they also intend to call a huge rally and hold dharna and gherao at the residence of the management. Counsel submits that plaintiffs fear that defendants may take law in their own hands and block the ingress and egress of the plaintiffs and also at their residence also their corporate office and the factory which is also evident from reading the notice.

Issue summons in the suit to the defendant, by all modes, including dasti, returnable on 20th November, 2014. Issue notice in the application to the defendants, by all modes, including dasti, for the date fixed.

I have heard learned counsel for the plaintiff and also perused the plaint, application and the documents filed along with the plaint. I am satisfied that it is a fit case for grant of ex parte ad interim injunction.

Accordingly, till the next date of hearing, defendants 1 and 2 are restrained from obstructing the ingress or egress of the plaintiffs, their staff, visitors and other persons from entering the residence of plaintiffs, (i.e., A-27R, Rose Apartments, Sector 14 Extn, Rohini, Delhi-110085), their corporate office (i.e., 306-308, Sushma Tower, D Block,

Central Market, Prashant Vihar, Delhi-110085) and the factory premises (i.e., Plot no.1120, Gali no.17, Rithala, Delhi-110085). However,

defendants 1 and 2 would be free to carry out peaceful agitation beyond a radius of 300 metres from the main gate(s) of the aforesaid premises. Defendants 3 to 5 are directed to ensure that no damage is caused to the aforesaid properties of the plaintiffs.?

Taking into consideration the submissions made and having regard to the facts that defendant no.2 has chosen not to appear despite service, the suit is decreed against defendant No.2 in terms of the interim order passed on 29.09.2014. Decree sheet be drawn up accordingly.

G.S.SISTANI, J

NOVEMBER 20, 2014/ns

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.L.P. 312 of 2013

VIJAYPOWER GENERATORS LIMITED ..... Petitioner

Through: Mr. H.K. Chaturvedi, Advocate.

versus

POWER SET INDIA PVT LTD. and ANR. ..... Respondents

Through: Mr. N.N. Sarvaria, Advocate.

CORAM: JUSTICE S.MURALIDHAR

O R D E R

20.08.2014

Crl.M.A. No. 9603 of 2013 (For delay)

1. For the reasons stated therein, the delay of 180 in filing the criminal leave petition is condoned.

2. The application is disposed of.

Crl.L.P. No. 312 of 2013

3. This petition seeks leave to appeal against the impugned order dated 20th October 2012 passed by the learned Metropolitan Magistrate (?MM?), Karkardooma Courts, Delhi in Complaint Case No. 982 of 2010 acquitting the Respondents for the offence under Section 138 of the Negotiable Instruments Act, 1881 (?NI Act?).

Crl.L.P. No. 312 of 2013
Page 1 of 4

4. The only ground on which the trial Court acquitted the Respondents was that the authorized representative, Mr. G.K. Pachauri, Assistant Manager (Legal) of the Petitioner was held not to be legally authorized to present the complaint.

5. During the course of the present proceeding, the Petitioner has placed on record certain documents to show that Mr. Pachauri is in fact a duly authorized person to represent the Complainant. The Court is of the view that these documents are required to be considered by the trial Court. There are sufficient grounds made out for grant of leave to appeal.

6. This petition is accordingly allowed and the matter is directed to be registered as a criminal appeal.

Criminal Appeal No. of 2014 (to be numbered)

7. Leaned counsel for the parties have been heard.

8. The documents now produced by the Appellant, originals of which have been shown to the Court, reveal that at a meeting of the Board of Directors held on 27th September 1997 specific authorization was given to Mr. G.K. Pachauri to represent the Complainant. The said documents nevertheless

Crl.L.P. No. 312 of 2013
Page 2 of 4

have to be proved in accordance with law before the trial Court and therefore, this Court does not wish to comment on it. The reasons adduced by the Appellant for not producing the documents earlier before the trial Court appear to be bonafide. Accordingly, the Court is of the view that the Appellant should be given one more opportunity to produce the documents before the trial Court in accordance with law and further that the trial Court should deal with the complaint on its merits.

9. The Court accordingly issues the following directions:

(i) Subject to the Appellant paying Respondent No. 2 a sum of Rs. 20,000 as costs on or before 8th September 2014 and placing on record the proof

of payment of such costs before the trial Court, the impugned order dated 20th October

2012 of the trial Court is set aside and the complaint is restored to the file of the learned MM;

(ii) The Appellant is directed to place on record before the trial Court the documents enclosed with the present criminal leave petition, i.e., Annexures A-19 to A-23 and lead evidence to the limited aspect of proving the documents in accordance with law. The originals of the

Crl.L.P. No. 312 of 2013
Page 3 of 4

said documents will be produced before the trial Court and the Respondent will be permitted to cross-examine the Appellant?s witnesses on this aspect;

(iii) Except to the extent indicated above, no further evidence will be permitted to be adduced by either party;

(iv) The trial Court will deal with the matter afresh not limited to the question of authorization of the authorized representative of the Appellant.

10. The matter will now be placed before the Chief Metropolitan Magistrate (?CMM?), Karkardooma Courts, Delhi on 8th September 2014 on which the authorized representative of the Appellant shall remain present. As regards Respondent No. 2, it will be open to him to seek exemption from personal appearance before the CMM by filing an appropriate application. The CMM will allocate the matter to the concerned MM who will proceed with the complaint in the above manner.

11. The appeal is disposed of in the above terms. Order be given dasti.

S.MURALIDHAR, J

AUGUST 20, 2014/Rk

Crl.L.P. No. 312 of 2013
Page 4 of 4

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment delivered on: 4th December, 2014

\+ **W.P.(C) No. 2182/2011**

PASUPATI SPINNING AND WEAVING MILLS LTD..... Petitioner

Represented by: Mr. Navin Chawla, Mr. Aditya V. Singh and Mr. Anurag Narula, Advocates.

Versus

REGIONAL PROVIDENT FUND COMMISSIONER AND ANR ..... Respondents

Represented by: Ms.Aparna Bhat, Advocate for Respondent No.1.
Mr.H.K.Chaturvedi, Advocate for the Respondent No.2.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. The present petition is directed against the original order dated 28.03.2005 passed by the Assistant Provident Fund Commissioner and the appellate order dated 28.01.2011, whereby an amount of Rs.56,086/- has been determined on account of provident fund dues for the period from September, 1999 to April, 2003, in respect of respondent No.2.

2. Vide the aforesaid original order, the petitioner was directed that the amount shall be paid in respective accounts within a period of 15 days from the date of receipt of the order.

3. Also granted liberty to the respondent No.1 to initiate a fresh inquiry under Section 7A of the Employees' Provident Fund & Miscellaneous Provisions Act, 1952 (for short 'the Act'). In case of concealment of any fact by the petitioner/Establishment for the period under inquiry, the petitioner will be liable to pay liability as determined by the Department. It was further directed that the Establishment is liable to pay an amount of interest at the rate of 12% *per annum*, as provided under Section 7Q of the Act from the date of due till the date of payment. The assessment under Section 7A of the Act shall be without prejudice to any demand raised under Section 14B of the Act.

4. Mr. Navin Chawla, learned counsel appearing on behalf of the petitioner/Establishment submits that the respondent No.2 was the Visiting Consultant/Advisor of the petitioner/Establishment for a period from September, 1999 to April, 2003, on the mutually agreed terms and conditions that the respondent No.2 was to be paid a consolidated sum of Rs.8,000/- per month for the consultation/ assistance/advice on issues relating to taxation/finance/accounts of the petitioner/Establishment. However, he was not entitled to any other benefits, much less any conveyance allowance/provident fund/bonus/gratuity/children education etc.

5. Mr.Chawla further submits that during the aforesaid period, the respondent No.2 never raised any dispute in respect of relationship between him and the petitioner Establishment. He was allowed to take up work for other clients besides doing independent practice.

6. Mr.Chawla submits that the learned Tribunal has wrongly considered

the respondent No.2 as the 'employee' of the petitioner/Establishment, whereas the respondent No.2 was engaged just as a Visiting Consultant/Accountant by the petitioner/Establishment and he was not the employee of the petitioner at any point of time.

7. Also submits that the learned Tribunal committed an error apparent on the record by holding that the receipts show different amounts were paid on different dates, however, it is correct on the face of the record as the receipts itself shows that a uniform amount of Rs.8,000/- was being paid to the respondent No.2 and that too only as 'rent' .

8. On a specific query put by this Court that at one place, the petitioner/Establishment has mentioned that the respondent No.2 was a Consultant or Retainer and at other place, it is mentioned that an amount of Rs.8,000/- was being paid to him as rent. Learned counsel explained that sum of Rs.8,000/- was paid to respondent no. 2 as Retainer or Consultant by the petitioner/Establishment, however, for his own tax benefit, he used to take receipt of rent in lieu of Rs.8,000/-.

9. In support of his case, learned counsel for the petitioner has relied upon a case of ***The Regional Director, E.S.I. Corporation Vs. P.K. Mohammed (Pvt.) Ltd., 1985 (2) KLJ 515***, wherein held as under:-

> *"2. The short facts relevant for consideration of the above question are as follows:*
>
> *.....Ultimately, it came to the question whether Krishna Menon and Sadasivan Pillai whose services are engaged as consultants on contract basis by the Respondent could be treated as its employees and their names should find a place in the register. It was contended by the Respondent that Krishna*

Menon retired from the service of the Respondent in the year 1976 and he was aged 73 at the time of inspection. He was engaged as consultant on contract basis from 1st September 1980 onwards. He was being paid only consultancy charges. It is not obligatory on his part to come to the establishment. After the year 1979 about 13 inspections were conducted by different officers and on no occasion they had found it necessary to register the names of those who were rendering consultancy service. The E.S.I. Court accepted the above contention and found that excluding two consultants there were no sufficient number of employees so as to cover the establishment by the Act.

3. .....

4. The word 'employee' is defined as follows under Section 2(9) of the Employees State Insurance Act, 1948:

2(9) 'employee' means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and

1. who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere, or

2. who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment, or

3. whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of

service; (and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment for any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment, but does not include)

(a) any member of (the Indian) naval, military or air forces; or

(b) any person so employed whose wages (excluding remuneration for overtime work) exceed (such wages as may be prescribed by the Central Government) a month:

Provided that an employee whose wages excluding remuneration for overtime work exceed (such wages as may be prescribed by the Central Government) a month at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period.

Admittedly the two consultants are not working in the premises of the Respondent. Their work is carried on at their own place. They are engaged as consultants in the matter of carrying on the business of the Respondent just like retaining tax consultants. Such engagement cannot create an employer-employee relationship. The Respondent may be one among the several clients of the consultants. They cannot be treated as employees of all their clients to whom they give advice on business matters.

5. In Tata Oil Mills Co. Ltd., Ernakulam v. The Employees State Insurance Corporation, Trichur 1978 L.A.B. I.C. 585, a question arose as to whether persons who are employed principally for the work of a particular factory would come within the definition of the term 'employee' under Section 2(9), even when they do some Ors.' work also. This Court held that if

the relationship is mostly and basically with a particular factory and not with any other factory, he will be an employee of the particular factory for the purpose of the Act. This is a question of fact which has to be ascertained by a general appreciation of the various circumstances connected with the employment. If the employees are not so specially connected with any one factory, but are only employed in connection with the distribution or sale of the products of various factories with none of which they are principally connected, they cannot be treated as employees of any one factory under the Act.

6. In this case the finding of the fact is that services of Krishna Menon and Sadasivan Pillai are sought for as consultants on contract basis. There is no finding that their employment is solely or mainly under the Respondent establishment. In the light of the above finding of fact, no other view is possible than the one taken by the E.S.I. Court that they would not come within the definition of 'employee' under the Act. We are therefore of the view that the consultancy service rendered by two persons to the Respondent would not make them employees of the establishment thus bringing it under the purview of the E.S.I. Act. The appeal therefore stands dismissed."

10. Also relied upon the case of ***Food Corporation of India Vs. Provident Fund Commissioner & Ors. (1990) 1 SCC 68***, wherein the Apex Court held as under:-

"7. The question, in our opinion, is not whether one has failed to produce evidence. The question is whether the Commissioner who is the statutory authority has exercised powers vested in him to collect the relevant evidence before determining the amount payable under the said Act.

8. It is of importance to remember that the Commissioner while conducting an inquiry under Section 7A has the same powers as are vested in a Court under the CPC for trying a

suit. The section reads as follows:

Section 7(A) Determination of Moneys due from Employer - (1) The Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner or any Regional Provident Fund Commissioner may, by order determine the amount due from any employer under any provision of this Act (the scheme or the Family Pension Scheme or the Insurance Scheme) as the case may be and for this purpose may conduct such inquiry as he may deem necessary.

(2) The Officer conducting the inquiry under Sub-section (1) shall, for the purposes of such inquiry, have the same powers as are vested in a Court under the CPC, 1908, for trying a suit in respect of the following matters, namely:

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavit;

(d) issuing commissions for the examination of witnesses.
and any such inquiry shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196 of the Indian Penal Code.

9. It will be seen from the above provisions that the Commissioner is authorised to enforce attendance in person and also to examine any person on oath. He has the power requiring the discovery and production of documents. This power was given to the Commissioner to decide not abstract questions of law, but only to determine actual concrete differences in payment of contribution and other dues by identifying the workmen. The Commissioner should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. That is the legal duty of

the Commissioner. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person."

11. The respondent No.2 has filed reply to the instant petition, wherein in reply to Para 4 of the petition, it is stated that he was appointed by the Management in the month of September, 1999 as an Accountant and his last drawn salary was Rs.13,000/- per month (basic salary of Rs.5,000/- + Rs.8,000/- p.m. as HRA + ex gratia Rs.2,500/- *per annum* + leave etc.). Further stated, services of the respondent No.2 were illegally terminated on 30.09.2003 without complying with the provisions of Section 25F of the Industrial Disputes Act, 1947.

12. It is an admitted case that the respondent No.2 has raised an industrial dispute against the aforesaid termination order, which is pending adjudication.

13. Vide the original order dated 28.03.2005, the learned Authority specifically stated that none of the parties could produce urgent proof of basic salary and allowances. In the absence of proof of documentary evidence, the learned Authority while passing the original order, took a sum of Rs.5,000/- as basic salary for the purpose of assumption of Provident Fund dues, as submitted by the Member during inquiry proceedings under Section 7A of the Act.

14. Perusal of the receipts at page No.23 dated 31.10.1999 and at page No.27 dated 31.12.1999 reveals that the respondent No.2 had received a sum of Rs.8,000/- each in cash against rent for the months of October and

December, 1999, respectively. Some more receipts corroborating the same are also on record. Moreover, these receipts do not establish that the respondent No.2 was employee of the petitioner/Establishment.

15. Since both the parties did not produce any material or led any evidence before the Authority, therefore, there is no material on record to ascertain the fact that the consultancy service rendered by the respondent No.2 to the petitioner/Establishment would make him employee of the petitioner/Establishment or not.

16. Under Section 7A of the Act, the Central Provident Fund Commissioner or Deputy Provident Fund Commissioner or any Regional Provident Fund Commissioner may determine the amount due from an employer under any provision of this Act as the case may be and for this purpose may conduct such enquiry as he may deem necessary. The said Authority for the purpose of such enquiry has the same powers as are vested in a Court under CPC, 1908 for trying a Suit in respect of enforcing the attendance of any person or examining him on oath; requiring the discovery and production of documents and receiving evidence on affidavit. The Commissioner / authority should exercise all his powers to collect all evidence and collate all material before coming to proper conclusion. This is the legal duty of the Commissioner, which the said authority failed to do so in the present case.

17. In view of the above discussion, the original order dated 28.03.2005 and the appellate order dated 28.01.2011 are hereby set aside and the case is remitted to the Authority to hold a fresh inquiry in the matter.

18. It is clarified that if the parties do not produce the record pertaining to the alleged employment, the said Authority may take steps in accordance with law and pass order accordingly.

19. Pursuant to award passed by the Authority, the petitioner/Establishment has deposited a cheque of Rs.56,086/- with the Regional Provident Fund Commissioner. The said Authority is directed to invest this amount in the form of FDR and the same shall be released with interest to be accrued, subject to the outcome of the inquiry, as directed above.

20. Accordingly, the parties are directed to appear before the Regional Provident Fund Commissioner, Regional Office: 28 Community Centre, Wazirpur Industrial Area, Delhi-52, on 12.01.2015 for directions.

21. The present petition stands allowed with above observations.

22. The Registry of this Court is directed to send a copy of this order to the Authority mentioned above.

SURESH KAIT
(JUDGE)

DECEMBER 04, 2014
Sb/jg