

**CYBER APPELLATE TRIBUNAL**  
**(Ministry of Communications & Information Technology)**  
**Jeevan Bharti (LIC) Building, Connaught Place,**  
**New Delhi**

**APPEAL NO. 5/2009**

**Date of decision May 28,2010**

**Ms.Aruna Kashinath** .....Appellant  
Through Mr.Pavan Duggal,Advo.  
With Mrs.Renu Narula,Advocate

Versus

**Controller of Certifying Authorities &**  
**Others** ..... Respondents  
Through Mr.Vakul Sharma,Advo.with  
Ms.Seema Sharma,Advocate for  
respondent No.1 and

**Mr.Sajan Poovaya,Adv. with**  
**Mr.Parveen Sherawat,Advo.**  
**& Mr.Akhil Anand,Advocate**  
for respondents 2-3

**CORAM:**

**HON'BLE MR. JUSTICE RAJESH TANDON,**  
**CHAIRPERSON**

- |           |  |            |
|-----------|--|------------|
| <b>1.</b> | <b>Whether the Reporters of local papers may be allowed to see the judgment?</b> | <b>YES</b> |
| <b>2.</b> | <b>To be referred to the Reporter or not</b>                                     | <b>YES</b> |
| <b>3.</b> | <b>Whether the judgment should be Reported in the Digest.</b>                    | <b>YES</b> |

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**(Ministry of Communications & Information Technology)**  
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**New Delhi**

**APPEAL NO. 5/2009**

**Date of decision May 28,2010**

Ms.Aruna Kashinath  
D/o Late Mr.S.N.S.Dikshit  
Chief Operating Officer & Head  
MGL, Healthcare & Life Sciences of  
Mascon Global Limited.  
B 8/10, Vasant Vihar,  
New Delhi-110057

**.....Appellant**  
**Through Mr.Pavan Duggal,Advo.**  
**With Mrs.Renu Narula,Advocate**

Versus

Controller of Certifying Authorities,  
Electronic Niketan, Lodhi Road,  
New Delhi

**.....Respondent No.1**  
**Through Mr.Vakul Sharma,Advo.**  
**With Ms.Seema Sharma,Advocate**

GMAIL.COM  
C/o Google Inc., California, USA  
Email: [removals@google.com](mailto:removals@google.com)

And

Google Inc.,California, USA  
Email: [removals@google.com](mailto:removals@google.com)

**Respondents 2-3**  
**Through Mr.Sajan Poovaya,Advo.**  
**With Mr.Parveen Sherawat,Advo.**  
**& Mr.Akhil Anand,Advocate**

**JUSTICE RAJESH TANDON, CHAIRPERSON**

Heard Mr.Pavan Duggal,Advocate assisted by Mrs.Renu Narula,Advocate for the appellant, Mr.Vakul Sharma,Advocate assisted by Ms.Seema Sharma,Advocate for respondent No.1 and Mr.Sajan Poovaya, Advocate assisted by Mr.Parveen Sherawat, Advocate and Mr.Akhil Anand, Advocate for respondents Nos.2 and 3.

By the present appeal, the appellant has prayed for a direction to respondent No.1, Controller of Certifying Authority to investigate the various contraventions of the provisions of the Information Technology Act,2000 as detailed in the complaint of the appellant to the Controller of Certifying Authority dated 23.9.2009 and further direction to respondents 2 and 3 to assist the respondent No.1 in its investigations of the various contraventions of the provisions of the Information Technology Act,2000, as detailed in the complaint dated 23.9.2009.

Briefly stated the facts leading to the present appeal are that the appellant was shocked to receive print outs being copies of the various e-mails apparently sent by the email ID [kashinath.aruna@gmail.com](mailto:kashinath.aruna@gmail.com). It is stated that the email identity [kashinath.aruna@gmail.com](mailto:kashinath.aruna@gmail.com) is a email account that does not belong to the appellant but has been created in the name of the appellant at the popular email service [www.gmail.com](http://www.gmail.com).

Counsel for the appellant has submitted that some unknown persons have falsely, dishonestly and fraudulently fabricated and created the email ID [kashinath.aruna@gmail.com](mailto:kashinath.aruna@gmail.com) registered in the name of the appellant by submitting false and mischievous information. It is further submitted that the said unknown persons have sent defamatory, derogatory and obnoxious e-mails to

distinguished personalities, representing an important investor of the appellant Company and its Chairman and CEO Sh.Sandy K Chandra. By using the said fictitious email identity [kashinath.aruna@gmail.com](mailto:kashinath.aruna@gmail.com) the following emails were sent by the unknown persons, as per the printouts and information received by the appellant.

- (a) Email sent on Saturday, November 22,2008 at 4.50 AM to Christian Hansmeyer, Ketan Patel, Joe Searly, Francis Crispico with subject entitled MGL (Mascon).
- (b) Email sent on Sunday, November 23,2008 at 9.51 PM sent Christian Hansmeyer with subject titled MGL (Mscon)
- (c) Email sent on Sunday, November 23,2008 at 1.35 AM sent to Christian Hansmeyer, subject titled as MGL (Mascon)
- (d) Email sent on Tuesday, November 25,2008 at 9.52 PM with subject entitled as MGL (Mascon)
- (e) Email sent on Wednesday, January 07,2009 at 10.39 PM sent to many persons with subject titled MGL is a Twin Brother to Satyam with attachment of statement of the Chairman of Satyam Computer Services.

That the above e-mails had the following contents:-

“I am sending this mail to you in great confidence. I have inside information and personal news on the company’s CEO that I would like to share with you if you want. I am doing this because almost 100% of the company’s employees strongly believe that the current ceo and chairman must go immediately if you want to save the company or see anything left behind after his siphoning hundreds of millions and cooking the books. The board is dummy and dead and you are the only hope. Please respond to this mail so that we can point you in the right direction in confidence.

“Hope you are following the unprecedented story of Satyam in India. Aberdeen, an investor of Satyam was able to bring

out the truth from Satyam—and forced a resignation for the CEO/chairman and restructure. This is a true test of corporate governance in India in ‘Enron’ style. MGL is a replica of what happened in Satyam—with false revenues, profits, assets and liabilities. All that Sandy is trying to do is to cover the ‘gap’ desperately with garbage and random M&A. It is your only and final chance to stand up for your rights and force him down or threaten to expose him with a forensic audit or we will provide enough materials and data if you are interested’

“MGL is falling apart every day as we speak thanks to a thug and jerk called Sandy Chandra who is neither a leader nor a professional. He just wants to loot the company as quickly as possible and will take the whole company along with its investors, employees and clients down. He has become a tyrant, a dictator and is not willing to listen to anyone. You are the only hope because you are a large shareholder and probably have some rights. If you combine with other shareholders such as Laurus, Mr. Nirmal Sethia of London, Investec of London, you may be able to do an open offer for the company and have Dr.Nandu of US (original founder) run the company. Please get in touch with him as soon as possible before it is too late and protect your investment. Nandu works closely with all senior management and he has everyone’s (including leaders of new acquisitions – Ed Hoofnagle of EBW, Ajay Gupta of SDG, Chakri of Ja’s) confidence. Pl let us know if we can be of any further help’.

“Everyone knows that Sandy has acquired multi million dollar residences=(4 in NY, 2 in Delhi, many in other cities and so on) with funds from GDR=probably cleverly managed through complex web of offshore investment companies), automobiles and has turned all personal liabilities into corporate liabilities. The company is so cash starved and daily existence is getting to be hard and will probably fold by December end. You may wish to directly talk to current owners of acquisitions and their issues and you will find that acquisition pricing is padded (from published reports and actual=SPA) and shares have been taken out.”

Respondent No.1 has filed the reply to the appeal inter alia raising preliminary objection stating therein that the present appeal

is void ab initio as the appeal can be filed under Section 57 of the Information Technology Act only against an order of the Controller that too as per the Chapter relating to Digital signature. In the instant case since no order has been passed by the Controller, no appeal can be filed. The appellant has failed to enclose any order passed by the Controller, which could be made subject matter of this appeal and thereby making mockery of all established legal principles and procedures. Further, the appellant without even waiting for a reasonable time for the Controller to investigate the complaint and pass an order, filed this appeal against the respondent No.1. The appellant by his own admission admitted that he has filed a complaint before the Controller on 24<sup>th</sup> September,2009 and has approached this Tribunal by filing this appeal on 24<sup>th</sup> September,2009 seeking relief against the Controller of Certifying Authority.

Respondents 2 and 3 have also filed Statement of objections wherein it has been stated that the appellant has impleaded Gmail.com as respondent No.2 and that Gmail.com is a service offered by GoogleInc., and is not a legal entity by itself, as such the appellant has wrongly impleaded Gmail.com as a party to the proceedings. It is also submitted that the application to direct respondent No.1 to investigate the various alleged contraventions of the provisions of the Information Technology Act,2000 and further to direct respondents No.2 and 3 to assist the respondent No.1 in its investigations could not have been filed before this Tribunal.

It was further submitted that Section 57 of the Information Technology Act,2000 vests in this Tribunal's jurisdiction to hear appeals from the orders of the Controller or the Adjudicating Officer and the Appellate Tribunal has been set up with the express and limited purpose of providing any party aggrieved from

the order of the Controller, a forum to seek redress. The jurisdiction of this Tribunal cannot extend to hearing any other application or petition that is not an appeal from the order of the Controller or an adjudicating officer.

Apart from the aforesaid , various applications have been filed by both the parties.

Appellant has filed an application under Order 11 Rule 12 read with Section 151 CPC read with Section 58 (2) of the IT Act,2000 against respondents 2 and 3, being MA No.9/2010 on 30<sup>th</sup> March,2010.

Appellant has also filed an application under Sections 43 & 46 of the IT Act,2000 read with Order 11 Rule 12 read with Section 151 CPC, being MA No.10/2010 on 30<sup>th</sup> March,2010.

Appellant has also filed an application under Order 6 Rule 17 read with Section 151 CPC read with Sections 43 and 46 of the amended IT Act,2000 to amend the petition being MA No.17/2010 on 31<sup>st</sup> March,2010.

Respondent No.1 has filed an application under Section 58(2)(e) of the IT Act read with Section 151 CPC on 9<sup>th</sup> December,2009 for review of orders dated 13.10.2009 and 6.11.2009 being MA No.8/2009

Replies to above applications were filed by the opposite parties.

Heard counsels for both the parties at length. The present appeal raises the following points for consideration:-

- (i) Whether the present appeal is maintainable without exhausting the alternative remedy of approaching the Controller of Certifying Authorities or the Adjudicating Officer appointed under the IT Act,2000.**

- (ii) **Whether the offence is covered under the provisions of the Information Technology Act.**
- (iii) **Relief.**

**Point No.(i)**

Coming to the first point i.e. with regard to the maintainability of the appeal, Act provides for adjudicating the offences i.e. Certifying Authority and Adjudicating Officer in respect of the different offences.

Clauses (g) and (m) of Section 2 of the IT Act define the “Certifying Authority” and the “Controller”. Clauses (g) and (m) of Section 2 of the IT Act read as under:-

(g) “Certifying Authority” means a person who has been granted a licence to issue a (Electronic Signature) Certificate under section 24;

(m) “Controller” means the Controller of Certifying Authorities appointed under sub-section (1) of section 17.

Clause (n) of Section 2 of the IT Act defines the Cyber Appellate Tribunal as under:-

(n) “Cyber Appellate Tribunal” means the Cyber Appellate Tribunal established under sub-section (1) of Section 48.

Section 48 of the IT Act reads as under:-

“48.Establishment of Cyber appellate Tribunal.- (1) The Central Government shall, by notification, establishes one or more appellate tribunals to be known as the Cyber Regulation Appellate Tribunal.

(1) The Central Government shall also specify, in the notification referred to in Sub-section (1), the matters

and places in relation to which the Cyber Appellate Tribunal may exercise jurisdiction.”

As I have already indicated above, the Controller means the Controller of Certified Authorities appointed under sub-section (1) of Section 17 for considering the cases relating to the Chapter II, III, IV and V.

Section 17 of the IT Act provides for appointment of Controller and other officers which reads as under:-

**“17.Appointment of Controller and other officers – (1)** The Central Government may, by notification in the Official Gazette, appoint a Controller of Certifying Authorities for the purposes of this Act and may also by the same or subsequent notification, appoint such number of Deputy Controllers (Assistant controllers, other officers and employees) as it deems fit.

(2) The Controller shall discharge his functions under this Act subject to the general control and directions of the Central Government.

(3) The deputy Controllers and Assistant Controllers shall perform the functions assigned to them by the Controller under the general superintendence and control of the Controllers.

(4) The qualifications, experience and terms and conditions of service of Controller, Deputy Controllers (Assistant Controllers, other officers and employees) shall be such as may be prescribed by the Central Government.

(5) The Head Office and Branch office of the office of the Controller shall be at such places as the Central Government may specify, and these may be established at such places as the Central Government may think fit.

(6) There shall be a seal of the Office of the Controller.

Section 18 of the IT Act defines the functions of the Controller. Same are quoted below:-

**18.Functions of Controller** – The Controller may perform all or any of the following functions, namely:-

- (a) exercising supervision over the activities of the Certifying Authorities;
- (b) certifying public keys of the Certifying Authorities;
- (c) laying down the standards to be maintained by the Certifying Authorities;
- (d) specifying the qualifications and experience which employees of the Certifying Authorities should possess;
- (e) specifying the conditions subject to which the Certifying Authorities shall conduct their business;
- (f) specifying the contents of written, printed or visual materials and advertisements that may be distributed or used in respect of a (Electronic Signature) Certificate and the public key;
- (g) specifying the form and content of a (Electronic Signature) Certificate and the key;
- (h) specifying the form and manner in which accounts shall be maintained by the Certifying Authorities;
- (i) specifying the terms and conditions subject to which auditors may be appointed and the remuneration to be paid to them;
- (j) facilitating the establishment of any electronic system by a Certifying Authority either solely or jointly with other Certifying Authorities and regulation of such systems;
- (k) specifying the manner in which the Certifying Authorities;
- (l) resolving any conflict of interests between the Certifying Authorities and the subscribers;
- (m) laying down the duties of the Certifying Authorities; maintaining a database containing the disclosure

(n) record of every Certifying Authority containing such particulars as may be specified by regulations, which shall be accessible to public.

Procedure has been defined in Section 30 of the Information Technology Act,2000. Same is quoted below:-

**“Certifying Authority to follow certain procedures –**  
Every certifying Authority shall, -

- (a) make use of hardware, software, and procedures that are secure from intrusion and misuse;
- (b) provide a reasonable level of reliability in its services which are reasonably suited to the performance of intended functions;
- (c) Adhere to security procedures to ensure that the secrecy and privacy of the (electronic signatures are assured;
  - (ca) be the repository of all Electronic signature Certificates issued under this Act;
  - (cb) publish information regarding its practices, Electronic Signature Certificates and current status of such certificates; and
- (d) observe such other standards as may be specified by regulations.

Section 46 of the IT Act provides for the appointment of Adjudicating Officer. It reads as under:-

**46. Power to adjudicate.-**

(1) For the purpose of adjudging under this Chapter whether any person has committed a contravention of any of the provisions of this Act or of any rule, regulation, direction or order made hereunder the Central Government shall, subject to the provisions of Sub-section (3), appoint any officer not below the rank of a Director to the Government of India or an equivalent officer of a State Government to be an adjudicating officer or holding an

inquiry in the manner prescribed by the Central Government.

(2) The adjudicating officer shall, after giving the person referred to in Sub-section (1) a reasonable opportunity for making representation in the matter and if, on such inquiry, he is satisfied that the person that the person has committed the contravention, he may impose such penalty or award such compensation as he thinks fit in accordance with the provisions of that section.

(3) No person shall be appointed as an adjudicating officer unless he possesses such experience in the field of Information Technology and legal or judicial experience as may be prescribed by the Central Government.

(4) Where more than one adjudicating officer are appointed, the Central Government shall specify by order the matters and places with respect to which such officers shall exercise their jurisdiction.

(5) Every adjudicating officer shall have the powers of a civil court which are conferred on the Cyber Appellate Tribunal under Sub-Section (2) of Section 58, and-

(a) All proceedings before it shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of the Indian Penal Code (45 of 1860)

(b) Shall be deemed to be a civil court for the purposes of Sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974)

(c) Shall be deemed to be a Civil Court for purposes of Order XXI of the Civil Procedure Code, 1908 (5 of 1908)

Section 57 of the Information Technology Act, 2000 provides for filing the appeal before the Tribunal. It reads as under:-

### **57. Appeal to Cyber Appellate Tribunal.-**

- (1) Save as provided in sub-section (2), any person aggrieved by an order made by Controller or an adjudicating officer under this Act may prefer an appeal to a Cyber Appellate Tribunal having jurisdiction in the matter.
- (2) No appeal shall lie to the Cyber Appellate Tribunal from an order made by an adjudicating officer with the consent of the parties.
- (3) Every appeal under sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the Controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Cyber Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

- (4) On receipt of an appeal under sub-section (1), the Cyber Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
- (5) The Cyber Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Controller or adjudicating officer.
- (6) The appeal filed before the Cyber Appellate Tribunal under sub section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

A perusal of the aforesaid provision indicates that the appeal lies against the orders passed by the Controller of Certifying Authorities or the Adjudicating Officer.

However, counsel for the appellant has submitted that this Court has inherent jurisdiction to decide the appeal even without exhausting the alternative remedy. Counsel for the appellant has referred the provisions of Section 58 of the Information Technology Act in order to support the argument.

It will appear from the aforesaid definitions that the jurisdiction of the Certifying Authority is confined only to the digital signatures as contained under Chapter II and Chapter III, whereas Chapter IX relates to penalties, compensation and adjudication by the Adjudicating Officer and Chapter X relates to Cyber Appellate Tribunal

Counsel for the respondents have pointed out that present appeal is not maintainable in as much as neither there is any order passed by the Controller nor the matter pertains to Chapter II, III, IV and V relating to electronic signatures. The matter relates to the offences covered under Chapter IX and XI and as such the Controller gets no jurisdiction and the appeal, therefore, is also not maintainable.

Counsel for the appellant has submitted that this Tribunal has jurisdiction to decide the appeal even without exhausting the alternative remedy.

In support of the arguments, counsel for the appellant has referred the following judgments.

- (i) Raja Soap Factory & Ors. Vs. S.P.Shantharaj & Ors. Reported in AIR 1965 SC 1449.

- (ii) L.Mool Chand & Ors. Vs. Fatima Sultana Begum & Ors.  
Reported in 1995(6) SCC 742.
- (iii) Jet Ply Wood Pvt.Ltd. & Ors.Vs. Madhukar Nowlakha & ors  
and Biswarup Banerjee & Ors. Vs.Madhukar Nowlakha, reported  
in AIR 2006, SCC 1260
- (iv) Vikas Agarwal Vs. Anubha reported in AIR 2002 SC 1796.
- (v) Shipping Corporation of India Ltd. Vs.Machado Brothers &  
Ors. Reported in 2004 (11) SCC 168.
- (vi) Lakshmi Natesan Versus Periasamy & ors. Of Chennai High  
Court in CMA No.9/2007
- (vii) Justice P.Venugopal Vs. Union of India & ors. Reported in  
AIR 2003 SC 3887
- (viii) Assistant Collector of Central Excise Chandan Nagar Vs.  
Dunlop India Ltd. & ors. Reported in AIR 1985 SC 330 and
- (ix) Hussainara Khatoon & Ors.Vs. Home Secretary, State of  
Bihar, reported in AIR 1979 SC 1360.

Some of the judgments referred above are quoted below.

Relevant portion (para-8) of the judgment in the case of  
Raja Soap Factory & ors. (supra) reads as under:

“Section 151 of the Code of Civil Procedure preserves the inherent power of the Court as may be necessary for the ends of justice or to prevent abuse of the process of the Court. That power may be exercised where there is a proceeding lawfully before the High Court. It does not however authorize the High Court to invest itself with jurisdiction where it is not conferred by law.”

Relevant portion of para-25 of the judgment in the case of  
Jet Ply Wood Pvt.Ltd.(Supra) reads as under:-

“25.....There is no doubt in our minds that in the absence of a specific provision in the Code of Civil

Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito iustitiae for doing real and substantial justice between the parties.”

Relevant portion of para-11 of the judgment in the case of Vikas Agarwal (supra) reads as under:-

“11.....It is submitted that inherent powers of the Court under Section 151 CPC can always be exercised to advance interest of justice and the technicalities will have no place in such matters.....The contention that inherent powers under Section 151 CPC could not be exercised was repelled and it was held that there was nothing in Order XXXIX of the Code which expressly or by necessary implication precluded the exercise of inherent power of Court under Section 151 CPC and it was open for the Court to pass a suitable consequential order under Section 151 CPC as may be necessary for ends of justice or to prevent the abuse of process of Court.....”

Relevant portion of the judgment in the case of Shipping Corporation of India Ltd. (supra) reads as under:-

“The inherent power of a court is in addition to and complementary to the powers expressly conferred under the Code. But that power will not be exercise if its exercise is inconsistent with, or comes into conflict with, any of the powers expressly or by necessary implication conferred by the other provisions of the Code.....Whatever limitations are imposed by construction on the provisions of S.151 of the Code, they do not control the undoubted power of the Court conferred under Section 151 of the Code to make a suitable order to prevent the abuse of the process of the court.”

I have gone through the judgments referred by the appellant. Appellant has not referred a single judgment where the

statute provides a Forum for filing a complaint and ignoring the same the appeal can be preferred. He has referred the judgment regarding exercise of inherent powers under Section 151 of the Code of Civil Procedure or to prefer a writ petition under Article 226 of the Constitution of India. The aforesaid cases, therefore, are not applicable in the present case as statutory appeal has been provided under Section 57 of the Information Technology Act against the order passed by the Controller of Certified Authorities or order passed by the concerned Adjudicating Officer.

On the other hand, counsel for the respondents has referred the following judgments:-

- (i) State of Uttar Pradesh V. Singhara Singh reported in AIR 1964 SC 358
- (ii) Narbada Prasad v. Chhaganlal and others reported in AIR 1969 SC 396
- (iii) Chandra Kishore Jha Vs. Mahavir Prasad and others, reported in (1999) 8 SCC 266 and
- (iv) Babu Verghese and others V. Bar Council of Kerala and others reported in AIR 1999 SC 1281.

Further the matter is fully covered by the judgment of the Apex Court in the case of State of Uttar Pradesh Vs. Singhara Singh, reported in AIR 1964 SC 358 where the Apex Court has relied upon the judgment of Taylor V. Taylor (1876) 1 Ch.D 426 and decision in Nazir Ahmed's case 63 Ind.App.372 (AIR 1936 PC 253 (2)). Paras-8,12,13,17 and 19 of this judgment read as under:-

“8.The rule adopted in Taylor v. Taylor (1876) 1 Ch. D 426 is well recognized and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The

principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. A magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in S. 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down. If proof of the confession by other means was permissible, the whole provision of S. 164 including the safeguards contained in it for the protection of accused persons would be rendered nugatory. The section, therefore, by conferring on magistrates the power to record statements or confessions, by necessary implication, prohibited a magistrate from giving oral evidence of the statements or confessions made to him.”

12. A similar argument was advanced in Nazir Ahmed's case, 63 Ind App 372 : (AIR 1936 PC 253 (2) and rejected by the Judicial Committee. We respectfully agree with that view. The section gives power to make a record of the confession made by an accused which may be used in evidence against him and at the same time it provides certain safeguards for his protection by laying down the procedure subject to which alone the record may be made and used in evidence. The record, if duly made may not doubt be admitted in evidence without further proof but if it had not been so made and other evidence was admissible to prove that the statements recorded had been made, then the creation of the safeguards would have been futile. The safeguards were obviously not created for nothing and it could not have been intended that the safeguards might at the will of the prosecution be by passed. That is what would happen if oral evidence was admissible to prove a confession purported to have been recorded under S.164. Therefore it seems to us that the objection of s.164 was not to give the prosecution the advantage of Ss. 74 and 80 of the Evidence Act but to provide for evidence being made available to the prosecution subject to due protection of the interest of the accused.

13. We have to point out that the correctness of the decision of Nazir Ahmed's case 63, Ind App 372 : (AIR 1936 PC 253 (2) has been accepted by this Court in at least two cases, namely, Shiv Bahadur Singh v. State of Vindhya Pradesh, 1954 SCR 1098 : (AIR 1954 SC 322) and Deep

Chand v. State of Rajasthan, 1962-1 SCR 662 : (AIR 1961 SC 1527). We have found no reason to take a different view.

17.The next case to which reference was made by Mr. Aggarwala was Ghulam Hussain v. The King, 77 Ind App 65 (PC). That case dealt with the question whether a statement recorded under S.164 which did not amount to a confession could be used against the maker as an admission by him within Ss. 18 to 21 of the Evidence Act and it was held, that it could. The Judicial Committee observed that “the fact that an admission is made to a Magistrate while he is functioning under S. 164 of the Code of Criminal Procedure cannot take it outside the scope of the Evidence Act.” That case only held that the relevancy of a statement recorded under S.164 had to be decided by the provisions of the Evidence Act. We have nothing to do with any question as to relevancy of evidence. The question before us is whether a confession which is relevant can be proved by oral evidence in view of the provision of s. 164 of the Code. The question dealt with in Ghulam Hussain’s case, 77 Ind App 65 (PC) was quite different and that case has no bearing on the question before us.

19.Another case cited was Emperor v. Ram Naresh. ILR (1939) All 377 : (AIR 1939 All 242). What had happened there was that two accused persons walked into the court of a magistrate and wanted to make a confession. The magistrate called a petition writer and the accused persons dictated an application to him and that was taken down by the petition-writer and signed by them. That petition was admitted in evidence under S.21 of the Evidence Act. It was held, and we think rightly, that Nazir Ahmed’s case, 63 Ind App 372 : (AIR 1936 PC 253 (2) did not prevent the petition being admitted in evidence because it only forbade certain oral evidence being given. This case turned on wholly different facts and is of no assistance.”

Para-17 of the judgment reported in (1999) 8 SCC 266 (supra) reads as under:-

“In our opinion insofar as an election petition is concerned, proper presentation of an election petition in the Patna High Court can only be made in the manner prescribed by Rule 6 of Chapter XXI-E. No other mode of presentation of an

election petition is envisaged under the Act or the rules thereunder and, therefore, an election petition could, under no circumstances, be presented to the Registrar to save the period of limitation. It is a well-settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner, (see with advantage: Nazir Ahmad v. King Emperor, Rao Shiv Bahadur Singh v. State of V.P., State of U.P. v. Singhara Singh). An election petition under the rules could only have been presented in the open court up to 16.5.1995 till 4.15 p.m. (working hours of the Court) in the manner prescribed by Rule 6 (supra) either to the Judge or the Bench as the case may be to save the period of limitation. That, however, was not done. However, we cannot ignore that the situation in the present case was not of the making of the appellant. Neither the Designated Election Judge before whom the election petition could be formally presented in the open court nor the Bench hearing civil applications and motions was admittedly available on 16.5.1995 after 3.15 p.m., after the obituary reference since admittedly the Chief Justice of the High Court had declared that “the Court shall not sit for the rest of the day” after 3.15 p.m. Law does not expect a party to do the impossible – *impossibilium nulla obligano est* – as in the instant case, the election petition could not be filed on 16.5.1995 during the court hours, as for all intents and purposes, the Court was closed on 16.5.1995 after 3.15 p.m.”

In the case of Ajay Bansal Vs. Anup Mehta & ors, reported in 2007(Vol.II) SCC page 275, the Apex Court has held that,

“Ordinarily, an application under Article 227 of the Constitution of India would not be maintainable where an appeal lies. An appeal lay from the decree under Section 96 of the Code. When an appeal could be filed, ordinarily, an application under Article 227 of the Constitution of India would not be entertained.”

In the above judgment, it was also held,

“The defendant in such a case can also be left to appeal against the decree and therein challenge the order refusing leave to defend in terms of Section 105(1) of the Code.”

In view of the aforesaid, the statute provides that the appeal can be filed only against the orders passed by the Adjudicating Officer. So far as provisions of Section 43 of the IT Act and Chapter II are concerned there is no scope to appeal against the order passed by the Certifying Authority.

Therefore, in view of the above, the argument of the appellant can not be said to be justified, and the same is rejected.

Point is decided against the appellant and it is held that without exhausting alternative remedy of approaching the Adjudicating Officer appointed under the Information Technology Act, 2000, no appeal is maintainable under Section 57 of the Information Technology Act.

**Point No.(ii)**

Coming to the second point, since the appellant has not exhausted alternative remedy, therefore, I am not entering into the merits of the controversy and it will be open for the Adjudicating Officer to adjudicate the offences in accordance with law.

Counsel for the appellant has also submitted alternatively that the matter may be sent to the Adjudicating Officer for disposal. I am not inclined to accept the submission as there is nothing on the record to indicate that any complaint has been filed before the Adjudicating Officer at any point of time as required under Section 46 of the Information Technology Act. On the other hand, any complaint filed before the Controller of Certifying Authorities will not serve the requirement of Section 46 of the Information Technology Act. The appellant is required to file a complaint before the Adjudicating Officer who has the jurisdiction for deciding the disputes of such nature.. This point is decided in negative

**Relief**

In view of the aforesaid, the appeal lacks merit and is dismissed at the admission stage.

However, liberty is given to the appellant to file the complaint within 30 days of this judgment. The Adjudicating Officer shall not debar the appellant from filing a complaint as having been time barred and only the privilege of the time during the period when the appeal was pending shall be condoned automatically. At any stage if the Adjudicating Officer requires the record of the Appellate Authority in connection with the various orders passed from time to time or various applications filed by the appellant from time to time including the reply by the respondents, same may be called for the disposal of the complaint.

All pending applications are disposed of accordingly with liberty to file the same before the Adjudicating Officer and the same shall be considered in accordance with law.

Parties are left to bear their own costs.

Registrar is directed to send a copy of this judgment to all the Adjudicating Officers of the States and the Union Territories for information and record.

May 28,2010

**(Justice Rajesh Tandon)**  
**Chairperson**