

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

+ **CM(M) No.653/2012 and C.M. Nos.9961/2012 (stay) & 9963/2012**

% **11th September, 2014**

SHRI CHIRAGUDDIN Petitioner
Through: Mr. Paritosh Budhiraja, Advocate.

VERSUS

SMT. URMILA RANI & ORS. Respondents
Through: Mr. P.K. Rawal, Advocate.

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

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. This petition under Article 227 of the Constitution of India is filed against the impugned judgment of the Rent Control Tribunal dated 6.3.2012 which has dismissed the first appeal filed by the petitioner/appellant against the order of the trial court/Additional Rent Controller dated 21.5.2008 by which the trial court directed eviction of the petitioner/tenant in a petition filed under Section 14(1)(a) of the Delhi Rent Control Act, 1958 (hereinafter referred to as 'the Act') pertaining to non-payment of rent.

2. The issue in the present case is that whether a right created under Section 19 of the Slum Area (Improvement and Clearance) Act, 1956 (hereinafter referred to as 'the Slum Act') can be waived and is deemed to be waived by the petitioner/tenant in the facts of the present case.

3. The facts of the case are that the respondent nos.1 to 5/landlords filed an eviction petition under Section 14(1)(a) of the Act, on the ground of non-payment of rent. This eviction petition was decreed by the first court/Additional Rent Controller by the judgment dated 12.3.2007. Since in law after decreeing a petition, it has to be examined whether petitioner/tenant should be given benefit of the first default as per Section 14(2) of the Act provided that the tenant has complied with the order of deposit under Section 15(1) of the Act, proceedings consequent to the judgment dated 12.3.2007 were taken up and it was found that the petitioner/tenant had defaulted in payment of rent and consequently by the order dated 21.5.2008, benefit of Section 14(2) of the Act was denied to the petitioner/tenant and the petitioner/tenant was hence directed to be evicted from the suit/tenanted premises which is one shop in the property bearing no.1761, Main Road, Patuadi House, Darya Ganj, New Delhi. Petitioner/tenant challenged the judgment dated 12.3.2007 and the order of eviction dated 21.5.2008 before the Rent Control Tribunal but this appeal was

dismissed by the Rent Control Tribunal vide the impugned judgment dated 6.3.2012.

4. The issue with respect to the premises being in a slum area and therefore whether the eviction order could not be passed against the petitioner/tenant as no prior permission was taken under Section 19 of the Slum Act is dealt with and decided vide para 13 of the impugned judgment dated 6.3.2012, and which para 13 reads as under:-

“13. The other ground of premises being in slum is conspicuously absent in written statement. It was not for the landlord to show the negative that the premises were not situated in slums. Rather it was for the tenant to show the positive that the premises were situated in slum. He did not lead any evidence to establish the same. It is not that the entire old Delhi is in slum.”

5(i) Learned counsel for the petitioner/tenant has argued before this Court by placing reliance upon the judgment of a learned Single Judge of this Court in the case of *Albein Plywood Ltd. & Anr. Vs. Janak Kapur & Ors. 50 (1993) DLT 228* that once the permission under Section 19 of the Slum Act is not taken, proceedings for eviction of the tenant under Section 14 of the Act are not-maintainable and wholly barred. The relevant paras of the judgment which are relied upon are paras 3, 4, 6 to 9, 11 and 12 and which read as under:-

“3. Counsel for the appellant has raised a question of jurisdiction of the Rent Controller in entertaining the eviction petition for want of permission under Section 19 of the Slum Areas (Improvement & Clearance) Act. 1956. He has produced on record a notification dated April 20, 1957 SRO 1252 issued under Section 3 of the said Act

showing that the property in question namely 2155 Desh Bandhu Gupta Road known as 8/4 Desh Bandhu Gupta Road, New Delhi is located in the slum area to which the provisions of the said Act apply. He has moved an application for permission to lead additional evidence in this respect As the notification is published in the official Gazette a judicial notice of this notification can be taken. It is now not in dispute that the provisions of Slum Areas (Improvement & Clearance) Act. 1956 were applicable to the premises in question at the time the eviction petition was brought.

4. The learned counsel for the appellant has referred to judgment of the Supreme Court given in Civil Appeal No. 1906 of 1987 **Mohd Usman & Others Vs. Mohd. Siddique & Another** decided on August 26,1987 wherein it has been new categorically laid down that the permission to initiate eviction proceedings is a pro-requisite as provided in Section 19 of the said Act. He has then referred to **Puran Chand Vs. Nathu @ Nathauli & Others** S.A.O. No. 60 of 1970 decided on April 26, 1974 wherein it has been held by this Court that 17 unless the requisite permission as contemplated by Section 19 of the Slum Areas (Improvement & Clearance) Act 1956 is obtained for initiating the proceedings of eviction under the provisions of the Delhi Rent Control Act, the Controller under the Act would have no jurisdiction to try such a petition and if eviction order is passed in absence of such permission such an order would be nullity and the objection with regard to order being nullity passed by the court which has no jurisdiction to deal with the matter can be raised even in the execution proceedings. There legal propositions are not being disputed by the learned counsel for the respondent before me and rightly so.

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6. It is quite settled principle of law that if the language of the Section admits of no doubt and is clear then the objects given in the preamble need not be taken note of Section 19 clearly lays down that notwithstanding any thing contained in any other law for the time being in force no person shall except the previous permission in writing of the Competent Authority institute after the commencement of the Slum Areas (Improvement & Clearance) Amendment Act 1964 any suit or proceeding for obtaining any decree or order for the eviction of a tenant from any building or land in the slum area. It is

quite clear from the language of the statute that no suit or proceeding can be initiated for obtaining any decree or order for eviction of a tenant. It would mean that question whether a tenant has been or has not been in possession of a particular building in not to be gone into for deciding whether a particular proceeding or suit could be instituted or not for eviction of a tenant from the building.

7. The respondent in the present case has initiated proceedings seeking an order of eviction of the tenant from the building located in the slum area. Thus this language of Section 19 completely bars the initiation of such proceedings without obtaining necessary permission from the Competent Authority under the Slum Areas (Improvement & Clearance) Act.

8. Under Section 19(4) of the said Act the Competent Authority has been enabled to take into account certain factors to decide whether a permission, should or should not be granted for initiating such proceedings by the landlord against a tenant. Where one of the conditions is whether the tenant has acquired alternative accommodation which is within the means of the tenant. There are various grounds of eviction given in proviso to sub-section (1) of Section 14 of the Delhi Rent Control Act and one of such grounds is where the tenant has acquired or built another residential accommodation. Another ground of eviction 18 is where neither the tenant himself nor his family members have been residing in the premises for more than six months preceding the filing of the eviction petition. In such cases also the tenant would be deemed to have means to obtain alternative accommodation. If the contention of the learned counsel for the respondent is correct, then in such cases also no permission should be necessary to be obtained from the Competent Authority under the Slum Areas (Improvement & Clearance) Act before initiating the proceedings for eviction. If the legislature intended so then the legislature would have provided in Section 19 itself that in such like cases no permission would be needed from the Competent Authority before initiation of eviction proceedings against a tenant.

9. In absence of any such Explanation being provided in Section 19 in this manner it is not possible to hold that no permission would be

required for initiating the eviction proceeding against a tenant if it is found as a matter of fact that tenant has never been in possession of the demised premises. It is already held by the Supreme Court that obtaining of permission under Section 19 is mandatory and is pre-requisite for initiating the eviction proceeding. In the present case as no such permission has been obtained under Section 19 of the Slum Areas (Improvement & Clearance) Act the Additional Rent Controller has no jurisdiction to proceed in the matter and thus could not have passed the eviction order.

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11. The question whether a particular tenant would create a slum or not is to be gone into by the Competent Authority only-under the Slum Areas (Improvement & clearance) Act and the observations made by the court as quoted above were with regard to the exercise of jurisdiction by the Competent Authority under the said Act for giving the permission as required by Section 19 of the said Act. So these observations do not lay down the law that where the premises are situated in slum area an eviction petition can be brought without obtaining the requisite permission under Section 19 if the Controller was to come to the conclusion that the tenant would not create the slum as he was never in possession of the demised premises. So, this judgment cannot help the respondent in the present case.

12. I allow the appeal, set aside the impugned orders and dismiss the eviction petition as, not maintainable for want of requisite permission under Section 19 of the Slum Areas (Improvement & Clearance) Act 1956. The parties are however left to bear their own costs throughout.” (emphasis shown is relied upon by the petitioner)

- (ii) Petitioner accordingly contends that since no eviction proceedings can be filed without obtaining the permission of the authority under the Slum Act, and admittedly since the premises are situated in a slum area and

permission under Section 19 of the Slum Act has not been obtained, the eviction order against the petitioner/tenant is liable to be set aside.

6. Learned counsel for the respondents in response places reliance upon the later judgment of the Supreme Court in the case of *Martin and Harris Ltd. Vs. Vith Additional District Judge and Ors. AIR 1998 SC 492* wherein the Supreme Court has held that if a provision in a Rent Control Act is made for the benefit of a tenant, since that provision is for the personal benefit of the tenant, a right created by the provision can always be waived by the tenant. Reliance is placed upon the head note B of the judgment and which reads as under:-

“(B) U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act (13 of 1972), S.21(1)(a), First Proviso- Release of building-Application for possession-Provision for six months notice before initiation of proceedings-Though mandatory and confers protection to tenant, it can be waived by him.

The provision for six months’ notice before initiation of proceedings under S.21(1) though is mandatory and confers protection to the tenant concerned, it can be waived by him. On the facts of the instant case there is no escape from the conclusion that the appellant tenant, for the reasons best known to it, consciously and being alive to the clear factual situation that the suit was filed on that ground prior to the expiry of six months’ notice, did not think it fit to pursue that point any further and on the contrary joined issues on merits expecting a favourable decision in the suit and having lost therein and got an adverse decision did not think it fit even to challenge the decision on the ground of maintainability of the suit while filing an appeal and argued the appeal only on merits and only as an after thought at the stage of writ petition in the High Court such a contention was sought to be taken up for the first time for consideration. On the facts of the present case, therefore, it must be held that the appellant had waived that contention about the

suit being premature having been filed before the expiry of six months from the date of the suit notice.

AIR 1959 SC 559, Disting.

(Paras 11 to 14)

Further it could not be said that the provision containing the proviso to S.21(1) of the Act was for public benefit and could not be waived. It is, of course, true that it is enacted to cover a class of tenants who are sitting tenants and whose premises are subsequently purchased by landlords who seek to evict the sitting tenants on the ground of bona fide requirement as envisaged by S.21(1)(a) of the Act, still the protection available to such tenants as found in the proviso would give the tenants concerned a locus penitentiae to avail of it or not. It is easy to visualize that proceedings under S.21(1)(a) of the Act would be between the landlord on the one hand and the tenant on the other. These proceedings are not of any public nature, nor any public interest is involved therein. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed and call for adjudication by the prescribed authority. The ground raised by the landlord under S.21(1)(a) would be personal to him and similarly the defence taken by the tenant would also be personal to him. Six months' breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realizes that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived.

(1194) 4 SCC 422, Rel. on.”

(emphasis relied upon by the respondent)

7. Instead of only referring to head note B, I would seek to reproduce paras 11 to 14 of the judgment of the Supreme Court in the case of ***Martin and Harris Ltd. (supra)*** and which paras read as under:-

“11. So far as this point is concerned it must be held on the clear language of the first proviso to Section 21(1) of the Act that application for possession Under Section 21(1)(a) had to be filed by the landlord

concerned not earlier than expiry of six months from the date of issuance of the notice by the landlord. On the facts of the present case it cannot be disputed that when the notice was issued on 20.09.1985 the application for possession could not have been filed by the respondent invoking the grounds mentioned in Clause (a) of Section 21(1) of the Act, at least till 20.03.1986, while the application was filed in January 1986. To that extent it can be said that the application was premature. The provision in this connection has to be treated to be mandatory.

12. However the further question survives for consideration, namely, whether the beneficial provision enacted by the Legislature in this connection for the protection of the tenant could be and in fact was waived by the tenant. So far as this question is concerned on the facts of the present case the answer must be in the affirmative. As we have noted earlier after the suit was filed the appellant filed its written statement on 17.09.1986. In the said written statement the appellant, amongst others, did take up the contention that the application as filed by the respondent-landlord Under Section 21(1)(a) was not maintainable and was premature as six months' period had not expired since the service of notice dated 20.09.1985 when the suit was filed. But curiously enough thereafter the said contention raised by the appellant in written statement was given a go-by for reasons best known to the appellant. It is easy to visualise that if at that stage the appellant had pressed for rejection of the application on the ground of Section 21(1)(a) as not showing completed cause of action due to non-expiry of six months from the date of service of notice invoking Order VII Rule 11(a) and (d), CPC, alleging that the plaint did not disclose a cause of action or it appeared to be barred by law, respondent-plaintiff could have withdrawn the suit on that ground under Order XXIII Rule 1 Sub-rule (3), CPC as the suit based on grounds Under Section 21(1)(a) of the Act would have been shown to have suffered from a formal defect and he would have been entitled to claim liberty to file a fresh suit on the same cause of action after the expiry of six months' period from the date of service of notice. That opportunity was lost to the respondent-landlord as the appellant did not pursue this contention any further. On the contrary appellant joined issues on merits by seeking permission to cross-examine the plaintiff on merits of the case on grounds as pleaded Under Section 21(1)(a) of the Act. When the decree was passed against the appellant, even while challenging the

said decree in appeal no such ground was taken in the Memo of Appeal, nor was it argued before the First Appellate Court. Under these circumstances, the High Court rightly held that the contention, regarding the suit being premature as filed before expiry of six months from the date of the notice, must be treated to have been waived by the appellant. Joining issue on this question learned senior counsel, Shri Rao, for the appellant invited our attention to a decision of this Court in the case of **Badri Prasad and Others v. Seth Nagarmal (1959) Supp (1) SCR 769: (AIR 1959 SC 559)**. In that case a suit filed by an unregistered company was found to be hit by the provisions of Section 4 Sub-section (2) of the Rewa State Companies Act, 1935. The said contention was permitted to be taken for the first time during arguments in appeal before this Court. It was held that as this contention went to the root of the maintainability of the suit it could be agitated as a pure question of law. We fail to appreciate how that decision can be of any avail to the appellant in the present case. This Court, placing reliance on a decision of the Privy Council in the case of **Surajmal Nargoremul v. Triton Insurance Company Ltd., (1925) LR 52 Ind App 126: (AIR 1925 PC 83)**, extracted with approval the observations of Lord Sumner at page 128 of the Report of the Privy Council judgment to the following effect :

"The suggestion may be at once dismissed that it is too late now to raise the section as an answer to the claim. No court can enforce as valid that which competent enactments have declared shall not be valid, nor is obedience to such an enactment a thing from which a court can be dispensed by the consent of the parties, or by a failure to plead or to argue the point at the outset : *Nixon v. Albion Marine Insurance Co.* [1867] L.R. 2 Ex. 338. The enactment is prohibitory. It is not confined to affording a party a protection, of which he may avail himself or not as he pleases."

The decision of the Privy Council referred to with approval by this Court in the aforesaid decision clearly indicates that if a proceeding before a Court is barred by a law, a plea to that effect being a pure question of law can be agitated any time. But if the prohibition imposed by the Statute is with a view to affording protection to a party, such protection can be waived by the party. He may avail of it or he may not avail of it as he may choose. It is not the case of the

appellant that the application for possession as filed by the respondent-plaintiff was barred by any provision of law. All that was contended was that it was prematurely filed as six months' period had not expired from the date of issuance of the suit notice. That provision obviously was enacted for the benefit and protection of the tenant. It is for the tenant to insist on it or to waive it. On the facts of the present case there is no escape from the conclusion that the said benefit of protection, for reasons best known to the appellant, was waived by it though it was alive to the said contention as it was mentioned at the outset in the written statement filed before the prescribed authority. Thereafter it was not pressed for consideration. Result was that the respondent-landlord by the said conduct of the appellant irretrievably changed his position and would get prejudiced if such a contention is entertained at such a late stage as was tried to be done before the High Court after both the courts had concurrently held on facts that the respondent-plaintiff had proved his case on merits.

13. It is not possible to agree with the contention of the learned senior counsel for the appellant that the provision containing the proviso to Section 21(1) of the Act was for public benefit and could not be waived. It is, of course, true that it is enacted to cover a class of tenants who are sitting tenants and whose premises are subsequently purchased by landlords who seek to evict the sitting tenants on the ground of bona fide requirement as envisaged by Section 21(1)(a) of the Act, still the protection available to such tenants as found in the proviso would give the tenants concerned a locus penitential to avail of it or not. It is easy to visualise that proceedings Under Section 21(1)(a) of the Act would be between the landlord on the one hand and the tenant on the other. These proceedings are not of any public nature. Nor any public interest is involved therein. Only personal interest of landlord on the one hand and the tenant on the other hand get clashed and call for adjudication by the prescribed authority. The ground raised by the landlord Under Section 21(1)(a) would be personal to him and similarly the defence taken by the tenant would also be personal to him. Six months breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived. In this connection we may

profitably refer to a decision of this Court in the case of **Krishan Lal v. State of J&K.**, (1994) 4 SCC 422, wherein Hansaria, J., speaking for a Bench of two learned Judges has made the pertinent observations concerning the question of waiver of a mandatory provision providing for issuance of notice to the parties sought to be proceeded against by the person giving the notice, in paragraph 16 and 17 of the Report as under :

"As to when violation of a mandatory provision makes an order a nullity has been the subject-matter of various decisions of this Court as well as of courts beyond the seven seas. This apart, there are views of reputed text writers. Let us start from our own one time Highest Court, which used to be Privy Council. This question came up for examination by that body in *Vellayan Chettiar v. Government of the province of Madras* AIR (1947) PC 197 in which while accepting that Section 80 of the CPC is mandatory, which was the view taken in **Bhagchand Dagadusa v. Secretary of State for India in Council**, 54 Ind. App 338: (AIR 1927 PC 176) it was held that even if a notice Under Section 80 be defective, the same would not per se render the suit requiring issuance of such a notice as a precondition for instituting the same as bad in the eye of law, as such a defect can be waived. This view was taken by pointing out that the protection provided by the section 80 is a protection given to the person concerned and if in a particular case that person does not require the protection he can lawfully waive his right. A distinction was made in this regard where the benefit conferred was to serve "an important purpose", in which case there would not be waiver (see paragraph 14).

This point had come up for examination by this Court in *Dhirendra Nath Gorai v. Shudhir Chandra Ghosh*, AIR 1964 SC 1300: (1964) 6 SCR 1001 and a question was posed in paragraph 7 whether an act done in breach of a mandatory provision is per force a nullity. This Court referred to what was stated in this regard by Mookherjee, J. in *Ashutosh Sikdar v. Behari Lal Kirtania*, ILR 35 Cal. 61 at page 72 and some other decisions of the Calcutta High Court along with one of the patna High Court and it was held that if a judgment-debtor, despite having received

notice of proclamation of sale, did not object to the non-compliance of sale, did not object to the non-compliance of the required provision, he must be deemed to have waived his right conferred by that provision. It was observed that a mandatory provision can be waived if the same be aimed to safeguard the interest of an individual and has not been conceived in the public interest."

Consequently it must be held that the provision for six months' notice before initiation of proceedings Under Section 21(1) of the Act, though is mandatory and confers protection to the tenant concerned, it can be waived by him. On the facts of the present case there is no escape from the conclusion that the appellant, for the reasons best known to it, consciously and being alive to the clear factual situation that the suit was filed on that ground prior to the expiry of six months' notice, did not think it fit to pursue that point any further and on the contrary joined issues on merits expecting favourable decision in the suit and having lost therein and got an adverse decision did not think it fit even to challenge the decision on the ground of maintainability of the suit while filing an appeal and argued the appeal only on merits and only as an afterthought at the stage of writ petition in the High court such a contention was sought to be taken up for the first time for consideration. On the facts of the present case, therefore, it must be held that the appellant had waived that contention about the suit' being premature having been filed before the expiry of six months from the date of the suit notice.

14. **Apart from waiver the appellant was estopped from taking up such a contention as the respondent, on account of the aforesaid contention of the appellant, had irretrievably changed his position to his detriment and lost an opportunity of seeking leave of the Court to withdraw the suit with liberty to file a fresh suit as seen earlier.** The second point for consideration is, therefore, answered in the negative, in favour of the respondent-landlord and against the appellant." (emphasis is mine)

8. I may note that the judgment of the learned Single Judge of this Court in the case of *Albein Plywood Ltd. & Anr. (supra)* is of the year 1993

and the judgment of the Supreme Court in the case of *Martin and Harris Ltd. (supra)* is dated 11.12.1997 (reported in the year 1998) and consequently the learned Single Judge of this Court while deciding the case of *Albein Plywood Ltd. & Anr. (supra)* did not have the benefit of the ratio of the judgment of the Supreme Court in the case of *Martin and Harris Ltd. (supra)*.

9. In my opinion, learned counsel for the respondents/landlords is justified in placing reliance upon the ratio of the judgment of the Supreme Court in the case of *Martin and Harris Ltd. (supra)* and which clearly holds that if the provision of a statute gives certain right to a tenant, such a right is available to a tenant and can be waived by him. In my opinion, the right given as per Section 19 of the Slum Act is a right available with the petitioner/tenant in his personal capacity, and once no such objection was taken before the Additional Rent Controller who decided the main case under Section 14(1)(a) of the Act, such a right has clearly been waived by the petitioner/tenant. The impugned judgment of the Rent Control Tribunal has effectively held the same vide para 13 of the same, and to which reasoning the ratio of the judgment of the Supreme Court in the case of *Martin and Harris Ltd. (supra)* is to be added.

10. I may note that if the argument which is urged on behalf of the petitioner with respect to non-maintainability of the petition under Section

14(1)(a) of the Act is accepted on the ground that there was no jurisdiction of the Additional Rent Controller to pass the judgment decreeing the petition under Section 14(1)(a) of the Act, the same would create a very peculiar position because it is perfectly possible that an eviction petition may be decreed right till the Supreme Court and thereafter in execution proceedings an objection would be taken with respect to the fact that the eviction petition itself was not maintainable in view of the fact that the premises are situated in a slum area and permission of the slum authority was not taken under Section 19 of the Slum Act. To accept such an argument would mean grave harassment of the landlady and allowing a tenant to plead the rights which were waived by him i.e the tenant will be allowed to plead non-existence of jurisdiction although such an issue is an issue of a right which can be waived, and was in fact waived by not raising the same. After many years of litigation in which the landlady is successful in obtaining an eviction order, to argue that the entire proceedings for eviction must fail cannot be accepted. I cannot subscribe to such a view in view of the categorical ratio of the judgment of the Supreme Court in the case of *Martin and Harris Ltd. (supra)*. In para 14 of the judgment in the case of *Martin and Harris Ltd. (supra)* Supreme Court has applied the principle of estoppel in a case having facts such as the present because if objection under Section 19 of the Slum Act was taken in the written statement, the landlords

would have simply withdrawn the petition at that stage and sought permission under Section 19 of the Slum Act. Thus landlords having changed their position to their detriment by pursuing the eviction petition for a longer period of time (at least eight years), petitioner is estopped from raising the issue of maintainability only before the first appellate court.

11. It is an extremely important aspect to note that 'slum area' is now only a mere nomenclature because really there are no slums and there is no slum area except that an area in the old Delhi, popularly known as walled city of Delhi, has been categorized as a 'slum area' under the Slum Act although in fact and reality the entire walled city of Delhi/old Delhi is a totally built up area and therein exist some of the most valuable immovable properties; both commercial and residential; in Delhi. Actually Slum Act was passed in the year 1956 as per the situation then prevailing but today in the year 2014 really there are no slums but only huge costly buildings, both commercial and residential, though technically they continue to be labeled as a 'slum area'.

12. In view of the above, I do not find any merit in the petition and the same is therefore dismissed, leaving the parties to bear their own costs.

SEPTEMBER 11, 2014
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VALMIKI J. MEHTA, J