

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 09.04.2012

+ **W.P. (C) 449/2012**

GUNJAN SINHA JAIN ... Petitioner

Versus

**REGISTRAR GENERAL,
HIGH COURT OF DELHI** ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr R.K. Handoo with Mr Akhilesh Arora

For the Respondent : Mr Viraj R. Datar with Mr Chetan Lokur

WITH

+ **W.P. (C) 512/2012**

SAGAR SHANKAR ... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ **W.P. (C) 513/2012**

MANOJ KUMAR SHARMA ... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER ... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ **W.P. (C) 514/2012**

AJAY YADAV

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ **W.P. (C) 515/2012**

ANKUR JAIN

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ **W.P. (C) 587/2012**

ROHIT GUPTA

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ **W.P. (C) 588/2012**

SHITI AGARWAL

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ W.P. (C) 589/2012

ANIL KUMAR PASWAN

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ W.P. (C) 598/2012

ABHINAV KIRAN

... Petitioner

Versus

REGISTRAR, HIGH COURT OF DELHI

... Respondent

Advocates who appeared in this case:

For the Petitioner : Ms Amita Gupta

For the Respondent : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ W.P. (C) 600/2012

AMIT MISHRA

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

WITH

+ W.P. (C) 601/2012

MOHIT AGGARWAL

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ W.P. (C) 602/2012

NEERAJ SHARMA

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ W.P. (C) 603/2012

RAKESH KUMAR

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ W.P. (C) 616/2012

SWAPANDEEP SINGHAL

... Petitioner

Versus

HIGH COURT OF DELHI & ANOTHER

... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr A. Maitri with Ms Radhika Chandrashekhhar

For the Respondents : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ **W.P. (C) 619/2012**

PRAMOD KUMAR TYAGI

... Petitioner

Versus

**THE REGISTRAR GENERAL
HIGH COURT OF DELHI**

... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Vikram Aggarwal

For the Respondent : Mr Viraj R. Datar with Mr Chetan Lokur

AND

+ **W.P. (C) 862/2012**

RAJ KUMAR SINGH

... Petitioner

Versus

**DELHI HIGH COURT THROUGH
ITS REGISTRAR GENERAL**

... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Sudhir Kumar with Ms Neelmani and Mr Anish Shreshta

For the Respondent : Mr Viraj R. Datar with Mr Chetan Lokur

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

JUDGMENT

BADAR DURREZ AHMED, J

1. In this batch of petitions, the petitioners seek the quashing of the notice dated 23.12.2011 issued by the High Court of Delhi (hereinafter referred to as 'the DHC') whereby, on the basis of performance in the Delhi Judicial Service (Preliminary) Examination (hereinafter referred to as 'the said DJS Exam') held on 18.12.2011, 276 candidates have been short-listed for being provisionally admitted to the Delhi Judicial Service Examination (Written), subject to verification of their eligibility. The petitioners also seek a writ directing the DHC to evaluate the marks afresh of all the candidates who appeared for the said DJS Exam based on the corrections/ deletions/ amendments to the questions and answer keys. The petitioners also pray that the DHC be restrained from conducting the Delhi Judicial Service Examination (Main) till the entire results of the said DJS Exam are processed afresh.

2. The DHC had, in September 2011, issued a public notice in respect of 50 vacancies in the Delhi Judicial Service [23- *general*, 6 – *SC*, 15 – *ST*, 5 – *Physically handicapped (blind/ low vision)*, 1 – *Physically handicapped (orthopaedic)*], indicating that for filling up those vacancies it would hold an examination in two successive stages:–

- (1) Delhi Judicial Service Preliminary Examination (objective type with 25% negative marking) for selection for the main examination, and

(2) Delhi Judicial Service Main Examination (Written) for selection of candidates for calling for Viva Voce test.

3. In these petitions we are concerned with the Preliminary Examination (viz. the said DJS Exam) which was held on 18.12.2011 in which a total of 7250 candidates (including the petitioners herein) appeared. According to the syllabus for the said DJS Exam, the candidates were to be tested for their general knowledge and aptitude, their power of expression and flair in English, their knowledge of objective type legal problems and their solutions covering the Constitution of India, Code of Civil Procedure, Code of Criminal Procedure, Indian Penal Code, Contract Act, Partnership Act, principles governing arbitration law, Evidence Act, the Specific Relief Act and the Limitation Act.

4. The said DJS Exam was of the duration of 2 hours and 30 minutes and comprised of 200 objective type questions carrying multiple choices. Candidates were supplied with different booklet series - 'E', 'H', 'K' and 'P' and corresponding OMR (Optical Mark Recognition) answer sheets. In each of the series, the said 200 questions were common but had been placed at different serial numbers. The OMR answer sheets were similarly prepared. For the purposes of convenience we shall be referring to booklet series 'E' and to the answer key in respect thereof.

5. The instructions for candidates, *inter alia*, stipulated as under:-

“5. The duration of the test is **2 hours 30 minutes**.

6. There are **200** questions. Each question has four answer options marked (1), (2), (3) and (4).

7. Answers are to be marked on the OMR Answer Sheet, which is provided separately.
8. Choose the most appropriate answer option and darken the oval completely, corresponding to (1), (2), (3) or (4) against the relevant question number.
9. Use only **HB pencil** to darken the oval for answering.
10. Do not darken more than one oval against any question, as the scanner will read such marking as wrong answer.
11. If you wish to change any answer, erase completely the one already marked and darken the fresh oval with an HB pencil.
12. Each question carries equal mark (s). There is Negative Marking and 25% marks will be deducted for every wrong answer.
xxxx xxxx xxxx xxxx xxxx
16. The right to exclude any question(s) from final evaluation rests with the testing authority.”

6. As per the appendix read with Rule 15 of the Delhi Judicial Services Rules, the minimum qualifying marks in the preliminary exam is 60% for general and 55% for the reserved categories i.e., Scheduled Castes, Scheduled Tribes and Physically Handicapped. However, there is another limitation prescribed in the said Appendix and that is that the number of the candidates to be admitted to the main examination (written) should not be more than ten times the total number of vacancies of each category advertised. After the conduct of the said DJS Exam on 18.12.2011 and on evaluation of the OMR Answer Sheets submitted by the candidates, a list of 276 candidates (in alphabetical order), who had been short-listed for being provisionally admitted to the Delhi Judicial Service main examination (written) [i.e., the second stage of the examination process], was notified by the DHC through a notice dated

23.12.2011 which is impugned before us. The break-up of the 276 qualified candidates was – 235 - General, 27 - SC, 7 - ST, 03 - Physically handicapped (blind/low vision), 04 - Physically handicapped (Orthopaedic). The mark obtained by the last qualified candidate of the 'General' category was 123.50.

7. The petitioners claim that the question paper contained many questions which were not properly phrased or were outside the syllabus. It is also contended on behalf of the petitioners that many of the answers as provided in the Answer Keys are clearly wrong and there are others where the answers are not free from doubt. Furthermore, several questions have more than one correct answer whereas the answer key shows only one of them to be correct. The petitioners contend that questions which are outside the syllabus and questions where the answers are doubtful or have more than one correct answer have to be deleted from consideration. Those questions for which the answer key shows an incorrect answer should be re-evaluated after correcting the answer key. Then, the answer sheets of all the candidates be re-processed and the corrected list of qualified candidates be published. An argument had also been raised on behalf of the petitioners that the question paper itself was too long. In this connection it was submitted that as the candidates were required to answer 200 questions in 2 hours and 30 minutes (150 minutes), they had, on an average, only 45 seconds to read the question, understand it and mark the answer in the OMR answer sheet. Some of the questions, according to the petitioners, were so long that they would take much more than 45 seconds even to read. Such questions, as submitted on behalf of the petitioners, ought not to have even been

included in an objective type multiple choice test. Anyhow, we are not required to go into the aspect of the length of the question paper inasmuch as it was equally long or short for all the candidates and would not hurt their relative chances. Though, that is one aspect which the paper setters must keep in mind for future examinations.

8. The learned counsel for the DHC conceded that some of the questions / answers were incorrect but, with regard to most, he, on instructions, maintained that the questions and answers were correct. Our task would have been easy if the respondent had itself undertaken the responsibility of self-correction. Unfortunately, that was not to be and both sides have cast upon us the burden to adjudicate upon the correctness or otherwise of several questions and answers. We think that it is appropriate to point out that the petitioners had, in their petitions, pointed to many questions and answers which, according to them, either required deletion or correction but, we are only limiting discussion to those that were seriously pressed before us during arguments.

Question No. 60

60. *Ram aged 25 years, tells Shyam who is aged 17 years and on account at the death of his father is sad, that if Shyam dies by jumping in a burning pyre of a woman he i.e. Shyam would meet his father in heaven and would find bliss. Shyam, aged 17 years, knows that by doing so he would be committing suicide, but on account of instigation by Ram suffers death by jumping in the burning pyre of a woman. Ram is guilty of:*

(1) Abetment for the suicide committed by Shyam.

(2) *Murder of Shyam.*

(3) *No offence.*

(4) *Both (1) & (2) above.*

9. As per the Answer Key, answer (2) [*Murder of Shyam*] has been shown as the correct answer. It was rightly conceded by the learned counsel for the DHC that the correct answer is (1) [*Abetment for the suicide committed by Shyam*]. At this juncture it would be appropriate to examine the fall-out of this mistake. Those candidates who had correctly answered (1) would have been negatively marked minus (-) 0.25 because the answer key, albeit wrongly, showed (2) to be the correct answer. And, what is more, those candidates who wrongly answered (2) would have been given 1 mark each! This is double injustice in action.

Question No. 61

61. *The accused driver of a truck while driving on the left side i.e. his side of the road, sees a cyclist coming from the opposite direction, but on the wrong side of the road i.e. in the lane on which the truck was being driven; the road being narrow and the truck driver sensing that the cyclist was peddling negligently, maneuvers his truck on the opposite lane and simultaneously the cyclist suddenly moves to his lane and as a result the truck over-runs the cyclist, causing the death of the cyclist. The truck driver is not guilty of the offence of causing death by rash and negligent act because:*

(1) *He did not have the necessary mens rea.*

(2) *He acted bona fide.*

- (3) *The truck driver upon seeing the risk tried to avoid the risk.*
- (4) *Was justified in driving the truck on to the opposite lane.*

10. On behalf of the petitioners, it was argued that although option (3) [*The truck driver upon seeing the risk tried to avoid the risk*] is a correct answer as shown in the Answer Key, even option (4) [*Was justified in driving the truck on to the opposite lane*] would not be wrong. We agree. Section 304A IPC deals with ‘causing death by negligence’. The ingredients of section 304A, inter alia, require that the person who caused the death of another must have done so by a ‘rash or negligent act’. Clearly, if the truck driver upon seeing the risk tried to avoid the risk, he cannot be regarded as having acted rashly or negligently. Furthermore, if the truck driver was ‘justified’ in driving the truck on to the opposite lane, it cannot be said that he did a ‘rash or negligent act’. So, both options (3) and (4) are correct. Consequently, this question would have to be removed for the purpose of marking.

Question No. 69

69. *When examined under Section 313 Cr.P.C., a circumstance incriminating the accused is not put to the accused for his explanation. The said circumstance cannot be used against the accused because:*

- (1) *It is inadmissible in evidence.*
- (2) *It becomes irrelevant for purposes of evidence.*

(3) *Law mandates that it cannot-be taken into consideration.*

(4) *All of the above.*

11. It was contended by the learned counsel for the petitioners that option (4) is the correct answer. However, as per the Answer Key, the correct answer is option (3). The contention of the petitioners is not tenable. The question is not of admissibility or relevance of evidence. It is simply that a circumstance not put to the accused when he is examined under section 313 CrPC cannot be used against the accused. This position is clear from the observations of the Supreme Court in the case of **Nirmal Pasi v. State of Bihar: JT 2002 (6) SC 28** to the following effect:-

“The purpose of recording statement under Section 313 of the Cr.P.C. is to enable the accused person to explain any circumstances appearing in the evidence against him. A piece of incriminating evidence relied on by the prosecution and found proved by the court so as to rest the conviction of the accused thereon must be put to the accused in his statement under Section 313 of the Cr.P.C. enabling him to offer such explanation as he may choose to do. Unless that is done, the piece of incriminating evidence cannot be relied on for finding a verdict of guilty.”

Consequently, the answer indicated in the Answer Key is correct.

Question No. 71

71. *The employer has told the employee in the morning that when the employee leaves the office in the evening to go to his house, he should pick up Rs 50,000/- lying in the drawer of the employer and*

deliver the same to 'X', to whom the employer owes Rs 50,000/-. At 12.00 noon, in the absence of the employer, the employee picks up the money and absconds. The employee is liable to be charged for:

(1) Criminal breach of trust

(2) Cheating

(3) Theft

(4) Criminal misappropriation

12. The Answer Key shows option (3) [*Theft*] as the correct answer. On behalf of the petitioners it was contended that option (1) [*Criminal breach of trust*] ought to be regarded as the correct answer. Let us, straightaway, examine the contention of the petitioners. For this purpose we would have to look at section 405 of the Indian Penal Code, 1860, which deals with criminal breach of trust. The relevant portion of the said section 405 is as follows:-

“Section 405. Criminal breach of trust

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

XXXX XXXX XXXX XXXX XXXX”

13. It is clear upon a plain reading of the above provision that, in order to constitute the offence of criminal breach of trust, “entrustment” is an essential ingredient. If there is no entrustment there cannot be any criminal breach of trust. The entrustment may be in any manner but, there must be entrustment. In the facts given in the question at hand, there is no entrustment. The employer has not handed over the sum of Rs 50,000/- to the employee. The employer has merely informed the employee that a sum of Rs 50,000/- is lying in the drawer. His specific instructions being that when the employee leaves the office in the evening to go to his house he should pick up the said sum lying in the drawer for delivery to X. The entrustment, if at all, would come into operation only if the specific instructions are followed, that is, when the employee leaves the office “in the evening to go his house” he should pick up the money for delivery to X. But, that is not what the employee did. He took the money at 12 noon itself (not in the evening when he was to go home) and absconded. There was no entrustment to him at 12 noon. He also did not have dominion over the said sum at 12 noon. Therefore, this cannot be regarded as a case of criminal breach of trust.

14. On the other hand, it is a clear case of theft. A look at section 378 of the Indian Penal Code, 1860 would immediately make this clear:

“Section 378. Theft

Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person’s consent, moves that property in order to such taking, is said to commit theft.

XXXX

XXXX

XXXX

XXXX

XXXX”

The employee, intending to take dishonestly the said sum of Rs 50,000/- out of the possession of the employer, without his consent, moved the said cash from the drawer into his hands for the purpose of such taking. As such, he committed theft. As long as the money remained in the employer's drawer, it has to be regarded as being in the employer's possession. The employer had not given his consent to the employee to remove the money from the drawer at 12 noon. Therefore, it was removed from the possession of the employer without his consent and obviously the intent was dishonest, as suggested by the given facts, because the employee disappeared with the money.

15. Thus, option (3) as shown in the Answer Key is the correct answer.

Question No. 80

80. *If a series of acts are so connected together as to form the same transaction, and more than one offence is committed by the same person:*

- (1) *He shall be charged and tried separately for every such offence.*
- (2) *He shall be charged with every such offence and tried at one trial for all the offences.*
- (3) *Some of the offences may be clubbed and tried at one trial.*
- (4) *All of the above.*

16. It was contended on behalf of the petitioners that none of the options is correct. On the other hand, the learned counsel for the DHC drew our attention to the provisions of section 220(1) of the Code of Criminal Procedure, 1973 to support the fact that the Answer Key shows option (2) [*He **shall** be charged with every such offence and tried at one trial for all the offences*] as the right answer.

17. Section 220 of the Code of Criminal Procedure, 1973, so much as is relevant, reads as under:-

“220. Trial for more than one offence.

(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he **may** be charged with, and tried at one trial for, every such offence.

XXXX XXXX XXXX XXXX XXXX”

A simple reading of the said provision reveals that the word used is “may”, whereas option (2) uses the word “shall”. Consequently, the question itself has been styled incorrectly. As such, it would have to be deleted from consideration.

Question No. 84

84. *Which of the following charges cannot be compounded without permission of the court before which the prosecution is pending?*

(1) *Section 298 of the IPC.*

(2) *Section 426 of the IPC.*

(3) *Section 491 of the IPC.*

(4) *Section 388 of the IPC.*

18. According to the Answer Key, answer (4) is the correct answer. However, the petitioners contend that the question itself is wrong as none of the four options are correct. To decide this, we have to look at section 320 of the Code of Criminal Procedure, 1973 which deals with 'compounding of offences'. Sub-section (1) gives the list of offences which do not require the permission of the court before which the prosecution is pending. Sections 298, 426 and 491 IPC (ie., options (1), (2) and (3)) are listed therein. In other words, these offences may be compounded without the permission of the court. Now, sub-section (2) of section 320 CrPC lists those offences under the Indian Penal Code which are compoundable but, only with the permission of the Court before which any prosecution for such an offence is pending. Section 388 IPC, which is the fourth option in the question at hand, does not find any mention in this list also. Meaning thereby that, the offence punishable under section 388 IPC is not compoundable at all!

19. The manner in which question No. 84 has been put indicates that at least one of the four offences mentioned therein 'cannot be compounded without permission of the court'. Or, in other words, at least one of the four offences can be compounded only with the permission of the court. But, none of the given options provides an answer to the question. This is so because the first three options are all compoundable without the permission of the court and the fourth option (section 388 IPC) is not compoundable at all, with or without the permission of the court. We, therefore, have to agree with the contention of the petitioners that none of the suggested answers to Question No.84

are correct. Hence, Question No. 84 would have to be deleted for the purposes of evaluating the candidates.

Question No. 90

90. Which of the following statement is correct ?

- (1) Section 34 IPC creates a substantive offence.
- (2) Section 34 IPC introduces the principle of vicarious liability for an offence committed by the co-accused.
- (3) Section 34 IPC recognizes that the co-participant in a crime must be made liable for his act in the commission of the crime by the co-accused.
- (4) Both (2) & (3) above.

20. It was submitted on behalf of the petitioners that none of the options (1) to (4) are correct. The Answer Key shows option (2) [*Section 34 IPC introduces the principle of vicarious liability for an offence committed by the co-accused*] as the correct answer. There are several Supreme Court decisions which support the contention that section 34 of the Indian Penal Code involves vicarious liability. For example, in **Virendra Singh v. State of Madhya Pradesh: (2010) 8 SCC 407**, the Supreme Court, after referring to many earlier decisions, held as under:

“42. Under the Indian Penal Code, a person is responsible for his own act. A person can also be vicariously responsible for the acts of others if he had a common intention to commit the acts or if the offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, then also he can be vicariously responsible. **Under the**

Indian Penal Code, two sections, namely, Sections 34 and 149, deal with the circumstances when a person is vicariously responsible for the acts of others.

43. **The vicarious or constructive liability under Section 34 IPC** can arise only when two conditions stand fulfilled, i.e., the mental element or the intention to commit the criminal act conjointly with another or others; and the other is the actual participation in one form or the other in the commission of the crime.”

(emphasis supplied)

21. We may also refer to the Supreme Court decision in **Maharashtra State Electricity Distribution Co. Ltd. v. Datar Switchgear Ltd.:** (2010) 10 SCC 479 wherein it observed:-

“It is trite that **Section 34 IPC does not constitute a substantive offence**, and is merely in the nature of a rule of evidence, and liability is fastened on a person who may have not been directly involved in the commission of the offence on the basis of a pre-arranged plan between that person and the persons who actually committed the offence.”

(emphasis supplied)

It is obvious, therefore, that option (2), as indicated in the Answer Key, is correct.

Question No. 97

97. *Under Section 200 Cr.P.C. recording of pre-summoning evidence may be dispensed with if:*

- (1) *The complaint is supported by an affidavit of the complainant.*
- (2) *The complaint is made in writing by a public servant.*

- (3) *The Magistrate feels that ends of justice require pre-summoning evidence to be dispensed with.*
- (4) *None of the above.*

22. The Answer Key shows option (4) as the correct answer. According to the petitioners, it is option (2) [*The complaint is made in writing by a public servant*] which is the correct answer. The learned counsel for the DHC conceded that option (2) is the correct answer and that the mistake in the Answer Key, which shows option (4) as the correct answer, needs to be rectified and the OMR answer sheets need to be re-evaluated.

Question No. 99

99. *Which of the following statements is/are correct?*

- (1) *Mens rea is not an essential ingredient of an offence punishable under Section 107 IPC.*
- (2) *Mens rea is not an essential ingredient of an offence punishable under Section 304-A IPC.*
- (3) *Mens rea is not an essential ingredient of an offence punishable under Section 364-A IPC.*
- (4) *Both (1) & (2) above.*

23. According to the Answer Key, option (2) [*Mens rea is not an essential ingredient of an offence punishable under Section 304-A IPC*] is the correct answer. The learned counsel for the DHC fairly conceded that this is not right in view of the Supreme Court decision in **Jacob**

Mathew v. State of Punjab: (2005) 6 SCC 1 wherein the Court observed as under:-

“(5) The jurisprudential concept of negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.”
(underlining added)

A similar view was taken in a subsequent decision in **Malay Kumar Ganguly v. Dr Sukumar Mukherjee: (2009) 9 SCC 221.**

24. Clearly, option (2) is not the correct answer. In fact, none of the options is correct. As a result, this question would have to be deleted for the purposes of evaluating the candidates.

Question No.100

100. *Perjury resulting in the conviction of a person for an offence punishable with death, attracts the maximum penalty of:*

- | | |
|----------------------|-------------------------------|
| (1) Death. | (2) Imprisonment for life |
| (3) RI for 10 years. | (4) RI for 10 years and fine. |

25. It was submitted on behalf of the petitioners that option (1) [Death] is the correct answer but the Answer Key indicates option (2) [Imprisonment for life] as being correct. The learned counsel for the DHC referred to the provisions of the first part of section 194 IPC to support the contention that option (2) [Imprisonment for life] is the correct answer. Section 194 IPC is as under:

“194. Giving or fabricating false evidence with intent to procure conviction of capital offence

Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law for the time being in force in India shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine;

if innocent person be thereby convicted and executed.— and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.”

26. The section has two parts. The first part deals with the intention or knowledge of the person fabricating or giving false evidence, that by giving or fabricating false evidence he intends to cause or has the knowledge that it is likely to cause, any person to be convicted of a capital offence. It does not deal with a situation where the targeted person is actually convicted. The first part would apply irrespective of whether the targeted person is convicted or not. But, the second part will apply only if the targeted person, though innocent, is convicted and

executed in consequence of the false evidence. The maximum penalty under the first part is imprisonment for life and the maximum penalty under the second part is Death.

27. Thus, we have to see as to whether, given the information in question No.100, the penalty falls under the first or the second part of section 194 IPC. The penalty of death under the second part of section 194 IPC requires two conditions to be fulfilled. The first being that an innocent person must be convicted as a consequence the false evidence and the second being that such person should also have been executed. The question, however, only speaks of conviction. Vital information, as to whether the person in question has been executed or not, has not been supplied. In order to answer the question, a candidate would have to presume either that the convicted person has also been executed or that he has not been executed. Either presumption would alter the answer. If it is presumed that the convicted person has been executed, then the second part would apply and, consequently, option (1) [Death] would be the correct answer. On the other hand, if it is presumed that the convicted person has not been executed, then, the first part would apply and option (2) [Imprisonment for life] would be the correct answer.

28. Therefore, since a candidate cannot be expected to answer a multiple choice question on a presumption made by him, we feel that that this question ought to be removed from consideration.

Question No. 140

140. *Which of the following rivers does not flow west to east?*

- (1) *Ganga*
- (2) *Yamuna*
- (3) *Sutlej*
- (4) *Narmada*

29. As per the Answer Key, option (4) [*Narmada*] is the correct answer. The learned counsel for the DHC conceded that option (3) [*Sutlej*] would also be correct as the Sutlej flows west and south-west for the most part. Therefore, it would a river which 'does not flow west to east'. Consequently, both options (3) and (4) are correct.

Question No. 165

165. *Which of the following statements is incorrect:*

- (1) *Temporary injunction may be granted only at the time of institution of a suit.*
- (2) *Temporary injunction may be granted at any stage of a suit.*
- (3) *Temporary injunctions are regulated by the Code of Civil Procedure, 1908.*
- (4) *Temporary injunctions are a form of preventive relief.*

30. The Answer Key shows option (2) as the correct answer. According to the petitioners, it is option (1) [*Temporary injunction may be granted only at the time of institution of a suit*] which is the correct answer. The learned counsel for the DHC conceded that option (1) is the correct answer and that the mistake in the Answer Key, which shows

option (2) as the correct answer, needs to be rectified and the OMR answer sheets need to be re-evaluated.

Question No. 166

166. *As per the Civil Procedure Code as applicable to Delhi, a suit for specific performance of a contract of sale of immovable property can be filed:*

- (1) *Only in the Court within whose jurisdiction the property is situated.*
- (2) *Either in the Court where the immovable property is situated or also in the Court where the defendant resides.*
- (3) *Besides the Courts mentioned in (2) above, also in the Court within those jurisdiction the Contract was entered into.*
- (4) *Only in the High Court of Delhi.*

31. The Answer Key shows option (1) [*Only in the Court within whose jurisdiction the property is situated*] to be the correct answer. However, on behalf of the petitioners it was contended that, in the case of a suit where specific performance of a contract of sale of immovable property *simpliciter* is prayed for, option (3) [*Besides the Courts mentioned in (2) above, also in the Court within those jurisdiction the Contract was entered into*] would be the correct answer. According to them, option (1) would be the correct answer where a prayer in respect of title or possession is made in addition to the relief of specific performance. Since the question as framed indicates that the suit is for specific performance *simpliciter*, it is option (3) and not option (1) which is the correct answer. In support, they relied upon **Adcon Electronics**

Private Limited v Daulat: (2001) 7 SCC 698 and **Mrs Bhawna Seth v. DLF Universal Limited: AIR 2007 Del 189.** In ***Adcon Electronics (supra)***, the question before the Supreme Court was – ‘*whether a suit simpliciter for specific performance of contract for sale of immovable property is a "suit for land" within clause 12 of the Letters Patent of the High Court of Judicature at Bombay?*’ After referring, inter alia, to the provisions of section 22 of the Specific Relief Act, 1963, the Supreme Court held:-

“In its true sense, a suit simpliciter for specific performance of contract for sale of land is a suit for enforcement of terms of contract. The title to the land as such is not the subject-matter of the suit.”

32. ***Bhawna Seth (supra)*** is a decision of a learned single judge of this court. In that case, a distinction was drawn between the Supreme Court decisions in **Harshad Chiman Lal Modi v. DLF Universal Ltd: (2005) 7 SCC 791** and ***Adcon Electronics (supra)*** in the following manner:-

“20. On consideration of the aforesaid judgments, I am of the view, that there can be no doubt that where in a suit for specific performance possession is also claimed as a relief, the competent Court to deal with the matter is the Court where the property is located in view of Section 16 of the said Code, the judgment in Harshad Chiman Lal Modi case (AIR 2005 SC 4461) (*supra*) clearly lays down the said proposition. However, what cannot be lost sight of is that the judgment is in the facts of the case where the relief of possession was specifically claimed. The question as to what would happen where the relief for possession is not claimed does not form subject-matter of a relief in Harshad Chiman Lal Modi case (*supra*).

22. M/s. Adcon Electronics Pvt. Ltd. case (supra) deals with the distinction in a case simpliciter for specific performance as against a case where possession is also prayed. This issue is not discussed in Harshad Chiman Lal Modi case (supra) nor has the judgment in Adcon Electronics Pvt. Ltd. case (supra) been apparently cited in the proceedings in Harshad Chiman Lal Modi case (supra). Thus, both the judgments would operate in their respective areas. M/s. Adcon Electronics Pvt. Ltd. case (supra) clearly sets down that in a suit for simpliciter specific performance the same does not amount to a suit for land. If it is a simpliciter suit for specific performance, i.e. for enforcement of Contract for Sale and for execution of sale, in that event there can be no good ground for holding that such a suit is for determination of title to the land or that the decree in it would operate on the land. The observations made in the judgment in M/s. Moolji Jaitha and Co. v. The Khandesh Spinning and Weaving Mills Co. Ltd. referred to in the said judgment being a judgment of the Federal Court was approved by the Supreme Court, as noted in paragraph 15 of the Adcon Electronics Pvt. Ltd. case (supra). Thus a distinction has been carved out in respect of a suit where no possession had been claimed of the land in question.”

33. We may point out that in ***Bhawna Seth*** (supra) another decision of a learned single judge of this court in the case of **Rohit Kochhar v Vipul Infrastructure Developers Limited: 2005 (122) DLT 480** was referred to.

“28. I need not, therefore, deal with the various decisions of this Court and other High Courts relied upon by Counsel for the defendants for the reason that the decision of the Supreme Court in Adcon Electronic's case (supra) holds the

field. The said decision has taken into account Section 22 of the Specific Relief Act. Decision categorically holds that a suit seeking specific performance of an agreement to sell simplicitor even if it relates to immovable property is not a suit in which the relief claimed relates to title or to land. The suit is for enforcement of terms of contract. Decision categorically holds that it is at the option of the plaintiff to seek delivery of possession. Decision categorically holds that unless possession of immovable property is specifically prayed for, suit could be instituted within the local limits of the Court having jurisdiction where the defendant resides, carries on business or personally works for gain.”

34. However, in appeal [**Vipul Infrastructure Developers v. Rohit Kochhar: 2008 IV AD (Delhi) 63**], a Division Bench of this court, set aside the decision of the learned single judge in **Rohit Kochhar** (*supra*) by holding that the **Adcon Electronics** decision was distinguishable as it had been rendered in the context of the expression “suit for land” in clause 12 of the Letters Patent of the High Court of Judicature at Bombay. But, as observed in a subsequent Division Bench decision of this court in [**Anil Verman v Raheja Developers Private Limited: FAO(OS) No. 96/1999 decided on 22.09.2011**], the Division Bench decision in Vipul Infrastructure (*supra*) is the subject matter of a Special Leave Petition [SLP(civil) Nos.10169-10171/2008] which is pending before the Supreme Court. Interestingly, in **Anil Verman** (*supra*), the Division Bench observed that the legal position with regard to the plea of a distinction between a suit for specific performance simpliciter and a suit where the relief for possession is also claimed, was ‘fluid’. The exact words used are:-

“16. We are in a legally fluid situation on the basic plea of a distinction between a suit for specific performance simplicitor and a suit where the relief for possession is also claimed. It is our view that the principles set out in Adcon Electronics Pvt. Ltd.'s case (supra) would come into play where no relief of possession was claimed. The field of the factual matrix would be material to determine whether the principles of Adcon Electronics Pvt. Ltd.'s case (supra) would come into play or not. But then in Vipul Infrastructure Developers Ltd.'s case (supra), a co-ordinate Bench of this Court had taken a different view without specifically discussing this aspect. The matter is little more complicated arising out of the pendency of the SLP against that Order of the Division Bench where interim orders are operating.”

(underlining added)

35. While on law the Division Bench in *Anil Verman (supra)* took a view different from the one in *Vipul Infrastructure (supra)*, it chose not to refer the issue to a larger Bench or to await the judgment of the Supreme Court because it came to the conclusion that the suit, in the case before it, was not a suit for specific performance simpliciter without the relief of possession. It held as under :-

“17. We, however, do not consider it necessary to refer this issue to a larger Bench or await the judgment of the Supreme Court for the reasons set out hereinafter.

18. It is our view that the plaint as framed in the present case is not a suit filed simplicitor for specific performance without any relief of possession. The relief of possession has, in fact, been claimed albeit by not stating so in so many words. Thus, the appellant cannot avail of the benefit of the principles set out in Adcon Electronics Pvt. Ltd.'s case (supra) to file the suit in Delhi by claiming that it is merely a

suit for specific performance and the reliefs as claimed can be enforced by the personal obedience of the defendant.”

36. All this shows that the question at hand does not have a definite answer. In the view of a Division Bench of this court in **Anil Verman** (*supra*) the position in law is “fluid”. In this backdrop, in our view, the issue as to whether option (1) or option (3) is the correct answer, is debatable. Hence it would be best if the question itself is removed from the purview of marking.

Question No. 170

170. *An arbitration agreement providing for arbitration of four arbitrators is, under the Arbitration & Conciliation Act, 1996, to be construed as an agreement for arbitration by:*

- (1) *Sole arbitrator.*
- (2) *Five arbitrators.*
- (3) *Three arbitrators.*
- (4) *Four arbitrators only.*

37. On the strength of the Supreme Court decision in **Narayan Prasad Lohia v. Nikunj Kumar Lohia: (2002) 3 SCC 572**, it has been contended on behalf of the petitioners that option (4) [*Four arbitrators only*] is the correct answer and not option (1) [*Sole arbitrator*], as shown in the Answer Key. Section 10 of the Arbitration and Conciliation Act, 1996 provides for the number of arbitrators. It reads as under:-

“10. Number of arbitrators.— (1) The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
(2) Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.”

38. A simple reading of the said section makes it clear that while the parties are free to determine the number of arbitrators, that number shall not be an even number. If a determination of the number of arbitrators is not made at all or is not made in terms of sub-section (1) of section 10, the statutory stipulation in sub-section (2) is that the arbitral tribunal shall consist of a sole arbitrator. Thus, where the parties determine an even number of arbitrators, it would not be construed as a determination in terms of section 10(1). The obvious corollary of which is that, in such a case, the arbitral tribunal shall consist of a sole arbitrator. This is exactly what has been held by a learned single judge of this court in **Dr Deepashree v. Sultan Chand and sons: AIR 2009 Delhi 85**, wherein the learned single judge noted the Supreme Court decision in ***Narayan Prasad Lohia*** (*supra*) and distinguished the same by holding that the latter was a post award matter where the two arbitrators had given an award which was challenged on the ground of being contrary to the statutory provisions and was, therefore, void. The learned single judge further held that the question which was under the consideration of the Supreme Court was as to whether the mandatory provisions of the Arbitration and Conciliation Act, 1996 could be waived by the parties and that it was in that context that the Supreme Court held that section 10 of the said Act was derogable. The learned single judge specifically observed that the provisions of Section 10(2) of the said Act were not

directly in issue and that the Supreme Court was not faced with a situation such as when the Chief Justice or his designate has to decide under Section 11 as to whether the arbitral tribunal ought to consist of two Arbitrators (as agreed upon by the parties) or to a Sole Arbitrator (in view of section 10(2)). Consequently, the learned single judge was of the view that the Supreme Court decision in ***Narayan Prasad Lohia*** (*supra*) was not a judgment on the issue raised in the case before him.

39. A similar decision was rendered by the learned single judge in ***Pooja Gambhir v. Parveen Jain***: ***Arb.P. No. 191/2009 decided on 22.09.2009.***

40. So, the decisions of learned single judges of this court on the aspect of interplay of the provisions of sub-sections (1) and (2) of section 10 of the Arbitration and Conciliation Act, 1996 point in the direction that, where parties agree to an even number of arbitrators, such an agreement would not be an agreement within the meaning of section 10(1) of the Act and consequently section 10(2) would come into play and the arbitral tribunal would have to comprise of a sole arbitrator.

41. No Division Bench decision on this point has been brought to our notice. We should also make it clear that we are not expressing any opinion as to the correctness of the Single Bench decisions of this court. That is left open for consideration in an appropriate case in a dispute inter partes. However, from the standpoint of a candidate in the said DJS exam, he/she is to be guided by the law as it stands. Consequently, option (1) [*Sole arbitrator*], as shown in the Answer Key, would have to be

regarded as correct. In fine, no change is called for insofar as this question is concerned.

Question No. 172

172. *An arbitration award under the Arbitration and Conciliation Act, 1996:*

- (1) *Has the status of a decree immediately on publication / pronouncement thereof.*
- (2) *Does not have the status of a decree.*
- (3) *Has the status of a decree only after the time of three months for making an application to set aside the same has expired or such application having been made has been refused.*
- (4) *Has the status of a decree only after time of three months and a further period of 30 days for making an application to set aside the same has expired or such application having been made has been refused.*

42. According to the petitioners, option (4) is the correct answer. However, as per the Answer Key, it is option (3) which is the correct answer. The relevant provisions are sections 34(3) and 36 of the Arbitration and Conciliation Act, 1996, which are reproduced below:-

“34. Application for setting aside arbitral award.—

- (1) xxxx xxxx xxxx xxxx
- (2) xxxx xxxx xxxx xxxx

- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

- (4) xxxx xxxx xxxx xxxx”

“36. Enforcement.— Where the time for making an application to set aside the arbitral award under section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court.”

43. A reading of the said provisions would indicate that an award becomes enforceable as a decree when the time for making an application to set aside the award under section 34 has expired or in case such an application has been made, it has been refused. The time for making an application for setting aside an award is three months from the relevant date. This is provided in section 34(3). However, the proviso thereto permits the court to entertain such an application within a further period of thirty days if it is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months. But, this does not mean that the expression – ‘*the time for*

making an application to set aside the arbitral award under section 34' – refers to a period of three months and thirty days. The moment the period of three months expires, the award becomes enforceable as a decree. The person seeking enforcement of the award cannot be expected to assume that, after the three-month period is over, the unsuccessful party would be filing such an application by invoking the proviso to section 34(3).

44. Consequently, the answer as per the Answer Key is correct.

Question No. 175

175. *In an arbitration between two parties before an arbitrator appointed by the Chief Justice of the High Court (in exercise of powers under Section 11 of the Arbitration & Conciliation Act, 1996), the rival parties have filed claims against each other. When the arbitration was at an advanced stage, the parties are of the opinion that the arbitrator is likely to reject the claims / counter claims of both the parties. The parties jointly inform the arbitrator that they are not willing for arbitration before him and stop appearing before him. The parties thereafter:*

- (1) *Are entitled to appoint another arbitrator and to start arbitration proceedings de novo*
- (2) *Are not entitled to a second round, the same being in contravention of public policy prohibiting forum shopping.*
- (3) *Are entitled to appoint another arbitrator but the discretion whether to commence the arbitration proceedings de novo or from the stage where left by the earlier arbitrator is of the Arbitrator and not of the parties.*

- (4) *Cannot themselves appoint the second arbitrator and are required to again approach the Chief Justice for appointment of another arbitrator.*

45. The Answer Key shows option (1) as the correct answer. However, the petitioners contend that the correct answer should be option (4). Section 15 of the Arbitration and Conciliation Act, 1996 is relevant. It reads as under:-

“15. Termination of mandate and substitution of arbitrator.—

- (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate—
- (a) where he withdraws from office for any reason; or
 - (b) by or pursuant to agreement of the parties.
- (2) Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
- (3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal.
- (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.”

46. So, by agreement the parties may terminate the mandate of an arbitrator. When that happens, by virtue of section 15(2), a substitute arbitrator shall be appointed '*according to the rules that were applicable to the appointment of the arbitrator being replaced*'. It is obvious that if there is an agreed procedure for appointing the arbitrator, the same would be applicable. However, if there is no agreed procedure, then section 11(5) of the said Act would apply. Section 11(5) stipulates that in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him. Even in the case of an agreed procedure, if a party fails to act as required under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment. This is provided in section 11(6) of the said Act. It is, therefore, clear that in the case of an arbitration with a sole arbitrator the Chief Justice can be called upon for appointment of the arbitrator when the parties fail to agree or when one party fails to act in accordance with an agreed procedure. Where there is agreement between the parties as to the arbitrator, the question of requiring the Chief justice to appoint the arbitrator does not arise. Thus, option (4) is certainly not the right answer.

47. A plain reading of sub-sections (3) and (4) of section 15 would show that if agreed by the parties the arbitration proceedings may be started *de novo*. Consequently, option (1) is the correct answer. This

being as per the Answer Key, no change is required insofar as this question is concerned.

Question No. 177

177. *A Private Limited Company having registered office at Delhi advances monies to another Private Limited Company also at Delhi. Disputes and differences arise relating to the said transaction and the parties agree to the arbitration at Mumbai by a retired Judge of the Bombay High Court who both trust. The arbitrator delivers an award at Mumbai. The Private Limited Company which had advanced monies during the pendency of the arbitration proceedings also shifts its registered office at Mumbai. The award dismisses the claims of the said Private Limited Company. The challenge to the said award can be made:*

- (1) *Only in the Courts at Mumbai where the arbitration award was pronounced.*
- (2) *Only in the Courts at Delhi.*
- (3) *Either in the Court at Mumbai or in the Court at Delhi.*
- (4) *Though challenge can be made in the Court at Mumbai also but the Court at Mumbai will return the objection for filing in the Court at Delhi, the challenge being to an award of the retired Judge of the Bombay High Court.*

48. In terms of the Answer Key, option (2) [*Only in the Courts at Delhi*] is the correct answer. The petitioners suggest that option (3) [*Either in the Court at Mumbai or in the Court at Delhi*] would be the right answer.

49. Section 34 of the Arbitration and Conciliation Act, 1996 makes provision for an application for setting aside an arbitral award. The opening words of section 34(1) are – “Recourse to a Court against an arbitral award may be made only by an application for setting aside such award...”. Clearly, such an application must be made to a “court”. Which court? The answer lies in section 2(1)(e) of the said Act which reads as follows:-

“2. Definitions.—

(1) In this Part, unless the context otherwise requires,—

XXXX XXXX XXXX XXXX XXXX

(e) “Court” means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes;

XXXX XXXX XXXX XXXX XXXX”

50. The crucial words are – “*having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit*”. The question, therefore, is – if there had been no arbitration clause, where could the suit have been filed? This takes us to section 20 of the Code of Civil Procedure, 1908, which would be applicable in the facts of the question at hand. Section 20 of the Code reads as under:-

“20. Other suits to be instituted where defendants reside or cause of action arises.

Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises.

Explanation.-A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.”

51. Now, let us go back to the facts. If we refer to the Private Limited Company which advanced the money and the Private Limited Company which received the money as A and B, respectively, it is apparent that A has a claim against B. The money was advanced in Delhi. The disputes arose in Delhi. Thus, the entire cause of action arose in Delhi. At that point of time, both A and B carried on business in Delhi. It is only during the arbitration proceedings that A shifted its registered office to Mumbai. But, that would not alter the place of suing

inasmuch as it is the place of business of the defendant (i.e., B) which is relevant and not the places of business of the plaintiff (i.e., A).

52. Consequently, Delhi is the only place where a suit could have been filed. Therefore, option (2) [*Only in the Courts at Delhi*], as indicated in the Answer Key, is the correct answer.

Question No. 182

182. A time barred debt can be claimed:

- (1) *As a set off.* (3) *As a fresh suit.*
(2) *As a counter claim.* (4) *None of the above.*

53. According to the petitioners, option (1) [*As a set off*] is the correct answer. But, the Answer Key shows option (4) [*None of the above*] to be the correct answer.

54. There can be a legal set-off and an equitable set-off. The question does not specify which. Therefore, it must be presumed that it refers to both kinds of set-off. Order VIII Rule 6 of the Code of Civil Procedure, 1908 deals with legal set-off. But, independent of the provisions of the said Code, there also exists the concept of equitable set-off. This would be clear from the following observations of the Supreme Court in **Union of India v. Karam Chand Thapar & Bros (Coal Sales) Ltd : (2004) 3 SCC 504**, with reference to the provisions of Order VIII Rule 6 of the said Code:-

“17. Sub-rule (1) of Rule 6 of Order 8 of the CPC provides as under :

"6. Particulars of set-off to be given in written statement. - (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off."

18. What the rule deals with is legal set-off. The claim sought to be set-off must be for an ascertained sum of money and legally recoverable by the claimant. What is more significant is that both the parties must fill the same character in respect of the two claims sought to be set-off or adjusted. Apart from the rule enacted in Rule 6 abovesaid there exists a right to set-off, called equitable, independently of the provisions of the Code. Such mutual debts and credits or cross-demands, to be available for extinction by way of equitable set-off, must have arisen out of the same transaction or ought to be so connected in their nature and circumstances as to make it inequitable for the Court to allow the claim before it and leave the defendant high and dry for the present unless he files a cross-suit of his own. When a plea in the nature of equitable set-off is raised it is not done as of right and the discretion lies with the Court to entertain and allow such plea or not to do so."

55. Once it is clear that there can be two kinds of set-offs and that the question does not distinguish between either of them, what needs to

be seen is whether in either case a time barred claim can be claimed as a set-off. A Division Bench of the Calcutta High Court in the case of **Peerless General Finance and Investment Co. Ltd v. Jitendra Kumar Khan: 2004 (4) CHN 255** noted as under:-

“14. In the case of Ramdhari Singh, reported at 19 CWN 1183, also a Division Bench judgement, it was opined that the right of set-off exists not only in cases of mutual debits and credits but also where cross-demands arise out of the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit. It was also said there that an equitable set-off is to be permitted in the defendants' pleadings "more specially when a fresh suit, may be barred by limitation".

(underlining added)

56. It was further observed in the said decision as follows:-

“18. In the facts of the present case, in our opinion, it would be inequitable to permit the plaintiffs to recover its unliquidated damages, provided he is able to prove the case at trial, without allowing the defendants to set-off the amounts outstanding on an old debt, provided the existence of the loan and the existence of still outstanding amounts can be sufficiently proved by the defendants at trial apart from the question of limitation.

19. We are of the opinion that section 3 of the Limitation Act of 1963 does not relate to equitable set-offs at all. The most important distinction between a legal set-off as mentioned in the Code, and an equitable set-off as formulated by Judge made law, is that at the end of a suit, a legal set-off might result in a sum of money being paid to the defendants alone without the plaintiff's being held to be entitled to any recovery at all; but in the case of an equitable set-off, which is time-barred, this can never happen. Such an equitable set-off can only wipe off pro tanto the plaintiffs' claim. If the

plaintiffs claim is not proved at all and if the defendants' barred equitable set-off is proved to the full extent, even then the defendants cannot claim a decree because the whole purpose why he was allowed to plead a barred equitable set-off was that it was inequitable to allow the plaintiff to recover, leaving the defendants equitable claims out of consideration altogether. If the plaintiff is recovering nothing, then nothing inequitable is done if the defendants equitable set-off is completely brushed off."

So, there is judicial precedent that a time barred debt may be claimed by way of an equitable set-off. Therefore, option (1) cannot be regarded as a wrong answer. But, at the same time, we must also keep in mind that some candidates may have had in mind only a legal set-off. This is so because the question does not specify the kind of set-off. So, candidates, who worked out the solution on the understanding that the question dealt with legal set-off and the provisions of Order 8 Rule 6 CPC, and, consequently, chose option (4), also cannot be faulted. But, as there cannot be two correct answers for the same question in the scheme of the 'OMR Sheet' based test, the question would have to be removed from consideration so that neither those candidates who chose option (1) nor those who chose option (4) are negatively marked.

Question No. 188

188. A, B and C are partners in a firm. C retires and X is admitted as a new partner. The firm did not give a public notice of the change but continued its business in its old firm name. Z, a customer of the firm, deals with the firm after the change and the firm becomes indebted to him:

(1) Z can sue A, B, C and X.

- (2) *Z can sue A, B and C.*
- (3) *Z can sue either A, B and C, or, A, B and X.*
- (4) *Z can sue A and B only.*

57. The petitioners contend that option (3) is the correct answer in view of the decision in the case of **Scarf v. Jardine: (1882) 7 App.Cas. 345.** On the other hand, the learned counsel for the DHC drew our attention to section 32(3) of the Indian Partnership Act, 1932 and submitted that a plain reading of the provision would suggest that C alongwith A, B and X would be liable to Z. Therefore, according to him, option (1) has correctly been shown in the Answer Key.

58. Lindlay & Banks on Partnership, 18th edition, has dealt with the subject of ‘incoming and outgoing partners’ in the following manner at pages 99-100:

“..Assume that A and B carry on business under the name X & Co. Neither A nor B holds himself out as a member of that firm to anyone who does not know of his connection with it. Thus, if A retires from the firm but gives no notice thereof, he will remain liable to existing customers who know of that connection and continue to deal with the firm on the assumption that he is still a partner; but A will incur no liability to new customers of X & Co. who have never heard of him. If, on A’s retirement, C enters into partnership with B, and B and C thereafter carry on business under the name X & Co., even an old customer of X & Co., who continues to deal with the firm and has no notice of A’s retirement or C’s admission, cannot truly say that A ever held himself out as a partner with C or with both B and C. Consequently, such an old customer cannot maintain an action against A, B and C jointly for a debt contracted by X & Co. after A’s retirement. What he *may* do is

either sue A and B, on the ground that he dealt with X & Co. relying on the fact that they were both still members of that firm, or sue B and C, on the ground that they are his real debtors. He must, however, elect between those two options: he may not sue A, B and C on the ground that B and C are in truth the partners of X & Co. and that A is stopped from denying that he is a member of that firm. This was decided in *Scarf v. Jardine*.”

59. Coming, now, to the question at hand, we have two sets of partners of the firm (1) A, B and C and (2) A, B and X. However, no public notice of the retirement of C or the admission of X is given and the business is continued in the old firm name. Thus, Z, who is presumably an old customer of the firm, cannot say that C held himself out as a partner with X or with A, B and X. This is so because Z, when he dealt with the firm subsequent to the retirement of C and admission of X, was not aware of this change at all. There are only two possibilities: either Z knew of the change or Z did not know of the change. If Z did not know of the change, he would continue to think that the firm comprised of A, B and C. If he did not know about the change, he would be aware that the firm comprised of A, B and X and that C was no longer a partner. In either eventuality, there would be no occasion for Z to believe that C was a partner with X or with A, B and X. As a result, Z cannot bring an action against all (A, B, C and X) jointly. The reason being that C never held out to Z that he (C) and X were ever partners at the same time with A and B.

60. At the same time, since no public notice was given of the change-over in the partnership, C’s liability to third parties for acts done

by the firm after his retirement would continue. Therefore, Z has to decide as to whether he wants to sue C or not? If he chooses to sue C, he can only do so in conjunction with A and B but, not in conjunction with X. Because C and X were never partners together. To make it clear, Z may either sue A, B and C on the ground that he dealt with the firm relying on the fact that they were still the partners of the firm or Z may sue A,B and X on the ground that they are his real debtors. The two claims are mutually exclusive and it is for this reason that Z has to elect one of the two options available to him.

61. Let us now examine, section 32(3) of the Indian Partnership Act, 1932. The said provision is as under:-

“32. Retirement of a partner

(1) xxxx xxxx xxxx xxxx

(2) xxxx xxxx xxxx xxxx

(3) Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement, until public notice is given of the retirement:

PROVIDED that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) Notices under sub-section (3) may be given by the retired partner or by any partner of the reconstituted firm.”

62. The first point to be noted is that the said provision only speaks of retirement of a partner and does not deal with a situation of

retirement and admission of a new partner. Obviously, therefore, the expression “he and the partners” would refer to the retiring partner and the other partners of the firm immediately prior to his retirement (viz. C and A and B in the context of the question under consideration). It would exclude reference to a partner (viz. X) who is subsequently admitted as a partner in the firm. Furthermore, all that this provision says is that if public notice is not given of the retirement of a partner, the retiring partner and the other partners would ‘continue’ to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement. It does not in any way detract from the rule in ***Scarf v. Jardine*** (*supra*). Z can sue A, B and C because of section 32(3) or, alternatively, A, B and X because they, in fact, are the partners in the firm. But, he cannot sue A, B, C and X together because C and X were never partners.

63. Consequently, option (3) [*Z can sue either A, B and C, or, A, B and X*] is the correct answer and not option (1).

Question No. 191

191. *If only a part of the consideration or object is unlawful, the contract under Section 24 of the Indian Contract Act, 1872 shall be:*

- (1) *Valid to the extent the same are lawful.*
- (2) *Void to the extent the same are unlawful.*
- (3) *Void as a whole.*
- (4) *Valid as a whole.*

64. The Answer Key shows option (2) [*Void to the extent the same are unlawful*] as the correct answer. According to the petitioners, it is option (3) [*Void as a whole*] which is the correct answer. The learned counsel for the DHC conceded that option (3) is the correct answer and that the mistake in the Answer Key, which shows option (2) as the correct answer, needs to be rectified and the OMR answer sheets need to be re-evaluated.

Question No. 195

195. Which of the following is an offer?

- (1) A bid at an auction sale.
- (2) Banker's catalogue of charges.
- (3) Menu card at a restaurant.
- (4) All of the above.

65. According to the petitioners, the correct answer is option (1) [*A bid at an auction sale*]. On the other hand, on behalf of the DHC it was maintained that option (4) [*All of the above*] has been correctly shown in the Answer Key as the right answer.

66. Undoubtedly, 'a bid at an auction sale' is an 'offer' or, more accurately in terms of section 2(a) of The Indian Contract Act, 1872, a proposal. But, in view of the Privy Council decision in the case of **State Aided Bank of Travancore v. Dhrit Ram**; AIR 1942 PC 6, a banker's catalogue of charges is not an offer. Clearly, therefore, option (4) is not the correct answer. Furthermore, a menu card at a restaurant is also not

an offer. It is only an invitation for offers. Thus, the only correct answer is option (1), as suggested by the petitioners.

Question No. 197

197. In which of the following cases, a contingent contract becomes void:

- (1) If the contract contemplates the happening of the event within a certain time, and event does not happen or its happening becomes impossible.
- (2) If the performance is made to depend upon an event which is already impossible.
- (3) If the event contemplated does not happen.
- (4) Both (1) & (2) above

67. According to the petitioners, the correct answer is option (1). Whereas, according to the Answer Key, the correct answer is option (4) [Both (1) & (2) above]. Thus, there is agreement that, at least, option (1) is one of the correct answers. This is also straightaway apparent from the first part of section 35 of the Indian Contract Act, 1872, which is as under:-

“35. When contracts become void, which are contingent on happening of specified event within fixed time

Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void, if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

XXXX XXXX XXXX XXXX XXXX”

Therefore, we have to examine as to whether Option (2) is also correct. If that be so, then, option (4) [*Both (1) & (2) above*] would be the correct answer. However, if option (2) is not a correct answer then, option (1) would be the right answer.

68. The learned counsel for the DHC drew our attention to section 36 of the Indian Contract Act, 1872 in support of his contention that option (2) would also be a correct answer. The said section 36 is as under:-

“36. Agreements contingent on impossible event void
Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to agreement at the time when it is made.”

The question as framed mentions a “contingent contract” becoming void. But, section 36 does not deal with that at all. It refers to “contingent agreements”. A contingent agreement whose performance depends upon the happening of an ‘already’ impossible event is void in view of section 36. Such a contingent agreement does not even mature into a contract which may subsequently become void. There is no contract but, only a void contingent agreement. We must also point out that by virtue of section 10 of the said Act, all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void by the said Act. Since a “contingent agreement” whose performance depends upon the happening of an ‘already’ impossible event is void, as aforesaid, such an agreement cannot even be regarded as

a contract. Therefore, section 36 cannot be regarded as one dealing with “contingent contracts” which subsequently, become void because of certain circumstances. That being the position, option (2) cannot be a correct answer.

69. As a result, the only correct answer to this question is option (1) and not option (4). The Answer Key, which shows option (4) as the correct answer, needs to be rectified and the OMR answer sheets need to be re-evaluated.

OUT OF SYLLABUS

70. At this point, it would be appropriate to recall that according to the syllabus for the said DJS Exam , the candidates were to be tested for :-

- (1) their general knowledge and aptitude,
- (2) their power of expression and flair in English,
- (3) their knowledge of objective type legal problems and their solutions covering:
 - (i) The Constitution of India,
 - (ii) Code of Civil Procedure,
 - (iii) Code of Criminal Procedure,
 - (iv) Indian Penal Code,
 - (v) Contract Act,
 - (vi) Partnership Act,
 - (vii) Principles governing arbitration law,
 - (viii) Evidence Act,
 - (ix) The Specific Relief Act and

(x) The Limitation Act.

Question No. 105

105. Which one of the following thinkers called jurisprudence as the "Philosophy of Positive Law" ?

- | | |
|-------------------------|------------------------|
| <i>(1) Salmond</i> | <i>(2) H.L.A. Hart</i> |
| <i>(3) Roscoe Pound</i> | <i>(4) John Austin</i> |

71. This question relates to jurisprudence, which was not part of the syllabus. According to the learned counsel for the DHC, it was a question on general knowledge. We cannot persuade ourselves to agree with this contention. The question by its very nature refers to jurisprudence. As such, this question has to be removed from the purview of the DJS exam.

Question No. 112

112. The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 rescinded

- (1) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.*
- (2) SEBI (Disclosure and Investor Protection) Guidelines, 2000*
- (3) SEBI (Prohibition Of Insider Trading) Regulations, 1992.*
- (4) SEBI (Delisting of Securities) Guidelines, 2003.*

72. The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 is also outside the syllabus. Therefore, this question has to be removed from the purview of the DJS exam.

Question No. 150

150. *The Pure Theory of Law which saw Law as a Norm of Action was advocated by*

- | | |
|-------------------|-----------------|
| (1) A.V. Dicey | (2) Leon Duguit |
| (3) Francois Geny | (4) Hans Kelsen |

73. This question is also of jurisprudence, which was not part of the syllabus. Consequently, this question has to be removed from the purview of the DJS exam.

Question No. 187

187. *Upon the coming into force of the Limited Liability Partnership Act, 2008:*

- (1) *The Indian Partnership Act, 1932 stands repealed.*
- (2) *The provisions of the Indian Partnership Act, 1932 ipso facto apply to Limited Liability Partnerships (LLPs) also.*
- (3) *Both the Acts co-exist but the provisions of the Indian Partnership Act, 1932 are not applicable to LLPs save as otherwise provided.*
- (4) *The Limited Liability Partnership Act, 2008 is applicable to only metropolitan cities as defined therein and the Indian Partnership Act, 1932 continues to apply to the rest of the country.*

74. Clearly, this question tests the knowledge of a candidate in respect of the Limited Liability Partnership Act, 2008 which, admittedly, was not part of the syllabus. Consequently, this question has to be deleted for the purposes of the said DJS exam.

SUMMARY

75. In view of the above discussion, the questions would fall into three categories. The first being those questions where the answers reflected in the Answer Key are correct. This category would include all those questions which have not been discussed above (i.e., questions in respect of which there was no challenge at the hearing) and those questions in respect of which the answers shown in the Answer Key have been found to be correct by us. The second category comprises of those questions in respect of which the option shown to be correct in the Answer Key is incorrect and instead another option as determined above is correct. The third category of questions covers (1) questions out of syllabus; (2) questions in respect of which the answer in the Answer Key is debatable; (3) questions in respect of which there are more than one correct option; (4) questions in respect of which none of the options is correct; and (5) questions which are confusing or do not supply complete information for a clear answer.

76. As regards the first category, no change in the Answer Key is required. The Answer Key in respect of the second category of questions would have to be corrected and the OMR answer sheets would have to be re-evaluated. Insofar as the third category is concerned, questions falling in this category would have to be removed from the purview of the

examination. A summary of all the disputed questions is given in tabular form below:-

Question No.	Answer as per the Answer Key	Correct Answer(s)	Out of Syllabus	Action
60	(2)	(1)	No	Correct the Answer Key
61	(3)	(3), (4)	No	Remove
69	(3)	(3)	No	No change
71	(3)	(3)	No	No change
80	(2)	none	No	Remove
84	(4)	none	No	Remove
90	(2)	(2)	No	No change
97	(4)	(2)	No	Correct the Answer Key
99	(2)	none	No	Remove
100	(2)	(1) or (2), debatable	No	Remove
105	-	-	Yes	Remove
112	-	-	Yes	Remove
140	(4)	(3),(4)	No	Remove
150	-	-	Yes	Remove
165	(2)	(1)	No	Correct the Answer Key
166	(1)	(1) or (3), debatable	No	Remove
170	(1)	(1)	No	No change
172	(3)	(3)	No	No change
175	(1)	(1)	No	No change
177	(2)	(2)	No	No change
182	(4)	(1) or (4)	No	Remove
187	-	-	Yes	Remove
188	(1)	(3)	No	Correct the Answer Key
191	(2)	(3)	No	Correct the Answer Key
195	(4)	(1)	No	Correct the Answer Key
197	(4)	(1)	No	Correct the Answer Key

77. From the above table, with respect to the questions discussed above, it is evident that 12 questions would have to be removed/ deleted from the purview of the said DJS Exam, 7 questions would require corrections in the Answer Key as indicated above and 7 questions (alongwith the 174 other questions not disputed in the course of arguments) require no change in the Answer Key.

78. Now, the point for consideration at this stage is how is this re-evaluation to be done? We must make it clear that the 276 candidates who have been declared as qualified for the DJS Main Examination (Written) are not before us and, therefore, it would not be fair to disturb their status as qualified candidates. At the same time, insofar as the others are concerned, we must also keep in mind the following twin criteria of qualification in the said DJS exam:-

- (1) Minimum qualifying marks in the preliminary examination of 60% for general and 55% for reserved categories (i.e, Scheduled Castes, Scheduled Tribes and Physically Handicapped [Blind/ low vision], [orthopaedic]);
- (2) The number of candidates to be admitted to the main examination should not be more than ten (10) times the total number of vacancies of each category advertised.

79. Let us first consider the condition with regard to minimum qualifying marks. When there were 200 questions, the maximum possible marks were 200 on the basis of one mark for each correct answer. Consequently, the minimum qualifying marks for general candidates was 120 (60% of 200) and for reserved candidates it was 110

(55% of 200). Because we have directed that 12 questions be removed from the purview of consideration for the purposes of re-evaluation, the minimum qualifying marks would also change. It would become 112.8 (60% of 188) for general candidates and 103.4 (55% of 188) for the reserved categories.

80. We now come to the second condition which stipulates that the number of candidates to be admitted to the main examination (written) should not be more than ten times the total number of vacancies of each category advertised. Let us take the case of general vacancies which were advertised as 23 in number. Ten times 23 would mean that up to 230 general candidates could qualify. But, as mentioned above, 235 general candidates have already been declared as qualified for taking the Main Examination (Written). We are, therefore, faced with a problem. If we strictly follow this condition then there is no scope for any other candidates (other than the 235 who have been declared qualified) to qualify. But, that would be unfair to them as the question paper itself, as we have seen above, was not free from faults. Hypothetically speaking, a candidate may have left the 12 questions, which are now to be removed, and, therefore, he would have scored a zero for those questions. What is worse, he may have answered all those 12 questions wrongly (in terms of the Answer Key) and, therefore, he would have received minus (-) 3 marks because of 25% negative marking. And, all this, for no fault on his part as the 12 questions ought not to have been there in the question paper. Therefore, it would be unfair to shut out such candidates on the basis of the second condition.

81. We must harmonize the requirement of the second condition with the requirement of not disturbing the candidates who have been declared as qualified as also with the requirement of justice, fairness and equity insofar as the other candidates are concerned. We feel that this would be possible:

- (1) by re-evaluating the OMR answer sheets of all the general category candidates on the lines summarized in the table set out above;
- (2) by selecting the top 230 candidates in order of merit subject to the minimum qualifying marks of 112.8; and
- (3) by adding the names of those candidates, if any, who were earlier declared as qualified but do not find a place in the top 230 candidates after re-evaluation.

In this manner, all persons who could legitimately claim to be in the top 230 would be included and all those who were earlier declared as having qualified would also retain their declared status. Although, the final number of qualified candidates may exceed the figure of 230, this is the only way, according to us, to harmonize the rules with the competing claims of the candidates in a just and fair manner. A similar exercise would also have to be conducted in respect of each of the reserved categories. The entire exercise be completed by the respondents within a period of two weeks. Consequently, the Main Examination (Written) would also have to be re-scheduled and, to give enough time for preparation, we feel that it should not be earlier than the 26.05.2012.

Long Questions

82. At the beginning of this judgment we had stated that though the objection to the length of questions had been taken, we were not required to examine that aspect insofar as this examination was concerned inasmuch as the questions were equally lengthy for all and did not hurt the relative chances of the candidates. However, for the future we would like to point out that lengthy questions ought to be avoided considering the fact that a candidate has only 45 seconds on an average to read, understand and select the right option. By way of illustration we quote two questions (Question Nos. 63 and 176) which clearly fall in the category of lengthy questions:-

63. *In a writing containing an acknowledge by 'A' that he will sell his house in Kolkata to 'B' for a sum of Rs 50,00,000/- or Rs 60,00,000/- and having blank space with respect to the particulars of the house i.e. the house number, the street number and the colony not being written, and it not being in dispute that 'A' has a house on a plot of land ad-measuring 300 sq. yards and another house on a plot of land ad-measuring 1000 sq. yards at Kolkata, in a suit filed by 'B' against 'A', 'B' can lead evidence:*

- (1) *To prove that market rate for land in Kolkata is Rs 18,000/- per sq. yard in the colony where 'A's house was situated; to make good the deficiency in the writing by linking the price of Rs 18,000/- per sq. yard as only applicable to the plot ad-measuring 300 sq. yards and the rest being the value of the building.*
- (2) *To prove that unintentionally the house number got omitted to be written and that*

the writing pertained to the 300 sq. yards land and unintentionally the sum of Rs 50,00,000/- written on the writing got omitted to be scored of.

(3) To prove that the property number was left blank because 'A' told him that he would be exchanging his house on the 300 sq. yard plot of land with another house in a similar colony with his brother and later on the house number would be filled up.

(4) None of the above.

176. 'A' has lent monies to 'B' under a written agreement containing an arbitration clause. The agreement does not specify the time of repayment. Rather the money was repayable on demand by 'A'. 'A' after five years of the date when the loan was made demanded money which was not repaid by 'B'. The parties could not arrive at a consensus on the appointment of arbitrator also. 'A' filed an application under Section 11 of the Arbitration & Conciliation Act, 1996 before the Chief Justice of the High Court for appointment of an arbitrator. 'B' in response to the said application contends that the claim of 'A' is stale and barred by time and thus arbitrator be not appointed. The Chief Justice:

(1) Is bound to appoint the arbitrator leaving the plea of limitation open for decision in arbitration award.

(2) Is bound to dismiss the application for appointment of arbitrator since the claim adjudication whereof is sought by arbitration is barred by time.

- (3) *Is required to make 'B' deposit the money in Court and then appoint the arbitrator and refer the parties to arbitration.*
- (4) *Is required to require 'A' to furnish security for actual costs of arbitration to be incurred by 'B' and then appoint the arbitrator and refer the parties to arbitration.*

83. Before concluding this judgment, we would also like to observe that, for the future, the respondents should take care in framing questions for such multiple-choice tests. The questions must be clear and provide all the necessary information leading to the appropriate answer. Questions which have doubtful or debatable answers should be excluded. As we have seen some of the questions in this examination require detailed reasoning and consideration which is not possible in the time frame of 45 seconds. Such questions are best left for an essay type examination and are not suited to multiple choice tests. In this light, it would be appropriate to refer to the Supreme Court's decision in **Kanpur University v. Samir Gupta: (1984) 1 SCC 73**, wherein the Supreme Court, in the context of 'multiple choice objective-type test', *inter alia*, observed as under:-

“..... Fourthly, in a system of 'multiple choice objective-type test', care must be taken to see that questions having an ambiguous import are not set in the papers. That kind of system of examination involves merely the tick-marking of the correct answer, it leaves no scope for reasoning or argument. The answer is 'yes' or 'no'. That is why the questions have to be clear and unequivocal.”

84. We hope that these observations are kept in mind for future examinations conducted by the respondents.

85. With these observations, the writ petitions are allowed to the extent indicated above. In the circumstances, the parties are left to bear their own costs.

BADAR DURREZ AHMED, J

V.K. JAIN, J

APRIL 09, 2012

HJ