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SUBJECT INDEX

'A'

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Arbitration and Conciliation Act, 1996- Section 34- Objections were filed against the award of the arbitrator in the Court of Civil Judge (Senior Division), which were dismissed as not maintainable – held, that the proceedings were initiated in the year 1986, when Arbitration Act, 1940 was in force – the Act was replaced in the year 1996, when the proceedings were initiated under the Act of 1940, its provisions would regulate the subsequent proceedings notwithstanding the commencement of 1996 Act- the award was not filed before the Court and the objections could not have been filed directly – the order passed by Civil Judge (Senior Division) set aside- objection were ordered to be returned for presentation before appropriate Court. (Para-2 to 14) Title: Dhani Ram Vs. Divisional Manager, Forest Working Division Page-1473

Arbitration and Conciliation Act, 1996- Section 8- The work of widening and strengthening of Theog-Kotkhai-Hatkoti-Rohru Road from 0+00 k.m. to 80+684 k.m. was awarded in favour of second respondent who executed a sub contract with the first respondent- first respondent entered into an agreement with the petitioner the -work was subsequently cancelled and the machinery of the petitioner was impounded along with the machinery of second respondent – a civil suit was filed by the petitioner, which is pending disposal- a civil writ petition was filed, which was dismissed as not maintainable in view of the arbitration clause- the payment of the bill has not been made to the petitioner- hence, permission was sought to appoint the arbitrator – the respondent No.2 stated that it had not entered into any contract with the petitioner and the petition is not maintainable- held, that principal contractor is liable to indemnify the claim of the sub-contractor like the petitioner – however, in absence of any signed written agreement between the parties, the petition is not maintainable against the respondent No.2- however, there is written memorandum of understanding between the petitioner and the respondent No.1, which can be referred to the arbitrator – the petition allowed and Arbitral Tribunal appointed to adjudicate the claim of non-payment of the dues of the petitioner. (Para-9 to 16) Title: Mansarovar Infratech Private Limited Vs. Neftogaz India Privat Limited and others Page- 1034

'C'

Code of Civil Procedure, 1908- Section 24- An application seeking the transfer of election petition filed on the ground that respondent No. 2 had made uncalled for remarks, disclosed that he was going to set aside the election of the petitioner and behaviour of respondent No. 2 is rude – held, that a transfer petition is not to be dealt in a light hearted manner - transfer of a case from one authority to another should not be granted readily for any fancied notion of the petition – the authority should have shown an unfair attitude or biased frame of mind against the petitioner – mere suspicion of denial of justice is not sufficient to order transfer - election petition is pending for ten months – sixteen proceedings have been held, which proves that respondent No. 2 is not biased against the petitioner, otherwise he would have decided the matter – mere allegation that justice will not be done is not sufficient to transfer the matter- petition dismissed.(Para-5 to 9) Title: Onkar Chand Vs. State of H.P. and others Page-1802

Code of Civil Procedure, 1908- Section 47- Rent Controller ordered the eviction of the tenant on the ground of arrears of rent - the order was put to execution – objections were filed, which were dismissed – held, that an application for extension of time was filed, which was dismissed, this shows the liability to pay the amount – however, the general power of attorney admitted in subsequent rent petition that the tenant had paid the rent – the objections were wrongly

dismissed by the Executing Court- revision allowed – order of the Rent Controller set aside.(Para-2 to 4) Title: Pawan Kumar Sharma Vs. Sarla Sood and others Page-1229

Code of Civil Procedure, 1908- Section 96- Plaintiff pleaded that he was assaulted and humiliated by the defendant No.1 in the presence of many people – the defendants subsequently gave him beatings- the Trial Court awarded the compensation of Rs. 22,000/- along with interest @ 9% per annum – held in appeal that witnesses of the plaintiff proved the case of the plaintiff – an FIR was registered regarding the incident – one defendant was convicted by the Juvenile Justice Board – MLC proved the injuries suffered by the plaintiff – compensation of Rs.22,000/- is inadequate and is enhanced to Rs.1 lac – appeal partly allowed.(Para-3 to 11) Title: Vishal Puri and others Vs. Yashpal Singh Page-1582

Code of Civil Procedure, 1908- Section 100- Contract for extraction of resin was awarded to the defendant – plaintiff pleaded that the target for extraction was 137.75 quintals, whereas, the defendant had extracted 94.11 quintals resin– the defendant is liable to pay compensation/damages for the difference of resin i.e. 43.64 quintals @ Rs.3,100 per quintals- the defendant pleaded that incessant rains during the pre-monsoon period dried the blazes and the trees fell due to high velocity winds – the requests were made to fix the blazes after excluding dried up blazes from which no extraction was possible – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held, that plaintiff had not led any evidence to prove the case – the defendant had denied his liability to pay the amount- the onus was upon the plaintiff to prove the case and in absence of evidence, Court had rightly held that case was not proved – there is no infirmity in the judgment passed by the Court – appeal dismissed – direction issued to initiate disciplinary proceedings against the concerned officer of the Forest Corporation. (Para-8 to 11) Title: H.P. State Forest CorporationVs. NasibSingh Page-893

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for the recovery of Rs.27,000/- pleading that the defendant had offered to purchase apple crop of the orchard of the plaintiff for a sum of Rs.1,01,000/- - defendant paid Rs.76,000/- and remaining amount of Rs.25,000/- was to be made after the sale of the apple- the amount was not paid – hence, the suit was filed – the suit was decreed by the Trial Court – an appeal was filed, which was dismissed- held in second appeal that the plaintiff examined himself and two witnesses to prove his version- oral evidence was corroborated by documents – the defendant denied the version of the plaintiff but did not lead any evidence to prove his version – the evidence was correctly appreciated- appeal dismissed. (Para-18 to 30) Title: Kewal Ram Vs. Murat Singh Page-1751

Code of Civil Procedure, 1908- Section 100- Plaintiff had advanced a sum of Rs. 6,500/- to the defendant No. 1 for running a karyana shop – defendant No. 2 stood guarantor- the loan was not repaid and the suit was filed for the recovery of the amount – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held in appeal that the case of the plaintiff was proved by oral and documentary evidence- Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para-8 to 11) Title: Surat Ram and another Vs. Himachal Gramin Bank, Churag Branch, Tehsil Karsog, District Mandi, H.P. Page-1707

Code of Civil procedure, 1908- Section 100- Plaintiffs pleaded that their land was acquired for the construction of Chamera Hydro Electric Project Stage-II (NHPC) – Government decided to award Rs.2,50,000/- to the affected families, who were not given employment as per the agreement entered at the times of acquisition – employment or the compensation was not paid to the plaintiffs – hence, the suit was filed for the recovery of compensation- defendants denied the claim of the plaintiffs and asserted that requisite compensation was paid to the plaintiffs – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed and the judgement and decree passed by the Trial Court were set aside – held in second appeal that acquisition was not disputed – it was also not disputed that one member of the family of the ousted was to be provided employment and in the alternative compensation – it is admitted that

plaintiffs had received compensation of Rs.2,50,000/- regarding 3-2 bighas of land – plaintiff asserted that they are entitled to financial package regarding 17 biswas of land– record shows that 17 biswas of land was not independent but part of the acquired land – financial package was received by all the legal representatives of P, the previous owner- plaintiffs are not entitled to separate compensation – appeal dismissed. (Para-17 to 28) Title: Parkash Chand & Others Vs. State of H.P. & Others Page-1758

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that applicant is co-owner of the suit land and is not in a position to alienate her share in view of the injunction granted by the Court- the application was allowed by the Trial Court- held in revision that applicant is recorded to be the co-owner of the property – suit has been filed for declaration – all the co-owners are necessary parties in a suit for declaration- her interest would be directly affected by the declaration- the Court had rightly allowed the application- revision dismissed.(Para-10 to 12) Title: Sunil Kumar s/o Sh. Sanjay Kumar and others Vs. SudeshKumari w/o Sh. Satish Kumar and others Page-1316

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed, which was allowed by the trial Court- held, that the interest of the applicant is involved in the present suit and applicant is a necessary party – therefore, the application was rightly allowed by the Trial Court – revision dismissed.(Para-8 to 11) Title: Suresh Kumar & others Vs. M/s Sunnox International &anr. Page-1247

Code of Civil Procedure, 1908- Order 7 Rule 11- An application for rejection of the plaint filed by defendant No.4 pleading that plaint does not disclose any cause of action against defendant No.4 **-** defendant No.4 had taken action in discharge of his official duties and is not liable – held, that defendant No.4 has been arrayed as party because he remained the Managing Director of the Bank – acts done in discharge of official duty are protected and immune from prosecution, provided they are done in good faith and without malafide – malafide means thatthe act is not done for the proposed purpose – malafide should be pleaded by specific allegations – merely by saying that action was not justified and was out of bias will not amount to plea of malafide- general and vague allegations of malafide have been levelled – no evidence can be led regarding a plea not asserted in the plaint- application allowed and plaint ordered to be rejected against the defendant No.4.(Para-7 to 23) Title: Narotam Dutt Sharma Vs. H.P.State Co-operative Bank Ltd. and others Page-1785

Code of Civil Procedure, 1908- Order 7 Rule 14- Plaintiff filed a civil suit for declaration challenging the revenue entries and the entry of date of birth of defendant No.3 – plaintiff filed an application seeking permission to place on record the date of birth certificate, which was dismissed – plaintiff filed a similar application in the suit after it was remanded by the appellate court, which was dismissed- plaintiff was fully aware of the date of birth of defendant No.3 – birth certificate is a public document and could have been obtained or proved without any difficulty- obtaining a certified copy is not the discovery of a new fact- plaintiff failed to prove as to why he had not placed the document on record with the plaint –no error was committed by the Court in dismissing the application- petition dismissed. (Para-8 to 14) Title: Piar Chand Vs. Deepika& others (D.B.) Page-1190

Code of Civil Procedure, 1908- Order 8 Rule 9- Plaintiff amended the plaint – L.Rs. Of defendant No. 1 filed an amended written statement- plaintiff filed an application for rejection of the amended written statement on the ground that it was beyond the scope of amendment - held, that defendant can amend the written statement to the extent of amendment in the plaint – if the defendant wants to amend the written statement, he has to seek permission from the Court – L.Rs had amended the written statement beyond the scope of the amendment- L.Rs. can file written statement appropriate to their character as L.Rs. but they have to seek permission from the Court before filing additional written statement – the order passed by trial Court set aside and

amended written statement filed by the L.Rs. ordered to be rejected. (Para-9 to 25) Title: Ram SwarupVs. Lila Wati& Others Page-957

Code of Civil Procedure, 1908- Order 9 Rule 13- Applicant filed an application for setting aside ex-parte decree on the ground that she was not properly served – the application was dismissed by the Trial Court- an appeal was filed, which was also dismissed – held, that process server had made the endorsement on the back of the summons regarding the personal service along with the copy of plaint – the endorsement was not proved to be false – the service was properly effected – appeal dismissed.(Para-3 to 5) Title: Ganga Devi Vs. Om Prakash Page-1050

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed for restraining the defendants from causing any obstruction upon the path existing in the suit land- an application for execution was filed, which was dismissed by the Court- held, that the decree had obtained finality – an oral prayer was made during the pendency of suit and appeal that the defendant had encroached upon the suit land and a decree of mandatory injunction be passed – however, the prayer was declined in absence of the pleadings – a fresh suit would be barred by the principle of res-judicata- the Executing Court had wrongly dismissed the Execution Petition and the decree holder was deprived of the fruits of the decree obtained by him- petition allowed and order of Executing Court set aside – Executing Court directed to decide the same afresh.(Para-5 to 7) Title: Tek Chand and another Vs. Karam Singh & others Page-1450

Code of Civil Procedure, 1908- Order 21 Rule 32- Civil suit was decreed for specific performance of the agreement – the decree was put to execution – Court ordered the execution of the sale deed and directed the vendee to join J.D. for completing the sale – held, that decree was passed for specific performance of the agreement relating to Khasra No.508 – the Court had directed the execution of the sale deed in respect of Khasra No.508/8- the Executing Court cannot go behind the decree – revision allowed and the Court directed to execute the sale deed in accordance with the decree. (Para- 5 to 9) Title: Ganga Ram Vs. Prakash Verma Page-1322

Code of Civil Procedure, 1908- Order 21 Rule 32- Section 47- A petition was filed for the execution of the decree of specific performance – the petitioner filed objections pleading that the decree is unexecutable as she is not in possession of the flat – the bank had taken possession of the flat and had auctioned it to N- objections were dismissed by the Trial Court- held, that any right created during the pendency of the suit will not affect the decree holder in view of the doctrine of lispendens – this doctrine is also applicable to the Court sales – the petitioner had prolonged the proceedings for 3½ yearsafter obtaining ex-parte stay order – petition dismissed with the cost of Rs.30,000/-. (Para-6 to 20) Title: Raksha Devi Vs. Uma and others Page-1653

Code of Civil Procedure, 1908- Order 21 Rule 97 read with Section 151- An order of eviction was passed – an application for its execution was filed –the objector filed objections, which were dismissed- held, that the order was passed against the brother of the objector – no application for impleadment was filed by the objector during the main petition, which means that the objector had acquiesced in the passing of the order- the objections were filed to delay the execution – there was no requirement of framing the issues and recording the evidence- petition dismissed. (Para- 3 to 9) Title: Vikas Kapila & another Vs. Ashok Sood & another Page-1453

Code of Civil Procedure, 1908- Order 33 Rule 2- Plaintiff filed a suit for compensation of Rs.2 lacs for electrocution due to the negligence of the defendants – the defendants denied the claim of the plaintiff – suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the suit was decreed for recovery of Rs.1,66,000/- along with interest @ 6% per annum- held in second appeal that Plaintiff had examined himself and two witnessesto prove his version- documentary evidence also proved his version – there was no distance between the roof of the house of the plaintiff and the HT line, whereas distance of 12 feet is required to be maintained as

per rules – thus, the negligence was duly proved.(Para-16 to 29) Title: HPSEB & Another Vs. Babu Ram Page-1745

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Petitioner was appointed as beldar – he was promoted and trained to operate the hydra crane – he was being transferred to the Mining Department without any training- a civil suit was filed along with an application for seeking ad-interim injunction- the injunction was granted by the Trial Court- an appeal was filed, which was allowed- held in revision that the petitioner was transferred to the Mining Department and was asked to undergo training in dumper operation, which the petitioner refused – the petitioner was transferred to crusher section and was advised to report to HOD crusher – the petitioner refused and was charge-sheeted – an employee can be posted anywhere to subserve the administration – the petitioner is not interested to undergo the training but wants to continue only on one machine – he cannot deny the order of superior – no prima facie case exists in favour of the petitioner – the injunction was rightly denied to the petitioner- revision dismissed. (Para-9 to 14) Title: Subhash Chand Vs. Rajinder Thakur & others Page-1599

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff/applicant filed an application seeking an ad interim injunction, which was partly allowed by the Trial Court and the defendant/respondent was restrained from mortgaging or creating charge over the suit land – however, relief of injunction for restraining the defendant/respondent from interfering with the suit land was declined on the ground that defendant/respondent was in possession of the suit land - an appeal was filed, which was allowed and the defendant/respondent was restrained from interfering with the suit land – held, that the Appellate Court had not upset the findings recorded by the Trial Court that defendant/respondent was in possession and therefore, could not have granted injunction for restraining the defendant/respondent from interfering with the suit land – petition allowed and order of Appellate Court set aside. (Para-4 to 7) Title: Meemo Devi Vs. Saroj Kumari Page-1681

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a civil suit pleading that suit land is owned and possessed by them – partition was ordered by AC 1st Grade but the order was set aside in appeal – the defendants were interfering with the suit land – an application for interim injunction for restraining the defendants was filed, which was dismissed by the Trial Court- an appeal was preferred, which was also dismissed- held, that power under Article 227 of the Constitution of India is to be exercised sparingly and in appropriate cases for keeping Subordinate Courts within the bounds of their authority – the defendants are recorded owners in possession of the suit land- plaintiffs are not recorded to be the owners in possession of the suit land – in case injunction prayed for is granted, the defendants will suffer – the Courts had not committed any jurisdictional error while dismissing the application- petition dismissed. (Para-7 to 17) Title: Karam Chand and others Vs. Manjeet Singh and another Page-1825

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a suit for declaration and injunction- an application for interim relief was also filed, which was allowed and parties were directed to maintain status quo qua the nature, user, possession, construction and alienation – an appeal was filed, which was allowed and the application was dismissed – held, that the finding regarding the execution of the Will cannot be given while deciding the application for interim relief – both the parties are asserting their title and possession- hence, the status quo order is necessary to protect the rights of the parties – revision allowed, order of the Appellate Court set aside and the order of the Trial Court restored.(Para-9 to 16) Title: Santosh w/o Sh. Tara Dutt& Another Vs. Sanjeev Kumar s/o Sh. Bal Krishan & Others Page-1363

Code of Civil Procedure, 1908- Order 41 Rule 1- Section 11- Plaintiff filed a civil suit for recovery- the defendant filed a counter-claim – the suit was partly decreed while the counter-claim was dismissed- an appeal was filed by the defendant against the judgement and decree – no separate appeals were filed regarding partly decreeing the suit and dismissing the counter- claim-

the Appellate Court reversed the judgment and decree and allowed the counter-claim- held in second appeal that non-filing of appeal against the judgment and decree means that it has become final – the dismissal of counter-claim leads to finality of the controversy and even if the decree has not been drawn,it will not take away the effect of the dismissal – the defendant should have filed two appeals and relief could not have been granted to him in one appeal – otherwise the decree in one suit will operate as res-judicata vis-à-vis the other – appeal allowed and the judgment of the Appellate Court set aside.(Para-16 to 24) Title: H.P. State Forest Corporation through its Divisional Manager Vs. Kahan Singh since deceased through his LRs Partap Singh and others Page-1137

Code of Criminal Procedure, 1973- Section 127- S was married to G – G started maltreating S and ousted her from her matrimonial home – she filed a petition for maintenance and maintenance of Rs.500/- per month was granted to him on 19.6.2207- S filed a petition for enhancement of maintenance from Rs.500/- to Rs.5,000/-- Session Judge, Mandi enhanced the maintenance allowance toRs.2,000/- per month from the date of the order- held, that keeping in view the price index and the fact that one daughter is residing with S, it is not expedient to interfere with the order of Session Judge, Mandi – the husband is duty bound to maintain his wife – rise in prices is a changed circumstance and the petition for enhancement can be filed on this ground – petition dismissed. (Para- 8 to 12) Title: Girdhari Lal son of Shri Sher Singh Vs. Shashi Kumari wife of Shri GirdhariLal Page-1220

Code of Criminal Procedure, 1973-Section 133- Petitioner is co-owner in possession of the land – the villagers requested the petitioner to allow them to construct the road – petitioner gave an undertaking to provide land for the construction of the road – the retaining wall was damaged during the construction of the road – when Gram Panchayat did not construct the wall, the petitioner himself erected the same – it was claimed that the obstruction was caused to the road- proceedings were initiated against the petitioner and notice was issued to him- held, that obstruction has been caused to the road –SDM had rightly passed the order after visiting the spot and verifying the facts- petition dismissed. (Para- 6 to 8) Title: Sudershan Singh Vs. State of Himachal Pradesh &ors. Page-1704

Code of Criminal Procedure, 1973- Section 133- The petitioner filed an application pleading that respondent No. 1 had blocked flow of rainy and domestic water - respondent No.1 pleaded that civil litigation was going between the parties – no water was blocked by him and false application was filed – SDM dismissed the application by holding that there was no nuisance and general public was not involved in the dispute- a revision was filed before Additional Sessions Judge, which was dismissed- held, that power under Article 227 of the Constitution of India is to be used sparingly for keeping the Subordinate Courts within the bounds of their authority and not for correcting mere errors – it was not disputed that a civil suit was pending between the parties regarding the subject matter – there was no public nuisance as it was not established that drain was being used by public at large – filing of an application before Criminal Court to settle the civil dispute amounted to abuse of the process of the Court – petition dismissed with cost of Rs.10,000/- (Para-9 to 19) Title: Kashetar Pal Singh alias Kripal Singh Vs. Harpal Singh and another Page- 1782

Code of Criminal Procedure, 1973- Section 377- Accused was convicted by the Trial Court and sentenced to undergo imprisonment for a period of 6 months- an appeal was filed, which was partly allowed and the sentence of imprisonment was modified – the accused was sentenced to undergo imprisonment till the rising of the Court - an appeal has been filed against the sentence imposed pleading that the sentence is inadequate – held, that the sentence imposed by the Trial Court can only be enhanced under Section 377 of Cr.P.C– in this case sentence was imposed by the appellate court- hence, appeal is not maintainable – permission granted to file a revision petition. (Para-4) Title: State of H.P. Vs. Prem Chand Page-1491

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 341, 323, 325, 307 and 506 of I.P.C – the petitioners sought bail – held, that there are two versions regarding the manner of incident- the injuries do not show that they could have been caused by stick, kicks or fist blows – petition allowed- petitioners ordered to be released on bail of Rs.25,000/-. (Para-3 to 7) Title: Sohan Lal Vs. State of H.P. Page-1367

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 147, 148, 149, 307, 323 and 506 of I.P.C – the petitioners are students, who had assaulted the members of rival students' union – held, that the violence in the University campus has become a permanent feature due to frequent fights between the members of rival unions- the petitioners have committed heinous offences and stringent conditions are required to be imposed to ensure cordial atmosphere – the petitioners are the permanent residents of Himachal Pradesh- hence, they are ordered to be released subject to conditions. (Para-6 to 13) Title: Amrish Kamal & another Vs. State of Himachal Pradesh Page-1096

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 332, 353, 452, 342 and 504 read with Section 34 of I.P.C – the petitioner pleaded that he has been falsely implicated – informant had given beatings to the petitioner – held, that keeping in view the fact that simple injuries were sustained by the petitioner, the petitioner is permanent resident of the place and is not in a position to flee from justice or to temper with the prosecution evidence; bail application allowed subject to conditions. (Para-8) Title: Ashok Kumar Vs. State of Himachal Pradesh Page-1585

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offences punishable under Sections 500, 501, 502, 503, 504, 505, 506 read with Section 177, 182 and 186 of I.P.C.- the Magistrate found that a prima facie case was made for the commission of offences punishable under Sections 500, 504 and 506 of I.P.C but no case was made for the commission of other offences- a revision was preferred, which was partly allowed and it was held that prima facie case was made out for the commission of offence punishable under Section 500- held, that the statements and the documents prove that there are sufficient ground to proceed against the accused for the commission of offence punishable under Section 500 of I.P.C – the Court has to satisfy prima facie itself that there are sufficient ground for proceeding against the accused at the stage of summoning of the accused - mere pendency of the civil suit is not sufficient to dismiss the criminal complaint – petition dismissed. (Para-9 to 17) Title: Mohinder Nath Sofat son of Shri Ram Krishan Sofat Vs. Dr. Rajeev Bindal Ex-Health Minister of H.P. Page-1326

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Sections 447 and 506 read with Section 34 of I.P.C – petitioners have sought the quashing of FIR on the ground that the disputed land is located adjacent to the land of the petitioners – the land is in possession of the petitioners – held, that Civil Court had also found the petitioners to be in possession- continuation of criminal proceedings will be abuse of the process of the Court – petition allowed, FIR and consequential proceedings quashed. (Para-4 to 8) Title: Neeraj Naiyar and others Vs. State of H.P. and another Page-1341

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 498-A and 506 read with Section 34 of I.P.C – the police sought cancellation of FIR – the Court ordered the cancellation of the FIR with liberty to file a private complaint- held, that after the cancellation of FIR, filing of criminal complaint would amount to abuse of the process of the Court – order set aside and case remanded to the Trial

Court with a direction to decide the same afresh. (Para-2 to 4) Title: NishuVs. State of Himachal Pradesh Page-1086

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Section 376 and 417 of I.P.C against the petitioner- petitioner and second respondent were training together and were having a live in relationship – the petitioner had promised to marry the second respondent but had married elsewhere – FIR was registered against the petitioner at the instance of the second respondent – it was pleaded that no offence has been made out against the petitioner and FIR be quashed – held, that it was established that the petitioner did not have the intention to marry the second respondent from the inception- second respondenthad surrendered her mind, body and soul only because of the promise that petitioner would marry her – whether the physical contact was established between the parties with consent and without commitment of marriage would be seen during the course of trial – petition dismissed. (Para-3 to 9) Title: Vikas Sharma Vs. State of Himachal Pradesh Page-1534

Code of Criminal Procedure, 1973- Section 482 and 320- Petition has been filed for quashing of the FIR registered for the commission of offences punishable under Sections 498-A, 406 and 109 of I.P.C. – it has been plead that matter has been compromised between the parties and permission be granted to compound the matter - since parties have voluntarily compromised the matter; therefore, permission granted- FIR and consequent proceeding ordered to be quashed. (Para-5 to 7) Title: Ricky Sharma s/o Sh. Raman Sharma & OthersVs. State of H.P. and others Page-1765

Constitution of India, 1950- Article 226- Land of the petitioner was used for the construction of the road without acquisition - assurance was made to acquire the land but no steps were taken for acquisition – the respondent stated that the road was constructed on the persistent demand of the Villagers- it was denied that any objection was raised by the petitioner – held, that the road was constructed in the year 1991 - no document was placed on record to show that the land was donated by the petitioner or that there was implied consent of the petitioner – the petition allowed – respondent directed to pay admissible compensation to the petitioner. (Para-8 to 13) Title: Khuri Vs. State of Himachal Pradesh and another Page-1274

Constitution of India, 1950- Article 226- Petitioner submitted a tender, which was the lowest – however, work was not allotted to the petitioner – the petitioner filed the present petition – held, that the petitioner was found to be lowest tenderer – the petitioner had submitted experience certificate along with PAN and EPF number - a complaint was received against the petitioner that the experience certificate was fictitious and cannot be taken into consideration- the experience certificate shows that the same was not in favor of the petitioner but in the name of K – there was over writing in the same- since the bidder had failed to fulfill the condition of tender notice; hence, a decision was rightly taken to cancel the tender- the Court cannot sit as an expert – writ petition dismissed. (Para-7 to 26) Title: Krishna Sanitation Society Jatroon Vs. State of Himachal Pradesh and another (D.B.) Page-1388

Constitution of India, 1950- Article 226- A proposal was prepared to notify Ner Chowk Panchayat as Municipal Corporation – objections were invited from the inhabitants who opposed the formation of municipality – a notification was issued declaring the areas of Ner chowk as Municipal Corporation – present writ petition was filed challenging the decision – respondents replied that Nagar Panchayat fulfilled the criteria required for the constitution of new Municipality – the town was a hub of Industrial and Business activities – there was a considerable floating population of workers in the area which required civic amenities- these amenities could only be provided by a Municipality – the procedure prescribed by the law was followed and it was prayed that writ petition be dismissed – held, that allegations of malafides were made against a member of legislative assembly- it was incumbent to implead that person as a party – the proposal fulfilled the criteria laid down in the Act- objections were invited and considered – the proposal was

approved by the Cabinet – mere error in the nomenclature by mentioning Nagar Parishad instead of Nagar Panchayat will not invalidate the notification- no record was produced to show that notification was not in a public interest or was issued with some ulterior motive – the Courts are not to interfere with the legislative function unless the decision was not in public interest but was taken with ulterior motive at the behest of some interested persons – petition dismissed. (Para- 11 to 43) Title: Yudh Chand Saklani Vs. State of Himachal Pradesh and others (D.B.) Page-1733

Constitution of India, 1950- Article 226- A road was constructed by the State under PMGSY – acquisition proceedings were initiated but were allowed to lapse- State on its own took decision to initiate fresh proceedings for acquisition of the land but did not do anything- held, that no person can be deprived of his property save and except by following due process of law- right to property is not only constitutional or statutory right but also a human right- the petition allowed and the respondents directed to initiate proceedings for acquisition of the land.(Para-3 to 7) Title:Balwant Singh & others Vs. State of Himachal Pradesh & others Page-1384

Constitution of India, 1950- Article 226- A writ petition was filed by the petitioner seeking direction to the University to show the answer sheets/books of the petitioner and the copy of notification of dates of examination – the petition was dismissed – SLP was filed before the Supreme Court, which was also dismissed – a CMP was filed to provide the record kept in the sealed cover –the petitioner was directed to approach the authorities for obtaining the copy of the requisite documents – the petitioner filed the present application pleading that he is not satisfied with the order passed by the authority – held, that the language used by the petitioner is intemperate and contemptuous – the petitioner has attempted to interfere with the due course of judicial proceedings – no licence can be given to the petitioner to commit contempt of Court – however, no action was taken considering the fact that petitioner is a student — further, the writ petition has been disposed of and the Court has become functus officio - no direction can be issued – petition dismissed. (Para-6 to 24) Title: Lalit Narain Mishra Vs. The State of Himachal Pradesh & others (D.B.) Page-1612

Constitution of India, 1950- Article 226- Construction work on selected reaches on NH-70 was advertised – two bids were submitted – one was rejected by Tender Evaluation Committee – the Committee decided to cancel the tender process being single tender - the work was re-advertised – six bids were received out of which four were rejected – a complaint was filed regarding concealment of facts by respondent No.5, which was found to be correct on inquiry – another complaint was filed against the petitioner- the tender was again cancelled – the petitioner filed a writ petition challenging the cancellation process- held, that the officer of respondent No.2 was associated at the time of inquiry into complaint made against respondent No.5- he had written a letter subsequently that in case of opening of financial bid, no cognizance will be taken by respondent No.2- this shows lack of coordination between the respondents - the objection of respondent No.5 regarding the fact that technical personnel will not be ready to work with the petitioner is an assumption belied by the documents showing that they had consented to work with the petitioner – petition allowed - letter quashed and set aside - respondents directed to award the work to the petitioner.(Para-17 to 29) Title: Sandeep Chauhan Vs. Union of India and others (D.B.) Page-1631

Constitution of India, 1950- Article 226- Deceased was posted in CRPF – he was found unconscious on his bed and was taken to hospital, where he was declared brought dead due to myocardial infraction- ordinary family pension was sanctioned to his widow- she claimed that her husband had died on account of illness in the snowbound hostile area- cause of death is directly attributable to government service – held, that rules provide that there should be causal connection between the death and the government service – if the disease is contracted because of continued exposure to a hostile work environment, subjected to extreme weather condition or occupational hazards resulting in death or disability, same are to be accepted as attributable to or aggravated by government service – the deceased was serving in insurgency hit area – he had

no prior history of chronic heart disease – his death was caused by multiple factors like hostile work environment and extreme weather condition- writ petition allowed and petitioner held entitled to the benefit of extraordinary pension. (Para-12 to 31) Title: Rajni Devi Sharma Vs. Union of India & Others (D.B.) Page-1484

Constitution of India, 1950- Article 226- Government of India introduced ex-servicemen contributory health scheme to provide medicare to ex-servicemen and their dependents- scheme was contributory and the appointment of the staff was contractual- petitioners were appointed on different dates on contractual basis- their services were dispensed with on cessation of the contractual service- the petitioners filed writ petitions against the orders – a division bench dismissed some of the writ petitions while another division bench allowed some of the writ petitions- full bench was constituted to resolve the conflict between the judgments of division benches – held, that the petitioners were not appointed on permanent basis but on contractual basis- once the contract came to an end, the person holding the post can have no right for renewal of contract or continuation as a matter of right- services of a contractual employee cannot be equated with the services of ad hoc employee- the scheme was meant not only to provide medical facilities to the ex-servicemen but to adjust the personnels superannuating from the army for a short period – therefore, the persons who were given appointment cannot claim any right of renewal of the employment after the expiry of contract – the respondents had never represented to the petitioners that their services will continue – writ Court can judiciallyreview the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action- judicial review cannot extend to the Court acting as an Appellate Authority sitting in judgment over the decision- the petitioners have failed to place any material on record to show that the action of the respondents is either unreasonable, unfair, perverse or irrational – petitioners had accepted the terms and conditions of the employment and they cannot claim higher rights ignoring the conditions laid down in the scheme- petitioners have no right to continue beyond the period prescribed in the contract- petitions dismissed. (Para- 4 to 36) Title: Pawan Kumar Vs. Union of India and another (F.B.) Page-1181

Constitution of India, 1950- Article 226- Petitioner applied for the post of PGT English along with other candidates – respondent No.5 was selected – petitioner claimed that marks were wrongly awarded to respondent No.5 – held, that as per the communication made by Secretary, Gram Panchayat and Revenue Authorities, respondent No.5 is not a permanent resident of patwar circle – 10 marks were wrongly awarded to him- writ petition allowed – appointment of respondent No.5 set aside and respondent/State directed to offer appointment to the petitioner. (Para-4 to 13) Title: Kusum Lata Vs. State of Himachal Pradesh and others Page-1076

Constitution of India, 1950- Article 226- Petitioner applied for the post of drawing master along with other persons- respondent No.6 was selected – petitioner contended that respondent No.6 was not qualified and there were cuttings and over writings in the result sheet- held, that there is no tampering in the result sheet and the marks were awarded as per the notification- two years diploma in Art and Crafts was required – respondent No.6 had obtained the diploma and was eligible – the petitioner had participated in the selection process and could not have challenged the same – writ petition dismissed.(Para-8 to 19) Title: Amit Singh Vs. State of H.P. & others (D.B.) Page-911

Constitution of India, 1950- Article 226- Petitioner applied for establishing green house for growing agriculture and horticulture produce – he was to pay Rs.18 lacs and remaining amount of Rs.30 lacs was to be financed by the Bank- he was entitled to subsidy – the petitioner failed to repay the amount and notice under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was issued – he approached the writ Court, which passed an order for release of subsidy into the account of the petitioner- however, the subsidy was not released – held, that the project was to be implemented within a

period of two years – issuance of letter of intent will not enable a person to get the subsidy – subsidy cannot be claimed as a matter of right- the petitioner had failed to furnish the certificate of completion of project and his case was rightly not considered by the respondents- writ petition dismissed.(Para-10 to 23) Title: Partap Singh Rauaut Vs. Union of India & Others (D.B.) Page-989

Constitution of India, 1950- Article 226- Petitioner applied for the post of Part Time Water Carrier on the ground that her father had donated land for the construction of the school in the year 1964 – respondent No.3 was selected by the Government under Rule 12 of Recruitment Scheme for the appointment of Part Time Water Carriers – held, that Rule 12 empowers the State to make the appointment on compassionate ground without following the selection process amongst widow, women deserted by their husbands, or otherwise destitute, handicapped persons, if such candidate falls below the poverty line - the petitioner had applied for recruitment under this Rule – the Rule was subsequently quashed but the appointment was made prior to the quashing – respondent No.3 falls within the criteria laid down in Rule 12 and her appointment cannot be said to be bad – writ petition dismissed.(Para-7 to 10) Title: Anjali Devi Vs. State of H.P. & others Page-1351

Constitution of India, 1950- Article 226- Petitioner challenged the appointment of respondent No.6 as Part Time Water Carrier – petitioner claims that she belongs to an IRDP family and has been included in the National Health Insurance Scheme – she had submitted an application and her name was recommended by Gram Panchayat – however, respondent No.6 was appointed – respondents No.1 to 4 stated that approval was granted for appointment of respondent No.6 as Part Time Water Carrierbefore the consideration of the case of the petitioner - held, that Rule 12 empowers the State to make the appointment on compassionate ground without following the selection process from amongst widow, women deserted by their husbands, or otherwise destitute, handicapped persons if such candidate falls below the poverty line - the petitioner had applied for recruitment under this Rule – the Rule was subsequently quashed but the appointment was made prior to the quashing- respondent No.6 is a widow and has placed on record BPL certificate – no document establishing the claim of the petitioner was filed – the appointment of respondent No.6 cannot be faulted- writ petition dismissed. (Para-12 to 16) Title: Krishna Devi Vs. State of H.P. &others Page-1074

Constitution of India, 1950- Article 226- Petitioner had applied for sanitation tender at Mahatama Gandhi Medical Services Complex, Khaneri Rampur but ineligible firms were declared qualified in the technical bid- the tender was allotted to respondent No.4 despite the fact that it was not fulfilling terms and conditions of the tender documents- respondent stated that the tender was allotted to respondent No.4 as it was found to be the lowest bidder - a writ petition was filed earlier, which was dismissed as not maintainable- respondent No.4 raised an objection that petitioner had not participated in the tender and cannot questionthe process – held, that petitioner had not participated in the tender process and has no locus standi to question the same – ESIC No. was wrongly blocked/cancelled by ESIC, which mistake was rectified by ESIC – no case for judicial review was made out—petition dismissed.(Para-8 to 10) Title:Balwinder Singh Vs. The State of Himachal Pradesh and others (D.B.) Page-1601

Constitution of India, 1950- Article 226- Petitioner is a registered dealer for manufacturing and treading of drugs and medicines – the petitioner has set up a factory for manufacturing drugs at Baddi – a notice was issued to the petitioner – penalty of Rs.84,44,838/- was imposed – an appeal was filed, which was dismissed- the matter was carried before H.P. Tax Tribunal, which set aside the orders passed by assessee and Appellate Authority but imposed a cost of Rs. 20 lacs for the reason that petitioner could not be permitted to take the benefit of technicalities of law and wrong committed by the Assessing Authority- held, that statutory Tribunals must function within their bound and their decisions should not be arbitrary, fanciful or based on irrelevant consideration- fiscal statute must be strictly interpreted – there is no equity in tax matter – once it was concluded that the orders passed by Assessing and Appellate Authority were not sustainable in

the eyes of law, costs could not have been imposed- the purpose of imposing the cost is to indemnify the party for the expenses incurred – writ petition allowed and the order passed by the Tribunal set aside.(Para-10 to 21) Title: M/s. Dr. Reddy's Laboratories Ltd. Vs. State of Himachal Pradesh and another (D.B.) Page-1399

Constitution of India, 1950- Article 226- Petitioner is the sole surviving daughter of late J, who belonged to ST category – the petitioner performed marriage with the non-tribal – the application for grant of tribal certificate was rejected – aggrieved from the rejection, present writ petition has been filed – held, that in case of inter caste marriage or marriage between a tribal and non-tribal person, the status of children is a question of fact – there can be a presumption that children have the status of the father but the presumption is rebuttable – the children had received middle and higher education at Chamba – they had not suffered the disabilities suffered by other members of the scheduled tribe- the application was rightly rejected- appeal dismissed.(Para-6 to 17) Title: Sreshta Devi Vs. State of Himachal Pradesh and others (D.B.) Page-1303

Constitution of India, 1950- Article 226- Petitioner joined the services of the department as daily waged beldar – he was engaged as a pipe fitter – his case was considered for regularization and he was appointed as a work charge beldar – he joined under protest and filed original application before the Tribunal – a direction was issued to appoint the petitioner to the post of work charge pipe fitter – a corrigendum was issued and the designation of the petitioner was shown as fitter – the petitioner filed an original application claiming the time scale on seniority basis – the application was transferred to the High Court and was dismissed – held in appeal that the petitioner was directed to be appointed as pipe fitter in the lowest grade with the scale of work charge beldarby the Tribunal – the corrigendum was issued in terms of the direction- the petitioner should have filed a review petition or an appeal, if he was not satisfied with the direction issued by the Tribunal- he cannot claim that he should have been appointed as a daily waged pipe fitter with the time scale – appeal dismissed.(Para-8 to 13) Title: Bhuri Singh Vs. State of Himachal Pradesh and others (D.B.) Page-1603

Constitution of India, 1950- Article 226- Petitioner No.1 is an unaided private college established by petitioner No.3 and is a constituent of petitioner No.2- essentiality certificate was issued in favour of the petitioner No.3 by the State Government after which the college was established- Medical Council of India granted letter of intent to petitioner No.3 to open the medical college with certain conditions – State Government notified the procedure for admission and fee structure – State Government issued a notification amending Himachal Pradesh Private Medical Educational Institution (Regulation of Admissions and Fixation of Fee) Act, 2006 – amendment was challenged by the petitioner on the ground of competence of the State Government to carry out the amendments – held, that the Medical College has to apply for permission and to submit consent of affiliation from a recognized University – once recognition is granted, College is required to take affiliation from University – recognition and affiliation are distinct and their purposes are different – role of MCI is confined to recognition whereas affiliation is left to the State Government or the examining University- Himachal Pradesh University Act, 1970 is the parent statute under which all the Universities in the State have to be constituted – the petitioners can have no right to claim that it will be affiliated to the University of its choice – writ petition dismissed.(Para-22 to 54) Title: Maharishi Markandeshwar Medical College and Hospital and others Vs. State of Himachal Pradesh and others (D.B.) Page-1616

Constitution of India, 1950- Article 226- Petitioner participated in tender process for the supply of tools and equipments for vocational laboratories/workshop – petitioner was recommended for grant of contract by Tender Evaluation Committee- however, the tender process was cancelled- respondent pleaded that complaints were received regarding discrepancies in the tendering process- hence, a decision was taken to cancel the whole process- held, that it was not disputed that the petitioner was the lowest tenderer – tender was cancelled on the ground of discrepancies and the shortcomings – all purchases beyondRs.50 lacs were to be carried out by e-tender but in

the present case this procedure was not adopted – there was no infirmity in the cancellation of the tender – Court can interfere in the tender or contractual matter only when the process adopted or the decision taken is malafide or intended to favour some persons – no such circumstances were established in the present case- writ petition dismissed.(Para-8 to 30) Title: M/s Quality Industries Corporation Vs. State of Himachal Pradesh and another (D.B.) Page-1330

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwari worker – she was absorbed as Supervisor - she claimed the benefit of the service rendered by her asanaganwari worker for pensionary benefits - held, that appointment of the petitioner as anganwari worker is not against any civil post and cannot be counted towards the pensionary benefits- petition dismissed. (Para- 1 to 3) Title: Madhu Tomar Vs. State of H.P. and another Page-1155

Constitution of India, 1950- Article 226- Petitioner was engaged as drawing master – she was subsequently asked not to come on the duty - respondent stated that the permission to fill up the post was withdrawn by respondent No.3 as no criteria was approved by the Government for distribution of marks- held, that the petitioner has scored maximum marks in the interview and her selection was not challenged – action of the respondent of not allowing the petitioner to work is arbitrary- writ petition allowed and respondent directed to permit the petitioner to work. (Para-7 to 11) Title: Babita Vs. State of H.P. & others Page-1586

Constitution of India, 1950- Article 226- Petitioner, a cooperative society filed a writ petition seeking quashing of inspection note and the office order issued on the basis of the inspection note – held, thatrevisional power has been given to the State Government under Section 94 of H.P. Cooperative Societies Act, 1968, where there is no provisions of appeal – the petitioner can approach the competent authority for the redressal of his grievances – the alternative and efficacious remedy is available to the petitioner – petitioner is required to pursue that remedy and not to invoke the writ jurisdiction of the High Court- petition dismissed as not maintainable. (Para-5 to 19) Title: The Tiara Co-operative Agriculture Service Society Ltd. Vs. State of Himachal Pradesh and others (D.B.) Page-1644

Constitution of India, 1950- Article 226- Petitioners are employees of respondent No.1- petitioners claimed that EPF contribution is payable to them in accordance with H.P. University Act, 1970, various statutes, ordinances and regulations as the college is affiliated to H.P. University – held, that as per the ordinance, every college or institute seeking affiliation with the University is required to satisfy the condition laid down in the statute – respondents No.1 and 2 had restricted the contribution to the one prescribed under EPF and MP, 1952, which is not permissible as ordinance has a force of law- no college can take a decision contrary to the provisions of H.P. University Act and Ordinances, Regulations and Statutes – the scheme framed by the Central Government does not prohibit the applicability of any other regulation or the scheme – petition allowed and respondents No.1 and 2 directed to contribute the provident fund in accordance with the Non-Government Affiliated College Teachers Contributory Provident Fund Rules.(Para-14 to 35) Title: Ajay Kumar Sud and others Vs. St. Bede's College and others Page-1249

Constitution of India, 1950- Article 226- Petitioners made applications for grant of GNM and B.Sc. (Nursing) at Rohru and Tanda– the approval was granted in favour of respondent No.2- held, that no uniform yardstick was applied while carrying out the inspection- the authorities directed to carry out fresh inspection in terms of guidelines after affording opportunity of being heard to all the applicants. (Para-13 and 14) Title: Jyoti Education Welfare Society Vs. State of H.P. & another (D.B.) Page-980

Constitution of India, 1950- Article 226- Petitioners were appointed as Inspectors Grade-I – a notification was issued on 1.6.1996 merging 147 posts of Inspector Grade-II in the cadre of

Inspector Grade-I- the petitioners challenged the tentative seniority list – the writ petition was dismissed on the ground that petitioners were not in service on the date of integration of cadres and had no locus standi to challenge the same- held in appeal that cadres were merged w.e.f. 1.7.1995 but in view of pendency of litigation notification of mergers could be given effect on 9.3.1999 and 17.3.1999 – the date of merger was modified by Administrative Tribunal as 1.8.1995 – a working formula was evolved before the High Court, which was accepted – Rules do not prohibit the merger of the cadres – the petitioner were appointed subsequent to the issuance of notification – retrospective seniority cannot be given to the employees from the date when they were not borne in the cadre- seniority needs to be counted against promotion/appointment from the date of issuance of order of substantive appointment – mere pendency of litigation will not assist the petitioner- merging of cadres is a matter of policy- writ petition dismissed. (Para-10 to 28) Title: Rajesh Jaswal and others Vs. State of Himachal Pradesh and others (D.B.) Page-1353

Constitution of India, 1950- Article 226- Petitioners were appointed as beldar/plant observers – they were promoted to the post of Field Assistants - post of Field Assistants was merged with the post of horticulture Sub-Inspector by the State Government – petitioners claimed the pay scale of Horticulture Sub-Inspector on the basis of this notification – University claimed that it had its own ordinance and was not bound by the notification issued by the State Government- writ Court held that the University had framed its own recruitment and promotion Rules and had not taken any decision to merge the posts and dismissed the writ petition- held, that University has its own pay scale- no decision was taken to merge the post of Field Assistant with Horticulture Sub-Inspector – therefore, the petitioners cannot claim the pay scale of Horticulture Sub-Inspector – appeal dismissed. (Para-10 to 26) Title: Shankar Lal and others Vs. State of Himachal Pradesh and another (D.B.) Page-1523

Constitution of India, 1950- Article 226- Respondent No. 3 permitted to hire accommodation for hostel purposes instead of creating own permanent built up structure – Chief Secretary directed to file a consolidated status report and to take appropriate action from time to time. (Para-6 and 7) Title: Bhawan Avam Sannirman Kamgar Sangh (Regd.) Vs. State of HP and others (D.B.) Page-1260

Constitution of India, 1950- Article 226- Revision petition has been dismissed by a non-speaking order- no findings were recorded on the grounds raised in the revision petition-recording of reasons is necessary, in case of a decision affecting anyone prejudicially – the order set aside and case remanded to the revisional Court for afresh decision. (Para-2 to 5) Title: Budhi Singh Vs. State of H.P. and others Page-1128

Constitution of India, 1950- Article 226- Tampering was noticed by Flaying Squad of H.P.S.E.B. – criminal proceedings were initiated and electricity connection was disconnected - ombudsman decided the dispute – aggrieved from the order, present writ petition has been filed – held, that ombudsman had decided the dispute only on the basis of acquittal recorded by Criminal Court, which is not correct- no other reason was given by the ombudsman – writ petition allowed and the case remanded to ombudsman for a fresh decision. (Para-9 and 10) Title: Himachal Pradesh State Electricity Board, through its Secretary, VidyutBhawan, Shimla, H.P.Vs. M/s Virendra Hotels and Allied Hotels Pvt. Ltd. & anr. Page-1223

Constitution of India, 1950- Article 226- The delimitation process for ZilaParishadTikkar Ward was concluded on 20.8.2015 – petitioner raised objections and delimitation was set aside – a direction was issued to complete the delimitation process in accordance with Rule 9 of H.P. Panchayati Raj (Election) Rules, 1994 – model code of conduct came into force in the meantime – the final order of delimitation was passed – writ petitions were filed, which were dismissed as infructuous – the order passed by Deputy Commissioner completing the process of delimitation was challenged and the appeal was allowed- writ petition was filed challenging the order of election petition and the notification – held, that democracy is a basic feature of the Constitution-

a specific procedure has been prescribed under the Rules and there is no possibility of deviating from the same – the procedure prescribed under the Rules is mandatory and has to be scrupulously followed – proposal regarding delimitation was required to be forwarded to the offices of ZilaParishad, Panchayat Samiti and Gram Panchayat for inviting objections – proposals were to be affixed on the notice board by the Secretaries of respective ZilaParishad, Panchayat Samiti and Gram Panchayat in the presence of two independent witnesses- no such exercise was undertaken – the language of the objections was same – Deputy Commissioner recorded the joint statements of the objectors – objections were not decided specifically – non-consideration of relevant material would make the order perverse and the Court has power to interfere with the same in exercise of judicial review – the authority is bound to given reasons in support of the objections - the order passed by Deputy Commissioner set aside- final order of delimitation also quashed and set aside.(Para-11 to 68) Title: Dr. Sushant Deshta Vs. State of H.P. and others Page-1494

Constitution of India, 1950- Article 226- The trucks owned by the petitioners were ordered to be delisted by H.P. Ex-servicemen Corporation – a writ petition was filed by one B before High Court in which it was found that a few persons were permitted to attach more than one truck – the Court issued various directions – the judgment was accepted and bye-laws were amended – a special leave petition was filed before the Supreme Court, which was dismissed- show cause notices were issued to various persons – separate writ petitions were filed against the notices, which were permitted to be withdrawn – representations were filed, which were rejected- held, that the prayers made in the present petition have already been considered and rejected earlier- amendments were carried out in the bye-laws on the basis of the directions issued by the Court – writ petitioners have no right to seek attachment after the issuance of the direction- writ petition dismissed. (Para- 14 to 17) Title: Vinod Kumar Vs. State of H.P. and others Page-1374

Constitution of India, 1950- Article 226- Writ petitioner appeared in the teacher eligibility test – the answer key was circulated and objections were invited – the result was declared, keeping in view the report of the expert – the petitioner was declared to be unsuccessful – she challenged the report of the expert- held, that the Courts cannot substitute the expert opinion – the decision of deleting defective/wrong questions and allotting marks on pro-rata basis is legal- the objections were examined by the experts – mistakes were found and thereafter the result was declared – the Court has to respect the opinion of the experts – writ petition dismissed. (Para-7 to 22) Title: Lalita Devi Vs. State of H.P. and another (D.B.) Page-1476

Constitution of India, 1950- Article 226- Writ petitioner No.2 was appointed as anganwari worker – respondent No.5 questioned her appointment and sought cancellation of income certificate – it was found on inquiry that the income shown in the certificate was incorrect and the income certificate was cancelled – appeal was filed, which was dismissed- a writ petition was filed, which was also dismissed- held in appeal that the question of facts determined by the authority cannot be questioned in the writ petition unless it is shown that the findings recorded are perverse or are based on no evidence or the evidence, which is inadmissible – the authorities had thrashed all the facts – the orders are well reasoned and legal, which cannot be said to be erroneous, perverse or suffering from non-application of mind – writ petition was rightly dismissed- appeal dismissed.(Para-9 to 15) Title: Amar Nath and another Vs. State of H.P. and others (D.B.) Page-1256

Constitution of India, 1950- Article 226- Writ petitioners were regularized as hostel attendants vide different office orders- they claimed that they were discharging the duties of higher post of Hostel Assistants and are entitled to the pay of the same– University had proposed the upgradation of the post but the proposal was returned by the Comptroller - the writ petition was allowed by the Writ Court holding that the University had proposed the upgradation of the post which strengthens the claim of the writ petitioners- held in appeal that University had 11 hostels and only four persons are occupying posts of regular Hostel Assistants – writ Court had rightly

held that the writ petitioners are looking after the work of Hostel Assistants – the judgment was based upon correct appreciation of fact and law- however, the petitioners are entitled to the arrears for the period of three years prior to filing of writ petition.(Para-11 to 19) Title: Dr. Y.S. Parmar University of Horticulture and Forestry, Nauni Vs. Satish Chand (D.B.) Page-1647

Contempt of Courts Act, 1971- Section 12- It was pleaded that the Court had directed the respondents to consider the case of the petitioner for placement as S.P.- respondents stated that they had adopted sealed cover procedure and had complied with the directions – held, that the respondents were directed to consider the case of the petitioner for placement as S.P. and release all consequential benefits - the respondents are in breach – they are directed to comply with the directions and report compliance.(Para-5 to 9) Title: Mahinder Singh Vs. PrabodhSaxena and another (D.B.) Page- 1324

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Employees Compensation Act, 1923- Section 4- Deceased was a conductor in a truck- he died in an accident- compensation of Rs.9,05,520/- was awarded – held in appeal that the monthly wages of the workmen have to be taken as Rs.4,000/- in view of the statutory provisions – the Commissioner had wrongly taken the income as Rs.8,000/- - after deducting 50% amount and taking the factor as 225.22, compensation of Rs.4,50,440/- (2000 x 225.22) awarded- along with interest @ 12% per annum. (Para-5 to 8) Title: United India Insurance Co. Ltd. Vs. Teji Devi & others Page-1319

Employees Compensation Act, 1923- Section 4- Deceased was a driver in a truck – he died in the accident of the truck – compensation of Rs.4,42,740/- was awarded along with interest- held in appeal that the owner had not specifically denied that deceased was employed by him as a driver – it was asserted in the examination-in-chief by the applicant that deceased was working as driver and his wages were Rs.6,000/- per month – respondent No.1 also admitted that deceased was working as a driver and his wages were Rs.5,000/- per month – the fact that the driver was the brother of the owner will not make the case suspect – the provision of Code of Civil Procedure and Evidence Act are not applicable to the proceedings under Workmen Compensation Act – the deceased was having a valid driving licence to drive the vehicle – appeal dismissed. (Para-16 to 25) Title: Oriental Insurance Company Ltd. Vs. Hima Vati & another Page-1589

Employees Compensation Act, 1923- Section 4- Deceased was employed as a driver and died in a motor vehicle accident during the course of his employment – a claim petition was filed which was dismissed by the Commissioner for want of proof that the deceased was discharging his duties at the time of accident – held in appeal that the owner had specifically stated that the deceased was employed by him as a driver - it was also proved that he was discharging his duties at the time of accident -a claim petition was filed before MACT which was dismissed- hence, penalty of Rs.1 lac imposed upon the employer. (Para-5 to 11) Title: Devi Dass & others Vs. Prem Chand &another Page-1217

Employees Compensation Act, 1923- Section 4- Deceased was employed as driver- he died during the course of his duties- compensation of Rs.9,97,000/- was awarded by the Commissionerwith interest @12% per annum - funeral expenses of Rs.40,000/- were also awarded- held in appeal that it was not disputed that deceased was driver and he had died during the course of his employment – Commissioner had taken the salary as Rs.10,000/- - the claimant had pleaded that deceased was drawing salary of Rs.7,000/- per month and Rs.120/- per day as daily allowance –compensation of Rs.80,000/- in lump sum is to be awarded when the actual income is not proved – since, in the present case the actual income was proved – therefore, compensation could not have been restricted to Rs.80,000/- in lump sum- Rs.40,000/- could not have been awarded towards funeral expenses in absence of any statutory provisions – interest was payable on the compensation amount after one month of the accident – appeal partly

allowed. (Para-6 to 8) Title: United India Insurance Company Ltd. Vs. Khem Lata and others Page-941

Employees Compensation Act, 1923- Section 4- Deceased was employed as a driver in a tractor – he died in an accident involving tractor – a claim petition was filed – Commissioner awarded compensation of Rs.2,03,850/- with interest @ 12% per annum- held in appeal that tractor falls within the definition of light motor vehicle (LMV) –however, it will become commercial vehicle when trolley is attached to it and goods are being carried in the same – the tractor was carrying sand and grit and was being used as a transport vehicle – the accident occurred on 2.6.2000- the licence was valid till 23.10.1997 and no application for renewal was received – there was no valid licence with the driver – the insurer was wrongly saddled with liability – appeal allowed and liability fastened upon the insurer.(Para-7 to 12) Title: Oriental Insurance Company Vs. Kushla Devi &ors. Page-1226

Employees Compensation Act, 1923- Section 12- Deceased was an employee of the contractor- H.P. Housing Board was principal employer- principal employer has to pay compensation at the first instance and it is at liberty to recover the same from the contractor – appeal allowed and order modified accordingly. (Para-2 to 4) Title: H.P. Housing and Urban Development Authority Vs. Giani Devi & others Page-1136

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H.P. Motor Vehicles Taxation Act, 1972- Section 3- Petitioner had purchased different construction equipment vehicles- respondents have imposed tax on them – the petitioner filed a writ petition pleading that construction equipment vehicles do not fall within the definition of motor vehicle- held, that machinery like excavator, loader, dumpers have been included as construction equipment vehicle and have been termed as non-transport vehicle- therefore, there cannot be any exemption regarding the imposition of tax – petition dismissed. (Para-5 to 25) Title: M/s Italian-Thai Development Public Company Ltd. Vs. State of HP & Others (D.B.) Page-1289

H.P. Urban Rent Control Act, 1987- Section 14- Landlady filed an eviction petition on the ground that tenant had ceased to occupy the premises – eviction petition was dismissed by the Rent Controller – an appeal was filed and the Appellate Authority remanded the case for afresh decision after framing additional issues – held in revision Appellate Authority can make an inquiry either itself or through the Rent Controller – there is no power of remand with the Appellate Authority – revision allowed and the case remanded to the Appellate Authority for afresh decision.(Para-13 to 17) Title: Madan Mohan son of Shri Kailash Chand Vs. Pushpa Devi wife of Shri Amar Chand Page-1457

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized on 4.12.1994 – two children were born- the husband assaulted the wife causing her injuries – she was residing with her parents – husband had not made any efforts to take her to matrimonial home- the petition was dismissed by the Trial Court- held in appeal that it was duly proved that husband had subjected the wife to physical cruelty – he had not made any efforts to bring the wife from her parental home- this proved the desertion on the part of the husband – the marital ties had broken down irretrievably – petition allowed and the marriage between the parties ordered to be dissolved.(Para-7 to 10) Title: Anjana Devi Vs. Manjit Singh Page-968

Hindu Marriage Act, 1955- Section 25- Petitioner had applied for a decree of judicial separation – the parties agreed to dissolve their marriage by a decree of customary divorce – maintenance of Rs.450/- per month was awarded- petition for enhancement was filed, which was dismissed on the ground that maintenance amount was mutually settled by the parties and there was no provision for enhancement – held in appeal that agreement regarding the receipt of Rs.450/- per month as maintenance will not create estoppel to debar the petitioner from seeking enhancement

of the amount of alimony in the changed circumstances- husband admitted that his salary was Rs.3,300/- per month when he had agreed to pay Rs.450/- as maintenance -he further admitted that his salary was Rs.16,000/- per month at the time of retirement – his total salary was Rs.23,204/- per month as per salary certificate – husband is getting handsome amount from pension – hence, maintenance enhanced to Rs.2,500/- per month. (Para-5 to 10) Title: Kubja Devi Vs. Ishwar Dass Page-983

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Income Tax Act, 1961- Section 147 and 148- Petitioner filed a return showing the income from salary and house property- a notice was issued by the Income Tax Authorities – the petitioner filed a fresh return – proceedings were initiated against the petitioner under Section 147 of the Act- a survey was conducted with respect to the affairs of V and it was found that he had given loan to the petitioner, which was held to be unexplained credit in the hands of the petitioner- the petitioner filed a reply stating that the amount was re-paid with interest – the notice was the result of non-application of mind and there was no dispute regarding the identity of the person, genuineness of the transaction or creditworthiness of the loaner- held in the writ petition that the objections were rejected by the Assessing Officer – Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year and if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax – the original return was not subjected to assessment – however, the Assessing Officer is not precluded to re-open assessment on the basis of his finding of fact so made on the basis of fresh material so discovered in the course of assessment of next assessment year – it is not disputed that investigations were conducted against V and it was found that loan was advanced to the petitioner and his family members – the petitioner and family members admitted the receipt of money in response to the notice- the order rejecting objection was not cryptic – the objections were considered and rejected – the action is not ex-facie illegal – it is not a case of lack of jurisdiction – the Writ Court is not a fact finding authority- writ petition dismissed. (Para-11 to 89) Title: Virbhadra Singh Vs. Deputy Commissioner, Circle Shimla, Income Tax Office & others (D.B.) Page-1714

Income Tax Act, 1961- Section 147 and 148- Petitioner filed a return showing the income from rent, salary and interest from deposits- a notice was issued by the Income Tax Authorities – the petitioner tried to explain the source of investment as being agricultural income from Hindu undivided family- proceedings were initiated against the petitioner under Section 147 of the Act- held in the writ petition that the assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year and if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax – the original return was not subjected to assessment – however, the Assessing Officer is not precluded to re-open assessment on the basis of his finding of fact so made on the basis of fresh material so discovered in the course of assessment of next assessment year –the order rejecting objections was not cryptic – the objections were considered and rejected – the action is not ex-facie illegal – it is not a case of lack of jurisdiction – the Writ Court is not a fact finding authority- writ petition dismissed. (Para-14 to 89) Title: Pratibha Singh Vs. Deputy Commissioner, Circle Shimla, Income Tax Office & another (D.B.) Page-1685

Indian Penal Code, 1860- Section 279 and 337- HRTC bus and a private bus were in competition- the accused was driving the private bus in a rash and negligent manner and hit HRTC bus – the accused was tried and acquitted by the Trial Court- held in appeal that the rashness and negligence should be more than carelessness or error of judgment – prosecution is required to prove that the act on the part of the accused was responsible for the accident - PW-9 did not state that accused was driving the bus in a rash and negligent manner- PW-11 stated in cross-examination that accident had taken place due to the breakage of patta (leaf) of the bus – the prosecution case was contradictory and vague – the accused was rightly acquitted- appeal dismissed. (Para-9 to 15) Title: State of Himachal Pradesh Vs. Mohinder Singh Page-947

Indian Penal Code, 1860- Section 279 and 337- **Motor Vehicles Act, 1988-** Section 187- Accused was driving a vehicle in a rash and negligent manner- the vehicle hit the informant and caused injuries to him- the accused was tried and acquitted by the Trial Court- held in appeal that testimonies of the prosecution witnesses corroborated each other – medical evidence also corroborated their version – the identity of the accused was also established – minor contradictions in the testimonies of witnesses are not sufficient to doubt them- appeal allowed- accused convicted of the commission of offences punishable under Sections 279 and 337 of I.P.C. and 187 of M.V. Act.(Para-9 to 16) Title: State of H.P. Vs. Ashwani Kumar Page-1433

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a van in a rash and negligent manner- Van hit the informant and caused him injuries – the accused was tried and acquitted by the Trial Court- held in appeal that the informant had suddenly appeared before the vehicle - the contents of the FIR were not readover and explained to the informant – one prosecution witness had not supported the prosecution version- the accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-9 to 13) Title: State of H.P. Vs. Balvinder Kumar Page-1235

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving the bus in a rash and negligent manner- bus rolled down in a gorge and the passengers sustained injuries – accused was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held in revision that accident was not disputed – it was also not disputed that the accused was driving the bus – only one witness had supported the prosecution version – he admitted in cross-examination that it took about 50-55 minutes for the bus to cover the distance of 12 kilometers, which shows that bus was being driven in a normal speed- rash and negligence was not proved, in these circumstances- the accused was wrongly convicted by the Courts- appeal allowed- judgments of the trial Court and Appellate Court set aside and accused acquitted.(Para-6 to 22) Title: Hemant Kumar Vs. State of Himachal Pradesh Page-1267

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a truck in a rash and negligent manner- Truck went off the road and fell into the gorge - the occupants sustained injuries and some of them died – the accused was tried and convicted by the Trial court- an appeal was preferred, which was dismissed- held, that accused has not disputed the accident or the fact that he was driving the truck – the material prosecution witnesses turned hostile – the truck was carrying 80-90 peoples, which by itself is an act of negligence especially when the truck is not meant to carry the passengers – benefit of Probation of Offenders Act cannot be granted in a case of rash and negligent driving- however, keeping in view the time elapsed since the incident, sentence modified. (Para-8 to 42) Title: Kalimudeen Vs. State of H.P Page-1015

Indian Penal Code, 1860- Section 292- **Indian Copy Right Act, 1957**- Section 68-A- Accused was found in possession of pornographic VCDs –he was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed – held in revision that seizure memo contains FIR number along with the sections under which the FIR was registered in the same ink, same pen, same flow and same handwriting as the remaining contents - FIR number has also been mentioned in the statements of the witnesses recorded under Section 161 Cr.P.C. – these documents were prepared prior to sending of ruqua and it was not possible to record the FIR number at that time – this falsifies the version of the prosecution and makes it difficult to rely upon the statements of official witnesses especially when independent witnesses have turned hostile – further independent witnesses were not associated from the locality and were taken by the I.O. with him – there was no compliance of Section 65-B of Indian Evidence Act- appeal allowed – judgment of Trial Court and Appellate Court set aside. (Para-15 to 24) Title: Subhash Chand Vs. State of H.P. Page-1815

Indian Penal Code, 1860- Section 302 and 201- A dead body was found on which FIR was registered – it was found on investigation that accused had consumed liquor with the deceased and had murdered him- the accused was tried and acquitted by the Trial Court- held in appeal that PW-1 (brother of the deceased) had not suspected the involvement of the accused and had stated that deceased was crushed under the vehicle by someone – motive for crime was also not established – K was present in the company of the deceased – the disclosure statement was not made in the presence of independent witnesses- the deceased was heavily intoxicated and possibility of sustaining injuries under the influence of alcohol cannot be ruled out- report of FSL did not connect the accused with the commission of crime- chain of circumstances does not lead to the guilt of the accused- accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-7 to 22) Title: State of H.P. Vs. Narender Kumar (D.B.) Page-1469

Indian Penal Code, 1860- Section 302- Deceased was married to the accused- two children were born – accused killed the deceased – he was tried and convicted by the Trial Court – held in appeal that daughter of the accused had witnessed the incident – the weapon of offence was got recovered by the accused – blood stains were found on the same – medical evidence showed that the injuries could have been caused with the weapon of offence- it was duly proved that there was altercation between the accused and the deceased after which the accused had killed the deceased – the oral and circumstantial evidence proved the guilt of the accused- appeal dismissed.(Para-10 to 25) Title: Rakesh Kumar Vs. State of Himachal Pradesh (D.B.) Page-1841

Indian Penal Code, 1860- Section 302 read with Section 34- Accused murdered A – they were convicted for the commission of offence punishable under Section 304(II) of I.P.C – held in appeal that the eye-witness had not disclosed the incident to the police at the first opportunity – the testimony of eye-witness was contradicted by other witnesses –persons who took the deceased to the hospital were not examined – the incident had taken place during the darkness and it was difficult to identify the assailants- recovery of clothes did not establish the prosecution version as blood stains on the clothes were not connected to the deceased – the prosecution version was not proved beyond reasonable doubt- appeal allowed and accused acquitted. (Para-26 to 51) Title: Aniln Katoch & another Vs. State of H.P. (D.B.) Page-1002

Indian Penal Code, 1860- Section 306 and 498-A- Deceased was married to the accused – one daughter was born – the accused started beating the deceased under the influence of liquor- she complained that her husband used to beat her and he had also tried to kill her – she committed suicide by consuming poison- the accused was tried and acquitted by the Trial Court - held in appeal that marriage of the deceased with the accused was not disputed – it was also not disputed that deceased had consumed poison – the allegations made by the deceased are nothing but normal wear and tear of normal married life – they do not amount to such willful conduct, which would have driven the deceased to commit suicide – the instances of maltreatment and cruelty pertain to 1-2 years prior to the commission of suicide – there is no evidence that deceased was subjected to cruelty prior to commission of suicide – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed. (Para-9 to 25) Title: State of Himachal Pradesh Vs. Labh Singh (D.B.) Page-1809

Indian Penal Code, 1860- Section 323, 325 and 506 read with Section 34- Informant was in her house with her son – the accused came and made inquiry from the informant about her son- accused pulled the arm of the shirt worn by the informant and tore it from arm and neck – son of the informant came, who was beaten by the accused along with other co-accused – the accused were tried and acquitted by the Trial Court- held in appeal that the presence of accused K and A was not disputed in the cross-examination –the grievous hurt was not established as x-ray was not connected to the MLC- recovery of the torn short was proved, which corroborated the prosecution version - no person had deposed about the role of J- hence, he was rightly acquitted- appeal partly allowed and accused A and K convicted of the commission of offences punishable

under Sections 451, 323 and 506 read with Section 34 of I.P.C. (Para- 9 to 17) Title: State of H.P. Vs. Ashok Kumar and others Page-1040

Indian Penal Code, 1860- Section 341, 323, 326, 504 and 506- Wife of the accused knocked at the door of the informant saying that accused was beating her -when the informant and his wife went to the house of the accused, the accused abused them- he inflicted a blow with danda on her head – the accused inflicted a blow by darat on the left wrist of the informant – the accused was tried and convicted by the trial Court- an appeal was filed, which was dismissed- held in revision that parties were in litigation for 18-19 years – all the material witnesses had turned hostile – the defence version was rejected without any justification- there are material contradictions in the testimonies of the witnesses- there was no sufficient evidence to prove the prosecution case- revision allowed and accused acquitted.(Para-8 to 36) Title: Lal Chand Vs. State of HP Page-1026

Indian Penal Code, 1860- Section 341, 323 and 325 readwith Section 34- Accused B gave blow of chain on the nose of the informant due to which he suffered injuries on his eyes- accused S caught hold of the informant from his neck- the accused were tried and acquitted by the Trial Court – held in appeal that PW-1 had improved upon his previous version- the person who had rescued the informant from the accused was not examined – there are contradictions in the testimony of PW-3- the blood on the clothes was not connected to the informant – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-9 to 14) Title: State of H.P. Vs. Sant Ram & another Page-1119

Indian Penal Code, 1860- Section 353 and 332- Informant was posted as a clerk in Rural Hospital, Chowari and accused was posted as staff nurse in the same hospital- the accused gave beating to the informant while he was discharging his duties – the accused was tried and convicted by the Trial Court- an appeal was filed, which was partly allowed and the sentence was modified – held in revision that cross complaints were filed by the accused and the informant against each other – both the parties were convicted by the trial Court- however, the informant was acquitted by the Appellate Court – statements of witnesses show that accused was asking for certain papers belonging to her – no person stated that accused had prevented the informant from discharging his duties – it was not proved that intention of the accused was to deter the informant from discharging the duties – the judgment passed by the Court set aside and the accused acquitted.(Para-9 to 28) Title: Bharti Rana Vs. State of Himachal Pradesh Page-950

Indian Penal Code, 1860- Section 353 and 333 read with Section 34- Accused assaulted and used criminal force to deter the informant posted as AddaIncharge, HRTC from discharging his duties - they were convicted by the Trial Court- held in appeal that the genesis of the occurrence is change of route of bus- it can be believed that accused being Pardhan of Gram Panchayat may have questioned working of HRTC functionary – the accused P had also sustained injuries- the possibility of informant and other staff members being assailants cannot be ruled out- there is contradiction regarding the name of accused who inflicted injuries – the witnesses had contradicted themselves regarding other aspects of prosecution case – appeal allowed and accused acquitted.(Para-8 to 13) Title: Punnu Ram & ors. Vs. State of Himachal Pradesh Page-1429

Indian Penal Code, 1860- Section 363, 366-A, 376, 506 and 120-B- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Prosecutrix was taken to Beas and thereafter to Baba Bakala – she was subjected to sexual intercourse by accused No.1 without her consent – accused were tried and acquitted by the Trial Court- held in appeal that the age of the prosecutrix was stated to be below 16 years – reliance was placed on the parivar register but the parivar register is not a legal or acceptable piece of evidence to determine the age of person – it was not proved at whose instance the entries were recorded in the register on the basis of which birth certificate was issued – the prosecutrixwas admitted in the school at the age of 6 years – she had

failed twice or thrice – she was studying in class 10th at the time of incident- therefore, she was aged (10+6+2/3) =18-19 years at the time of incident- the prosecutrix had accompanied the accused voluntarily and had stayed without lodging any protest –the prosecution version was not proved beyond reasonable doubt – accused were rightly acquitted by the Trial Court- appeal dismissed.(Para-9 to 19) Title: State of Himachal Pradesh Vs. Rajeev Kumar and others (D.B.) Page-996

Indian Penal Code, 1860- Section 363, 366 and 376(I)- Prosecutrix was studying in class 8th – she had gone to school with her sister – the accused took the prosecutrix away forcibly on a bike – the matter was reported to police- the father of the accused produced the prosecutrix and the accused in the police Station- the accused was tried and acquitted by the Trial Court- held in appeal that the Medical Officer issued MLC stating that prosecutrix was habitual of sexual intercourse and it was not possible to assess the time of first sexual intercourse- no injury was found on the body of the prosecutrix – father of the prosecutrix was not examined as a witness – the prosecutrix and accused had travelled in a taxi – no complaint was made to the taxi driver – the prosecutrix had not made any efforts to resist and to raise alarm when she was taken from the school – prosecutrix had not complained to any person regarding her kidnapping – prosecutrix was not proved to be a minor – her radiological age was found to be between 15½ - 19 years – the prosecutrix was a consenting party and the accused was rightly acquitted by the Trial Court- appeal dismissed. (Para- 7 to 23) Title: State of Himachal Pradesh Vs. Ram Chander (D.B.) Page-895

Indian Penal Code, 1860- Section 376- Accused had subjected the prosecutrix to sexual assault – the accused was tried and acquitted by the Trial Court- held in appeal that testimony of the prosecutrix if found credible does not require any corroboration - the Court may look for corroboration in case of child witness to satisfy its conscience – Court should have no hesitation in accepting the testimony of the prosecutrix – minor discrepancy or variation in the statement of witness will not be fatal, whereas, contradiction will be – the prosecutrix was minor on the date of incident- the accused was on visiting terms with the family of the prosecutrix and is a close relative – the father of the prosecutrix was not at home and the accused had visited the house of the prosecutrix to spend the night – the prosecutrix supported the prosecution version – her credit was not impeached in cross-examination- absence of blood, rashes, sperms or bruises on the vital part of the prosecutrix is not sufficient to disbelieve her testimony – her version was corroborated by her mother – the matter was reported to police immediately- the prosecution version was proved beyond reasonable doubt and the Trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offence punishable under Section 376 of I.P.C. (Para-7 to 40) Title: State of Himachal Pradesh Vs. Nanha(D.B.) Page-1238

Indian Penal Code, 1860- Section 379 read with Section 34- Accused were found in possession of small pieces of aluminum wire, 6 blades, two hacksaw blades, bundle of aluminum wire and small pieces of ladder – they failed to account for the same- informant filed an application stating that one ladder was stolen – he identified the ladder as his own – the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused were acquitted – held in appeal that the copy of seizure memo was not supplied to the accused- testimony of PW-8 was contrary to the contents of the seizure memo- the theft was reported by the informant after delay for which no explanation was given - the Appellate Court had rightly acquitted the accused- appeal dismissed.(Para- 9 to 13) Title: State of H.P. Vs. Kishori Lal & another Page-1116

Indian Penal Code, 1860- Section 436 and 427- Informant was watching television – he heard murmuring of the persons on the backside – he came out and saw G and accused T – informant went inside – his wife came and noticed that cow shed was put on fire – domestic bitch died in the fire – the accused was tried and convicted by the Trial Court- held in appeal that the witnesses had improved upon their versions making their testimonies doubtful – G was not cited as a

witness and adverse inference has to be drawn against the prosecution- the prosecution version was not proved beyond reasonable doubt and the Court had wrongly convicted the accused- appeal allowed- judgment passed by the Trial Court set aside.(Para-9 to 13) Title: Tej Singh Vs. State of H.P. Page-1447

Indian Penal Code, 1860- Section 447, 323, 342, 506-II and 367 read with Section 34- Complainant had given the contract of construction of his house to the accused S- the accused had used his shuttering material as well as the material of the complainant- the accused started carrying the shuttering material of the complainant to which the complainant objected- accused M and J arrived at the spot- all the accused gave beatings to the complainant- complaint and charge-sheet were filed before the Court – the accused were tried and acquitted of the commission of offences punishable under Sections 447, 342, 506 and 367 read with Section 34 of I.P.C but were convicted and sentenced to pay Rs.1,000/- each as fine for the commission of offence punishable under Section 323 of I.P.C- held in appeal that testimonies of the witnesses only lead to the conclusion that some scuffle had taken place between the complainant and the accused S – subsequently, accused J and accused M joined the scuffle – it was not explained as to who was the aggressor – simple injuries were found on the person of the complainant, whereas, no such injuries were found on the person of accused – however, it was duly proved that the accused had administered beatings to the complainant- hence, the accused were rightly convicted by the trial Court- appeal dismissed.(Para-11 to 16) Title: Dinesh Chander Sharma Vs. Swaran Singh and others (D.B.) Page-1123

Indian penal Code, 1860- Section 451, 352 and 506 read with Section 34- Informant had gone to attend a local fair, where she was abused by the accused- the accused gave beatings to her on her return- the accused were tried and acquitted by the Trial Court- held in appeal that testimony of the informant is corroborated by PW-2 and PW-3- there is nothing in their cross-examination to show that they were making incorrect statements – delay in reporting the matter was satisfactorily explained- appeal allowed- accused convicted of the commission of offences punishable under Sections 451, 352 and 506 read with Section 34 of I.P.C. (Para-9 to 13) Title: State of H.P. Vs. Suman Sharma and others Page-965

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused No.1- accused No.2 was mother-in-law of the deceased – the accused started maltreating the deceased for bringing insufficient dowry – they used to beat the deceased – the deceased committed suicide by consuming poison – the accused were tried and acquitted by the Trial Court- held in appeal that PW-1 admitted in cross-examination that accused had not demanded dowry at the time of marriage or till the death of deceased- statement of PW-4 is general in nature and no specific instance was given by her- material witness was not examined- the complaint stated to have been written by the deceased was suspicious – the FIR was lodged after three years and no explanation for the same was provided – the prosecution version was not proved beyond reasonable doubt and the accused were rightly acquitted by the Trial Court- appeal dismissed. (Para-5 to 18) Title: State of Himachal Pradesh Vs. Ajay Kumar & Another (D.B.) Page-1658

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that N was owner of the suit land, who had executed a Will in favour of the plaintiff – mutation was wrongly sanctioned in favour of the defendants- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that the finding of Trial Court that N was not proved to be the owner and he could not have bequeathed the suit land was not examined by the Appellate Court- Appellate Court examined the veracity of the Will, which was not permissible – appeal allowed – judgment of the Appellate Court set aside- case remanded for fresh adjudication.(Para-11 to 15) Title: Jamuna Devi Vs. Arjun and others Page- 1799

Indian Succession Act, 1925- Section 63- The Land was owned by L – he died in the month of June, 1988- mutations were attested on the basis of the Will – the deceased was not competent to execute the Will as he remained ill at the time of the execution of the Will – the suit was decreed by the Trial Court – an appeal was preferred, which was allowed- held, that original Will was not produced before the Court – defendant has not stated anything about the scribe of the Will or the marginal witnesses – the marginal witness failed to identify his signatures on the Will due to poor eye-sight – the execution of the Will was not proved – appeal allowed – judgment and decree passed by the Appellate Court set aside while judgment and decree passed by the Trial Court restored. (Para-10 to 18) Title: Premvati and others Vs. Vasu Dev Page-911

Industrial Disputes Act, 1947- Section 17-B- A writ petition was filed assailing the award passed by Industrial Tribunal-cum-Labour Court, Shimla- an application was filed by the workman- held, that Section 17-B has been enacted by the parliament to give relief to a workman who has been ordered to be reinstated under the award of Labour Court or Industrial Tribunal- the object of this provision is to relief the hardship caused to the workman due to delay in implementing the award- workman is entitled to the payment of full wages last drawn as subsistence allowance – employer directed to pay wages from the date of filing of the application. (Para- 5 to 16) Title: M/s Federal Mogul Bearing India Ltd. Vs. Brij Lal Page-1163

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged on daily wage basis- his services were terminated- he filed original application before Administrative Tribunal, which was allowed – the services of the petitioner were disengaged without following the procedure – the Labour Court dismissed the reference – held, that the petitioner had worked for three days in July, 2001- the plea of the petitioner that he had completed 240 days and his services were illegally terminated was not proved – the Labour Court had rightly dismissed the reference – writ petition dismissed. (Para-5 to 14) Title: Narain Singh Vs. State of Himachal Pradesh and others Page-1080

Industrial Disputes Act, 1947- Section 25- The petitioner was appointed as Librarian – his services were terminated after an inquiry, which was not proper – the Labour Court rejected the claim of the petitioner – held, that no objection was raised to the appointment of the Inquiry Officer – petitioner was unable to prove that he was deprived of an opportunity to examine the witnesses- serious allegations were made against the petitioner and the inquiry was rightly held to verify those allegations – the Writ Court will not act as a Court of appeal to disturb the findings of fact- writ petition dismissed.(Para-9 to 15) Title: Som Dutt Sharma Vs. The Presiding Judge, Industrial Tribunal-cum-Labour Court and another Page-1637

Industrial Disputes Act, 1947- Section 25- The workman was appointed as a driver – his services were terminated orally without issuance of notice – a reference was made, which was allowed by the Labour Court- held, that the management had not challenged the award – the Industrial Tribunal had wrongly denied the benefit of backwages especially when continuity in service and seniority were granted – Writ Court does not have jurisdiction to re-appreciate the facts- however, Tribunal had failed to exercise the jurisdiction by denying the back wages – writ petition allowed and workman held entitled to 50% of back wages from the date of retrenchment till passing of award. (Para-9 to 16) Title: Kulvinder Singh Vs. The Managing Partner, M/S Cousins GunVs. Manufactures Mandi Page-1606

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11) Title: State of Himachal Pradesh & another Vs. Ashok Kumar Page-1306

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11) Title: State of Himachal Pradesh & another Vs. Inder Singh Page-1311

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11) Title: State of Himachal Pradesh & another Vs. Bhuri Singh Page-1309

Industrial Disputes Act, 1947- Section 25-F- P was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that plea of the employer that P had abandoned the service has not been established- merely because a workman had not reported for duty cannot lead to an inference of abandonment- a disciplinary inquiry should have been initiated against the workman for abandoning the service, which was not done- fresh hands were engaged and employer had not complied with the provision of Section 25-H –there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-10 to 13) Title: State of Himachal Pradesh & another Vs. Partap Singh Page-1314

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Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for the construction of Karara-Chandi Road – land Acquisition Collector assessed the value of cultivable land as Rs.4,000/- per biswa and value of ghasni land as Rs. 500/- per biswa- a reference was made and the compensation was enhanced to Rs.10,000/- per biswa- held in appeal that the exemplar sale deed showed that one biswa of land was alienated for Rs.6,000/- large piece of land was acquired, whereas, exemplar sale deed was regarding one biswa of land, therefore, 20% deduction has to be made from the sale consideration shown in the exemplar sale deed – appeal partly allowed and the value assessed as Rs.6,000/- per biswairrespective of the category of the land-20% amount ordered to be deducted from this amount. (Para-2 to 5) Title: State of H.P. & another Vs. Shanti Devi & others Page-1205

Land Acquisition Act, 1894- Section 18- Reference petition was ordered to be dismissed in default- held, that the reference petition cannot be dismissed in default and the reference Court had wrongly ordered the dismissal – direction issued to restore the reference petition to its original number and to decide the same in accordance with law. (Para-2 to 5) Title:Vinod Kumar and others Vs. State of H.P. and others Page-1679

Land Acquisition Act, 1894- Section 18- The award pronounced by Reference Court was assailed before the High Court – appeal was disposed of in RFA no.44 of 2009- the award in the present case has arisen from the common notification- the award was common in the present appeal and in RFA no.44 of 2009- therefore, the present appeal disposed of in terms of RFA No.44 of 2009. (Para- 1 to 4) Title: The Secretary (PWD) to the Government of Himachal Pradesh and another Vs. ChamanLal Page-1211

Land Acquisition Act, 1894- Section 18- Land Acquisition Collector had awarded compensation on the basis of the settlement –held, that statutory benefits payable under the Act cannot be waived by the Land Owners – there can be no estoppel against the law- the benefits were rightly

granted by the Reference Court – appeal dismissed. (Para-3 to 7) Title: The State of Himachal Pradesh & others Vs. Bhagat Ram & others Page-1532

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam – Land Acquisition Collector determined the compensation @Rs.4,69,955/- for cultivated land and Rs.1,04,416/- for uncultivable land – Reference petition was filed and the Reference Court determined the market value @ Rs.4,69,955/- per bigha – held in appeal that sale deeds were tendered in evidence but in absence of evidence regarding the similarity of the acquired land with exemplar sale deed, the deeds cannot be taken into consideration to determine the market value of the acquired land –the sale deed pertained to two different villages and very small chunk of lands - the reference Court had rightly declined to take exemplar sale transactions into consideration- appeal dismissed. (Para- 5 to 12) Title: NTPC Ltd.(Kol Dam) Vs. Sukh Ram &others Page-1520

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam- Land Acquisition Collector awarded the compensation at different rates- reference was made – exemplar sale deeds were produced, which were subsequent to initiation of acquisition proceedings- no material was placed on record to establish its similarity of potential, use, kind and nature with the acquired land – the Court has awarded compensation in respect of other acquired land of the same Tehsil on uniform basis irrespective of classification nature and category of land- Reference Court awarded compensation on uniform basis by taking the highest rate so determined by the Collector himself after relying upon several decisions of the Apex Court – the Reference Court had rightly determined the compensation- appeal dismissed.(Para-4 to 10) Title: NTPC Ltd., Kol Dam Vs. Balam Singh & another Page-1481

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam- Reference Court re-determined the market value @ Rs.5 lacs per bigha after relying upon exemplar sale deed and exemplar award –held in appeal that claimants had claimed compensation @ Rs.15 lacs per bigha category/classification wise- the Reference Court is bound to determine market value, which is just fair and reasonable- Collector determined the market value at different rates – exemplar sale deeds were duly proved- similarity of the acquired land with exemplar sale deeds was established- the market value in exemplar sale deeds worked out to be Rs.7,50,000/- per bigha but allowing deduction up to 33.13%, the fair market value was found to be 5 lacs per bigha – similarity of the land in previous award was established with the acquired land – award has attained finality –sale deeds relied upon by the respondents could not form the basis for determining market value as the similarity between the lands was not established – appeal dismissed. (Para-7 to 31) Title: NTPC Limited Vs. Amar Singh &another Page-1462

Land Acquisition Act, 1894- Section 18- The land was acquired for the extension of Airport, Gaggal – the land owners sought reference and the Reference Court enhanced the compensation – aggrieved from the order, the present appeal was filed – held in appeal that exemplar sale deed was executed subsequent to the date of notification and cannot be relied upon - the benefit of 20% increase was also not permissible – appeal allowed- award of the reference Court set aside and that of the Land Acquisition Collector restored. (Para-6 to 13) Title: Sub Division Officer (Civil)-cum-Land Acquisition Collector Vs. Harbhagwant Singh Page-1045

Limitation Act, 1963- Section 5- An appeal was against the award of Workmen Compensation Commissioner filed, which was barred by limitation – an application for condonation of delay in filing the appeal filed- held that appellant had deposited the amount before the Commissioner on 24.1.2011, which shows that it had notice regarding the award – the appeal was filed in the year 2015- no satisfactory explanation for the delay has been given – delay cannot be condoned- application dismissed. (Para-3) Title: ICICI Lombard General Insurance Company Ltd. Vs. Leela Devi & others Page-1073

Limitation Act, 1963- Section 5- An application for condonation of delay of 256 days was filed pleading that the matter remained pending before various authorities in the department – held, that the memo of appeal was returned by Assistant Solicitor General of India in the month of May, 2014 for signatures and was filed in the month of January, 2015 – no explanation for the delay was given – no sufficient cause exists for condonation of delay- application dismissed.(Para-5) Title: Union of India Vs. Vivek Bhardwaj & Another Page-1122

Limitation Act, 1963- Section 5- There was delay of 125 days in filing the appeal – an application for condonation of delay was filed, which was dismissed – held, that the counsel for the applicant had not obtained the copy from the copying agency – there is no requirement of intimating the counsel on the preparation of the copy – the time till the collection of the copy cannot be deducted – the delay was not explained properly- appeal dismissed.(Para-3 to 6) Title: Employees Provident Fund Organization and another Vs. Gian Chand and another Page-1134

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Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased was travelling in the vehicle after loading the goods – this fact was not denied in the reply- the plea taken by the insurer that the deceased was travelling in the vehicle as a gratuitous passenger was not proved- the insurer was rightly saddled with liability- appeal dismissed. (Para-3 to 5) Title:Bajaj Allianz General Insurance Company Ltd. Vs. Ram Kali and others Page-1383

Motor Vehicles Act, 1988- Section 149- Driver had a valid licence to drive a light motor vehicle – it was nowhere provided that the driver was not competent to drive a motorcycle or a scooter – the Tribunal had fallen into error in holding that the driver did not have a valid and effective driving licence to drive the vehicle – it was for the insurer to prove the breach of the terms and conditions of the policy and mere plea is not sufficient to seek exoneration. (Para-8 to 13) Title: Hari Chand and another Vs. Chaya Kumari and others Page-1552

Motor Vehicles Act, 1988- Section 149- Driver was driving a tipper un-laden weight of which is 2800 kg. – it falls within definition of light motor vehicle – the driver had a licence to drive light motor vehicle- no endorsement of PSV was required – the driver had a valid licence at the time of accident – the Tribunal wrongly discharged the insurer from liability- appeal allowed and insurer directed to satisfy the award. (Para- 9 to 22) Title: Gautam Nath and another Vs. Duni Chand and others Page-1546

Motor Vehicles Act, 1988- Section 149- Interrogatories were sent to District Judge, Mathura, who had sent the report to the Tribunal showing that the original licence was not issued in the name of the driver Shakti Chand – however, the insurer had not proved the said report – the licence was renewed at Kangra and the renewal was not fake – the burden was upon the insurer to establish that the insurer had committed willful breach of the terms and conditions of the policy, which was not proved – insurer was rightly saddled with liability- however, the rate of interest reduced to 7.5% per annum. (Para-5 to 17) Title: National Insurance Company Ltd.Vs. Pawan Kumar and others Page-1560

Motor Vehicles Act, 1988- Section 149- It was contended that the driver was under the influence of liquor and insurer is not liable – held, that the insurer had not led any evidence to prove this plea- the insurance policy does not contain any such clause – insurer cannot escape from liability on this ground. (Para-6 and 7) Title: The New India Assurance Company Ltd.Vs. Kirna & others Page-1575

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a tipper, the unladenweight of which is 3680 k.g. and it falls within the definition of light motor vehicle – copy of licence shows that driver was having a valid and effective driving licence at the time of accident – it was for the insurer to plead and prove that the owner had committed willful breach of the terms and

conditions of the policy- insurer is to be saddled with liability – thus, the Tribunal had rightly saddled the insurer with liability – however, rate of interest reduced from 9 % to 7.5% per annum.(Para-8 to 21) Title: ICICI, Lombard General Insurance Co. Ltd. Vs. Gian Chand & others Page-1149

Motor Vehicles Act, 1988- Section 149- Tribunal saddled the owner with liability – held, that the driver was having a valid and effective driving licence, which was also renewed- even otherwise, it was for the insurer to plead and prove the the driver was not having a valid licence and the owner had committed willful breach – the insurance was admitted and the insurer has to satisfy the award- appeal allowed. (Para- 6 to 13) Title: Navdeep Singh and another Vs. Inder Singh and another Page-1405

Motor Vehicles Act, 1988- Section 163-A- Deceased was the son of owner/insured, who died in the accident - the owner had specifically stated in the reply that the vehicle was parked in the garage due to some mechanical defeat- the deceased had taken the vehicle in the absence of the owner – the deceased was not engaged as a driver but was driving the vehicle in the capacity of the son of the insured and will step into the shoes of the owner – the insured had paid extra premium insuring the owner to the extent of Rs.2 lacs - representative of the deceased are entitled to the compensation of Rs.2 lacs with interest @ 7.5% per annum.(Para-14 to 24) Title: ICICI Lombard General Insurance Company Limited Vs. Parul Sharma and others Page-1144

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 30% permanent disability- his right leg has been shortened – he cannot drive the vehicle the way he was driving before the accident – accident has affected earning capacity to the extent of 50% - monthly income of the claimant was Rs. 7,800/- per month and loss of earning will be Rs. 3,900/- per month– the claimant was 34 years at the time of accident and multiplier of 15 is applicable- thus, the loss of income is Rs. 3,900 x 12 x 15= Rs. 7,02,000/- - compensation of Rs. 50,000/- under the head pain and suffering during treatment, Rs. 50,000/- under the head loss of enjoyment of life, Rs. 60,000/- under the head loss of earning capacity during treatment, Rs. 83,000/- under the head special diet and attendant charges do not need any interference- claimant is entitled to Rs. 9,70,000/- as compensation – rate of interest reduced from 9% to 7.5% per annum. (Para- 15 to 22) Title: Oriental Insurance Company Vs. Roop Singh and others Page-1837

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that accident was caused by the negligence of the driver of the vehicle – FIR was registered against the claimant – acquittal was recorded on the ground that case was not proved beyond reasonable doubt and not on the ground that the accident was caused by the negligence of other driver- the statement of PW-1 was shattered in the cross-examination – negligence was not proved and the claim petition was rightly dismissed- appeal dismissed.(Para-6 to 11) Title: Ram Lal Vs. Bishan Singh and others Page-1432

Motor Vehicles Act, 1988- Section 166- Claimant specifically pleaded that accident was outcome of contributory negligence – challan was filed against the driver of the truck as well as motorcyclist – drivers of both vehicles had driven the vehicles rashly and negligently and it was a case of contributory negligence – the deceased was bachelor and 50% amount was to be deducted towards personal expenses- the deceased was 21 years of age and multiplier of 15 was applicable – however, multiplier of 16 was applied by the Tribunal, which is maintained – appeal dismissed. (Para-11 to 26) Title: Prit Pal Singh Vs. Radha Devi and others Page-1193

Motor Vehicles Act, 1988- Section 166- Claimant suffered permanent disability to the extent of 55% - medical evidence proved that the injured was victim of the motor vehicle accident and had sustained 55% disability – he remained undertreatment for about 3 months – hence, by guess work, Rs.2 lacs awarded in lump sum under the heads ‘pain and sufferings’, ‘loss of amenities’ and ‘medical expenses’ with interest @ 7.5% per annum. (Para-10 to 16) Title: Manoj Kumar Vs. Himachal Road Transport Corporation & others Page-1158

Motor Vehicles Act, 1988- Section 166- Claimant sustained 40% disability qua his left leg- he remained admitted in the hospital w.e.f. 30.9.2008 till 20.11.2008 – claimant was 10 years of age at the time of incident – he will not be able to seek appointment in the Armed Forces or get the job of his choice after attaining the age of majority – the claimant would have been earning not less than Rs.5,000/- per month after attaining majority- considering the disability, the claimant had suffered Rs.2,000/- per month as loss of income – multiplier of 18 will be applicable – thus, compensation of Rs.2000 x 12 x 18= Rs.4,32,000/- awarded towards loss of future income – Rs.42,805/- awarded under the head medical expenses and Rs.12,000/- awarded under the head transportation charges- compensation of Rs.1 lac each awarded under the heads pain and suffering and loss of amenities of life- thus, total compensation of Rs. 6,86,805/- awarded with interest @ 7.5% per annum.(Para-9 to 27) Title: Mahesh Vs. Prince and others Page-1396

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that driver Sunil Kumar was driving the vehicle rashly and negligently- Tribunals held that Sunil Kumar had caused the accident while driving the vehicle rashly and negligently – Rajesh Kumar was convicted by the Criminal Court for driving the vehicle in a rash and negligent manner – this judgment was set aside in appeal and it was held that Sunil Kumar was driving the vehicle - the judgment of the Appellate Court has attained finality – Tribunals had rightly held that accident was caused by the rash and the negligent driving of Sunil Kumar – seating capacity of the vehicle is 42 and 30 claim petitions were filed - the risk of all the claimants is covered – the insurer was rightly saddled with liability- appeals dismissed.(Para-7 to18) Title: New India Assurance Company Limited Vs. Fata Chand & others Page-1411

Motor Vehicles Act, 1988- Section 166- Claimants specifically pleaded that deceased was working as labourer in the offending vehicle and was travelling in the same as a labourer at the time of accident- this fact was admitted in the reply – sitting capacity of the vehicle was 3+1 – premium was paid for the employee - the claimants are 7 in number and 1/5th amount was rightly deducted towards personal expenses- the deceased was 31 years of age at the time of accident and multiplier of 15 is just and appropriate – the amount cannot be said to be excessive – appeal dismissed. (Para-13 to 21) Title: Oriental Insurance Company Ltd. Vs. Sumitra Devi and others Page-1177

Motor Vehicles Act, 1988- Section 166- Claimants specifically stated in the claim petition that deceased was driving the vehicle at the time of accident – owner also admitted this fact in the reply - it was specifically stated in the FIR that accident had taken place due to rash and negligent driving by the deceased- thus, it can be safely said that accident had taken place due to the negligence of the deceased – rashness and negligence have to be proved to get compensation under Section 166- the claim petition was therefore, not maintainable under Section 166 – since, the income of the deceased was proved to be Rs. 23,791/- per month; therefore, claim petition cannot be treated under Section 163-A – appeal allowed- award set aside. (Para-12 to 25) Title: Oriental Insurance Company Ltd. Vs. Brahmi and others Page-1830

Motor Vehicles Act, 1988- Section 166- Deceased was a house wife – her monthly income cannot be less than Rs.6,000/- / 1/3rd is required to be deducted towards personal expenses of the deceased and claimant has lost source of dependency of Rs.4,000/- per month- multiplier of 15 is applicable and claimant is entitled to compensation of Rs.4000 x 12 x 15= Rs. 7,20,000/- under the head loss of dependency – claimants is also entitled to Rs.10,000/- each under the heads loss of love and affection and funeral expenses- thus, total compensation of Rs.7,20,000 + 20,000= Rs.7,40,000/- awarded along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-9 to 14) Title: Master Nitish Kumar (Minor) Vs. Managing Director & another Page-1161

Motor Vehicles Act, 1988- Section 166- claimant is a house wife – her income can be taken as Rs.6,000/- per month- the loss of income has to be taken as Rs.3,600/- per month in view of the

disability sustained by her - applying the multiplier of 11, loss of future income will be Rs.4,75,200/- - the claimant will face difficulty in movement – hence, in addition to Rs.20,000/- spent during the treatment, Rs.10,000/- granted for future expenses towards movement , Rs.30,000/- awarded towards loss of amenities - Rs.20,000/- awarded for future treatment – total amount of Rs.7,45,200/- awarded as compensation with interest @ 9% per annum- cost of Rs.10,000/- also awarded. (Para-13 to 22) Title: ICICI Lombard General Insurance Co. Vs. Bimla Devi and others Page- 923

Motor Vehicles Act, 1988- Section 166- Deceased was a pillion rider of the motorcycle which met with an accident due to the rash and negligent driving of the driver of the bus- it was contended that accident was the result of the contributory negligence of the driver of the motorcycle – held, that in claim petition prima facie proof is required and not strict pleadings and proof - both the drivers had not taken due care and caution while driving their respective vehicles- when two drivers do not take due care and caution while driving their respective vehicles and contribute in causing accident, it is a case of contributory negligence – appellate directed to deposit 50% amount while the insurer of the other vehicle directed to deposit 50% of the amount.(Para-15 to 29) Title: Oriental Insurance Company Ltd. Vs. Daljeet Kaur and others Page-1173

Motor Vehicles Act, 1988- Section 166- Deceased was a TGT and was drawing gross salary of Rs. 27,000/- per month- he was to retire at the age of 58 years and was aged 56 years at the time of accident – 1/4th amount is to be deducted towards personal expenses- claimants have lost source of dependency of Rs. 20,000/- per month – the compensation has to be determined keeping in view the fact that deceased was to retire within two years and that thereafter he was to get pension for the rest of the life- keeping in view the age of the deceased, multiplier of 7 is applicable out of which multiplier of 2 has to be applied for assessing loss of salary and 5 has to be applied for assessing loss of pension – claimants are entitled to Rs. 20,000 x 12 x 2= Rs. 4,80,000/- under the head loss of salary – the deceased would not have taken pension less than Rs. 12,000/- per month out of which 1/4th is to be deducted towards personal expenses and the loss of dependency will be Rs. 9,000/- per month – claimants are entitled to Rs. 9,000 x 12 x 5= Rs. 5,40,000/- under the head loss of pension- claimants are also entitled to Rs. 10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses – claimants are entitled to total compensation of Rs. 4,80,000 + 5,40,000 + 40,000= Rs. 10,60,000/- with interest @ 7.5% per annum. (Para-18 to 28) Title: Darshan Kaur & another Vs. Vidya Thakur & others Page-1822

Motor Vehicles Act, 1988- Section 166- Deceased was drawing Rs.13,064/- per month as salary- he was 37 years of age at the time of accident – multiplier of 15 was rightly applied – claimants are four in numbers and 1/4th amount was rightly deducted from the monthly income the deceased- the driver had a valid driving licence and insurer was rightly saddled with liability- appeal dismissed. (Para-4 to 7) Title: Dolma Devi and others vs. Mohinder Kumar Goel and others Page-1387

Motor Vehicles Act, 1988- Section 166- Deceased was hit by a car – he fell down upon the motorcycle – the driver and pillion rider also sustained injuries – a claim petition was filed for seeking compensation of Rs.6,12,000/- - the Tribunal dismissed the petition – held in appeal that PW-2 specifically stated that accident was caused due to the negligence of the driver – his testimony was corroborated by the report of post-mortem – thus, rashness and negligence were duly proved – monthly income of the deceased can be taken as Rs.3,000/-- 1/3rd amount is to be deducted towards personal expenses and loss of dependency will be Rs.2,000/- per month- the age of the deceased was 56 years and multiplier of 8 is applicable – compensation of Rs.1,92,000/- (2000 x 12 x 8) awarded towards loss of dependency- compensation of Rs.10,000/- each awarded under the heads funeral expenses, loss of love and affection and loss of consortium – thus, total compensation of Rs.2,22,000/- awarded with interest @ 9 % per annum. (Para-13 to

22) Title: Savitri Devi widow of late Shri Balwant Singh Vs. Mohinder Pal son of Shri Ram Lal & others Page-1594

Motor Vehicles Act, 1988- Section 166- Deceased was running a tea shop and was earning Rs.8,000/- per month – however, no documentary proof was filed – the income of the deceased can be taken as Rs.6,000/- per month or Rs.200/- per day- after deducting 1/3rd amount towards the personal income, loss of source of dependency will be Rs.4,000/- per month – the deceased was 55 years of age and multiplier of 10 is applicable- thus, the claimants are entitled to Rs.4,000 x 12 x 10= Rs.4,80,000/- under the head loss of source of dependency – claimants are also entitled to Rs.10,000/- each under the heads loss of estate, loss of love and affection, loss of consortium and funeral expenses – the deceased remained admitted in the hospital w.e.f. 14th May, 2011 till 21st May, 2011 and must have spent some amount on the treatment – compensation of Rs.50,000/- awarded under the head treatment- claimants are entitled to Rs.4,80,000 + 40,000+ 50,000= Rs.5,70,000/- along with interest @ 7.5% per annum. (Para-14 to 23) Title: Hari Chand and another Vs. Chaya Kumari and others Page-1552

Motor Vehicles Act, 1988- Section 166- Deceased was travelling as a labourer while deceased N was traveling as owner of goods –they died in an accident- the fact that the deceased were travelling as labourer and owner, respectively was admitted in the reply- it was also proved by PW-4, occupant of the vehicle- the delay is not sufficient to dismiss the petition- the compensation was rightly assessed- the rate of interest were wrongly granted as 9% and 7% - rate of interest modified to 7.5% per annum. (Para-11 to 19) Title: Divisional Manager, Oriental Insurance Co. Ltd. Vs. Ram Kali & others Page-1129

Motor Vehicles Act, 1988- Section 166- Deceased was travelling in the vehicle with the goods – vehicle fell down due to the rashness and negligence of the driver – deceased sustained grievous injuries and died – compensation of Rs. 3 lacs was awarded by the Tribunal- held, that income of the deceased was rightly taken to be Rs. 3,500/- per month and compensation was rightly assessed as Rs. 3 lacs- there was no proof that accident had taken place due to the mechanical defect – the deceased was owner of goods and insurance company cannot escape from liability – appeal dismissed. (Para-10 and 11) Title: The New India Insurance Company, through its Divisional Manager Vs. Hiravati Sharma and others Page-1711

Motor Vehicles Act, 1988- Section 166- Deceased was travelling with N on motorcycle – a truck being driven by respondent No.1 in a rash and negligent manner came from the opposite side and hit the motorcycle – the deceased and pillion rider fell down and sustained multiple injuries – deceased was taken to hospital but succumbed to the injuries – compensation of Rs.6,01,000/- was awarded by the Tribunal jointly and severally along with interest @ 7% per annum- held in appeal that monthly income was assessed as Rs.3,600/- per month- 1/3rd amount was to be deducted towards personal expenses – the loss of dependency would come out as Rs.2,400/- per month- the age of the deceased was 24 years and Tribunal had applied multiplier of 17 – the burden to prove the breach of the terms and conditions of the policy was upon the insurance company- no evidence was led by the insurer to discharge the burden- the Insurance Company was rightly held liable to indemnify the insured- appeal dismissed. (Para-12 to 21) Title: National Insurance Company Ltd. through its Divisional Manager Vs. Rajveer Kaur d/o Sh. Major Singh and others Page-1661

Motor Vehicles Act, 1988- Section 166- Injured remained admitted in the hospital at Bilaspurw.e.f. 13th April, 2002 till 17th April, 2002 and thereafter at IGMC w.e.f. 9th May, 2002 till 17th May, 2002- the compensation has to be awarded under pecuniary and non-pecuniary heads by making guess work in case of injuries - the claimant pleaded that he was earning Rs.6,000/- per month as cleaner of the vehicle- however, by guess work, it can safely be held that he would have been earning not less than Rs.3,000/- per month – injured had suffered 45% permanent disability and loss of income will be Rs.1,500/- per month – age of the claimant was 24 years at

the time of accident and multiplier of 15 is applicable- claimant has lost source of income of Rs.2,70,000/- (1500 x 12 x 15) – claimant has placed on record cash payment/medical bills amounting to Rs.13,909.64/- and is entitled to Rs.13,910/- under the head medical expenses – the claimant has placed on record taxi bills/bus tickets to the tune of Rs.35,443/- and is entitled to Rs.35,500/- under the head transportation charges – compensation of Rs.50,000/- each awarded under the heads pain and suffering and loss of amenities of life- thus, total compensation of Rs.4,19,410/- awarded with interest @ 7.5% per annum from the date of the award. (Para-17 to 21) Title: Umed Singh Vs. Sohan Singh and others Page-1577

Motor Vehicles Act, 1988- Section 166- Monthly income of the claimant was Rs.5,000/- - claimant had sustained 25% permanent disability- claimant was 35 years at the time of accident – Tribunal had erred in applying the multiplier of 16- multiplier of 14 is applicable- thus, the claimant is entitled to Rs.1250 x 12 x 14= Rs.2,10,000/- - amount awarded under other head is maintained and total compensation of Rs.3,34,000/- awarded with interest @ 7.5% per annum- the claim of third party cannot be defeated on the ground of breach of the terms and conditions of the policy – the insurer saddled with liability with the right to recovery.(Para-16 to 24) Title: Avtar Singh Vs. Tilak Raj & another Page-927

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs.4,500/- 1/3rd was to be deducted towards personal expenses and loss of source of dependency would be Rs.3,000/- per month- multiplier of 12 is applicable – thus, claimants are entitled to Rs.3000 x 12 x 12= Rs.4,32,000/- under the head loss of dependency- claimants are also entitled to Rs.25,000/- under the head 'loss of consortium and Rs.25,000/- under the head 'loss of love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs.4,82,000/- along with interest @ 7.5% per annum. (Para-6 to 13) Title: Reliance General Insurance Company Ltd. Vs. Shiv Rajia & others Page-1203

Motor Vehicles Act, 1988- Section 166- The salary of the deceased was Rs.8,700/- per month – 1/3rd amount was to be deducted towards personal expenses – thus, the claimants have lost source of dependency to the tune of Rs.6,000/- per month- the age of the deceased was 30 years at the time of accident and multiplier of 16 is applicable – thus, claimants are entitled to Rs.6,000 x 12 x 16= Rs.11,52,000/- under the head loss of dependency – the claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses- thus, total compensation of Rs.11,52,00 + 40,000/- =Rs.11,92,000/- awarded along with interest. (Para-8 to 14) Title: The New India Assurance Company Ltd. Vs. Kirna & others Page-1575

Motor Vehicles Act, 1988- Section 166- The vehicle fell down on the house of the claimant and caused damage to the same – MACT awarded compensation – it was pleaded that liability of the insurance company is restricted to Rs. 6,000/- and no extra premium was paid – compensation is excessive- held, that damages sustained by the petitioner were not specified in the valuation report- photographs do not show damage to the residential house – the report Ex.RW-1/A shows the damage to the extent of Rs. 17,200/- - this report was prepared by an independent person/expert – compensation was rightly assessed by the MACT- appeal dismissed. (Para-10 to 12) Title: Gian Chand & ors. Vs. M/s Mohan Transport Company and others Page-1682

Motor Vehicles Act, 1988- Section 166- Tribunal awarded compensation of Rs.86,000/- with interest – claimant had stated in the claim petition that he was sitting in the tractor as Labourer with the contractor but it was stated in the affidavit that the claimant was hit by the Tractor on the road – hence, the award set aside – however, Rs.25,000/- awarded under no fault liability.(Para-6 to 9) Title: National Insurance Company Ltd. Vs. Nand Lal & another Page-1403

Motor Vehicles Act, 1988- Section 166- Tribunal dismissed the claim petition on the ground that the driver was acquitted by the criminal Court- held, that mere acquittal in the criminal case

is not sufficient to dismiss the claim petition- a claim petition has to be prima facie proved while criminal case has to be proved beyond reasonable doubt - the deceased was a green grocer and was also selling milk – hence, his income cannot be less than Rs.6,000/- per month- the claimants are three in number and 1/3rd was to be deducted towards personal expenses- multiplier of 15 is applicable and claimants are entitled to Rs.4,000 x 12 x 15= Rs.7,20,000/- under the head loss of dependency- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to total compensation of Rs.7,60,000/- along with interest @ 7.5% per annum. (Para- 6 to 26) Title: Vikky Devi and others Vs. Kuldeep Bhatia and others Page- 1212

Motor Vehicles Act, 1988- Section 173- Deceased was travelling in the vehicle, which rolled down in the rivulet – MACT awarded the compensation of Rs.6,51,000/- along with interest- aggrieved from the award, insurer preferred the present appeal- held, that insurer had not examined any person to prove that the driver did not have a valid driving licence or other documents – the insurer was bound to indemnify the insured and was rightly saddled with liability – compensation was awarded in accordance with law- appeal dismissed. (Para-12 to 19) Title: Oriental Insurance Company Ltd. Vs. Sandeep Sharma son of Sh Kuram Chand Page-1570

Motor Vehicles Act, 1988- Section 173- Insurer contended that the accident was not caused by the driver of the offending vehicle but by the deceased himself – however, the owner/insured and the driver have not questioned these findings and the insurer has no locus to question the same – insurer does not have the right to challenge the adequacy of compensation as it had not obtained the permission under Section 170 of Motor Vehicles Act- however, the Appellate Court is to do complete justice between the parties – the income of the deceased was Rs. 15,630/- per month- the deceased was bachelor and 50% of the amount has to be deducted towards personal expenses – claimants have lost dependency of Rs.7,800/- per month- the age of the deceased was 23 years and multiplier of 15 was applicable – Tribunal had wrongly applied the multiplier of 18- claimants have lost source of dependency to the tune of Rs.7,800 x 12 x 15= Rs.14,04,000/- - claimants are entitled to the compensation of Rs.10,000/- each under the heads loss of love and affection, loss of estate and funeral expenses- total compensation of Rs.14,34,000/- awarded along with interest @ 7.5% per annum. (Para- 10 to 48) Title: Cholamandlam MS General Insurance Company Limited Vs. Shakuntla Devi and others Page- 1537

Motor Vehicles Act, 1988- Section 173- Insurer had not sought permission under Section 170 and it cannot question the award on the ground of adequacy of compensation- however, the Appellate Court can pass an order, which should have been passed by the Tribunal, even without any appeal/cross-objections- the age of the deceased was 47 years at the time of accident- monthly income of the deceased was Rs.31,510/- as per the salary certificate – after deducting the contribution towards income tax the annual income of the deceased is Rs.3,50,000/- - claimants are seven in numbers and 1/5th amount was to be deducted towards personal expenses – thus, the claimants have lost Rs.2,80,000/- towards source of income – multiplier of 11 is applicable and claimants have lost Rs.2,80,000 x 11= Rs.30,80,000/- towards the source of the income- compensation of Rs.20,000/- awarded under the heads funeral expenses, loss of love and affection and loss of consortium - the claimants are entitled to the compensation of Rs.30,80,000 + 20,000= Rs.31,00,000/- with interest @ 7.5% per annum.(Para-22 to 54) Title: Oriental Insurance Company Limited Vs. Krishna Kumari and others Page-1420

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N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1 kg. 550 grams charas- the accused was tried and acquitted by the Trial Court- held in appeal that the accused was travelling in the bus, however, no independent witness was associated- one police official was not examined – there are material contradictions in the testimonies of police witnesses – the testimonies of the police officials are not cogent or trustworthy and cannot be made basis for

convicting the accused- appeal dismissed.(Para-9 to 21) Title: State of Himachal Pradesh Vs. Ram Kishan (D.B.) Page-1346

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.540 kg. charas – he was tried and acquitted by the Trial Court- held in appeal that the prosecution version that accused was apprised of his right to be searched before a Magistrate or a Gazetted Officer was not proved – no independent witness was associated – there are contradictions in the statements of other prosecution witnesses – the Trial Court had rightly acquitted the accused- appeal dismissed.(Para-8 to 26) Title: State of Himachal Pradesh Vs. Darshan Lal (D.B.) Page-1666

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 505 grams charas- he was tried and acquitted by the Trial Court- held in appeal that the independent witness has not supported the prosecution version – other independent witness was given up by the prosecution – there are contradictions in the statements of official witnesses – the trial Court had rightly refused to rely upon the testimonies of the official witnesses – appeal dismissed.(Para-7 to 24) Title: State of Himachal Pradesh Vs. Pawan Kumar and others (D.B.) Page-1675

N.D.P.S. Act, 1985- Section 21- Accused was found in possession of 14 grams of heroin – accused was tried and acquitted by the trial Court- held in appeal that independent witness had not supported the prosecution version but he had admitted the signatures on the memos – the fact that the documents were signed without any pressure show that witness was not stating the truth before the Court – police officials proved the prosecution version – the findings recorded by the Trial Court that accused was not found in possession of contraband are not correct – appeal allowed and the accused convicted of the commission of offence punishable under Section 21 of N.D.P.S. Act- notice issued to the witness as to why proceedings be not initiated against him for making a false statement.(Para-7 to 25) Title: State of Himachal Pradesh Vs. Kamlesh alias Kaka (D.B.) Page-1804

N.D.P.S. Act, 1985-Section 18 and 20- A motorcycle being driven by accused M and occupied by accused K was intercepted by the police- accused K was found in the possession of 800 grams charas and 150 grams opium- accused M was found to be driving the motorcycle without any permit – the accused were tried and acquitted by the Trial Court- held in appeal that independent witnesses have not supported the prosecution version – timing in the ruqua was changed from 18.30 hours (6:30 P.M.) to 10:00 P.M. - no explanation for the same was given – there was contradiction regarding the person, who had carried out the search and seizure- the testimonies of the prosecution witnesses are contradictory – the Trial Court had rightly refused to place reliance on their testimonies – appeal dismissed.(Para-11 to 21) Title: State of Himachal Pradesh Vs. Krishna (D.B.) Page-1442

Negotiable Instruments Act, 1881- Section 138- A complaint was filed alleging that accused had borrowed sum of Rs.40,000/- from the complainant – accused issued a cheque of Rs.40,000/- for re-payment of the amount, which was dis-honoured with the endorsement insufficient funds – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed on the ground that cheque was presented twice but the notice was issued only once- held in revision that cheque could have been presented many times during the period of validity- the notice was issued only second time – there was holiday on the last day of presentation and the cheque was presented on the next working day- Appellate Court had wrongly set aside the judgment of Trial Court- revision allowed and judgment of Appellate Court set aside while that of the Trial Court restored.(Para-8 to 15) Title: Ram Chand Vs. Sunita Abrol Page-905

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque, which was dishonoured on presentation- the accused pleaded guilty and was convicted by the Trial Court- sentence of fine equivalent to the amount mentioned in the cheque was imposed - held, that the

accused can be sentenced to an imprisonment for a term, which may extend upto two years and fine which may extend to double the cheque amount – however, discretion has been conferred upon the Magistrate to impose appropriate sentence – the fact that the accused has pleaded guilty was a relevant fact to be taken into consideration while imposing sentence – the complainant has suffered no inconvenience by the sentence- petition dismissed. (Para-2 and 3) Title: M/s Techno Plastic Industries Vs. M/S Kiran General store and another Page-1519

Negotiable Instruments Act, 1881- Section 138- Accused issued two cheques of Rs.4 lacs and Rs.3 lacs for carrying out construction of a set on the slab purchased by the accused- cheques were dishonoured with the remarks 'insufficient funds' – the accused failed to make payment despite the receipt of the notice – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was also dismissed- held in revision that the complainant had not produced the earlier cheques issued by the accused and had not given their serial numbers- he had not produced the bills of the material used by him to complete the construction of the flat- statement of wife of the complainant also made the version of the complainant doubtful - revision allowed- judgments of the trial Court and Appellate Court set aside and the accused acquitted of the commission of offence punishable under Section 138 of N.I. Act. (Para-9 to 12) Title: Neelam Sharma Vs. Ved Prakash Page-1408

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Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- Sample of Vanaspati was taken, which was found to be adulterated on analysis- the accused was tried and acquitted by the trial Court- held in appeal that the sample was analyzed by Central Food Laboratory after three years- mere failure to pass Baudouin test is not sufficient to convict a person – appeal dismissed. (Para-10 to 13) Title: State of H.P Vs. Maharaj Kumar and others Page-1436

Probation of Offenders Act, 1958- Section 6 read with Section 11- Applicants pleaded that accused were less than 21 years of age at the time of their conviction and it was mandatory for the Court to grant the benefit of Probation Of Offenders Act- held, that the Trial Court had considered the question, whether the benefit of Probation of Offenders was to be granted to the accused or not and taking into consideration the nature of the offence, the Trial Court had decided not to extend the benefit – this decision was not challenged in appeal or revision- a discretion has been vested in the Trial Court to grant the benefit of Probation or decline the same and the Court cannot be compelled to grant the benefit in all cases – application dismissed.(Para-5 to 14) Title: Mohammad Farman and another Vs. State of H.P. Page-1557

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 5 cartons of Indian made foreign liquor each containing 12 bottles and one carton of country liquor 'Patiala' brand- the accused was tried and acquitted by the Trial Court- held in appeal that independent witnesses were available but were not associated –the link evidence was missing – the case property was not bearing any seal when it was produced before the Court- the view taken by the Trial Court was reasonable- appeal dismissed.(Para-9 to 15) Title: State of H.P. Vs. Subhash Chand Page-1343

Punjab Excise Act, 1914- Section 61(i)(a)- Accused was found in possession of 12 bottles of country liquor – he was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held, that only three bottles were sent for analysis out of which two were found to be country liquor – no permit is required for possessing two bottles and the prosecution version that the accused was found in possession of 12 bottles was not proved- revision petition allowed and judgments of Trial Court and Appellate Court set aside- accused acquitted.(Para-9 to 14) Title: Joginder Singh Vs. State of Himachal Pradesh Page-1777

'S'

Specific Relief Act, 1963- Section 5- Plaintiff pleaded that he is owner of the suit land- water pipe lines were laid through his land despite his objection – Officers of the State assured to acquire the land and to give employment to the son of the plaintiff - these promises were not fulfilled and the plaintiff instituted a suit for mandatory injunction- the job was provided to the son of the plaintiff and plaintiff got the suit dismissed in default- however, son of the plaintiff was removed from service- hence, the suit was filed for seeking possession- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held, that earlier suit was dismissed in default for non-appearance – plaintiff failed to prove that assurances were made to him at the time of laying pipe lines – circumstances show that pipe line was laid with the consent of the plaintiff- the suit was rightly dismissed by the Court- appeal dismissed.(Para-14 to 19) Title: Rameshwar Dass (Deceased) through LR Bhushan Lal Vs. State of Himachal Pradesh and others Page-1298

Specific Relief Act, 1963- Section 5- Plaintiffs filed civil suit pleading that they are owners in possession of the shop – predecessor-in-interest of the defendants had asked the plaintiffs for one room – plaintiffs had permitted him to keep the material – he had not vacated the room – hence, the suit was filed seeking possession – the defendants pleaded that shop was joint family property and was allotted to the predecessor of the defendants – the suit was dismissed by the Trial Court – an appeal was filed, which was also dismissed- held in second appeal that the suit land is recorded to be in the joint ownership of the parties in the revenue record - the land was not partitioned by metes and bounds – Hindi translation of the document in Urdu was not proved and reliance could not have been placed upon the same – however, in absence of partition, plaintiffs were not entitled for any relief – appeal dismissed. (Para-8 to 12) Title: Pushpa Devi & others Vs. Amro Devi and others Page-1197

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking the specific performance of the agreement to sell the suit land – the defendant denied the claim of the plaintiff- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that plaintiff has to prove his continuous readiness and willingness to perform the contract from the date of agreement till hearing – plaintiff had pleaded that he was ready and willing to perform his part of the contract, to pay remaining consideration and to bear the expenditure of execution and registration of the sale deed, which is not in accordance with Form 47 and Order 6 Rule 3 of C.P.C – plaintiff had only paid Rs.50,000/- out of Rs.4 lacs agreed to be paid – it was not proved that plaintiff was possessed of balance consideration and was ready to pay the same to the defendant- it was mentioned in the agreement that entire consideration was paid, which is not correct - plaintiff cannot be faulted for not executing the sale deed, in these circumstances – appeal allowed and the suit dismissed with the cost of Rs.20,000/- each.(Para-10 to 26) Title: Chander Lekha Vs. PurshotamDutt and others Page-1261

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit for specific performance and in the alternative for damages – it was pleaded that plaintiff had entered into an agreement to purchase the suit land for a consideration of Rs.98,000/- - a sum of Rs.70,000/- was paid as earnest money- the balance was to be paid at the time of the execution of the sale deed – the defendants failed to execute the sale deed- hence, the suit was filed – the suit was dismissed by the Trial Court- an appeal was preferred, which was partly allowed- held in second appeal that both the Courts found that agreement to sell was executed between the parties – sum of Rs.70,000/- was paid as earnest money- - Courts also found that Rs.28,000/- was not paid by the plaintiff on or before the due date – a substantial amount was paid to the defendants at the time of execution of the agreement – the suit should have been decreed by the Courts for specific performance – appeal allowed and the suit of the plaintiff decreed for the specific performance of the agreement.(Para-13 to 19) Title: Om Parkash Vs. Madhu Chandel and another Page-1565

Specific Relief Act, 1963- Section 34- P was owner in possession of the suit land – plaintiff, defendant No.1 and father of defendants No.6 and 7 are the sons of P, who constituted a joint Hindu Family- P had 1/5th share – he is stated to have executed a Will – defendant No.2 executed a gift deed in favour of defendants No.5 to 12, which is impermissible- hence, a suit was filed for seeking declaration – the suit was partly decreed- an appeal was preferred, which was dismissed- held in second appeal that suit land located in C was proved to be coparcenary property- suit land located in L and H was not proved to be coparcenary property – it was not proved that land in L and H was acquired from the usufructs of land located in C- the Courts had rightly appreciated the evidence- appeal dismissed. (Para-7 to 11) Title: Harnam Dass Vs. Jagdish and others Page-976

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that he had become the owner of the suit land by abandonment or in the alternative by adverse possession- defendant denied the claim of the plaintiff and set up a counter-claim- the suit was dismissed by the Trial Court and counter-claim was decreed – plaintiff filed an appeal, which was dismissed – held in second appeal thatthe suit was dismissed and counter claim was decreed – a decree of possession was passed in favour of the defendants – appeal was filed against the dismissal of the suit and decree of the counter claim – counter claim is treated as suit for all intents and purposes – separate appeal was required to be filed regarding the decree of the counter-claim – a single appeal was not maintainable – appeal dismissed. (Para- 24 to 48) Title: Surinder Kumar & Others Vs. Sumati Kumari Joshi & Others Page-1767

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration that shamlat land was allotted to him – the allotment was cancelled but the order of cancellation was set aside in the civil suit- an appeal was filed, which was dismissed-representation was made subsequently by the residents of the area on which the allotment was cancelled – the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that cancellation was set aside in the previous suit on the ground that Sub Divisional Magistrate had no jurisdiction to cancel the allotment and only Commissioner was empowered to do so – subsequent cancellation was made by the Commissioner – the land was never possessed by the plaintiff and the allotment was rightly set aside- appeal dismissed.(Para-10 and 11) Title: Rattan Chand Sharma Vs. State of Himachal Pradesh through Collector, Kangra at Dharamshala, H.P. Page-1231

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that D was the owner of the suit land- suit land was acquired by the plaintiff and the proforma defendants by way of gift- it was given to R for the purpose of living on Dharmarth – defendant No.1 and 2 got a Will executed by R – R had no right in the suit land – the defendants pleaded that D had executed a gift in favour of RS, who was tenant of D – his widow R remained in possession of the property as owner- she executed a Will in favour of the defendants No.1 and 2- they filed a counter claim seeking declaration – suit was dismissed by the Trial Court and counter claim was decreed- an appeal was filed, which was dismissed- held in second appeal that Trial Court had dismissed the suit and had decreed the counter-claim – one appeal was filed for setting aside the decree passed in the civil suit- no prayer was made for setting aside the decree in the counter-claim- counter-claim is a suit for all intents and purposes – separate appeals were required to be filed against the dismissal of the suit and decree of the counter-claim – once the defendants have been declared to be the owners while decreeing their counter-claim, relief could not have been granted to the plaintiff without setting aside the decree in the counter-claim- composite appeal was not maintainable- appeal dismissed.(Para-23 to 44) Title: Mohan Singh Vs. Inder Singh & Others Page-1279

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that he is owner in possession of the suit land with his sister – defendant applied for partition- plaintiff raised objection but partition was ordered ignoring the objections raised by the plaintiff- plaintiff sought declaration that order of the partition is null and void – the suit was dismissed by the trial Court as barred by Section

171(XVII) of H.P. Land Revenue Act- an appeal was preferred, which was also dismissed- held in second appeal that when the Court had concluded that it had no jurisdiction, it should have returned the plaint for presentation before appropriate forum – the plaintiff was to file an appeal/revision before Revenue authorities – hence, the plaintiff permitted to withdraw the suit with liberty to take appropriate proceedings in the forum having jurisdiction. (Para-8 and 9) Title: Label Chand alias Albel Chand Vs. Sita Devi &ors. Page-945

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that she is owner in possession of the suit land – defendant has no right over the same - previous owner K had not executed any Will – the defendant pleaded that K had executed a Will in favour of the defendant and he has become the owner after the death of K – suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that plaintiff had not appeared in the witness box to prove that Will was a forged document and adverse inference has to be drawn against her – the deceased had put her thumb impression on the Will and plaintiff had not sought the comparison of the thumb impression to determine the genuineness of the same – the execution of the Will was proved by the defendant by leading cogent and convincing evidence – the Appellate Court had rightly held that the execution of the Will was proved – appeal dismissed.(Para-12 to 35) Title: Brij Lal (since deceased) through his LRs Manohar Lal &Ors. Vs. Shakti Chand Page-930

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that suit land was jointly owned and possessed by the parties – mutation wrongly attested in favour of defendant No.1 exclusively - the defendant No.1 pleaded that land belonged to H who had sold some portion of the suit land and had executed a Will in her favour – the suit was decreed by the Trial Court – an appeal was preferred, which was dismissed- held in second appeal that no attesting witness was examined to prove the execution of the Will- however, the execution of the sale deed was duly proved – the Courts had correctly appreciated the evidence and no interference was warranted with the same – appeal dismissed.(Para-13 to 36) Title: Raj Kumari Vs. Sheela Devi &Others Page-1088

Specific Relief Act, 1963- Section 34- Plaintiffs sought declaration that they are owners in possession of the suit land and the entry showing the defendant to be the owner is wrong, illegal, null and void as the defendant was never inducted as a tenant – the defendant pleaded that he was inducted as a tenant on the payment of gallabatai and has become the owner on the commencement of H.P. Tenancy and Land Reforms Act- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that the plaintiffs had purchased the land in the year 1966 from predecessor-in-interest of the defendant- defendant was a co-owner and therefore cannot be a tenant – the version the defendant was paying gallabatai was not proved – the order was passed in the absence of the plaintiffs and would not bind them – the suit was rightly decreed- appeal dismissed.(Para-7 to 10) Title: Subhash Chand Vs. Bhim Sen and another Page-1206

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendants threatened to take forcible possession of the same – the suit was opposed by the defendants by pleading that a portion of the suit land was purchased by defendant No.1 vide agreement dated 14.11.1984- defendant No.1 is in possession of the portion of the suit land and has become owner by adverse possession- the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed – held in second appeal that the agreement shows that the father of the minor plaintiff had agreed to sell the suit land to the defendant No.1 for a sale consideration of Rs.2,000/- - the father of the plaintiff was not competent to alienate the property of the plaintiff and the agreement will not bind the plaintiff- Besides, it was established by the Revenue Record that plaintiff is in possession – defendants had not led sufficient evidence to rebut the presumption of the correctness attached to the revenue record- the suit was rightly decreed by the Appellate Court- appeal dismissed.(Para-7 and 8) Title: Rattan Chand (since dead) through LRs &Anr. Vs. Julfi Ram Page-1200

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is co-owner of the suit land – the defendants threatened to raise construction over the same- the defendants denied that suit land is owned jointly by the parties and claimed that an old abadi existed over the suit land- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that it was admitted that suit land is abadi deh and has not been partitioned by metes and bounds – defendant No.1 had purchased a specific portion of abadi from defendant No. 2 and became a co-sharer – he was raising new construction by demolishing the old one – plaintiff has failed to prove his possession over abadi and is not entitled to the injunction – appeal dismissed.(Para-13 to 24) Title: Surinder Mohan Vs. Ramesh Kumar &Anr. Page-899

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendant is stranger who is interfering with the suit land without any right to do so- the defendant pleaded that suit land was exchanged by father of plaintiff with G – G had given the suit land to the defendant – defendant had raised construction of three shops and one house over the suit land – the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that the Courts had rejected the exchange deed on the ground that it was not registered and no specific area was mentioned in the same – father of the plaintiff had not raised any objection when the construction was raised by the defendant, which means that he had agreed to the same – no objection was raised at the time of exhibition of deed of exchange – non-registration will not affect the part performance- the Courts had not properly appreciated the evidence – appeal allowed and suit of the plaintiff dismissed.(Para-8 to 14) Title: Tek Chand Vs. Govind Kumar Page-1369

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – the defendants have encroached upon a portion of the suit land – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the demarcation proved the encroachment – there was no infirmity in the process of demarcation – an owner has a right to claim possession of the encroached land- the suit was rightly decreed by the Courts- appeal dismissed.(Para-8 to 13) Title: Ashok Kumar and another Vs. Amrit Lal and others Page-971

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is co-owner in possession of the suit land – defendants were threatening to interfere in the ownership and possession of the plaintiff and to discharge the water of their taps and rainy water in the suit land and to create passage over the same – they had encroached upon part of the suit land- the defendants denied the claim of the plaintiff- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that the demarcation was obtained during the pendency of the suit- no objection was filed to the report of demarcation – the report was duly proved – the demarcation was conducted in accordance with law – the right of passage was not established by the defendants- the Courts had rightly appreciated the evidence.(Para-19 to 35) Title: Ramesh Chand & Others Vs. Roop Singh (since deceased) Through his LRs. Smt. Pushpa Devi &Ors. Page-1109

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they are recorded as gairmaurusi tenants and had become the owners after the commencement of H.P. Tenancy and Land Reforms Act – the defendant threatened to encroach upon the land – the defendant pleaded that revenue entries in favour of the plaintiffs were wrong – a counter-claim was also filed by the defendant – the Trial Court decreed the suit and dismissed the counter-claim – an appeal was filed, which was dismissed – held in second appeal that the original owner had not challenged the revenue entries – it was duly proved that plaintiffs were recorded as tenants, who had become the owner on the commencement of H.P. Tenancy and Land Reforms Act- separate appeals should have been filed against the decree of the suit and dismissal of the counter-claim- appeal dismissed.(Para-17 to 35) Title: Baldev Singh Vs. Chet Ram &Ors. Page- 1100

'T'

Transfer of Property Act, 1882- Section 60- Plaintiffs filed a civil suit for redemption of mortgage pleading that the land was mortgaged for Rs.240/- defendants pleaded that mortgagor had lost the right of redemption – the suit was dismissed by the Trial Court – an appeal was filed, which was allowed – held in second appeal that the land was mortgaged in the year 1930 and the period of redemption expired in 1971- however, Debt Redemption Act, 1976 furnished a fresh opportunity for getting the relief – mere expiry of 30 years from the date of mortgage does not extinguish the right of mortgagor- appeal dismissed. (Para-10 to 26) Title: Hem Ram & Another Vs. Bhagwan Dass & Others Page-1052

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Zuari Cement Ltd vs. Regional Director, ESIC, Hyderabad & Ors., AIR 2015, SC 2764

BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

H.P. State Forest Corporation ....Appellant
Versus
Nasib Singh ....Respondent

RSA No. 425 of 2006
Decided on: 10.08.2016

Code of Civil Procedure, 1908- Section 100- Contract for extraction of resin was awarded to the defendant – plaintiff pleaded that the target for extraction was 137.75 quintals, whereas, the defendant had extracted 94.11 quintals resin– the defendant is liable to pay compensation/damages for the difference of resin i.e. 43.64 quintals @ Rs.3,100 per quintals- the defendant pleaded that incessant rains during the pre-monsoon period dried the blazes and the trees fell due to high velocity winds – the requests were made to fix the blazes after excluding dried up blazes from which no extraction was possible – the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held, that plaintiff had not led any evidence to prove the case – the defendant had denied his liability to pay the amount- the onus was upon the plaintiff to prove the case and in absence of evidence, Court had rightly held that case was not proved – there is no infirmity in the judgment passed by the Court – appeal dismissed – direction issued to initiate disciplinary proceedings against the concerned officer of the Forest Corporation.
(Para-8 to 11)

For the appellant: Mr. Bhupender Pathania, Advocate.
For the respondents: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur , Judge (Oral):

The appellant (here-in-after referred to as plaintiff) has filed suit for recovery of Rs.1,02,035/- from respondent (here-in-after referred to as defendant), on the basis of agreement, for extracting quantity of resin lesser than as was required to be extracted in a work of extraction awarded to defendant in Lot No. 6-R/97.

2. The suit as well as appeal filed by plaintiff-appellant were dismissed, assailing which present appeal has been admitted on following substantial questions of law:-

1. Whether the findings of the ld. Courts below are erroneous in as much as in not appreciating the fact that the respondent in his written statement has not denied the execution of the agreement and the fact that there had been short fall of resin at the time of extraction, though the short fall had been attributed by the respondent/defendant upon certain factors. Was not the respondent/defendant required to produce evidence at the first instance.

2. Whether the Trial Court below has committed grave irregularity and illegality in placing the onus upon the appellant/plaintiff to prove issue No.1.

3. Both above substantial questions of law are inter-linked, hence are considered together.

4. In the plaint, it has been pleaded that extraction target in the work awarded to defendant was 137.75 quintals, whereas defendant has extracted 94.11 Quintals resin and therefore, as per agreement defendant is liable to pay damages/compensation to plaintiff for the difference of resin i.e. 43.64 Quintals @Rs. 3100/- per Quintal.

5. Defendant had filed written statement disputing the claim of plaintiff assigning reasons for lesser extraction as incessant rains during the pre-monsoon period, dried up blazes and falling of trees on ground due to high velocity wind which were beyond his control. It is

further stated in the written statement that defendant had always been informing Officers of plaintiff and factors affecting yield of resin were well within the knowledge of plaintiff and defendant had also represented to plaintiff requesting to fix number of blazes after excluding dried up blazes from which no extraction was possible. He has disputed his liability to pay damages/compensation as claimed in the plaint.

6. The trial Court had framed issues and issue No.1 is as under:-

> 1. Whether the defendant has failed to extract the agreed quantity of resin as per agreement, as alleged? OPP.

7. It is claim of plaintiff that defendant had failed to extract agreed quantity of resin as per agreement. Therefore, onus of proving this issue was rightly placed on plaintiff. Plaintiff was supposed to substantiate his pleading by leading oral as well as documentary evidence.

8. No replication was filed on behalf of plaintiff. Despite granting six opportunities for leading evidence, plaintiff neither led any oral evidence nor tendered any documents in evidence for determining the issues framed by the trial Court. To adjudicate the controversy in lis, agreement was basic document to be looked into by the Court. Plaintiff has not bothered to prove its case by leading evidence and proving documents i.e. photocopy of agreement, letters and other documents filed with plaint in accordance with law. In the plaint, plaintiff has asserted his claim but in written statement defendant has refuted his liability to pay. In absence of any evidence led by parties, the trial Court as well as First Appellate Court has rightly decided that the claim of plaintiff is not proved and suit as well as appeal of plaintiff has rightly been dismissed by lower Courts.

9. It is true that defendant has not denied execution of agreement and shortfall in extraction of resin but the same is not sufficient to cast liability upon defendant to pay damages as prayed in the plaint because defendant has disputed his liability to pay and for determining such liability, terms of agreement are required to be examined. Though defendant has not denied execution of agreement however at the same time defendant has also not admitted that copy of agreement placed on record is the same which was executed between the parties and also it is not proved on record that the photocopy of agreement placed on record is the true copy of the agreement which was signed between the parties. It was for plaintiff to prove the agreement alleged to be signed between the parties in accordance with law enabling the Court to consider rival contentions of the parties. The onus was definitely on plaintiff to prove its case including documents relied upon in the plaint but plaintiff has failed to discharge his duty.

10. In view of above discussion, there is no infirmity, illegality or perversity in the judgment passed by the Lower Courts. The trial Court has conducted trial in consonance with law of land and both the courts below have correctly and completely appreciated the material placed before them. Substantial questions of law framed in present appeal are answered in above terms. No other point is urged. Therefore, no interference in impugned judgments is warranted in present appeal. Accordingly, appeal is dismissed with costs.

11. Before parting with case, I would like to say that plaintiff Corporation was claiming Rs. 1,02,035/- in the year 2000 from the defendant but despite six opportunities granted by Court, no evidence was led to establish claim of the Corporation. The public Corporation is also dealing with public money and loss to public exchequer caused by conduct of Officers/officials of Corporation certainly amounts to loss to people of State and ultimately loss to nation. In a suit filed by Corporation for recovery of an amount from defendant, there was no occasion or reason to Officers of plaintiff Corporation not to appear in witness box and/or not to lead any evidence in support of plaintiff Corporation. It cannot happen without connivance of Officer of plaintiff Corporation and opponent. It is glaring example not only of willful negligence in performing duty by the concerned Officers but also dereliction of duty for which stein action against officer responsible is required. Therefore, I am constrained to direct Managing Director of plaintiff Corporation to initiate disciplinary proceedings against the concerned Officers of Forest Corporation within two months of receipt of copy of judgment, especially against officer

holding the charge of the post concerned from August 2002 to July, 2003 and amount equivalent to loss caused to plaintiff Corporation be recovered from the erring Officers whether in service or retired, who was/were Incharge and responsible to monitor the case at the relevant point of time and in case there is lapse on the part of other officials/officers in placing the matter before concerned authority or taking necessary steps on their part, disciplinary proceedings also be initiated against them including effecting recovery from them also. Copy of this judgment be also sent to Managing Director of respondent who shall file compliance affidavit in Registry of this Court on or before 31.3.2017.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh .....Appellant
Versus
Ram Chander .....Respondent

Criminal Appeal No. 376 of 2012
Date of Decision: 17.08.2016

Indian Penal Code, 1860- Section 363, 366 and 376(I)- Prosecutrix was studying in class 8th – she had gone to school with her sister – the accused took the prosecutrix away forcibly on a bike – the matter was reported to police- the father of the accused produced the prosecutrix and the accused in the police Station- the accused was tried and acquitted by the Trial Court- held in appeal that the Medical Officer issued MLC stating that prosecutrix was habitual of sexual intercourse and it was not possible to assess the time of first sexual intercourse- no injury was found on the body of the prosecutrix – father of the prosecutrix was not examined as a witness – the prosecutrix and accused had travelled in a taxi – no complaint was made to the taxi driver – the prosecutrix had not made any efforts to resist and to raise alarm when she was taken from the school – prosecutrix had not complained to any person regarding her kidnapping – prosecutrix was not proved to be a minor – her radiological age was found to be between 15½ - 19 years – the prosecutrix was a consenting party and the accused was rightly acquitted by the Trial Court- appeal dismissed. (Para- 7 to 23)

For the appellant Mr. Puneet Rajta, Deputy Advocate General.
For the respondent Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

In the present case Investigating Agency was set in motion by complainant Raju Ram (father of PW-1 prosecutrix) by lodging FIR Ex. PW-13 in Police Station, Paonta Sahib stating therein that his daughter (prosecutrix) born on 22.07.1995, studying in 8th class, had gone to School on 15.07.2011 at about 8.30 AM with her sister Kiran, studying in 10th class. At about 9.00 AM, Kiran saw respondent-accused taking away prosecutrix forcibly on his bike and respondent did not stop even on raising alarm and prosecutrix was not traceable despite best efforts.

2. On 16.08.2011, PW-9 Suresh Kumar, father of respondent produced prosecutrix and respondent in Police Station Paonta Sahib. Respondent-accused was arrested and was medically examined. Prosecutrix was also medically examined and put in custody of her father.

3. After completion of investigation, challan was presented in the court. Respondent-accused was charge-sheeted under Sections 363, 366 & 376 (I) of India Penal Code.

On conclusion of trial, respondent-accused was acquitted. Hence, present appeal by State with prayer to convict respondent-accused.

4. We have heard learned counsel for the State as well as for respondent-accused and have also gone through the record.

5. After medical examination of prosecutrix, PW-10 Dr. Daljeet Kumar issued MLC Ex.PW-10/A opining that prosecutrix was used to sexual intercourse and prosecutrix must have sexual intercourse more than seven times and it was not possible to assess time of first sexual intercourse. There was no external or internal injury on her body.

6. Raju, father of prosecutrix was complainant, but he had neither been examined in Court nor he was cited as witness in challan presented in the Court. Prosecutrix was victim and her elder sister Kiran was witness to forcibly taking away the prosecutrix on 15.7.2011 by respondent-accused and they were examined as PWs-1 and 2. Therefore, before evaluating other evidence on record, veracity of statements of these witnesses is to be assessed.

7. PW-1 prosecutrix stated in the Court that on 15th July 2011 at about 9.00 AM, her sister entered the school but she remained standing outside the school and in the meanwhile, respondent arrived there and asked her to accompany him on his motorcycle by pretending that he was in love with her and wanted to marry. She stated that respondent also threatened to kill her in case of her refusal to accompany him. According to her, she was taken to Dhaulakuan by respondent on motorcycle under threat and thereafter she was taken to Nahan in car and from Nahan to Amritsar she was taken in bus where she stayed for 25 days in Gurudwara and respondent committed rape upon her in Dhaba in Amritsar where they stayed for 6 days. Thereafter they came back from Amritsar to Paonta Sahib by bus where PW-9 Suresh Kumar (father of respondent) met them who produced them in Police Station, Paonta Sahib. She also stated that respondent had not married her but had forced to put Bindi on her forehead. In her cross-examination she admitted that respondent was working in rest house near to their house who used to love her however she was not in love with him and she used to talk with him on telephone since about two months prior to the date of eloping with him. She had stated that she did not know about date, month or year of her birth. She also admitted that many persons met them at Girinagar, in bus and also at Amritsar but she did not make any complaint to any one. She was confronted with her statement made to police in which she had not stated that respondent-accused had threatened her to force her to sit on motor cycle.

8. PW-2 Kiran, sister of prosecutrix stated that on 15.07.2011, she had entered the school whereas prosecutrix had suddenly stopped outside the school gate and from second floor she noticed respondent, pulling her sister from arm and thereafter both of them sat on motorcycle and respondent had taken prosecutrix away on motorcycle and because of rainy day her effort to raise alarm was futile and then she came back home and narrated the entire incident to her mother and prosecutrix was traced after one month. She stated that prosecutrix had not cried when prosecutrix and respondent had gone on motorcycle. In examination in chief, she stated that she had tried to raise alarm, but due to rain it was in vain. However, in cross examination she stated that she had not cried when respondent and prosecutrix left the place on the motor cycle.

9. On 15.07.2011, prosecutrix and respondent had travelled from Dhaulakuan to bus-stand Nahan in Taxi No. UA-07-3881 owned and driven by PW-6 Ajay Gupta. In his cross-examination, he stated that during their journey in taxi both of them were happy and were talking to each other in joyful mood and on inquiry prosecutrix had stated that they were going just for enjoyment. As per him, prosecutrix had not complained that respondent-accused had brought her forcibly.

10. PW-9 Suresh Kumar is father of respondent who had produced respondent and prosecutrix in Police Station. He stated that prosecutrix had told him that she had voluntarily accompanied respondent to marry with him and that being above 18 years of age, she was free to marry a person of her choice.

11. Prosecutrix and her sister PW-2 Kiran had gone to school, prosecutrix remained outside gate of the school and on arrival of respondent, she accompanied him on his motorcycle to Dhaulakuan. As per PW-2 Kiran, respondent was pulling prosecutrix from her arm and thereafter prosecutrix sat over motor cycle. It is not possible for a person riding on a motorcycle to pull a grown up girl from arm and to make her to sit on motorcycle as a pillion rider against her wishes and consent that too at 9.00 AM in the morning. It is also not believable that person who was being forced to ride motorcycle made no efforts to resist or to raise alarm despite knowing that number of students including her sister were present in the school. Prosecutrix travelled with respondent to Dhaulakuan on motor cycle and thereafter accompanied him in a car from Dhaulakuan to Nahan and in bus from Nahan to Amritsar, stayed at Amritsar for 25 days and in Dhaba for 6 days and thereafter came back with him by bus to Paonta Sahib.

12. Though, prosecutrix had stated that respondent used to love her and she was not in love with him, however, she admitted that she was in talking term with respondent on mobile since about two months prior to eloping with him. At the time of making statement to police she had not stated that respondent had forcibly made her to sit on motor cycle by threatening to kill her. This fact was stated by her for the first time in the Court only. Prosecutrix admitted that number of persons had met them, but she had not complained to any person. Rather her statement made to PWs-6 and 9 indicate that she was accompanying respondent-accused on her own desire. Scrutiny of statements of PW-2, PW-6 and PW-9 and the prosecutrix indicated that prosecutrix was accompanying respondent-accused with her own will and free consent. From the conduct of the prosecutrix her consent was writ large.

13. The father of prosecutrix was neither cited as witness nor was examined in Court. PW-3 Suresh Kumar uncle of prosecutrix is witness to the identification of Dhaba in Roshnabad in U.P. and taking into possession of motorcycle used by respondent on 15th July 2011. He had accompanied father of prosecutrix for tracing her and thereafter lodging FIR in Police Station. Only witness to the alleged incident of forcibly taking away prosecutrix is PW-2 Kiran. There is nothing in her statement from which it can be elucidated that PW-1 was forcibly taken away by respondent on 15th July 2011.

14. There is ample evidence on record to infer that prosecutrix eloped with respondent with her will and consent. Despite consent of prosecutrix, respondent would be liable to be punished under Sections 363, 366 and 376 (1) IPC if she was below 16 years on 15.07.2011 and may face conviction under Sections 363 and 366 IPC only in case she was below 18 years but above 16 years of age on 15.07.2011.

15. For proving age of prosecutrix, her date of birth certificate issued from School Ex. PW-5/A, copies of Pariwar Register of Gram Panchayat Ex. PW-12/A and Ex. PW-12/B and report of Radiologist Ex. PW-11/A were relied upon by prosecution.

16. PW-5 Sudarshan Kaur, Head Mistress of School had issued copy of date of certificate of birth of prosecutrix Ex.PW-5/A. She stated that as per that certificate date of birth of prosecutrix was 15th July 1997. In cross-examination she admitted that entry of date of birth of prosecutrix in original register brought by her was not in her hand and the said original register did not contain opening date, certification of pages, total number of pages and authority by whom it was opened.

17. PW-12 Mohan Singh, Panchayat Secretary, Gram Panchayat, Sainwala proved photocopy of extract of pariwar register Ex. PW-12/A and copy of the same issued by him Ex. PW-12/B indicating date of birth of prosecutrix as 15th July 1997. This witness admitted that mother of prosecutrix was resident of District Kinnaur before her marriage and because of posting in Kinnaur, Raja Ram father of prosecutrix used to reside with his family in Kinnaur and prosecutrix was born in Kinnaur and therefore her date of birth was not entered in Death and Birth register maintained by Gram Panchayat, Sainiwal. He expressed his ignorance about the time when names of prosecutrix, her sister and mother were entered in the pariwar register. He did not know about the person who had entered their names in pariwar register. He was also having no knowledge that on whose instance those entries were made. He was unable to deny

that date of birth of prosecutrix was wrongly entered in pariwar register for want of documentary proof which was basis for entry of date of birth of prosecutrix in pariwar register. He stated that Death and Birth register was separately maintained in his Panchayat and in that register entry of birth of prosecutrix was not there. It is settled Law that entries of pariwar register are not conclusive proof of date of birth of a person.

18. PW-11 Dr. D.D. Sharma, Radiologist at Regional Hospital, Nahan had examined prosecutrix for determination of age on reference made by PW-10 Dr. Daljeet Kaur. As per his opinion rendered vide Ex.PW-11/A, age of prosecutrix as on 17th August 2011 was between 15½ to 19 years. In cross-examination he admitted that margin of two years could be given to the age assessed by him on the basis of report Ex. PW-11/A. PW-10 Dr. Daljeet Kaur on basis of report Ex. PW-11/A had again opined that the age of prosecutrix in August 2011 was between 15½ to 19 years.

19. In case of availability of valid, reliable and admissible documentary proof of date of birth, determination of age by medical expert may be ignored. But in present case documents relied upon by prosecution Ex.PW-5/A and Ex.12/A and Ex.12/B cannot be treated conclusive proof of age of prosecutrix for the reason that basis of entries made in school record, in pariwar register is not known. In view of admissions of PW-5 Sudarshan Kaur and PW-12 Mohan Singh, these documents cannot be said to be valid, admissible and reliable proof of date of birth of the prosecutrix particularly when father of prosecutrix, in FIR has stated date of birth of prosecutrix as 22.07.1995 which again renders date of birth mentioned in Ex. PW-5/A, Ex. PW-22/A and Ex. PW-12/B doubtful. In such eventuality opinion of medical expert became relevant. On the basis of evidence on a record exact date of birth of prosecutrix has not been proved nor there is any document on record conclusively proving that prosecutrix at the time of incident was below 18 years of age, rather, there is a opinion of medical expert indicating that prosecutrix may be more than 18 years in August 2011. As per medical evidence age of prosecutrix in August 2011 has been determined between 15½ to 19 years with further clarification that there may be variation of two years. Therefore, prosecution has failed to prove by leading admissible and convincing evidence that prosecutrix at the time of incident, was below 18 years of age. As per medical evidence there is possibility of her age above 18 years on the day of incident and when there two views are possible, view beneficial to accused is to be given preference. Therefore, prosecutrix is to be considered more than 18 years on the day of incident on the basis of material available on record.

20. Once prosecutrix is found to be above 18 years at the time of incident, then for her consents, respondent cannot be said to be guilty under Sections 363, 366 & 376 of the Indian Penal Code.

21. Respondent was examined under Section 313 of the Code of Criminal Procedure. He admitted his love affairs with PW-1 prosecutrix. In answer to question No. 22, he stated that he still wanted to marry with prosecutrix but she had deposed against him under pressure of parents and her relatives In totality of circumstances defence propounded by respondent appears to be convincing and based on truth.

22. Prosecution has failed to prove guilt of the accused beyond all reasonable doubts and there is no merit in the appeal. There is no illegality or perversity in impugned judgment. Learned trial Court has appreciated evidence on record completely and correctly on record.

23. Allegations of prosecutrix are not trustworthy, believable and convincing and therefore, her statement cannot be treated as cogent, reliable and convincing to convict the respondent under Sections 363, 366 and 376 of the Indian Penal Code.

24. The present appeal, devoid of any merit, is dismissed, so also the pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Surinder Mohan ..... Appellant.
Versus
Ramesh Kumar & Anr. ..... Respondents.

RSA No. 516 of 2007
Judgment reserved on: 24.10.2016
Date of Decision: 28th October, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is co-owner of the suit land – the defendants threatened to raise construction over the same- the defendants denied that suit land is owned jointly by the parties and claimed that an old abadi existed over the suit land- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that it was admitted that suit land is abadi deh and has not been partitioned by metes and bounds – defendant No.1 had purchased a specific portion of abadi from defendant No. 2 and became a co-sharer – he was raising new construction by demolishing the old one – plaintiff has failed to prove his possession over abadi and is not entitled to the injunction – appeal dismissed.
(Para-13 to 24)

Case referred:
Laxmidevamma and Others Vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant : Mr.Deepak Kaushal, Advocate.
For the Respondents: Ms.Shalini Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

Instant Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, is directed against the judgment and decree dated 30.8.2007, passed by learned District Judge, Sirmaur, District Nahan, H.P., affirming the judgment and decree dated 25.10.2005, passed by learned Civil Judge (Senior Division) Rajgarh, District Sirmaur, H.P., in Civil Suit No.81/1 of 2004, whereby suit for injunction filed by the plaintiff was dismissed.

2. In nutshell, facts of the case are that present appellant(hereinafter referred to as the plaintiff) filed suit seeking relief of permanent prohibitory injunction restraining the defendants(hereinafter referred to as the respondents) from raising construction or changing the nature of the land comprised in khata/ khatauni No.72min/116min, khasra Nos.1093/1022/1017, measuring 13 biswas situated in village Johana, Tehsil Pachhad, District Sirmaur, H.P (hereinafter referred to as the suit land). Plaintiff averred in the plaint that on 20.8.2004, defendants with mala-fide intention to raise construction over the suit land started digging the suit land with JCB Machine and in order to level the same for raising construction thereon without the consent of the plaintiff. Plaintiff further averred that since suit land is joint between the parties, the plaintiff being co-sharer is owner of every inch of the suit land till the same is legally partitioned by metes and bounds. Plaintiff further averred in the plaint that the suit land is precious land since it falls in front of Shimla-Dehradun road and defendants solely with a view to grab the best portion of the suit land has resorted to illegal construction over that portion of the land. In view of the aforesaid background, plaintiff filed suit for injunction against the defendants.

3. Defendants by way of filing written statement refuted the claim put forth on behalf of the plaintiff on the grounds of maintainability, locus standi, cause of action and misrepresentation of the facts. Defendants also denied the case of the plaintiff on merits by disputing the status of the plaintiff being co-sharer in the suit land. Defendant specifically

averred that there is old Abadi which belongs to them and they are raising construction of a dwelling house over which the old Abadi/house was situated. Defendants specifically denied that the suit land is joint between the parties, rather defendants claimed that plaintiff preferred the present suit with mala-fide intention in order to harass them.

4. Record reveals that the plaintiff did not file any replication and as such, averments contained in the written statement stood un-rebutted.

5. On the pleadings of the parties, the learned trial Court framed the following issues:-

> "1. Whether the plaintiff is entitled for the relief of permanent injunction as prayed for? OPP.
>
> 2. Whether the suit is not maintainable in the present form? OPD.
>
> 3. Whether the plaintiff has no locus-standi to file the present suit? OPD.
>
> 4. Whether the plaintiff has no cause of action to file the present suit? OPD.
>
> 5. Relief.

6. The learned trial Court on the basis of the evidence adduced on record by the respective parties, dismissed the suit of the plaintiff vide impugned judgment and decree dated 25.10.2005.

7. Feeling aggrieved and dissatisfied with the impugned judgment dated 25.10.2005, passed by learned trial Court, appellant/plaintiff filed an appeal under Section 96 CPC in the Court of learned District Judge, Sirmaur, H.P, which came to be registered as Civil Appeal No.18-CA/13 of 2007/2005, however fact remains that learned District Judge, vide impugned judgment and decree dated 30.8.2007, dismissed the appeal preferred on behalf of the plaintiff/appellant and upheld the judgment passed by learned trial Court. In the aforesaid background, the present appellant-plaintiff approached this Court by way of Regular Second Appeal, praying therein for quashing and setting aside the impugned judgment passed by both the Courts below.

8. This Regular Second Appeal was admitted on the following substantial questions of law:-

> "(1) Whether the land which is described as Shamlat land in revenue record can be used by only one co-owner without there being any partition of the land?.
>
> (2). Whether the land described as Shamlat over which every villager/right holder having common rights can be used by an individual for the construction of his personal house which is obviously not for common purpose?
>
> (3). Whether an individual can be said to be in possession of a Shamlat land without placing on record any evidence to this effect that the land has been partitioned and particular piece of land has been allotted to him?".

9. Mr. Deepak Kaushal, learned counsel representing the appellant, vehemently argued that the judgment passed by both the Courts below are not sustainable as the same are not based on correct appreciation of the evidence available on record and as such, same deserve to be quashed and set-aside. He further contended that both the Courts while non suiting the plaintiff have miserably failed to appreciate the evidence adduced on record by the plaintiff in support of his claim in its rights perspective, as a result of which, erroneous findings have been returned by both the Court and great prejudice has been caused to the plaintiff. Mr. Kaushal, further argued that Courts below failed to appreciate the fact that the land in question is "Shamlat Deh" and every co-owner has right over the "Shamlat land" and same can only be used for common purposes. He further stated that since every co-owner has right to use the "Shamlat land", one individual cannot be allowed to use the "Shamlat land" for his individual purpose. In

the present case, without there being legal partition, defendants resorted to construction over the suit land and as such, judgments passed by both the Courts below deserve to be quashed and set-aside.

10. Mr. Kaushal, while concluding his arguments, strenuously argued that both the Courts below have committed an error of law by deciding all the issues together and both the Courts have given findings qua all the issues contrary to the documents placed on record. Mr. Kaushal, further contended that suit land is classified as "Shamlat land" and have been kept by the villagers for common purposes, right to use common land cannot be given to any individual by infringing the rights of the other co-owners of the "Shamlat land". In this regard, he invited the attention of the Court to the jamabandis placed on record to demonstrate that since the land in question is "Shamlat land", it is not known/understood that on what basis defendants started raising construction over the portion of the suit land for personal purpose without ascertaining the extent of their share. In the aforesaid background, Mr. Kaushal, prayed for decreeing the suit after setting-aside the judgment and decree passed by both the Courts below.

11. Ms. Shalini Thakur, learned counsel representing the respondents, supported the judgment and decree passed by both the Courts below. Ms. Thakur, vehemently argued that bare perusal of the impugned judgment passed by both the Courts below, suggest that same are based upon correct appreciation of the evidence available on record and as such, no interference, whatsoever, of this Court is warranted in the present facts and circumstances of the case. With a view to substantiate aforesaid argument, she specifically invited the attention of the Court to the judgment passed by both the Courts below to demonstrate that the Courts below have dealt with each and every aspect of the matter very meticulously and has returned concurrent findings of fact as well as law and as such, this Court has no occasion to differ with the concurrent findings returned by both the Courts below. Ms. Thakur, further contended that this Court has very limited power to re-appreciate the evidence when both the Courts below have returned concurrent findings on the facts as well as law. In this regard, to substantiate the aforesaid plea, she placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others Vs. Ranganath and Others, (2015)4 SCC 264.***

12. I have heard learned counsel for the parties and have gone through the record of the case.

13. In nutshell, it is admitted case of the parties that suit land is "Shamlat Deh" is used as Abadi and the same has not been partitioned by metes and bound. The defendant No.1, who purchased a portion of Abadi land from the defendant No.2, also became co-sharer over the suit land by virtue of sale deed. Until the land is partitioned by metes and bound the defendant No.1 cannot appropriate the land to his exclusive use to the disadvantage of the appellant/plaintiff. Plaintiff/ appellant, who claimed himself to be joint owner of the suit land claimed that the suit land is not legally partitioned and as such, defendants cannot be allowed to raise construction in the suit land, whereas defendants claimed that suit land is not joint between the parties, rather Abadi is situated in the suit land, which is now converted to new construction by dismantling old house existing over the suit land. Plaintiff in support of his contention placed on record certified copy of jamabandi for the year, 2002-03 Ex.PW1/A, perusal whereof clearly suggests that the suit land is recorded as **"Shamlat Deh Hasab Rasad Khewat".** In the column of remarks, it has been clearly reflected that defendant No.1, Ramesh Kumar son of Sh. Pratap Singh, has purchased the share of one of the possessor of the suit land namely Narayan Dutt. The total area of the suit land has also been depicted/ reflected to be constructed/ built up area. But careful perusal of Ex.PW1/A, nowhere reflect the name of plaintiff recorded either in the column of ownership or possession of the suit land.

14. Though, in Ex.PW1/B i.e list of share holders of the suit land, name of the plaintiff has been recorded as one of the shareholder in mauza, Johana, but interestingly, plaintiff nowhere claimed in the plaint that there exists any constructed area over the suit land, which is in his possession, whereas defendants by way of placing on record ample documentary evidence Ex.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E successfully proved on record that

the suit land is built up area for the last so many years, which was further purchased by present defendant from one co-sharer namely Narayan Dutt.

15. Plaintiff primarily filed suit by placing reliance on the jamabandi for the year, 2002-03 Ex.PW1/A and the Farist Malkann (list of owners) Ex.PW1/B as recorded "Shamlat land" on the record. Plaintiff specifically placed reliance upon the document Ex.PW1/B, to demonstrate that he has a right in the shamlat land, but at the cost of repetition, it may be reiterated that though there is mention of the name of plaintiff/appellant as one of the right holder in the list of owners Ex.PW1/B in the Shamlat land, but there is no such reference of his being in possession of land described in the jamabandi Ex.PW1/A. Close reading of Ex.PW1/A, clearly suggests that the suit land has been recorded as "Gair Mumkin Abadi" and as per entry in the column of remarks (Kafiyat), two biswas of land out of aforesaid "Gair Mumkin Abadi" has been shown to be sold by defendant No.2 namely Narayan Dutt, who was admittedly co-sharer in the suit land, in favour of defendant No.1 on 15.6.2004. Similarly, shares of the other shareholders in respect of the suit land have been specifically mentioned in column No.5 of Ex.PW1/A, shown in the jamabandi, referred hereinabove. Interestingly, there are no pleadings that entries as reflected in Ex.PW1/A are illegal and as such, not binding on the rights of the plaintiff. Similarly, there are no pleadings in respect of the other shareholders including defendant No.1 as mentioned in column No.5 of the said jamabandi as illegal and not binding on the rights of the plaintiff, whereas defendants in written statement filed before the trial Court specifically in para No.2 claimed that **"there is an old Abadi which belongs to the defendants and they want to raise construction of dwelling house in the place of this Abadi and old house. The plaintiff has filed the present suit with mala-fide intention and only with a view to harass the defendants."** Aforesaid specific averments contained in the written statement have not been controverted in any manner by the plaintiff by way of replication or by way of ocular evidence led on record before the Court below. Careful perusal of the plaint filed by the plaintiff, clearly suggest that he filed the suit simplicitor for permanent prohibitory injunction without there being any challenge to the correctness of the revenue entries, perusal whereof clearly suggest that suit land is "Gair Mumkin Abadi", which has been further sold by defendant No.2 being its co-sharer in the suit land in favour of defendant No.1 on 15.6.2004.

16. Apart from this, as has been discussed hereinabove, shares of the shareholders in respect of the suit land stands mentioned in column No.5 of Ex.PW1/A. Similarly, this Court during the proceeding of the case had an occasion to peruse the entire evidence led on record by the parties, perusal whereof clearly suggest that plaintiff was not able to prove that there is no Abadi over the suit land, which is admittedly entered as "Shamlat Deh Hasab Rasad Khewat", rather plaintiff by stepping into the witness box stated that name of defendant No.2 has been wrongly incorporated in the column of possession in respect of the suit land and he started digging the land on 20.8.2004 but the same was rightly not considered by the Courts below since no such pleas, as have been discussed hereinabove, were incorporated in the plaint. It is well settled that in the absence of specific pleadings in the plaint, evidence, if any, led in that regard may not be required to be looked by the Court while deciding the controversy.

17. Apart from this, this Court had an occasion to peruse the documents placed on record by the defendants, especially copies of jamabandis for the year, 1967-68 Ex.DW1/B, 1972-73 Ex.DW1/C, 1977-78 Ex.DW1/D and 1992-93 Ex.DW1/E, perusal whereof clearly suggest that plaintiff or his predecessor-in-interest were not in physical possession of the suit land or part thereof at any point of time, rather documents referred hereinabove, clearly suggest that predecessor-in-interest of Narayan Dutt, defendant No.2 had been coming in possession of the suit land. Similarly, the old revenue record, as referred hereinabove, i.e. jamabandis , clearly reflects that the suit land is built up area for the last so many years. Plaintiff Surinder Mohan himself admitted that the suit land is recorded as "Abadi Deh" and said "Abadi Deh" is duly recorded in the revenue record since 1972. If the deposition of plaintiff is examined juxtaposing, averments contained in the plaint it itself falsify the claim of the plaintiff/ appellant that the suit land is jointly owned and possessed by the co-owners. In his cross-examination, he admitted that defendant No.2, Narayan Dutt sold the share in the suit land in favour of defendant No.1 and he

has not obtained any demarcation of the suit land. Defendants by leading cogent and convincing evidence in the shape of documentary evidence were able to prove on record that the suit land is "Abadi Deh" and thee upon built up structure exists, hence the version put forth on behalf of the plaintiff, which was not at all proved by the plaintiff by leading cogent and convincing evidence, was rightly rejected by the Courts below. Similarly, perusal of statement of PW-2, Vijay Kumar adduced on record by the plaintiff, nowhere suggests that he was able to prove the contents of the plaint, rather careful perusal of his statement leads to the conclusion that he did not know anything with regard to suit land because in his cross-examination, he himself admitted that he has no landed property in village Johana and he was working as Safai Karamchari in Tehsil Office, where plaintiff was patwari, whereas, defendant No.1,Ramesh Kumar while deposing before the Court specifically stated that the suit land is constructed portion, which he purchased from defendant No.2,Narayan Dutt. He further stated that old house was situated in the suit land, which was now being reconstructed.

18. DW-2, Narayan Dutt, supported the version put forth on behalf of DW-1, Ramesh Kumar, who categorically deposed that he sold his share in the suit land in favour of defendant No.1. He further stated that defendant No.1 is constructing new house on the same place where his old house was in existence. At the cost of repetition, it may be again stated that aforesaid factum of existence of old house as categorically mentioned in para-2 of the written statement was nowhere refuted by the plaintiff either in the shape of replication or by way of leading cogent and convincing evidence before the Court.

19. Similarly, DW-3, Parkash Chand, supported the version of DW-1 and DW-2, who categorically stated that plaintiff has no concern in the suit land. This Court also perused the cross-examination conducted on these witnesses, which nowhere suggests that plaintiff was able to shatter the testimonies of these witnesses, who unequivocally stated that DW-2 sold constructed portion to defendant No.1. One thing which also emerged from the reading of the plaint that the plaintiff nowhere made mention, if any, with regard to the constructed portion over the suit land, which otherwise appears to be correct after appreciation of the documentary evidence as well as oral evidence led on record by the defendants. Defendants placing reliance upon Ext.DW1/B, Ex.DW1C, Ex.DW1/D and Ex.DW1/E were able to prove on record that the suit land is built up area for so many years but plaintiff nowhere claimed in his plaint that there exists constructed portion over the suit land, rather, he claimed that he alongwith his family members and defendants were owners in possession of the suit land described in the jamabandi for the year, 2002-03 and there is no mention, if any, with regard to the built up area of the land referred hereinabove. Whereas defendants by leading cogent and convincing evidence in the shape of Ex.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E successfully proved on record that the suit land is built up area and construction, if any, by defendant No.1 is being raised upon the same. Though, plaintiff termed revenue record reflecting defendant No.1 in the ownership of the suit land as illegal and wrong but same plea was rightly not considered by the courts below since there is /was no challenge, if any to the entries made in the revenue record.

20. Now coming to the argument having been raised by the learned counsel representing the plaintiff with regard to nature of the land i.e. Shamlat land. It is undisputed as per Ex.PW1/A that present plaintiff is one of the co-sharer in the shamlat land but that cannot be sufficient ground to conclude that the plaintiff had an cause of action for filing the suit against the defendants, who specifically proved on record that he purchased the specific portion of land from defendant No.2. Learned court below rightly came to the conclusion that since plaintiff specifically failed to challenge the status of the defendant No.2 being owner of the suit land to the extent of two biswas of land, who further sold the land to defendant No.1, suit filed by the plaintiff cannot be accepted.

21. Apart from above, status of defendant No.2 being owner of the suit land has not been specifically questioned and denied by the plaintiff and as per revenue record placed on record, it stands duly proved on record that "Gair Mumkin Abadi" exists on the suit land. Similarly, perusal of depositions made by DW-2 and DW-3 suggest that constructed portion of the

land was sold in favour of defendant No.1, meaning thereby specific portion of "Abadi" was purchased by defendant No.1, who on the said old Abadi started raising new construction by demolishing the old construction. Since, plaintiff failed to prove his physical possession, qua the Abadi owned and possessed by the defendants, Court below rightly not granted the discretionary relief of injunction in his favour.

22. Conjoint reading of evidence led on record, compel this Court to come to the conclusion that defendant No.1 successfully proved on record his exclusive possession over the suit land purchased by him from defendant No.2. It is well settled that co-owner, who is not in possession of any part of the property, is not entitled to seek injunction against another co-owner, who has been coming in exclusive possession of the common property, unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession. Since, in the present case, plaintiff was not able to prove his possession over the suit land being co-owner, his plea of making of construction or improvement by defendants on the alleged joint property may not be sufficient to conclude that he was being ousted from the common holding of the parties. There cannot be any dispute that Shamlat land recorded in the revenue record is used commonly by all the co-owners and all the villagers/right holders have common rights to use the same. Similarly, there cannot be any exclusive possession of "Shamla land" without there being partition among the right holders having common rights over the Samlat land. But in the present case, it stands duly proved on record that suit land i.e. "Gair Mumkin Abadi Hasab Rasad Khewat" is used as Abadi and in the column of remarks defendant No.1 namely Ramesh Kuamr has been shown as purchaser of share of one of the co-sharers/ possessor of the suit land namely Narayan Dutt. Similarly, it stands duly proved on record that the suit land sold by defendant No. 2 in favour of defendant No. 1 was constructed built up area. Whereas, name of plaintiff has been nowhere recorded either in the column of ownership and possession of the suit land. Revenue record placed on record in the shape of Ext.DW1/B, Ex.DW1/C, Ex.DW1/D and Ex.DW1/E, clearly establish on record that suit land is built up area of the last so many years and as such, there is no illegality and infirmity in the findings returned by both the Courts below that defendant No.1 purchased share of defendant No.2 in the suit land. Since, plaintiff/appellant could not establish his case legally before the Courts below, his prayer for injunction against the defendants was rightly rejected by the Court.

23. This Court sees no irregularity and infirmity, if any, in the judgments passed by both the Courts below, rather same are based upon correct appreciation of the evidence available on record. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since, both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**, herein below:-

> "16. Based on oral and documentary evidence, both the Courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the Courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."

24. Consequently, in view of the detailed discussion made hereinabove, present appeal fails and same is dismissed.

Interim directions, if any, are vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Ram Chand ....Petitioner.
Versus
Smt. Sunita Abrol ... Respondents.

Criminal Revision No.257 of 2010
Date of Decision: 1st November, 2016

Negotiable Instruments Act, 1881- Section 138- A complaint was filed alleging that accused had borrowed sum of Rs.40,000/- from the complainant – accused issued a cheque of Rs.40,000/- for re-payment of the amount, which was dis-honoured with the endorsement insufficient funds – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was allowed on the ground that cheque was presented twice but the notice was issued only once- held in revision that cheque could have been presented many times during the period of validity- the notice was issued only second time – there was holiday on the last day of presentation and the cheque was presented on the next working day- Appellate Court had wrongly set aside the judgment of Trial Court- revision allowed and judgment of Appellate Court set aside while that of the Trial Court restored.(Para-8 to 15)

For the Petitioner : Mr. Umesh Kanwar, Advocate.
For the Respondent : Mr. N.K.Thakur, Senior Advocate, with Ms. Jamuna, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral)

Instant Criminal Revision Petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, is directed against the judgment dated 4.10.2010, passed by learned Sessions Judge, Bilaspur, District Bilaspur, H.P. in Criminal Appeal No.1 of 2008, reversing the judgment of conviction passed by learned Judicial Magistrate 1st Class Court No.2, Ghumarwin, District Bilaspur, H.P. in case No.40/2 of 2005/1999, whereby the respondent (hereinafter referred to as the accused) was held guilty of having committed offence punishable under Section 138 of the Negotiable Instruments Act and accordingly convicted and sentenced the accused to undergo simple imprisonment for the period of three months and to pay a fine of Rs.2000/- and in default of payment of fine, to undergo simple imprisonment for a period of one month. The learned trial Court held the complainant entitled to compensation to the tune of Rs.80,000/- to be paid by the accused.

2. Briefly stated facts of the case as emerged from the record are that the petitioner (hereinafter referred to as the complainant) filed complaint under Section 138 of the Negotiable Instruments Act(hereinafter referred to as the Act) before the learned trial Court stating therein that the accused had borrowed a sum of Rs. 40,000/- from him as loan on 12.5.1998 and agreed to return the same within a period of three months alongwith interest, but despite several requests having been made by the complainant, accused failed to repay the aforesaid amount and finally the accused issued a cheque No.0936994, dated 12.10.1998 amounting to Rs. 40,000/- drawn on H.P. State Co-operative Bank Limited branch Office at Ghumarwin, in favour of the complainant, which on presentation in the bank by the complainant on 27.2.1999, was returned

by the bank with the endorsement "**insufficient funds"**. Complainant again presented the cheque for payment in the bank on 12.4.1999, however fact remains that same was again returned to the complainant with the remarks "**insufficient funds"** in the account of the accused. After receiving the aforesaid information from the bank, complainant got legal notice issued under Section 138 of the Act to the accused calling upon him to make the payment of the cheque amount within a period of 7 days from the receipt of the notice, but the accused failed to make the payment of the said cheque, as a result of which, complainant was compelled to file the complaint under Section 138 of the Act.

3. The learned trial Court on the basis of the evidence adduced on record, found accused guilty of having committed offence punishable under Section 138 of the Act and vide impugned judgment/order dated 29.12.2007/31.12.2007 convicted and sentenced the accused, as per the description given hereinabove.

4. Accused being aggrieved and dissatisfied with the impugned judgment of conviction and order of sentence passed by learned trial Court, filed an appeal under Section 374 of the Code of Criminal Procedure before the Court of learned Sessions Judge, Bilaspur, which came to be registered as Criminal Appeal No.1 of 2008. The learned Sessions Judge, vide impugned judgment dated 4.10.2010, accepted the appeal preferred by the accused and set-aside the judgment of conviction recorded by learned trial Court. Hence, in the aforesaid background, complainant approached this Court by way of instant Criminal Revision Petition, praying therein for quashing and setting-aside the impugned judgment dated 4.10.2010, passed by learned Sessions Judge, Bilaspur, H.P.

5. Mr. Umesh Kanwar, learned counsel representing the complainant, vehemently argued that the impugned judgment, passed by learned Sessions Judge, Bilaspur is not sustainable as the same is not based upon the correct appreciation of the evidence adduced on record by the complainant as well as law on the point and as such, same deserve to be quashed and set-aside. Mr. Kanwar, further contended that lower Appellate Court while accepting the appeal has miserably failed to appreciate the cogent and convincing evidence adduced on record by the complainant in its right perspective, as a result of which, great prejudice has been caused to the complainant. He further contended that complainant successfully proved on record by leading cogent and convincing evidence that the accused issued a cheque amounting to Rs. 40,000/- in favour of the complainant, which was dishonoured on account of "insufficient funds" in the account of the accused. While referring to the judgment passed by learned Sessions Judge, Mr. Kanwar, strenuously argued that bare perusal of the judgment suggests that learned Sessions Judge has not applied its mind while rejecting the complaint by holding that the complainant presented the cheque with the bank after expiry of six months. In this regard, Mr. Kanwar, specifically invited the attention of this Court to Section 25 of the Act, to demonstrate that since on 11.4.1999 there was holiday being Sunday, cheque could only presented on 12.4.1999. Mr. Kanwar, further contended the lower Appellate Court committed further illegality while recording the finding that no proper notice was issued to the accused within stipulated time by the complainant. With a view to substantiate his aforesaid argument, learned counsel representing the complainant invited the attention of the Court to the legal notice Ex.PW1/A, dated 17.4.1999 issued to the accused through postal receipt Ex.CA, dated 21.4.1999. He further contended that bare perusal of legal notice Ex.PW1/A, suggests that same was dated 17.4.1999 and if postal receipt dated 21.4.1999 is taken to be date of posting, even in that eventuality findings returned by the lower Appellate Court is totally contrary to the record that legal notice was not got issued within stipulated time by the complainant. Mr. Kanwar, while concluding his arguments, forcibly contended that reasoning of the lower Appellate Court is manifestly unreasonable and unsustainable as there was no occasion for the Court to disregard the well and consistent testimony of the complainant witnesses on material points and as such, impugned judgment passed by learned lower Appellate Court deserve to be quashed and set-aside.

6. Mr. N.K. Thakur, learned Senior Advocate, duly assisted by Ms. Jamuna, Advocate, supported the impugned judgment passed by learned lower Appellate Court. Mr.

Thakur, submitted that bare perusal of the judgment passed by learned lower Appellate Court is based upon the correct appreciation of the evidence available on record and as such, there is no scope of interference of this Court. Mr. Thakur, further contended that bare perusal of the judgment passed by the learned trial Court, suggests that the same was not based upon the correct appreciation of the evidence adduced on record by the respective parties, rather same was purely based on conjunctures and surmises and as such, was rightly quashed and set-aside by the learned lower Appellate Court while accepting the appeal preferred on behalf of the accused. Mr. Thakur, strenuously argued that it stands duly proved on record that the cheque Ex.PW2/M was deposited with the bank after expiry of six months and as such, there is no illegality and infirmity in the judgment passed by the learned lower appellate Court. Mr. Thakur, further contended that as per own case of the complainant, cheque in question was received by him from the bank with the endorsement "insufficient funds" on 12.4.1999, whereas legal notice Ex.PW1/A advising the accused to make the payment of the cheque amount within 15 days from the date of the receipt of the information from the bank was admittedly got issued after expiry of 15 days and as such, there is no illegality and infirmity in the judgment passed by the lower Appellate Court. Mr. Thakur, while concluding his arguments stated that bare perusal of the evidence led on record by the complainant, clearly suggests that there are major contradictions and as such, rightly discarded by the lower appellate Court while accepting the appeal. In the aforesaid background, learned counsel for the accused sought dismissal of the present revision petition.

7. I have heard learned counsel for the parties and have carefully gone through the record.

8. It is undisputed before me that accused issued a cheque amounting to Rs. 40,000/- in favour of the complainant on 12.10.1998 for consideration of amount which he had borrowed from the complainant. Learned trial Court on the basis of the material on record found accused guilty of having committed the offence under Section 138 of the Act and accordingly convicted and sentenced him as per the description given hereinabove. Learned Lower Appellate Court while accepting the appeal preferred on behalf of the petitioner-accused came to the conclusion that cheque Ex.PW2/M, dated 12.10.1998 was submitted before the bank twice. Learned lower appellate Court further concluded that since complainant presented the cheque in question twice in the bank on 27.2.1999 and 12.4.1999, it was incumbent upon him to issue notice to the petitioner-accused after receiving memo having endorsement" insufficient funds" from the bank on 27.2.1999. Learned Appellate Court further held that once cheque Ex.PW2/M was returned by the bank on 27.2.1999, notice ought to have been issued to the accused by the complainant as contemplated under clause (b) of proviso to Section 138 of the Act. Apart from above, learned appellate Court also concluded that thereafter cheque was presented after prescribed period of six months i.e. 12.4.1999 and as such complaint under Section 138 of the Act was maintainable.

9. After perusing the aforesaid findings returned by the learned lower appellate Court, this Court has no hesitation to conclude that the learned lower appellate Court has miserably failed to appreciate the fact that the cheque could be presented any number of times during the period of its validity by the payee and it is also well settled law that on each presentation of the cheque and its dishonour fresh right and new cause of action accrues in his favour and there is no bar under Section 138 of the Act to present the cheque before the bank for encashment after dishonouring the same at one occasion. True it is that if after getting intimation from the bank with regard to dishonour of the cheque, complainant gives a notice under clause(b) of Section 138 of the Act, he forfeits his right to present the cheque again with the bank even after getting memo of the bank indicating the reasons for dishonouring of the cheque because period of one month for filing the complaint would be reckoned from the day immediately following the day on which the period of 15 days from the date of the receipt of the notice by the drawer, expires.

10. Admittedly, in the present case, complainant presented the cheque twice on 27.2.1999 and 12.4.1999, but fact remains that after getting intimation Ex.PW2/A from the bank

with regard to dishonour of the cheque, complainant chose not to send notice, as envisaged under clause (b) of proviso to Section 138 of the Act, rather he again presented the cheque on 12.4.1999 for payment in the bank. Since, on 12.4.1999 cheque was returned by the bank vide memo Ex.PW2/D with the remarks "insufficient funds", he got legal notice issued in terms of clause (b) to Section 138 of the Act, hence, there is no illegality, if any, committed by the complainant while presenting the cheque on second occasion i.e.12.4.1999 without intimating the accused with regard to dishonour of the cheque on 27.2.1999. Had the complainant informed the accused with regard to dishonour of the cheque on 27.2.1999, he would have forfeited his right to present the cheque again on 12.4.1999. Since, the complainant instead of intimating the accused with regard to dishonour of the cheque on 27.2.1999 again presented the cheque on 12.4.1999, there is no illegality, whatsoever, in presenting the cheque on second occasion by the complainant. As far as, another finding returned by the lower appellate Court that cheque Ex.PW2/M was presented with the bank after prescribed period of six months from the date on which it is drawn is also erroneous and without any basis. It is clearly proved on record that cheque Ex.PW2/M was presented by the complainant on 12.4.1999 i.e. after expiry of six months but on 11.4.1999. There was a local holiday being Sunday and the complainant presented the same on 12.4.1999, there is nothing on the record that the bank refused to accept the cheque on 12.4.1999 on the ground of validity, rather bank accepted the same and issued memo Ex.PW2/D with the endorsement "insufficient funds". Since, cheque was dated 12.10.1998, same was valid up to 11.4.1999 but as has been observed that on 11.4.1999 there was holiday being Sunday and as such, there was no occasion for the complainant to present the same on Holiday.

11. At this stage, it would be apt to reproduce Section 25 of the Act as under:-

> "**25. <u>When day of maturity is a holiday</u>:-** When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day."

12 Bare perusal of the aforesaid provision contained in the Act, clearly suggests that if on the day a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day. In the present case, since cheque was to expire on 11.4.1999, which was holiday being Sunday, instrument i.e. cheque was valid up to 12.4.1999 and as such, same was rightly accepted by the bank. Hence, in view of the provisions of law, this Court is not in agreement with the findings returned by the Court below that the complainant failed to deposit the cheque within the period of six months from the date on which it is drawn or within the period of its validity. There is no dispute that cheque in question was to expire on 11.4.1999, on which date, it was holiday being Sunday and as such, there is no delay, if any, on the part of the complainant to present the same on 12.4.1999. Similarly, this Court finds that learned lower appellate Court has fallen in grave error while concluding that the complainant failed to get the legal notice issued to the drawee of the cheque within the period of 15 days from the date of information from the bank. Admittedly, In the instant case, intimation with regard to dishonour of the cheque was received by the complainant from the bank on 12.4.1999. Complainant got issued legal notice Ex.PW1/A to accused through his counsel vide postal receipt Ex.CA. Perusal of Ex.PW1/A, clearly suggests that notice is dated 17.4.1999 and perusal of receipt Ex.CA, clearly suggests that same was posted on 21.4.1999, meaning thereby legal notice was got issued by the complainant well within 15 days from the receipt of the intimation from the bank. In the instant case, since intimation from the bank was received on 12.4.1999, it is not understood how the learned lower appellate Court came to the conclusion that the complainant failed to issue legal notice within prescribed period, as envisaged under Section 138 of the Act, even if the period is counted from the date of postal receipt Ex.CA, dated 21.4.1999, it can be easily concluded that legal notice was got issued within a period of 15 days from the date of receipt of intimation i.e. 12.4.1999. When, it stands duly proved on record that the complainant got legal notice issued on 21.4.1999 through postal receipt Ex.CA, presumption of due service of the notice would stand attracted.

13. It is not the requirement of law to state in the complaint that the notice was served on a particular date as notice is deemed to have been served with the addressee or he is deemed to have the knowledge of the notice unless and until contrary is proved at the stage of evidence. In this regard reliance is placed on the judgment of the Hon'ble Apex Court in the case of Ajeet Seeds Ltd. V. K. Gopala Krishnaiah, 2014(12) SCC 685. The relevant para Nos.4, 5 and 6 of the judgment are reproduced as under:-

> 4. The Proviso (b) & (c) appended to Section 138 of the Act lays down the conditions which are to be complied with before a complaint under Section 138 of the Act could be filed, which are quoted hereunder:--
>
> "138. Dishonour of cheque for insufficiency, etc., of funds in the account.-
>
> Provided that nothing contained in this section shall apply unless--
>
> (a) ....
>
> (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
>
> Explanation.-- For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.
>
> 5. A perusal of Clauses (b) & (c) to the proviso would indicate that before a complaint could be filed, the payee or the holder in due course of the cheque, as the case may be, is to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and the drawer of such cheque fails to make payment of the said amount to the payee or as the case may be, to the holder in due course within 15 days of the receipt of notice.
>
> 6. The Apex Court in the case C***.C. Alavi Haji v. Palapetty Muhammed and another***, 2007 (6) SCC 555, held as under:--
>
> "10. It is, thus, trite to say that where the payee dispatches the notice by registered post with correct address of the drawer of the cheque, the principle incorporated in Section 27 of the G.C. Act would be attracted; the requirement of Clause (b) of proviso to Section 138 of the Act stands complied with and cause of action to file a complaint arises on the expiry of the period prescribed in Clause (c) of the said proviso for payment by the drawer of the cheque. Nevertheless, it would be without prejudice to the right of the drawer to show that he had no knowledge that the notice was brought to his address.
>
> 11. However, that the referring Bench was of the view that this Court in Vinod Shivappas case (supra) did not take note of Section 114 of Evidence Act in its proper perspective. It felts that the presumption under Section 114 of the Evidence Act being a rebuttable presumption, the complaint should contain necessary averments to raise the presumption of service of notice; that it was not sufficient for a complainant to state that a notice was sent by registered post and that the notice was returned with the endorsement out of station; and that there should be a further averment that the addressee-drawer had deliberately avoided receiving the notice or that the addressee had knowledge of the notice, for raising a presumption under Section 114 of Evidence Act.
>
> 12. Therefore, the moot question requiring consideration is in regard to the implication of Section 114 of the Indian Evidence Act, 1872 insofar as the service of notice under the said proviso is concerned. Section 114 of the Indian Evidence Act, 1872 reads as follows:

Section 114- Court may presume existence of certain facts -The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume -

(f) That the common course of business has been followed in particular cases.

....

13. According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

27. Meaning of service by post -

Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression served by post, whether the expression serve or either of the expressions give or send or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement refused or not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. (Vide ***Jagdish Singh v. Natthu Singh AIR 1992 SC 1604; State of M.P. v. Hiralal and Ors (1996) 7 SCC 523 and V. Raja Kumari v. P. Subbarama Naidu and Anr (2004) 8 SCC 774.*** It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the

Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasis that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends."

14. In view of the detailed discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, this Court has no hesitation to conclude that once the notice under Section 138 of the Act is in writing to the drawer of the cheque within 15 days from the date of receipt of intimation from the bank, then presumption under Section 114 of the Evidence Act comes into play that registered notice was sent to the addressee of the cheque and it shall be deemed to have been served to the addressee. In the present case as clearly emerge from the record that legal notice Ex.PW1/A, dated 17.4.199 was sent through registered post on 21.4.1999 i.e within the period of 15 days from the receipt of intimation from the bank and as such, findings of the learned lower Appellate Court deserve to be quashed and set-aside being contrary to facts as well as law.

15. Consequently, in view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, judgment passed by learned lower appellate Court deserve to be quashed and set-aside being contrary to the record as well as law. Accordingly, the present revision petition is allowed and judgment passed by learned lower appellate Court is quashed and set-aside. The respondent-accused is directed to surrender herself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court.

Accordingly, the present petition is disposed of alongwith pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Amit Singh …Petitioner.

Versus

State of H.P. & others …Respondents.

CWP No.: 920 of 2016
Judgment Reserved on: 26.10.2016
Date of Decision: 3rd November, 2016.

Constitution of India, 1950- Article 226- Petitioner applied for the post of drawing master along with other persons- respondent No.6 was selected – petitioner contended that respondent No.6 was not qualified and there were cuttings and over writings in the result sheet- held, that there is no tampering in the result sheet and the marks were awarded as per the notification- two years diploma in Art and Crafts was required – respondent No.6 had obtained the diploma and was

eligible – the petitioner had participated in the selection process and could not have challenged the same – writ petition dismissed.(Para-8 to 19)

Cases referred:

Manish Kumar Shahi Versus State of Bihar and others 2010(12) Supreme Court Cases 576
Madan Lal & Ors versus The State of Jammu & Kashmir and Ors 1995(2) SLR 209
Lila Dhar v. State of Rajasthan, 1981 (4) SCC 159

For the Petitioner : Mr. Ajay Sharma, Advocate.
For the Respondents : Mr. Anup Rattan & Mr. Romesh Verma,Additional Advocate Generals and Mr. J.k.Verma, Deputy Advocate General, for respondents No. 1 to 5. Respondent No.6 already ex-parte.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge

By way of present Civil Writ Petition filed under Article 226 of the Constitution of India, the petitioner has prayed for the following relief:-

> "(i) That selection and appointment of private respondent after summoning the appointment letter from the respondents may very kindly be quashed and set aside with direction to the respondents to reconsider the case of the petitioner by allowing him marks in consonance with annexure P-1 and select and appoint him as Drawing Master in Government Senior Secondary School, Haripur-Khol, Tehsil Paonta Sahib, District Sirmaur, H.P."

2. Briefly stated facts as emerged from the record are that pursuant to notice issued by the School Management Committee (for short 'SMC'), Government Senior Secondary School, Haripur-Khol, Tehsil Paonta Sahib, District Sirmaur, H.P, petitioner alongwith other candidates including respondent No.6 applied for the post of Drawing Master through 'SMC'. It also emerge from the record that the Deputy Director, Elementary Education granted permission to 'SMC' for appointing Drawing Master vide communication dated 15.11.2014 in above mentioned school. The 'SMC' after receipt of applications, conducted interviews on 2.11.2015, wherein respondent No.6 was declared selected and accordingly, he was engaged as Drawing Master in the school referred hereinabove. Since, present petitioner was not selected pursuant to interview aforesaid, he applied for certain information under Right to Information Act (for short 'RTI'). The respondents, pursuant to request having been made by the petitioner under RTI, supplied photocopy of result sheet prepared by the selection committee at the time of interview. As per the petitioner, there are cuttings with respect to the marks of interview, especially private respondent No.6, who has been declared selected and as such, entire selection process deserve to be quashed and set-aside.

3. Petitioner has further alleged that perusal of diploma certificate (annexure P-3) annexed by respondent No.6 alongwith his application, clearly suggests that same is not in consonance with the qualification, as prescribed in annexure P-1. Petitioner further alleged that respondent No.6 has allegedly passed diploma of Art & Crafts, which is not the qualification as prescribed in annexure P-1.

4. Mr. Ajay Sharma, learned counsel representing the petitioner, vehemently argued that bare perusal of the mark sheets, clearly suggests that the authorities concerned have tampered with the record solely with a view to offer appointment to respondent No.6 by ignoring other meritorious candidates including the petitioner. While referring to annexure P-3 i.e. certificate of diploma in Art & Crafts annexed by respondent No.6 at the time of his interview, Mr. Sharma, argued that same is not in consonance with the guidelines/regulations, as prescribed in annexure P-1 and as such, same could not be taken into consideration by the authority while

awarding marks in terms of the scheme of marking. Mr. Sharma, further stated that bare perusal of diploma annexure P-3, clearly suggests that respondent No.6 passed subjects of second year in first year, whereas subjects of first year in second year and as such, selection committee has erred in taking note of the same while awarding marks to respondent No.6 on the basis of the aforesaid certificate. Mr. Sharma, further stated that certificate annexure P-4, clearly suggests that petitioner has passed Applied Art & Craft course, which is equivalent to Bachelor of Arts and as such, interview committee ought to have granted more marks and as such, grave injustice has been caused to him. Learned counsel for the petitioner further claimed that as per notification annexure P-1, petitioner was entitled for grant of 10 marks, for the course of duration of three years, but he has been granted only 7.23 marks, which is not in accordance with the scheme of marking annexure P-1.Mr.Sharma,further contended that the petitioner at the time of interview produced experience certificate from H.P.Board of School Education and as such, he was also entitled to be given some marks on account of experience in terms of annexure P-1. Learned counsel for the petitioner while concluding his argument submitted that for three years duration course having undergone by the petitioner being equivalent of Bachelor of Arts, marks were required to be given to him and as such, respondents are liable to be directed to reconsider the case accordingly and prepare a fresh result sheet.

5. Mr. Romesh Verma, learned Additional Advocate General, vehemently argued that there is no illegality and infirmity in the selection of respondent No.6 because he has been selected strictly on the basis of the interview conducted by 'SMC' on 2.11.2015. He further stated that bare perusal of the mark sheet placed on record by the petitioner itself suggests that Sub Divisional Magistrate, Paonta Sahib, District Sirmaur being Chairman himself conducted the interviews alongwith other members, wherein respondent No.6, namely Hardeep Singh, was found to be more meritorious to the present petitioner. While referring annexure P-1, learned Additional Advocate General, contended that it clearly suggests that respondent No.6 procured 29.88 marks in total, whereas petitioner could only procure 27.49 marks and as such, he was rightly not selected for the post of Drawing teacher in Government Senior Secondary School, Haripur-Khol.

6. Learned Additional Advocate General, with a view to refute the allegations having been made in the petition as well as the submissions by the learned counsel for the petitioner that there is tampering in the market sheet, made available original record of selection made by 'SMC' to demonstrate that there is no cutting, whatsoever, as has been alleged by the petitioner. Mr. Verma, while inviting the attention of this Court to annexure P-1 forcibly contended that marking done by interview committee in its meeting held on 2.11.2015 is strictly in accordance with the scheme of marking as prescribed in annexure P-1 i.e. notification, dated 18.11.2014 and as such, there is no force, whatsoever, in the contention put forth on behalf of the petitioner and as such, same deserve to be dismissed.

7. We have heard the learned counsel for the parties and have gone through the record of the case.

8. During the proceedings of the case, learned Additional Advocate General, made available original record pertaining to the selection of respondent No.6, perusal whereof clearly suggests that 'SMC' initiated selection process for the post of Drawing Master on 2.11.2015 after obtaining necessary permission from the Deputy Director, Elementary Education, Sirmaur. Record further reveals that the petitioner as well as respondent No.6 alongwith other eligible candidates appeared before the interview committee headed by the Sub Divisional Magistrate, Paonta Sahib on 2.11.2015, on which date, interview committee on the basis of testimonials pertaining to education qualification found respondent No.6, namely Hardeep Singh more meritorious than the petitioner and as such, accordingly declared him selected. This Court perused the result sheet of the candidates compiled by the interview committee constituted by the SDM for interviewing the candidates for the post of Drawing Master in Government Senior Secondary School, Haripur-Khol. After perusal of the comparative merit/ result sheet, contention

put forth on behalf of the petitioner deserve to be rejected out rightly because this Court sees no tampering, if any, in the result sheet as alleged by the petitioner.

9. Close scrutiny of the result sheet made available on record clearly suggests that all the candidates, who appeared in the interview have been given marks strictly in accordance with the scheme of marking as per notification, dated 18.11.2014 (annexure P-1). Since, respondent No.6 i.e. selected candidate had procured 60% marks in 10+2, he was rightly awarded 6 marks out of 10 marks as provided under the scheme. Respondent No.6, who had secured 68.79% marks in diploma Art & crafts, has been awarded 6.88 marks out of 10 marks. Similarly, being resident of concerned patwar circle where Govt. Secondary school is located, respondent No.6 has been awarded 10 marks and as such, in total 22.88 marks have been awarded to respondent No.6 on the basis of testimonials/ qualifications out of 50 as prescribed under the scheme. The interview committee on the basis of viva-voce, has awarded 7 marks to respondent No.6 out of 10 marks. In total 29.88 marks have been procured by respondent No.6 in the interview.

10. Similarly, further perusal of result sheet reveals that petitioner namely Amit Singh, who had secured 52.6 marks in 10+2, has been awarded 5.26 marks out of 10 marks. The petitioner has been awarded 7.23 marks out of 10 marks for his diploma in Art & Craft, wherein petitioner has secured 72.32% marks. Since, the petitioner was also from the concerned Patwar circle, he has been also awarded 10 marks qua the same. As far as interview is concerned, petitioner has been granted 5 marks out of 10 marks and as such, in total petitioner secured 27.49 marks, which is definitely less than marks i.e. 29.88 secured by respondent No.6.

11. At this stage, it would be profitable to reproduce marking scheme (annexure P-1) as under:-

Drawing Master

Sr.No.	**Qualification**	**Marks**
1.	10+2 with atleast 50% marks	10
2.	Two year Diploma in Art and craft Teacher. Or Bachelor of Arts with Fine Arts/Visual Arts(Painting and Sculpture or applied Arts) an elective subject of 50% marks in Fine Arts. Or Master Decree in Fine Arts/Visual Arts(Painting and Sculpture).	10
3.	A person is Bachelor of Arts with Fine Arts/Visual Arts (Painting and Sculpture or applied Arts) as on elective subject of 50% marks in Fine Arts in Addition to Master Decree Fine Arts/Visual Arts (Painting and Sculpture).	**10**
4.	Permanent resident of the concern Patwar Circle where the High Secondary School located.	**10**
5.	Interview	**10**
	Total	**50**

12. Perusal of marking scheme as reproduced hereinabove, nowhere suggest that the petitioner, who had also passed his diploma in applied Art & Craft from Haryana State Board of Technical Education was entitled to some extra marks as claimed by him in the petition, rather clause-2 of the aforesaid notification suggest that either incumbent should have passed two years diploma in Art & Crafts or he should Bachelor of arts with Fine/Visual Arts(Painting and Sculpture or applied Arts) on elective subject 50% in Fine Arts. Admittedly, in the present case

petitioner had only passed diploma in applied Art & Craft and as such, there was no occasion for the interview committee to equate the same with the person having Bachelor of Arts with Fine Arts. Moreover, no document was placed on record by the petitioner suggestive of the fact that apart from two years in Art & Crafts he was also having Bachelor degree of Bachelor of Arts with Fine Arts.

13. This Court also perused the copy of diploma certificate annexure P-3, which clearly suggests that respondent No.6 passed diploma in Art & Crafts from the Punjab State Board of Technical Education and Industrial Training in 1st Division. Since, respondent No.6 Hardeep Singh secured 68.79% marks in diploma, he was rightly awarded 6.88 marks out of 10 strictly in terms of scheme referred hereinabove. Close scrutiny of aforesaid diploma certificate placed on record by respondent No.6 clearly suggest that respondent No.6 passed 1st year diploma course in the year, 2009 and second year course in 2011 and as such, there is no force in the contention put forth on behalf of the learned counsel for the petitioner that respondent No.6 has not passed diploma course in two years as required under the prescribed notification provided for the appointment to the post of Drawing Master.

14. This Court after carefully examining the pleadings as well as original record made available to this Court by the Principal, Government Senior Secondary School, Haripur-Khol, sees no force in the averments/allegations having been made by the petitioner in the writ petition and same appears to be frivolous, without any basis and same deserve to be rejected outrightly.

15. Petitioner participated in the said selection process, failed to make a grade,has approached this Court by way of present writ petition, which is not permissible at all. It is well settled law that candidate who participates in the selection process has no right to assail the same at subsequent time after having failed in the same.

16. Reliance is placed on the judgment of the Hon'ble Apex Court in **Manish Kumar Shahi Versus State of Bihar and others** 2010(12) Supreme Court Cases 576. The relevant para-16 of the judgment is reproduced as under:-

> "16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition. Reference in this connection may be made to the judgments in ***Mandan Lal vs. State of J&K*** 1995(3) SCC 486, ***Marripati Nagaraja v. Govt. of A.P.*** 2007(11) SCC 522, ***Dhananjay Malik v. State of Uttaranchal*** 2008 (4)SCC 171, ***Amlan Jyoti Borooah v. State of Assam*** 2009(3) SCC 227 and ***K.A.Nagamani v. Indian Airlines*** 2009(5)SCC 515."

17. It is well settled law that a candidate having taken a chance to appear in an interview and having remained unsuccessful, cannot turn round and challenge either the constitution of the selection Board or the method of Selection as being illegal; he is estopped to question the correctness of the selection. In this regard, reliance is placed in the case of **Madan Lal & Ors versus The State of Jammu & Kashmir and Ors** 1995(2) SLR 209. The relevant para-9 of the judgment is reproduced as under:-

> "9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful candidates being concerned respondents herein, were all found eligible in the light of (sic) marks obtained in the written test, to be eligible to be called for oral interview. Upto this

state there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the concerned Members of the Commission who interviewed the petitioners as well as the concerned contesting respondents. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, that they have filed that petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or Selection Committee was not properly constituted. In the case of **Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors (AIR 1986 SC 1043):[1986(1)SLR 699(SC)],** it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

18. In case of **Lila Dhar v. State of Rajasthan**, 1981 (4) SCC 159, the Hon'ble Apex Court has observed as under:-

" The appellant-petitioner having participated in the interview in this back ground, it is not open to the appellant petitioner to turn round thereafter when they failed in interview and contend that the provision of a minimum mark for interview was not proper."

19. Consequently, in view of detailed discussion made hereinabove, this Court does not see any merit in the petition and the same is accordingly dismissed. Pending application(s), if any, shall also stands disposed of. Record be returned to the learned Additional Advocate General.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Smt. Premvati and others. ……Appellants.
Versus
Vasu Dev …….Respondent.

RSA No. 108 of 2000.
Decided on: 7.11.2016.

Indian Succession Act, 1925- Section 63- The Land was owned by L – he died in the month of June, 1988- mutations were attested on the basis of the Will – the deceased was not competent to execute the Will as he remained ill at the time of the execution of the Will – the suit was decreed by the Trial Court – an appeal was preferred, which was allowed- held, that original Will was not produced before the Court – defendant has not stated anything about the scribe of the Will or the marginal witnesses – the marginal witness failed to identify his signatures on the Will due to poor eye-sight – the execution of the Will was not proved – appeal allowed – judgment and decree passed by the Appellate Court set aside while judgment and decree passed by the Trial Court restored. (Para-10 to 18)

Cases referred:

Kishan son of Shri Kundan versus Smt. Tulki Dev wd/o Shri Kundan, 2013 (1), Civil Court Cases 548 (H.P.)

Asha Devi vs. Smt. Tarsem Devi and ors., Latest HLJ 2015 (HP) 564

M.B. Ramesh vs. K.M.Veeraje Urs. and others, (2013) 7 SCC 490

For the appellant(s): Mr. Sumit Raj Sharma, Advocate.
For the respondent: Mr. G.D.Verma, Sr. Advocate with Mr. B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Justice Dharam Chand Chaudhary, J (Oral).

Plaintiffs are in second appeal before this Court. They are aggrieved by the judgment and decree passed by learned District Judge, Kinnaur Division at Rampur Bushahr, H.P. in Civil Appeal 109/1996, dated 27.9.1999, reversing thereby the judgment and decree dated 19.7.1996 passed by Senior Sub Judge, Kinnaur Division at Rampur Bushahr, Distt. Shimla in Civil Suit No. 137-1 of 1993/92 and dismissed the suit filed by them.

2. The subject matter of dispute in the present lis is land called as Kholti measuring about 16 biswas, Kashu Sataina, Khobar Kyar measuring 15 biswas which is part of land entered in Khata Khatoni No. 27/56 and 28/60 situate in Chak Jhana, Khata Khatoni No. 54/123 to 129, 55/136 to 138, 56/139 to 143, 60/143 and 69/147 situate in Chak Dansa, Khata Khatoni No. 70/148 to 152 situate in Chak Jagoni, Khata Khatoni No. 98/304 to 306 situate in Chak Dhar and the houses situate in *abadi deh* at Village Dansa, the ancestral property of late Lacchman, predecessor-in-interest of the parties to the suit. Lacchman had not acquired any property of his own. The suit property allegedly was co-parcenary property. Sh. Lacchman, their predecessor had died in the month of June, 1988. The respondent (hereinafter referred to as the defendant) allegedly managed the execution of 'Will' Ext. P-1 in his favour qua the land in dispute from deceased Lacchman in the year 1986. He allegedly was ill at that time, hence was not in a fit state of mind nor could have executed a valid Will. The plaintiffs when came to know about the existence of this forged and fictitious Will, requested the defendant not to take any benefit out of it but of no avail and to the contrary the mutations qua the land in dispute were attested on the basis of the Will, which according to the plaintiffs was forged and fictitious on 16.8.1989, 27.12.1989 and 21.2.1991, despite the objections they raised to the attestation thereof. Even after the attestation of the mutation also, they requested the defendant to admit their claim qua the land in dispute but of no avail, hence the suit for decree of declaration that Will dated 30.9.1986 Ext. P-1 was not executed by deceased Lacchman Dass in favour of defendant and the same is void, inoperative and not binding upon the plaintiffs. The mutations attested on the basis thereof were also sought to be declared as null, void and inoperative and the same were also sought to be quashed and set aside.

3. In the Written Statement, the defendant had contested the suit on the grounds of limitation, bad for non-joinder of necessary parties, maintainability and valuation etc. etc. On merits, while denying the contentions to the contrary, being wrong, it was pleaded that the land in dispute was inherited by deceased Lacchman from Daya Nand. It is, however, denied that the land was wrongly vested in the name of Lacchman. The deceased Lacchman allegedly rightly acted while executing the Will in question in his favour. It is denied that he had no right to execute the Will in question.

4. On the pleadings of the parties, learned trial Judge has framed the following issues:

"1. Whether late Sh. Lachhman executed a valid Will on 30.9.1986? OPD.

2. If issue no. 1 is not proved, whether the mutation of inheritance attested on the basis of the Will is not binding on the plaintiff and is liable to be set aside? OPP.

3. Whether the property is ancestral? OPP.

4. Whether the suit of the plaintiff is bad for non-joinder of necessary parties? OPD.

5. Whether the suit of the plaintiff is within limitation ? OPP.
6. Whether the suit of the plaintiffs is not maintainable? OPD.
7. Whether the suit of the plaintiffs has been properly valued for the purposes of court fee and jurisdiction? OPP.
8. Whether the plaintiffs has no locus-standi to file the present suit? OPD.
9. Relief.

5. Learned trial Court, on appreciation of the evidence produced by the parties, while answering issues No. 1 to 3 has concluded that the land though was not ancestral, however, it was held that the same could not have been bequeathed in favour of the defendant vide 'Will' Ext. P-1, which was held to be illegal, null and void. Consequently, the mutations attested on the basis thereof were also held to be illegal, null, void and inoperative against the rights and interest of the plaintiffs over the land in question. While answering issue No. 5 in favour of the plaintiffs, the suit has been held to be well within the period of limitation. The objection that the suit is bad for non-joinder of necessary parties, was answered against the defendant. Issues No. 6 & 8 were also answered in negative i.e. against the defendant and as regards valuation of the suit for the purposes of court fee and jurisdiction, the same was also answered in affirmative i.e. in favour of the plaintiffs. Consequently, learned trial Court has decreed the suit and declared the Will in question as null, void and inoperative. The mutations attested on the basis thereof were also declared as void and not binding on the rights of the plaintiffs over the suit land. In appeal, learned lower appellate Court has, however, accepted the appeal and reversed the judgment and decree passed by the trial Court.

6. The legality and validity of the impugned judgment has been questioned on the grounds, *inter alia*, that the execution of the 'Will' Ext. P-1 is not at all proved in accordance with law. The marginal witness examined by the defendant could not identify his thumb impression as well as that of the executants, deceased Lacchman. The requirement of Section 68 of the Indian Evidence Act, 1872, is not at all proved and as such, learned lower appellate Court has erroneously accepted the appeal and dismissed the suit. The original Will was not produced and proved in accordance with law. The Will Ext. P-1 is a legal and valid document has not at all been proved on record. Learned lower appellate Court, has allegedly mis-construed and mis-appreciated the evidence available on record in this regard. There being joint marriage of Lacchman and Dharma Nand, on the death of Dharma Nand, his share could have not been inherited by Lacchman to the exclusion of the plaintiffs and respondent who were class-I heirs and as such were entitled to inherit the share of Dharma Nand. Therefore, deceased Lacchman could not have alienated the land in dispute in favour of defendant in exclusion of the plaintiffs. Learned lower appellate Court is stated to have not appreciated the evidence available on record in its right perspective and as a result thereof concluded erroneously that the Will was a legal and valid document.

7. The appeal has been admitted on the following substantial question of law:

> "1. Whether the execution of the Will Ext. P-1 (sic. Ext. DA) has been proved by the propounder by only proving/producing the copy of Will without the production of the Original Will at the trial stage?"

8. Sh. Sumit Raj Sharma, Advocate, learned counsel representing the appellants-plaintiffs has strenuously contended that 'Will' Ext. P-1 is a genuine document which has not been proved on record in accordance with law. Therefore, according to Mr. Sharma, learned trial Court has rightly decreed the suit. The findings to the contrary recorded by learned lower Appellate Court have resulted in miscarriage of justice to the plaintiffs.

9. On the other hand, Mr. G.D.Verma, learned Sr. Advocate assisted by Mr. B.C.Verma, Advocate has urged that the 'Will' Ext. P-1 is a legal and valid document, duly proved from the evidence as has come on record by way of the own testimony of defendant and also the witness DW-2, he examined. It has, therefore been urged that learned lower appellate Court has appreciated the evidence available on record in its right perspective and has not committed any

illegality and irregularity while allowing the appeal on reversal of the judgment and decree passed by the trial Court.

10. The only substantial question of law, as formulated in the present appeal, has to be adjudicated upon in the light of the facts and circumstances of this case and also the evidence available on record as well as the law applicable in a case of this nature. At the outset, I would like to refer to the provisions contained under Section 63 of Indian Succession Act, which provides for necessary constituents of execution of a valid Will. The same reads as follows:-

(i) the Will must be attested by atleast two witnesses;

(ii) Each of these-

(a) must either see the testator sing or affix his mark to the Will or must see some other person sign the Will, in the presence and by the direction of the testator, or

(b) must receive from the testator a personal acknowledgement of his signature or mark or of the signature of such other person.

(iii) Each of these must sign the Will

(iv) They must sign in the presence of the testator.

11. This Court in ***Kishan son of Shri Kundan*** versus ***Smt. Tulki Dev wd/o Shri Kundan, 2013 (1), Civil Court Cases 548 (H.P.)***, after taking note of the legal position that not only the signature of the executor on the Will are required to be proved but the execution thereof should also be free from any suspicious circumstances and that if a Will is shrouded by suspicious circumstances, it cannot be treated as the last testamentary disposition of the testator in various judicial pronouncements, has held that the Will set up in that case was not the last testamentary disposition of the testator being shrouded by suspicious circumstances.

12. The law, in order to infer the execution of legal and valid Will, has been discussed by this Court in ***Smt. Asha Devi vs. Smt. Tarsem Devi and ors., Latest HLJ 2015 (HP) 564,*** wherein it has been held as follows:

"14. The adjudication of the legal questions takes us to the prerequisites of a legal and valid Will. A reference in this regard can be made to Section 63 of the Indian Succession Act, which reads as follows:

"63. Execution of unprivileged Wills.

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.
(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.
(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

15. Section 68 of the Evidence Act also provides for the requirement of law in the matter of execution of legal and valid Will, which reads as follows:

"68. **Proof of execution of document required by law to be attested.**

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the

Court and capable of giving evidence: Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied."

16. Additionally, Section 30 of the Hindu Succession Act provides that any Hindu may dispose of by Will or other testamentary disposition any property, which is capable of being disposed of by him in accordance with the provisions of Indian Succession Act or any other law for the time being in force applicable to Hindus."

13 The Apex Court in ***M.B. Ramesh vs. K.M.Veeraje Urs. and others, (2013) 7 SCC 490,*** has held as follows:

"16. We may, however, note in this behalf that as held by a Constitution bench of this Court in Chunilal Mehta Vs. Century Spinning and Manufacturing Company reported in AIR 1962 SC 1314, it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties, necessarily raises a question of law. That apart, as held by a bench of three judges in Santosh Hazari Vs. Purushottam Tiwari reported in 2001 (3) SCC 179, whether a particular question is a substantial question of law or not, depends on the facts and circumstances of each case. When the execution of the will of Smt. Nagammanni and construction thereof was the subject matter of consideration, the framing of the question of law cannot be faulted. Recently, in Union of India Vs. Ibrahim Uddin reported in 2012 (8) SCC 148, this Court referred to various previous judgments in this behalf and clarified the legal position in the following words:-

"67. There is no prohibition to entertain a second appeal even on question of fact, provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse."

17. At the same time we cannot accept the submission on behalf of the respondents as well that merely because the will was more than 30 years old, a presumption under Section 90 of the Indian Evidence Act, 1872 ('Evidence Act' for short) ought to be drawn that the document has been duly executed and attested by the persons by whom it purports to have been executed and attested. As held by this Court in Bharpur Singh Vs. Shamsher Singh reported in 2009 (3) SCC 687, a presumption regarding documents 30 years old does not apply to a will. A will has to be proved in terms of Section 63 (c) of the Succession Act read with Section 68 of the Evidence Act.

18. That takes us to the crucial issue involved in the present case, viz. with respect to the validity and proving of the concerned will. A Will, has to be executed in the manner required by S 63 of theSuccession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section "which is permissive and an enabling section permitting a party to lead other evidence in certain circumstances", as observed by this Court in paragraph 11 of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam reported in 2003 (2) SCC 91 and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time, as held in that very judgment the section cannot be read to absolve a party of his

obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available.

19. The relevant provisions of these three sections read as follows:

"Section 63 of the Succession Act "63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a) .....

(b) .....

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Section 68 of the Evidence Act

"68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving it's execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence..."

Section 71 of the Evidence Act

"**71**. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

20. In the present matter, there is no dispute that the requirement of Section 68 of the Evidence Act is satisfied, since one attesting witness i.e. PW-2 was called for the purpose of proving the execution of the will, and he has deposed to that effect. The question, however, arises as to whether the will itself could be said to have been executed in the manner required by law, namely, as perSection 63 (c) of the Succession Act. PW-2 has stated that he has signed the will in the presence of Smt. Nagammanni, and she has also signed the will in his presence. It is however contended that his evidence is silent on the issue as to whether Smt. Nagammanni executed the will in the presence of M. Mallaraje Urs, and whether M. Mallaraje Urs also signed as attesting witness in the presence of Smt. Nagammanni. Section 63 (c) of the Succession Act very much lays down the requirement of a valid and enforceable will that it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, and each of the witnesses has signed the will in the presence of the testator. As held by a bench of three judges of this Court (per Gajendragadkar J, as he then was) way back in R. Venkatachala Iyengar Vs. B N. Thimmajamma reported in AIR 1959 SC 443, that a will has to be proved like any other document except that evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, apart from the one under Section 68 of the Evidence Act."

14. Applying the above legal principles in the given facts and circumstances of this case, it would not be improper to conclude that the execution of the Will Ext. P-1 is not at all proved and the same rather is shrouded by suspicious circumstances cannot be treated to be the last testamentary disposition of the testator deceased Lacchman Dass by any stretch of

imagination. The present, as a matter of fact, is a case where cogent and reliable evidence qua scribe of the Will Ext. P-1 at the instance of the testator deceased Lacchman and attestation by two marginal witnesses, in the manner as provided under Section 63 (c) of the Indian Succession Act, is not at all proved.

15. The original Will has not seen the light of the day. The defendant, propounder thereof has not produced the same in evidence while in the witness box. It is an attested copy thereof, which has been tendered in evidence by learned counsel representing the plaintiffs in his own statement recorded separately. When the defendant has failed to produce the original Will, how he could have said, while in the witness box, that the same was executed by his father deceased Lacchman in his favour and that thereby the land in dispute was bequeathed to him exclusively in complete ouster of the plaintiffs, none else but his real brothers. Otherwise also, nothing has come on record in his statement while in the witness box as DW-1 as to who was the scribe of the Will. He has also not said anything about the marginal witnesses who witnessed the execution thereof in the manner as provided under Section 63 (c) of the Indian Succession Act.

16. Now, if coming to the statement of Chura Ram, no doubt, he claims himself to be one of the marginal witnesses to the Will Ext. P-1 and while in the witness box has deposed that the same was executed by deceased Lacchman at Rampur in favour of Vasu Dev (defendant), however, he expressed his ignorance that the same was reduced into writing by the scribe who sits near the side of one Megha Nand. Though, as per his version he had signed this document, however, due to weak eye-sight, expressed his inability to identify the same, meaning thereby that he has failed to identify his signatures on this document. Though, he tells us that the witnesses Moti Ram and Jagat Ram were also present, however, nothing has come in his statement that they had also put their signatures on this document. Interestingly enough, nothing has come on record to show in his statement that Will in question was reduced into writing at the instance of deceased Lacchman. The contents thereof were read over and explained to said deceased Lacchman in vernacular and that after understanding and admitting the same to be true and correct, he had put his signatures in the presence of all the witnesses. Also that, the witnesses had also put their signatures in the presence of testator. In other words, there is no evidence to show that the marginal witnesses have seen the testator while putting his signatures on the Will and the testator had also seen the marginal witnesses while putting their signatures on the Will in question. Therefore, for want of such evidence, it cannot be said by any stretch of imagination that Will Ext. P-1 is a legal and valid document. This is the only evidence produced by the defendant to prove the execution of 'Will' Ext. P-1, which in the opinion of this Court, is neither sufficient nor cogent and reliable. The facts and circumstances of this case rather are identical to ***M.B. Ramesh's case (supra).*** The point in issue in this case, therefore, is squarely covered by the judgment ibid.

17. Now, if coming to the evidence produced by the plaintiffs, plaintiff No. 2 has himself stepped into the witness box as PW-1. He has categorically stated that deceased Lacchman, being 80-90 years of age, was not in a sound disposing state of mind and neither he executed any Will in favour of the defendant nor he could have done so. As per his version, the Will in question is not a legal and valid document. Similar is the version of PW-2 Sh. Madan Lal. Both of them, though have been cross-examined at length, but in sundry. When the onus to prove that the Will executed in his favour is a genuine document has not been discharged by him at all, the same cannot be held as legal and valid by any stretch of imagination. Learned lower appellate Court has neither appreciated the evidence available on record nor legal position in its right perspective and as a result thereof the findings so recorded are erroneous, hence not legally sustainable. The substantial question of law is decided accordingly.

18. In view of what has been said hereinabove, this appeal succeeds and the same is accordingly allowed. Consequently, the judgment and decree passed by learned lower appellate Court is quashed and set aside and that of learned trial Court is affirmed. However, no orders so as to costs.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

ICICI Lombard General Insurance Co. ….Petitioner
Versus
Bimla Devi and others. ….Respondents

CWP No. 3922 of 2010
Date of decision: 8.11.2016

Motor Vehicles Act, 1988- Section 166- claimant is a house wife – her income can be taken as Rs.6,000/- per month- the loss of income has to be taken as Rs.3,600/- per month in view of the disability sustained by her - applying the multiplier of 11, loss of future income will be Rs.4,75,200/- - the claimant will face difficulty in movement – hence, in addition to Rs.20,000/- spent during the treatment, Rs.10,000/- granted for future expenses towards movement , Rs.30,000/- awarded towards loss of amenities - Rs.20,000/- awarded for future treatment – total amount of Rs.7,45,200/- awarded as compensation with interest @ 9% per annum- cost of Rs.10,000/- also awarded. (Para-13 to 22)

Cases referred:

National Insurance Company Ltd. Vs. Soma Devi 2003 ACJ 1919
New India Assurance Co. Ltd. Vs. Prem Chand and others, 2008 (1) ACJ 679
United India Insurance Company Ltd. Vs. Shila Datta, (2011) 10 SCC 509
Arun Kumar Agrawal and another Vs. National Insurance Company Limited and others (2010) 9 SCC 218

For the Petitioner: Mr.Jagdish Thakur, Advocate.
For the Respondents: Mr.Karan Singh Kanwar, Advocate, for respondent No. 1.
Mr.Janesh Gupta, Advocate, vice Mr.I.N. Mehta, Advocate, for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Vivek Singh Thakur J. (Oral).

Present petition has been filed by petitioner Insurance Company assailing the award dated 9.3.2010, passed by the Motor Accident Claims Tribunal-II, Solan (hereinafter referred to as the MACT) in MAC Petition No. 17-NL/2 of 2009, vide which respondent No. 1/claimant has been awarded compensation of Rs. 10,00,000/- for her disability suffered on account of accident dated 11.12.2008 during her travel in Bus No. HP-64-4697 owned by respondent No. 2 and being driven by respondent No. 3.

2. I have heard learned counsel for the parties and perused documents placed on record.

3. Learned counsel for petitioner-Company submits that in present petition impugned award has been assailed on the ground of perversity and in view of ratio laid down by this Court in ***National Insurance Company Ltd. Vs. Soma Devi 2003 ACJ 1919*** and ***New India Assurance Co. Ltd. Vs. Prem Chand and others, 2008 (1) ACJ 679***, present petition is maintainable against the award passed by the MACT.

4. In Soma Devi's case, referred supra, Full Bench of this Court has held as under:-

> *"**15.**It, therefore, becomes abundantly clear that in all such like cases where the award on the face ofit is a perversity, or is based on fraud, and the insurance company has no remedy under the MotorVehicles Act of either challenging the*

award in appeal or being either to have it recalled or reviewedby the Tribunal itself, the power of judicial review by this Court in the exercise of its extraordinary jurisdiction under Articles 226/227 of the Constitution can always be invoked and exercised by thisCourt in dispensing justice to the parties.

***16**. For the foregoing reasons, therefore, while dealing with the reference made to us vide singleBench order dated 18.7.2003, we hold that with respect to an insurer, if it challenges the awardpassed by the Motor Accidents Claims Tribunal only on the ground of compensation being high,excessive or unreasonable, in a petition filed under Articles 226/227 of the Constitution, such a petition in view of Section 173 of Motor Vehicles Act, 1988 is not maintainable. This was the limited,rather the only question of law, which was referred to us for consideration and we have answered itaccordingly. All the writ petitions shall now be listed before the appropriate single Benches fordisposal according to law.*

Reference answered and disposed of."

5. Following ratio of law laid down by Full Bench in Soma Devi's case, Division Bench of this Court in Prem Chand's case supra had entertained petition under Article 226 of Constitution of India on the ground of perversity with following observations:-

*"**5**. We are bound by the decision of the Full Bench of this court and according to us the only two grounds on which the award passed by Motor Accidents Claims Tribunal can be challenged in a writ petition by the insurance company are that the award is perverse or that it is based on fraud. In the present case, there is no allegation of fraud and the only allegation is that the award is perverse."*

6. It is submitted on behalf of petitioner that at the time of filing of present petition, petitioner Insurance Company had limited right to assail the impugned award, as present petition has been filed prior to pronouncement of Hon'ble Supreme Court in ***United India Insurance Company Ltd. Vs. Shila Datta,*** reported in ***(2011) 10 SCC 509*** and therefore, petitioner was not having any alternative remedy to assail quantum of compensation awarded in impugned award, rather only available remedy to petitioner was present petition and thus petition be decided on merit.

7. Learned counsel for respondent submits that accident had occurred in the year 2008 and respondent No. 1/claimant is waiting for her lawful claim for last eight years. Claim petition was also decided in the year 2010 and for more than last six years, present petition is pending in this Court and therefore, he has prayed that despite the fact that alternate remedies are available to petitioner under the provisions of Motor Vehicles Act to assail the impugned award by filing an appeal, present petition may be decided on merits in the interest of justice and for benefit of poor respondent No. 1/claimant, who is suffering for non release of amount in her favour due to pendency of present lis challenging the award passed in her favour by the MACT.

8. In similar matter coordinate bench of this Court had dismissed CWP No. 542 of 2011 vide judgment dated 24th April, 2012, titled *ICICI Lombard General Insurance Company Limited Vs. Sh. Hem Raj and another*, being non-maintainable. The said judgment was assailed in LPA No.269 of 2012 and Division Bench of this Court vide judgment dated 6th December, 2012 had decided the issue in dispute between parties on merits leaving the question of maintainability of writ petition against the impugned award open.

9. Issue involved in present petition can be adjudicated and decided on the basis of material placed on record and pleadings of parties. Self imposed restriction/rule of exclusion of writ jurisdiction on account of availability of alternative remedy does not operate as an absolute bar to entertain a writ petition. It is a rule of discretion to be exercised depending upon facts of each case. I am of the opinion that in facts and circumstances, it would be in the interest of justice to adjudicate the dispute between parties herein present petition on merits on equitable ground as respondent No. 1/claimant is being deprived of the fruit of award passed in her favour in the year 2010 and relegating the parties to another round of litigation for adjudicating the

matter under the remedy available to petitioner-company under Motor Vehicles Act would result into undue harassment and grave hardship to respondent No. 1/claimant for no fault on her part. Therefore, in peculiar facts and circumstances of this case, especially in the interest of claimant, I proceed to decide this petition on merits by exercising jurisdiction under Article 226 of Constitution of India, without going into question of alternative remedy available to petitioner to assail the impugned award.

10. Learned counsel for petitioner-Company submits that present award deserves to be interfered with for the reasons that there is no positive evidence on record that respondent No. 1/claimant was earning Rs. 10,000/- per month and disability suffered by respondent No. 1 is 42%, whereas she has been awarded compensation by considering her working disability as 60%. It is further submitted that as PW-2 Laxmi Ram, appearing for respondent No. 1, had himself stated that respondent No. 1/claimant belonged to IRDP family and therefore, her income cannot be considered as Rs. 10,000/- per month at any stretch of imagination.

11. On the contrary, learned counsel appearing for respondent No. 1/claimant has supported the award passed by the MACT on the ground that there is no evidence on record that respondent No. 1/claimant belonged to IRDP family except irrelevant bald assertion of PW-2 without any substantial material and no such suggestion was put to her. Further that petitioner-company has not disputed income of respondent No. 1/claimant as Rs. 10,000/- during her cross-examination. He also submits that in given facts and circumstances of a case working disability of a person may be more or less than percentage of physical disability and in present case, respondent No. 1/claimant has suffered 42% physical disability of lower limb which definitely affects her working ability more than percentage of disability of the said limb and further submits that working disability taken as 60% by the MACT is on lower side, whereas for lower limb with 42% disability, working disability of a person will be more than that of 60%.

12. Though there is no positive evidence on record to establish that respondent No. 1 was earning Rs. 10,000/- per month at the time of accident, however, at the same time contention of petitioner-Company is also not tenable that at the time of accident respondent No. 1/claimant belonged to IRDP family as self stated hazy line of PW-2 Laxmi Ram is not sufficient to hold that respondent No. 1/claimant was in IRDP at the time of accident or at the time of his making statement. There is no document on record showing that respondent No. 1/claimant was in IRDP family at the time of accident or even thereafter.

13. So far as working capacity of respondent No. 1 is concerned, same has rightly been determined by the MACT, because working disability cannot be equal to percentage of physical disability of a person in every case. Working disability will vary in each case irrespective of percentage of physical disability depending upon loss of limb or damage to part of the body and also nature of work performed by victim. In facts and circumstances of the case working disability may be lesser and even negligible than physical disability and in some cases, lesser physical disability may have larger effect on working disability of a victim. In present case, there is disability of lower limb to the extent of 42% and in life, for every movement, a person depends upon lower limb. Therefore, even 60% disability may be considered to be taken on the lower side, but as there is also no positive evidence for establishing extent of working disability of respondent No. 1/claimant, in my opinion on the basis of guess work, the MACT has rightly taken the working disability as 60%.

14. In ***Arun Kumar Agrawal and another Vs. National Insurance Company Limited and others (2010) 9 SCC 218***, the Apex Court, for an accident occurred prior to 2003, has considered income of a housewife as Rs. 5,000/-. Hon'ble Mr. Justice A.K. Ganguly, J. in his concurring conclusion/paras, has observed as under:-

> *"**41**. Despite the clear constitutional mandate to eschew discrimination on grounds of sex in Article 15(1) of the Constitution, in its implementation there is a distinct gender bias against women and various social welfare legislations and also in judicial pronouncements.*

....

44. *This bias is shockingly prevalent in the work of Census. In the Census of 2001 it appears that thosewho are doing household duties like cooking, cleaning of utensils, looking after children, fetchingwater, collecting firewood have been categorized as non-workers and equated with beggars,prostitutes and prisoners who, according to Census, are not engaged in economically productivework. As a result of such categorization about 36 crores (367 million) women in India have beenclassified in the Census of India, 2001 as non-workers and placed in the category of beggars,prostitutes and prisoners. This entire exercise of Census operation is done under an Act ofParliament.*

....

49. *Work is very vital to the system of gender reconstruction in societies and in this context masculineand feminine work is clearly demarcated. The question which obviously arises is whether Censusdefinition of work reflects the underlying process of gender discrimination.*

50. *Women are generally engaged in homemaking, bringing up children and also in production ofgoods and services which are not sold in the market but are consumed at the household level. Thus,the work of women mostly goes unrecognized and they are never valued. Therefore, in the categorization by the Census what is ignored is the well known fact that womenmake significant contribution at various levels including agricultural production by sowing,harvesting, transplanting and also tending cattles and by cooking and delivering the food to thosepersons who are on the field during the agriculture season."*

15. In absence of other evidence on record, Rs. 5,000/- per month income of house wife was considered to be appropriate for an accident occurred prior to 2003. In present case date of accident is 11.12.2008. Even it is considered that respondent No. 1/claimant was performing work equivalent to a labourer then also her earning is to be considered that of a labourer. In the year 2003 earnings of house wife were taken as Rs. 5,000/-. In the year 2010, this earning is bound to be increased 30% to 50% i.e. Rs. 6,500/- to Rs. 7,500/-. In the year 2010, daily wage of a labourer was more than Rs. 200/- per day i.e. more than Rs. 6,000/- per month. Even considering earning of respondent No. 1/claimant on lower side, it would be appropriate to consider it to be Rs. 6,000/- per month.

16. Considering income of respondent No. 1/claimant as Rs. 6,000/- per month, loss of income suffered by her comes to be Rs. 3,600/- per month. The MACT has rightly applied multiplier of 11 and after applying this multiplier, loss of future income comes to be Rs. 4,75,200/-.

17. The amount awarded under the heads of amount spent on medicines and in hospital and also for pain and sufferings warrants no interference. However, keeping in view nature of disability, particularly lower limb of the body, respondent No. 1 will definitely face difficulty in movement and some extra care and arrangement causing some extra expenditure for her movement, will be required. Therefore, under head of transportation, besides Rs. 20,000/- spent during the treatment, Rs. 10,000/- also required to be granted for future expenses to be incurred for her movement in life. Besides this, respondent No. 1/claimant is also entitled for loss of enjoyment of amenities to the extent of Rs. 30,000/-

18. At the time of filing petition and also at the time of leading evidence by way of affidavit, respondent No. 1 has clearly stated that she was under treatment at that time. The MACT has awarded Rs. 80,000/- for amount spent on medicine and also amount of Rs. 10,000/- with respect to amount spent in hospital, but nothing has been awarded for undergoing treatment and for future treatment. Therefore, respondent No. 1/claimant is also entitled for Rs. 20,000/- for future treatment and care.

19. In view of above discussion respondent No. 1/claimant is held entitled for following amount of compensation:-

1.	Loss of income:	Rs. 4,75,200/-
2.	Amount spent on medicines:	Rs. 80,000/-
3.	Amount spent in hospital:	Rs. 10,000/-
4.	Amount for future treatment and care.	Rs. 20,000/-
5.	Pain and sufferings:	Rs. 1,00,000/-
6.	Loss of enjoyment and amenities.	Rs. 30,000/-
7.	Transportation including future Expenditure for life time.	Rs. 30,000/-
	Total	**Rs. 7,45,200/-**

20. It is further contended on behalf of the petitioner company that the MACT has awarded interest @12% per annum in the year 2010, which was on higher side at the relevant point of time. Considering the date of filing of petition as well as decision of claim petition, it would be appropriate to award interest @9% per annum from the date of filing of the petition, instead of 12% per annum on the amount of compensation.

21. Impugned award is modified in above terms. Needless to say that respondent No. 1/claimant is also entitled to the cost of petition to the tune of Rs. 10,000/- assessed by the MACT.

22. Registry is directed to calculate the amount adding interest to which respondent No. 1/claimant is entitled on the basis of modified award and the said amount along with up to date proportionate interest be released in her favour by remitting the same in her saving bank account, to be furnished by her counsel and the excess amount, if any, along with up to date proportionate interest, shall be refunded to the petitioner-company by remitting the same to its bank account, particulars of which shall be furnished by its counsel.Petition stands disposed of in above terms along with pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Shri Avtar Singh ....Appellant

Versus

Sh. Tilak Raj & another ....Respondents

FAO No. 355 of 2012
Decided on : 11.11.2016

Motor Vehicles Act, 1988- Section 166- Monthly income of the claimant was Rs.5,000/- - claimant had sustained 25% permanent disability- claimant was 35 years at the time of accident – Tribunal had erred in applying the multiplier of 16- multiplier of 14 is applicable- thus, the claimant is entitled to Rs.1250 x 12 x 14= Rs.2,10,000/- - amount awarded under other head is maintained and total compensation of Rs.3,34,000/- awarded with interest @ 7.5% per annum- the claim of third party cannot be defeated on the ground of breach of the terms and conditions of the policy – the insurer saddled with liability with the right to recovery.(Para-16 to 24)

Cases referred:

Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the Appellant : Mr. Ramakant Sharma, Advocate.
For the Respondents: Nemo for respondent No. 1.
Mr. P.S. Chandel, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the judgment and award, dated 5th June, 2012, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (for short 'the Tribunal') in MAC Petition No. 42 of 2008, titled as Tilak Raj versus Shri Avtar Singh & others, whereby compensation to the tune of Rs. 3,64,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant and appellant-owner was saddled with liability (for short 'the impugned award').

2. The claimant, driver and insurer have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

3. The owner-insured has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellant-owner/insured argued that the Tribunal has fallen in an error in saddling him with the liability and the amount awarded is excessive.

5. Thus, the following questions are to be determined in this appeal:

1. Whether the Tribunal has rightly saddled the owner-insured with liability and discharged the insurer?

2. Whether the amount awarded is adequate?

6. In order to determine the aforesaid questions, it is necessary to examine the pleadings of the parties and record.

7. The claimant had invoked the jurisdiction of the Tribunal for grant of compensation to the tune of Rs. 6,00,000/- as per the break-ups given in the claim petition.

8. The respondents resisted and contested the claim petition by filing replies.

9. Following issues came to be framed by the Tribunal:

"1. Whether the petitioner has suffered injuries due to rash and negligent driving of Qualis, bearing No. PB-18-J-0074 by its driver-respondent No. 2, as alleged? ..OPP

2. If Issue No. 1 is proved in affirmative, whether the petitioner/claimant is entitled to compensation, if so, to what amount and from which of the respondents? …OPP

3. Whether the petition is not maintainable in the present form?…OPRs

4. Whether the vehicle in question was being driven by respondent No. 2 at the time of accident in violation of the terms and conditions of the Insurance Policy? …OPR-3

5. Whether the respondent No. 2 was not holding a valid and effective driving licence to drive the vehicle in question at the time of accident?…OPR-3

6. Relief."

10. The parties led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that the driver was not holding a valid and effective driving licence at the time

of accident, the owner-insured has committed willful breach, saddled him with liability and discharged the insurer and granted compensation to the tune of 3,64,000/- with interest @ 7.5% per annum in favour of the claimant.

Issue No. 1

11. There is no dispute qua findings recorded on issue No. 1. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

Issue No. 3

13. The respondents have not led any evidence to prove that the claim petition was not maintainable, thus have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on Issue No. 3 are upheld.

Issues No. 4 & 5

14. The Tribunal has held that the driver was not having a valid and effective driving licence at the time of accident and the same was in the name of Jaswinder Singh, son of Shri Karam Singh and not in the name of Sarvjeet Singh, son of Shri Balbir Singh. Further, it has recorded that there was no evidence on the record to show that the owner-insured had engaged the driver after exercising due care and caution and has taken steps as required under law while engaging driver.

15. Having said so, I am of the considered view that the Tribunal has rightly recorded the findings that the driver was not having a valid and effective driving licence at the time of accident and the owner-insured has committed willful breach. Thus, the findings, recorded by the Tribunal on issues No. 4 & 5 are upheld.

Issue No. 2.

16. The Tribunal has assessed the monthly income of the claimant-injured at Rs. 5,000/- per month and held that the claimant has suffered 25% permanent disability and granted him compensation to the tune of Rs. 15,000/, under the head 'loss of dependency'. The claimant-injured has not questioned the same. Accordingly, the same is upheld.

17. The age of the claimant-injured was 35 years at the time of accident. The Tribunal has fallen in an error in applying the multiplier of '16'.

18. The multiplier of '14' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

19. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 1250 x 12 x 14 = Rs. 2,10,000/- under the head 'loss of dependency'.

20. The amount awarded under the other heads is maintained.

21. Accordingly, the claimant-injured is held entitled to total compensation under the following headswith interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization,

(i) loss of dependency :	Rs. 2,10,000/-
(ii) Medical expenses :	Rs. 14,000/-
(iii) Attendant charges, special diet and transportation:	Rs. 15,000/-
(iv) Loss of income:	Rs. 15,000/-
(v) Pain and suffering:	Rs. 30,000/-

(vi) Loss of amenities of life: Rs. 50,000/-

Total: Rs. 3,34,000/-

22. Now, the question is- who is to be saddled with liability.

23. As discussed hereinabove, the owner-insured has committed willful breach. The claimant is the third party.

24. It is a beaten law of the land that right of third party cannot be defeated and even if the owner-insured has committed breach, the insurer has to satisfy the award, with right of recovery.

25. Viewed thus, the insurer is saddled with the liability, with right of recovery.

26. Learned Counsel for the appellant-insured stated at the Bar that an amount of Rs. 25,000/- stands already deposited before the Registry.

27. The insurer is at liberty to lay a motion before the Tribunal for recovery of the amount.

28. The insurer is directed to deposit the awarded amount minus the amount already deposited by the owner-insured before the Registry within a period of eight weeks from today.

29. The Registry is directed to release the awarded amount in favour of the claimant-injured, strictly as per the terms and conditions contained in the impugned award after proper identification, through payees' account cheque and by depositing the same in his account.

30. The impugned award is modified, as indicated hereinabove and the appeal is disposed of.

31. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Brij Lal (since deceased) through his LRs Manohar Lal & Ors. ….Appellants-Plaintiffs
Versus
Shakti Chand ..Respondent-Defendant

Regular Second Appeal No.270 of 2006.
Judgment Reserved on: 19.09.2016.
Date of decision: 11.11.2016

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that she is owner in possession of the suit land – defendant has no right over the same - previous owner K had not executed any Will – the defendant pleaded that K had executed a Will in favour of the defendant and he has become the owner after the death of K – suit was decreed by the Trial Court- an appeal was filed, which was allowed- held in second appeal that plaintiff had not appeared in the witness box to prove that Will was a forged document and adverse inference has to be drawn against her – the deceased had put her thumb impression on the Will and plaintiff had not sought the comparison of the thumb impression to determine the genuineness of the same – the execution of the Will was proved by the defendant by leading cogent and convincing evidence – the Appellate Court had rightly held that the execution of the Will was proved – appeal dismissed.(Para-12 to 35)

Cases referred:

Madhusudan Das vs. Smt.Narayani Bai and Others, AIR 1983 SC 114
H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443

Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529
Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40
Khatri Hotels Private Limited and Another vs. Union of India and Another, (2011)9 SCC 126
Man Kaur (Dead) by LRs. Vs. Hartar Singh Sangha, (2010)10 SCC 512, Rattan Dev vs. Pasam Devi, (2002)7 SCC 441
Iswar Bhai C Patel alias Bachu Bhai Patel vs. Harihar Behera and Another, (1999)3 SCC 457
Kamlesh Rani vs. Balwant Singh, 2010(3) Shim.L.C. 141.

For the Appellants: Mr.Ankush Dass Sood, Senior Advocate with Mr.Rakesh Kumar, Advocate.
For Respondents No.1, 2, 4 to 6.: Mr.G.D. Verma, Senior Advocate with Mr.Romesh Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 24.03.2006, passed by learned District Judge, Hamirpur, District Hamirpur, H.P., reversing the judgment and decree dated 17.06.2004, passed by the learned Civil Judge(Junior Division)-1, 1st Class-I. Hamirpur, District Hamirpur, H.P., whereby the suit filed by late Smt.Geeta Devi, predecessor-in-interest of the appellants-plaintiffs, has been decreed.

2. The brief facts of the case are that late Smt.Geeta Devi, predecessor-in-interest of the appellants-plaintiffs *(herein after referred to as the 'plaintiff'),* filed a suit for declaration with consequential relief of permanent injunction against the respondent-defendant *(hereinafter referred to as the `defendant')* stating therein that she is owner in possession of the suit land comprised in Khata No.70, Khatauni No.87, Khasra Nos.535/414, 555/453, 454, 557/470, Kita 4 measuring 10 Kanal 11 Marlas, situated in Tika Ramehra, Tappa Mehlta, Tehsil Bhoranj, District Hamirpur, H.P. and land comprised in Khata No.49, Khatauni No.83, Khasra Nos.1064, 1068, Kita 2 area 13 Marlas to the extent of 1/7th share and Khata No.46, Khatauni No.87, Khasra No.1092, area measuring 13 Marlas and Khata No.47, Khatauni No.88, Khasra No.1090, area 3 Marla, 1/7th share situated in Tika Loharni Mauza Mehlta, Tehsil Bhoranj, District Hamirpur, H.P. (herein after referred to as the *`suit land'*).

3. It is averred in the plaint that plaintiff Geeta Devi was daughter and Smt.Kaulan Devi was wife of Shri Paras Ram. It is further averred that Shri Paras Ram also married Smt.Nikki Devi and Smt.Kalan Devi, who were died issueless. Thereafter, Shri Paras Ram was also died. It has been averred by the plaintiff that a portion of the suit land was acquired by Smt.Kaulan Devi from her husband Shri Paras Ram. The plaintiff has further averred that she is the legal heir of Smt.Kaulan Devi, who died on 31.10.1993, and after the death of Smt.Kaulan Devi, she became owner in possession of the suit land. It has also been averred that the defendant is stranger to the suit land and has no right, title or interest over the same. It has been averred that the defendant started interfering with the ownership and possession of the plaintiff over the suit land with effect from the 1st week of February, 1994 on the ground of execution of Will dated 25.10.1993, purported to have been executed in his favour by Smt.Kaulan Devi. It has further been pleaded that Smt.Kaulan Devi has not executed any valid Will in favour of the defendant, as she was not in sound disposing state of mind before her death and as such she was unable to execute the alleged Will dated 25.10.1993. The alleged Will, set up by the defendant, is forged, false and fictitious and the same has been prepared fraudulently after the death of Smt.Kaulan Devi in connivance with the scribe and witnesses. It has also been averred that the alleged Will is the result of undue influence and importunity and thus the same is illegal, null and void and is not binding on the plaintiff. The plaintiff has sought declaration of her

ownership and possession over the suit land by restraining the defendant from interfering with her ownership and possession over the suit land.

4. The defendant resisted and contested the suit by filing written statement. It has been admitted by the defendant that the suit land was owned and possessed by Smt.Kaulan Devi wife of Shri Paras Ram. It has also been admitted that the plaintiff is the daughter of Paras Ram. It has been asserted by the defendant that after the death of Smt.Kaulan Devi, he succeeded the suit land on the basis of valid Will dated 25.10.1993 (Ex.DW-2/A) executed by her in her sound disposing state of mind. It has been averred that the defendant and his parents were looking after and maintaining Smt.Kaulan Devi for the last several years. Smt.Kaulan Devi died on 31.10.1993. It has further been averred by the defendant that the plaintiff was step-daughter of Smt.Kaulan Devi, as she was born to Smt.Nikki Devi wife of Shri Paras Ram, who died within a few days of birth of the plaintiff. It has further been averred that the plaintiff was taken away by her maternal uncle and brought up by him. The marriage of the plaintiff was also performed by her maternal uncle. It has been averred by the defendant that after the death of Smt.Kaulan Devi, he is owner in possession of the suit land and the plaintiff is not entitled to any relief, much less to the discretionary relief of permanent injunction.

5. On the pleading of the parties, the learned trial Court framed the following issues:-

> "1. Whether the plaintiff is entitled to the relief of declaration and permanent injunction, as prayed ? OPP.
>
> 1-A. Whether Smt.Kalan Devi has executed a valid and registered Will dated 25.10.1993 in favour of the defendant, as alleged? OPD.
>
> 2. Relief."

6. The learned trial Court decided both the issues in favour of the plaintiff and accordingly decreed the suit of the plaintiff with costs. The appeal preferred by the defendant before the learned Appellate Court was allowed with costs and the judgment and decree of the learned trial Court was reversed.

7. This second appeal was admitted on the following substantial question of law:

> *"(1) Whether there has been misreading of evidence by the learned first appellate Court who also not recorded the reasoning for reversal of the findings?*

8. Mr.Ankush Dass Sood, learned Senior Counsel, argued that judgment passed by learned first appellate Court deserves to be quashed and set aside since same is not based upon the correct appreciation of evidence as well as of law. Mr.Sood further contended that bare perusal of material available on record clearly suggests that Will Ex.DW-2/A is shrouded by suspicion and could not be accepted being a fake and forged document. Mr.Sood strenuously argued that defendant miserably failed to demonstrate on record that Will Ex.DW-2/A was genuine and was actually executed by deceased Paras Ram in sound and disposing state of mind and as such no reliance could be placed on the same. Mr.Sood further argued that learned District Judge being first appellate Court wrongly determined issue No.1A in favour of defendant-respondent No.1, which is contrary to sufficient evidence on record. As per Mr.Sood, there was sufficient evidence on record that Will Ex.DW-2/A, dated 25.10.1993 executed by Smt.Kaulan Devi in favour of defendant was shrouded by suspicious circumstances and as such onus was upon the defendant being propounder of the Will to dispel such suspicious circumstances. But perusal of evidence led on record clearly suggests that defendant was not able to prove beyond reasonable doubt that Will Ex.DW-2/A was free from suspicion. With a view to demonstrate his aforesaid arguments, Mr.Sood invited the attention of this Court to the judgment passed by learned trial Court, wherein learned trial Judge, while discussing the evidence on record, came to the conclusion that Will Ex.DW-2/A in question was shrouded by suspicious circumstances and in this regard he culled out suspicious circumstances in para-22 of his judgment dated 17.6.2004.

9. Mr.Sood, while specifically referring to para-22 of the judgment, made serious attempt to persuade this Court that judgment passed by learned trial Court, wherein Will Ex.DW-2/A was held to be shrouded by suspicious circumstances, is based upon correct appreciation of evidence led on record by the plaintiff as well as law and as such same deserves to be upheld. While concluding his arguments, Mr.Sood forcefully contended that findings of fact returned by learned trial Court could not be reversed by the learned first appellate Court without assigning there sufficient/plausible reasons, but as per him, perusal of judgment passed by learned first appellate Court, nowhere suggests that learned first appellate Court while differing with the judgment passed by the learned trial Court assigned sufficient reasons as required under Section 107 of the Code of Civil Procedure as well as judgment of Hon'ble Apex Court in ***Madhusudan Das vs. Smt.Narayani Bai and Others, AIR 1983 SC 114*** and as such judgment passed by the learned first appellate Court deserves to be quashed and set aside.

10. To the contrary, Shri G.D. Verma, learned Senior Counsel representing the respondent, supported the judgment passed by the first appellate Court. Mr.Verma, argued that judgment passed by learned first appellate Court is based upon correct appreciation of evidence available on record and as such there is no scope of interference, whatsoever, of this Court in the present facts and circumstances of the case. Mr.Verma further contended that Will Ex.DW-2/A was duly executed by deceased Smt.Kaulan Devi in favour of defendant in sound and disposing state of mind and as such same could not be held to be shrouded by suspicious circumstances by the learned trial Court. During arguments having been made by Mr.Verma, he made this Court to travel through the statements made by the plaintiff witnesses as well as documents placed on record to demonstrate that at no point of time plaintiff was able to prove on record that Will Ex.DW-2/A is not genuine document executed by deceased Smt.Kaulan Devi. Mr.Verma further argued that plaintiff miserably failed to lead evidence, be it ocular or documentary, on record suggestive of the fact that Will Ex.DW-2/A was falsely got executed by the defendant using force and undue influence upon testatrix Smt.Kaulan Devi. While concluding his arguments, Mr.Verma, invited the attention of this Court to the judgment passed by the first appellate Court and contended that judgment passed by first appellate Court is based upon correct appreciation of evidence on record and learned first appellate Court, while differing with the judgment passed by trial Court, has assigned sufficient reasons in support of its findings that Will Ex.DW-2/A is valid document, duly executed by Smt.Kaulan Devi in sound and disposing state of mind. He also stated that once suit was filed by the plaintiff alleging therein that Will Ex.DW-2/A set up by defendant is a result of fraud, onus was upon plaintiff to prove the validity of the Will Ex.DW-2/A that the same is not genuine document and is shrouded by suspicious circumstances, by way of leading cogent and convincing evidence, but perusal of material made available on record, nowhere suggests that Will Ex.DW-2/A is result of fraud as alleged by the plaintiff.

11. I have heard learned counsel for the parties and gone through the record of the case.

12. Needless to say that law regarding nature and onus of the proof of the Will is by way of propounder and in that regard the manner in which the evidence is required to be appreciated has been duly prescribed in the judgment passed by the Hon'ble Apex Court in ***H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443***.

13. Guidelines framed in ***H.Venkatachala Iyengar*** case (*supra*) were further reiterated by Constitutional Bench of Hon'ble Apex Court in ***Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529.*** The Court held:

> "4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of

proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no. such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested. (Page-531)

14. Now, this Court would be adverting to the evidence led on record by the respective parties to explore the answer to substantial question of law, *"whether there has been mis-reading of evidence by the learned first appellate Court and whether no reasons have been recorded by learned first appellate Court while reversing the findings returned by the learned trial Court that Will Ex.DW-2/A was shrouded by suspicious circumstances".* Keeping in view the pleadings on the point as well as submissions having been made on behalf of the respective parties by their counsel, it would be necessary and apt at this stage to refer to the plaint filed by the plaintiff; namely; Smt.Geeta Devi.

15. Perusal of plaint clearly suggests that plaintiff filed a suit for declaration to the effect that she is owner in possession of suit land, as described hereinabove, with consequential relief of permanent prohibitory injunction restraining the defendant from interfering in the suit land in any manner, whatsoever, or getting mutation sanctioned on the basis of alleged Will Ex.DW-2/A, dated 25.10.993. Plaintiff further in para-3 of plaint, which is reproduced here-in-below, stated that the defendant is stranger to the suit land and he has no right, title or interest over the suit land. It has been further stated in the said para that defendant has started illegal and unauthorized interference over the suit land by alleging that Smt.Kaulan Devi has executed a Will:

> "3. That defendant is a stranger to suit land and defendant has got no right, title over the suit land. Defendant has started illegal and unauthorized interference over the suit land by alleging that Smt.Kalan Devi has executed a Will in his favour. Kalan Devi has not executed any Will in favour of Defendant as she was unable to execute the alleged will dated 25.10.93 as she was not of having disposing mind before her death. The alleged will is fictitious, forged one and has been prepared after her death in connivance with the scribe and witnesses in fraudulent manner. The alleged will could be the result of undue influence and importunity also. The alleged will is illegal, null and void and is not binding on the plaintiff."

16. Perusal of aforesaid para contained in plaint clearly suggests that plaintiff prayed for relief of permanent prohibitory injunction against defendant on the ground that Will Ex.DW-

2/A is allegedly executed by deceased Smt.Kalan Devi in favour of defendant is fictitious, forged one allegedly prepared by defendant after her death in connivance with the scribe and witnesses in fraudulent manner. Plaintiff further claimed that alleged Will, which is a result of undue influence and importunity is not binding on the plaintiff.

17. The defendant in written statement claimed that Smt.Kaulan Devi executed a valid Will in the sound disposing mind on 25.10.93 in favour of defendant and Will was executed by Smt.Kaulan Devi of her own free will without any pressure of any side.

18. It is ample clear from the pleadings, as reproduced hereinabove, that plaintiff sought declaration as well as decree for permanent prohibitory injunction on the ground that Will Ex.DW-2/A set up by defendant is fictitious and forged document got prepared by the defendant after the death of Smt.Kaulan Devi in connivance with scribe and witnesses in fraudulent manner; meaning thereby onus had shifted on plaintiff to prove that Will is not a genuine document, as has been held by the Hon'ble Apex Court in ***Daulat Ram and Others vs. Sodha and Others,*** (***2005)1 SCC 40*** :-

> "10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so." (Page 43)

19. But, interestingly, perusal of judgment dated 17.6.2004 passed by learned trial Court clearly suggests that it proceeded to decide the controversy at hand on the premise that onus, if any, to prove that Will Ex.DW-2/A is a valid document is upon the propounder of the Will i.e. defendant in the present case, completely ignoring the fact that at first instance plaintiff herself termed Will Ex.DW-2/A as a fictitious/forged document procured by playing fraud. At the cost of repetition, it is once again stated that once plaintiff had termed Will Ex.DW-2/A to be forged and fictitious document, onus was upon her to prove on record that Will Ex.DW-2/A is not a forged document, rather the same is a result of fraud, by leading cogent and convincing evidence on record. However, in the present case learned trial Court on the basis of pleadings of the parties framed two following issues:-

> "1. Whether the plaintiff is entitled to the relief of declaration and permanent injunction, as prayed? OPP.
>
> 1A. Whether Smt.Kalan Devi has executed a valid and registered Will dated 25.10.1993 in favour of the defendant, as alleged? OPD."

but, while deciding the matter at hand, proceeded to decide issue No.1A at first instance and for this purpose analyzed the evidence led on record by the defendant. Whereas learned trial Court in view of specific stand taken by the plaintiff vis-à-vis Will Ex.DW-2/A in the plaint ought to have taken evidence led on record by the plaintiff for critically analyses at first instance to reach

just and fair conclusion that whether plaintiff was able to prove on record that Will Ex.DW-2/A is result of fraud as alleged in plaint. Had trial Court taken issue No.1 for discussion at first instance, he would have examined the evidence led on record by the plaintiff at first instance, from where he would have made an attempt to gather, whether plaintiff was able to prove on record that Will Ex.DW-2/A is not a genuine document and the mutation sanctioned on the basis of such Will is of no consequence.

20. Leaving everything aside, this Court solely with a view to answer substantial question of law, examined the judgment passed by the learned first appellate Court, perusal whereof nowhere suggests that learned first appellate Court, while reversing the judgment of trial Court misread the evidence available on record and recorded no reason. Rather, perusal of judgment passed by the first appellate Court clearly suggests that it undertook an exercise to critically examine the evidence led on record while coming to the conclusion that Will Ex.DW-2/A is a valid document duly executed by Smt.Kaulan Devi in her sound disposing state of mind in favour of defendant. This Court solely with a view to ascertain the genuineness and correctness of the arguments having been made on behalf of the plaintiff also examined the evidence led on record by the respective parties.

21. Perusal of para-22 of the judgment passed by the learned trial Court though suggests that trial Court had culled out certain circumstances, which persuaded learned trial Court to conclude that Will Ex.DW-2/A is a forged document shrouded by suspicious circumstances, but, as has been discussed and observed hereinabove that in the given facts and circumstances of the case onus was upon the plaintiff to prove that Will Ex.DW-2/A is a forged document by leading cogent and convincing evidence. But interestingly, none of the plaintiff witness stated that Will Ex.DW-2/A is a result of fraud and was procured by defendant by playing fraud upon testatrix; namely; Smt.Kaulan Devi. Moreover, plaintiff, who claimed herself to be a legal heir of deceased Kaulan Devi, never stepped into witness box, rather she gave her power of attorney to her husband, who appeared as PW-1. This Court was unable to find on record any explanation rendered by the plaintiff that what prevented her from entering the witness box to prove what she stated in the plaint. Perusal of statement made by PW-1, nowhere suggests that effort, if any, was ever made to prove on record that Will Ex.DW-2/A is a fictitious and forged document procured by the defendant by playing fraud upon the testatrix Smt.Kaulan Devi. PW-1 stated that testatrix Kaulan Devi died in October, 1993 and she was not keeping well at the time of her death. He further stated that Kaulan Devi was not able to speak for the last 15-16 days and she did not execute any Will and nor she was able to execute any Will. He also stated that she was looked after and maintained by him and his wife and her last rites were also performed by him. But in his cross-examination he admitted that Geeta Devi-plaintiff was brought up by her maternal uncle. Though he stated that Kaulan Devi remained ill for 15-20 days before death and he got her medically examined in Government Hospital, Bassi, but interestingly he did not place any document on record to prove that during her last days she was got medically examined by the plaintiff at Government Hospital, Bassi. Similarly, PW-1 nowhere stated that Kaulan Devi was not in a sound and disposing state of mind and was unable to append thumb impression on the alleged Will Ex.DW-2/A. Rather, he stated that Kaulan Devi remained ill for 10-15 days prior to his death and she was not even able to talk. PW-1 nowhere stated that Will in question is a result of fraud and same is a forged document procured by the defendant by playing fraud in connivance with scribe and attesting witnesses as alleged in the plaint.

22. Withholding of the plaintiff herself from the witness box and thereby denying the defendant an opportunity for cross-examination is a valid and sufficient ground for Court to draw an adverse inference against the plaintiff.

23. In this regard reliance is placed on the judgments passed by Hon'ble Apex Court in ***Khatri Hotels Private Limited and Another vs. Union of India and Another, (2011)9 SCC 126 , Man Kaur (Dead) by LRs. Vs. Hartar Singh Sangha, (2010)10 SCC 512, Rattan Dev vs. Pasam Devi, (2002)7 SCC 441, Iswar Bhai C Patel alias Bachu Bhai Patel vs. Harihar***

Behera and Another, (1999)3 SCC 457 and our own High Court in ***Kamlesh Rani vs. Balwant Singh, 2010(3) Shim.L.C. 141.***

24. Similarly, PW-3 stated that Kaulan Devi was not keeping well prior to her death and even she was not able to speak. But he also nowhere stated that Will Ex.DW-2/A is a forged and fictitious document procured by the defendant by playing fraud. He also not stated that Kaulan Devi was totally incapacitated and was not in a position to put thumb impression. Similarly, these aforesaid two witnesses, nowhere stated that defendant had no cordial relation with Kaulan Devi and there was no occasion/motive for Kaulan Devi to execute Will Ex.DW-2/A in favour of defendant. Though these aforesaid plaintiff witnesses stated in their statements that Kaulan Devi was being looked after by plaintiff and her husband, but there is no explanation worth name that in what capacity plaintiff; namely; Geeta Devi was staying with Kaulan Devi because it has come in evidence that plaintiff Geeta Devi was brought up by her maternal uncle and after her marriage she was residing with her husband at a place distant from house of deceased Kaulan Devi. Though plaintiff in plaint specifically alleged that Will was procured fraudulently by the defendant in connivance with the scribe; namely; Ramesh Chand and attesting witnesses but none of plaintiff witnesses stated anything with regard to these aforesaid persons, who allegedly connived with the defendant while procuring/preparing forged Will. Though plaintiff by way of leading documentary evidence made an attempt to prove on record that Kaulan Devi never used to append thumb impression on the documents, rather, she being Pradhan of Gram Panchayat used to sign the document. In this regard plaintiff produced evidence in the shape of various documents allegedly signed by Smt.Kaulan Devi. PW-1 as well as his witnesses stated before the Court below that Smt.Kaulan Devi used to sign the ration card and proceedings of the Gram Panchayat. This Court also perused the Ration Card as well as Register of proceedings of Gram Panchayat of 1962-63, which suggest that Kaulan Devi had been signing documents. But signature of Smt.Kaulan Devi as available in the aforesaid proceedings of Gram Panchayat itself appears to be clumsy. Ex.PW-2/A,placed on record by the plaintiff, pertains to year 1962-63, whereas undisputedly alleged Will is dated 25.10.1993; meaning thereby that thumb impression, if any, was appended upon Will after 30 years of alleged signatures of the Gram Panchayat Proceedings. There cannot be any dispute that a person, who used to sign 30 years back cannot append thumb impressionin later part of his/her life, especially when she was in frail health as claimed by the plaintiff. Moreover, none of the plaintiff witnesses stated that they saw signing Kaulan Devi in their presence. Whereas, defendant also produced Ration Card of Smt.Kaulan Devi on record, perusal whereof suggests that Smt.Kaulan Devi used to put thumb impression on the document.

25. Apart from above, during pendency of appeal, the defendant had moved an application under Order 41 Rule 27 of the Code of Civil Procedure for leading additional evidence, wherein document with regard to holding of time deposit account by the deceased Kaulan Devi in the Post Office was sought to be brought on the record. By way of application, defendant also stated that Kaulan Devi was holding Post Office saving account, whereas plaintiff, while filing reply to the aforesaid application, nowhere disputed the averments and feigned ignorance of having saving account by late Smt.Kaulan Devi with the local Post Office and Cooperative Society. Similarly, the defendant also averred in the application that deceased Kaulan Devi was holding Account No.36 in Cooperative Society and had been operating that account and she was also holding ration card. Defendant specifically stated that in all the aforesaid documents and transactions, Smt.Kaulan Devi had been putting thumb impression. To substantiate averments contained in the application, pass book of account, ration card and certificate issued by Secretary, Cooperative Society were also appended with the application, perusal whereof clearly suggests that deceased Kaulan Devi had been appending thumb impression upon the documents. Whereas, plaintiff while filing reply to the aforesaid application, nowhere disputed the averments and feigned ignorance of having saving bank account by late Smt.Kaulan Devi with the local Post Office and Cooperative Society. Similarly, perusal of reply to the application, nowhere suggests that at any point of time plaintiff stated that Smt.Kaulan Devi had not put thumb impression on the documents in the local Post Office and Cooperative Society. In view of the fact that thumb

impression of the deceased was available on local post Office and Cooperative Society, it could not be concluded by the learned trial Court merely on the basis of statement made by PW-1 that Kaulan Devi never used to put thumb impression, rather she used to sign. Moreover, at no point of time plaintiff applied for comparison of thumb impression of Smt.Kaulan Devi on Will Ex.DW-2/A with that of the account of local Post Office and Cooperative Society, as a result of which Court below had no option but to accept the contention put forth on behalf of the defendant that testatrix Kaulan Devi had been putting thumb impression on the document.

26. PW-1 Brij Lal as well as other witnesses though stated that testatrix Kaulan Devi was not well for 10-15 days prior to her death and she was not able to understand the documents like the Will Ex.DW-2/A, but, as has been discussed hereinabove, none of these plaintiff witnesses stated that at the time of execution of alleged Will Ex.DW-2/A testatrix Kalan Devi was not in sound disposing state of mind. Statements to the effect that Kaulan Devi was not keeping well for 10-15 days prior to her death cannot be termed to besufficient to conclude that she was totally incapacitated even to put thumb impression on the documents.

27. After perusing the entire evidence led on record by the plaintiff, this Court is unable to conclude that plaintiff was able to prove on record that Will Ex.DW-2/A is a forged and fictitious documents procured by the defendant by playing fraud. Since plaintiff had termed the Will to be forged and fictitious documents, onus was upon her to prove on record that Will is forged and fictitious document procured fraudulently by the defendant by leading cogent and convincing evidence, but none of plaintiff witnesses, as has been discussed in detail, has either stated or has explained circumstances from which it could be inferred/gathered that Will Ex.DW-2/A is a result of fraud. Whereas, defendant stated that his parents and he himself had been looking after and maintaining Smt.Kaulan Devi. He also stated that testatrix; namely; Kaulan Devi, had been visiting in defendant's house. Aforesaid assertion stands duly corroborated with the admission having been made by PW-3 Bhuru Ram. In his cross-examination, he categorically admitted that defendant and his parents had been visiting Smt.Kaulan Devi. He admitted the plaintiff to be the daughter of Kaulan Devi, who was the second wife of Paras Ram. He specifically stated that he and his father served Kaulan Devi and Geeta Devi never visited her parental house nor they saw her. It has also come in his statement that plaintiff Geeta Devi was brought up by and was married by her maternal uncle. He further stated that Kaulan Devi executed a Will in his favour and money was bequeathed in favour of his mother.

28. DW-2 Vidya Sagar stated that Will was executed by Kaulan Devi in favour of defendant Shakti in his presence. He specifically stated that Will was read over and explained to Kaulan Devi who after admitting the contents to be correct, put her thumb mark on the Will in his presence and the other witnesses signed the Will as witnesses in his presence. He categorically stated in his statement that she was in sound disposing mind at the time of execution of the Will. It has also come in his statement that Kaulan Devi was being looked after and served by Sandhya Devi and Partap i.e. parents of the defendant. He also stated that he never saw plaintiff Geeta Devi visiting the house of deceased Kaulan Devi. However, in his cross-examination he stated that Will was executed at the residence of Sandhya Devi at Gayaldi, where he was called by nephew of the defendant. He stated that when he reached there, Bhagat Ram and Roop Lal were already sitting there on the cot in the Varandah and Ramesh Chand came after 15 minutes. It is also deposed by him that testatrix Kaulan Devi dictated that she bequeathed her movable and immovable property in favour of Shakti Chand and nothing more was dictated by her.

29. Bhagat Ram DW-3 also stated that Kaulan Devi executed a Will Ex.DW-2/A in favour of defendant in his presence. He also stated that he signed the Will as witness. It has also come in his statement that Will was written by Ramesh Chand at the instance of Kaulan Devi, which was read over and explained to her and thereafter she put her thumb impression on the same. He also stated that other witnesses also signed the Will in her presence. He specifically stated that Kaulan Devi was in sound disposing mind at that time and she was being looked after and served by defendant and her mother. Like DW-2, he also stated that he never saw plaintiff

Geeta Devi visiting Kaulan Devi at any point of time. It has also come in his statement that Will was produced before Tehsildar, where he again signed the Will. Cross-examination conducted upon these aforesaid defendantwitnesses, who allegedly signed as marginal witnesses on the Will Ex.DW-2/A, nowhere suggests that any suggestion worth name was ever put to these attesting witnesses that Kaulan Devi never executed Will in favour of defendant. No suggestion to the effect that thedefendant got the Will prepared fraudulentlyin connivance with scribe andwitnesses. Similarly, no suggestion was put that Will Ex.DW-2/A is a result of fraudand same isforged and fictitious document and they never appended their signatures upon the same. Since scribe Ramesh Chand had passed away, there was no occasion for defendant to cite him as a plaintiff witness in support of his claim, but attesting witnesses, as have been discussed hereinabove, clearly proved on record that Will was executed by late Smt.Kaulan Devi in their presence in sound and disposing state of mind. Both the attesting witnesses categorically stated that they and scribe signed the Will in the presence of testatrix. But learned trial Court while coming to the conclusion that Will is shrouded by suspicious circumstances also observed that thumb impression of testatrix had appeared at the end, whereas attesting witnesses and scribe signed the Will above the thumb impression of the testatrix. But, as has been rightly observed by learned District Judge, Will Ex.DW-2/A was not prepared and scribed by trained/license deed writer and as such aforesaid discrepancy pointed out by learned trial Court could not be termed as suspicious circumstance in any manner, especially in the teeth ofspecific and unequivocal statements of both the attesting witnesses that Kaulan Devi got the Will scribed from late Shri Ramesh Chand in their presence and she had appended signatures in their presence with sound disposing state of mind. It is not understood as to how learned trial Court came to the conclusion that thumb impression of the deceased was available on the blank paper and space of thumb impression was used for preparation of the Will and attestation thereof, because it was none of the case of the plaintiff. Moreover, no evidence, if any, in this regard was ever led on record by the plaintiff witnesses. Perusal of cross-examination conducted upon PW-2 and PW-3 suggests that no suggestion worth the name was ever put to PW-2 and PW-3 with regard to thumb impression of the testatrix appearing at the bottom. Had defendant put this suggestion to PW-2 and PW-3, they would have definitely explained the circumstances under which the thumb impression of the testatrix was obtained at the bottom. Similarly, no attempt was made by the plaintiff to prove on record that Kaulan Devi had put thumb mark on the blank paper for some other purpose, but the same was fraudulently used by the defendant for preparing alleged Will Ex.DW-2/A. It may be noticed that Will Ex.DW-2/A was prepared on the judicial paper of 1987 and in this regard plaintiff, nowhere made an attempt to prove on record that judicial paper used for preparing Will was not procured by Kaulan Devi, especially for execution of Will.

30. This Court, after perusing evidence led on record by the defendant, has no hesitation to conclude that defendant was able to prove on record that Will Ex.DW-2/A was duly executed by late Smt.Kaulan Devi in his favour in sound disposing state of mind. At this juncture, it would be relevant to refer to the provisions of Section 63 of the Indian Succession Act, 1925:

> "63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
>
> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator,

> or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

31. Perusal of aforesaid provision clearly suggests that for valid attestation of Will, it must be proved that Will was attested by at least two witnesses and each of these witnesses must either see the testator signing or affixing his mark on the Will or it shall be signed by some other person, in their presence, on thedirection of testatrix. Similarly, these witnesses must receive from the testator a personal acknowledgement of his signature or mark or the signature of such other person. Apart from above, these witnesses must sign Will in the presence of the testator.

32. In the present case, defendant by leading cogent and convincing evidence, as has been discussed in detail, was successful in proving that Will was executed by late Smt.Kaulan Devi in her sound disposing state of mind after understanding the contents contained in the document and put her signatures on the document on her own free will.

33. This Court, after carefully perusing the evidence led on record by defendant, has no hesitation to conclude that defendant was able to prove that Will Ex.DW-2/A was validly executed by Smt.Kaulan Devi, whereas evidence led on record by the plaintiff, which has been discussed in the earlier part of the judgment, nowhere suggests that plaintiff was able to discharge onus shifted upon her after terming Will Ex.DW-2/A as a forged and fictitious document, that Ex.DW-2/A is a forged document procured fraudulently by the defendant and as such this Court sees no illegality and infirmity in the judgment passed by the learned first appellate Court who definitely while reversing the judgment passed by trial Court examined entire evidence available on record in right perspective and by no stretch of imagination it can be said that there has been a misreading of evidence by Court below. This Court is of the firm view, after perusing the judgment passed by Hon'ble Apex Court in ***Daulat Ram's*** case *supra* that onus was upon plaintiff to prove, especially when in her plaint she had termed the Will to be forged and fictitious document and there was no requirement for this Court to examine the evidence, if any, led on record by the defendant to examine the genuineness and correctness of the judgment passed by the learned trial Court. Perusal of par-22 of the judgment passed by trial Court clearly suggests that trial Court while culling out suspicious circumstance, nowhere taken into consideration evidence led on record by the plaintiff upon whom onus was heavy to prove that Will is forged and fictitious document, rather close reading of para-22 suggests that learned trial Court selectively used the evidence led on record by the defendant while pointing out suspicious circumstances. Careful perusal of aforesaid para-22 of the judgment passed by learned trial Court compels this Court to conclude that the evidence led on record by the defendant was not appreciated in its right perspective by the trial Court, rather same was selectively referred by learned trial Court while decreeing the suit of the plaintiff. Otherwise also plaintiff was supposed to stand on her own legs while proving the contents of the plaint and by no means she could be allowed to take benefit of weakness/discrepancies, if any, in the case of the defendant.

34. While concluding and upholding the judgment passed by the learned first appellate Court, this Court is of the view that learned trial Court wrongly proceeded to decide the case at hand on the premise that onus, if any, to prove that Will is not shrouded by suspicious circumstance was upon the defendant because by now it is well settled that onus to prove that will is forged and fictitious document is upon the person, who alleges the same. Since in this case plaintiff had termed Will as a forged and fictitious document, she was under obligation to prove on record by leading cogent and convincing evidence that Will Ex.DW-2/A is a result of fraud, but in the present case as clearly emerge from the record especially the judgment passed by learned trial Court, that trial Court decided the matter on the premise that onus, if any, to prove that Will was free from suspicion is/was upon defendant.

35. Consequently, in view of the facts and circumstances discussed hereinabove, this Court is of the view that there is no illegality and infirmity in the judgment passed by learned first

appellate Court and as such it does not warrant any interference by this Court, moreover, as has been discussed in detail hereinabove, appellant-plaintiff was not able to make out her case to persuade this Court that Will Ex.DW-2/A is fake and fictitious document procured by the defendant by undue influence. Similarly, this Court, after perusing the evidence led on record by the plaintiff, was unable to see any circumstance which could compel this Court to return the findings that Will Ex.DW-2/A is shrouded by suspicious circumstances. Hence present appeal fails and is dismissed, accordingly.

36. All the interim orders are vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

United India Insurance Company Ltd. .....Appellant.
Versus
Khem Lata and others ......Respondents.

FAO No. 563 of 2016.
Decided on : 15th November, 2016.

Employees Compensation Act, 1923- Section 4- Deceased was employed as driver- he died during the course of his duties- compensation of Rs.9,97,000/- was awarded by the Commissionerwith interest @12% per annum - funeral expenses of Rs.40,000/- were also awarded- held in appeal that it was not disputed that deceased was driver and he had died during the course of his employment – Commissioner had taken the salary as Rs.10,000/- - the claimant had pleaded that deceased was drawing salary of Rs.7,000/- per month and Rs.120/- per day as daily allowance –compensation of Rs.80,000/- in lump sum is to be awarded when the actual income is not proved – since, in the present case the actual income was proved – therefore, compensation could not have been restricted to Rs.80,000/- in lump sum- Rs.40,000/- could not have been awarded towards funeral expenses in absence of any statutory provisions – interest was payable on the compensation amount after one month of the accident – appeal partly allowed. (Para-6 to 8)

For the Appellants: Mr. G.D. Sharma, Advocate.
For the Respondents No.1 to 4 : Mr. G.R. Palsra, Advocate.
Respondent No.5 proceeded against ex-parte.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

CMP(M) No. 789 of 2015.

Heard. In view of the averments made in the application which are duly supported by an affidavit and in the interest of justice, the delay in filing the appeal is condoned. Application stands disposed of.

FAO No. 563 of 2016.

The instant appeal arises from an order rendered by the Commissioner for Employees Compensation, Chachiot at Gohar, District Mandi, H.P., (for short the "Commissioner"), on 17.01.2015 in E.C. Act No. 4 of 2011, whereby, compensation quantified in a sum of Rs.9,97,000/- along with simple interest @12% p.a. from the date of death of the deceased till its realization alongwith funeral expenses quantified at Rs.40,000/- stood assessed qua the claimants, who are the successors-in-interest of one Murari Lal, who uncontrovertedly suffered fatal injuries during the course of his performing employment as a driver under respondent No.5.

2. The appellant herein standing aggrieved by the rendition of the learned Commissioner hence concert to assail it by preferring an appeal therefrom before this Court.

3. Uncontrovertedly, the predecessor-in-interest of the claimants/respondents No.1 to 4 herein suffered his demise in a motor vehicle accident involving vehicle bearing No. HP-32B-7777, whereon he stood employed as a driver by respondent No.5 herein. The learned counsel for the appellant herein submits qua his not controverting the factum of the demise of the deceased occurring during the course of his performing employment in the ill-fated vehicle as its driver under respondent No.5. Even, the conclusion recorded by the learned Commissioner on the issue apposite to the aforesaid factum does not disclose qua his conclusion qua the occurrence of demise of the deceased arising during the course of his performing duties as a driver at the relevant time in the ill-fated vehicle bearing No. HP-32B-7777, suffering from any perversity of it standing anchored upon irrelevant or discardable evidence or its omitting to mete deference to the germane besides relevant evidence.

4. The counsel for the appellant herein submits at the bar qua his not contesting the findings recorded in the impugned order by the learned Commissioner qua the claimants/respondents No.1 to 4 herein holding the apposite capacity to on demise of their predecessor-in-interest stake a claim for compensation against respondent No.5, also concomitantly, against the appellant herein, given the evident existence of a valid contract of insurance covering the apposite liability of the insurer to indemnity the insured qua compensation assessed under the Act arising from occurrence of demise of his lawfully engaged driver in the ill-fated vehicle during the course of his performing employment under the insured.

5. The counsel for the appellant makes a vociferous submission qua the determination recorded by the learned Commissioner qua the deceased drawing from his employment as a driver under respondent No.5 an amount of Rs.10,000/- per month standing anvilled upon evidence which is beyond pleadings, significantly when in the claim petition the claimants record a pointed averment qua the deceased drawing from his avocation as a driver under respondent No.5 a sum of Rs.7000/- per month, whereupon he espouses qua any evidence which stood adduced before the learned Commissioner qua his drawing from his relevant employment, a salary/ amount of Rs.10,000/- per month being obviously beyond pleadings, hence, discardable rendering hence the reliance thereupon to be inapt. However, the aforesaid submission is unacceptable especially when apart from the claimants recording an averment in the apposite claim petition qua their predecessor-in-interest drawing an amount of Rs.7000/- per month as salary from his employer, theirs also making a communication therein qua his drawing a sum of Rs.120/- per day as daily allowance from his employer. Since, the totaling of a sum of Rs.7000/- drawn as salary per month by the deceased from his employment as a driver under respondent No.5 alongwith an amount of Rs.120/- per day yields a figure of Rs.10,000/- per mensem, consequently, the testification of the claimants qua their predecessor-in-interest drawing an amount of Rs.10000/- per month as wages/salary from his relevant employment under respondent No.5 is obviously not beyond pleadings. Moreover, a perusal of the order impugned hereat discloses qua the learned Commissioner concluding qua the deceased drawing a sum of Rs.10,000/- per month from his avocation as a driver under respondent No.5 being the apt amount whereto the relevant statutory principles were purportedly enjoined to be applied for computing the compensation amount assessable qua the claimants. For lack of repudiation thereto by respondent No.5 comprised in his adducing cogent evidence therebefore constituted in his adducing into evidence the salary register maintained by him personifying his defraying to the predecessor-in-interest of respondents No.1 to 4 an amount lesser than Rs.10,000/- per month as salary/wages for the work performed by him as a driver in the relevant vehicle. In sequel, the omission of respondent No.5 to adduce the best evidence in portrayal of the deceased drawing an amount lesser than Rs.10,000/- from him as salary/wages from his employment as a driver under him, enhances an inference qua the testification of the claimants qua the facet aforesaid being both credible besides reliable whereupon it was apt for the learned Commissioner to anvil his apposite findings.

6. However, the learned counsel appearing for the appellant has with vigour contended of yet the learned Commissioner proceeding to move stray from the provisions of Section 4 of the Workmen Compensation Act (hereinafter referred to as the "Act"), relevant provisions whereof stand extracted hereinafter, digression whereof by him stands espoused by the learned counsel for the appellant to emanate from his while determining inconsonance with the initial condition embodied in clause (a) to subsection (1) of Section 4 of the Act, the amount per month drawn as salary/wages by the deceased workman from his employment as a driver under respondent No.5 whereto on his inaptly applying the statutory principles, he assessed compensation amount payable to the claimants, his though also standing enjoined to mete deference to the condition alternative to the primary condition of sub section 1(a) of Section 4 of the Act, wherewithin a mandate is held qua his being bound irrespective of the actual amount of the wages/salary drawn by the deceased workman to restrict the relevant compensation amount at Rs.80,000/- in lump sum, whereas, his slighting the impact of the condition alternative to the primary condition to sub section 1(a) of Section 4 of the Act upon the relevant facet, has sequeled his hence grossly mis-assessing the compensation amount qua the claimants. However, the aforesaid submission has no force given the learned counsel appearing for the appellant though aptly submits qua the two conditions enumerated in clause (a) of subsection 1 of Section 4 of the Act standing enjoined to be conjunctively read also he makes an apt submission of the condition alternative to the initial relevant condition wherewithin an echoing is embodied qua the learned Commissioner also standing enjoined to restrict the compensation amount assessable qua the dependents of the deceased workman at Rs.80,000/- yet his further submission qua the learned Commissioner standing hence enjoined to restrict the relevant compensation amount at a sum of Rs.80,000/- is for the reasons ascribed hereinafter grossly inapt. (I) A reading in its entirety of the condition alternative to the relevant statutory initial condition makes a vivid disclosure of it postulating qua its warranting reverence only when the initial condition remains unsatiated. While making a dilation upon the aforesaid factum qua the relevant initial statutory condition holding an expostulation of the Commissioner standing enjoined to deduct 50% of the actual wages drawn by the deceased from his relevant employment whereon he is enjoined to apply the relevant statutory principles for computing the compensation amount, for attraction whereof upsurgings of firm evidence qua the actual wages per mensem drawn by the deceased from his relevant employment under respondent No.5 is enjoined to spur. Also with the initial statutory condition encapsulated in the hereinafter extracted relevant statutory provisions standing satiated there would hence be no occasion for attraction hereat of the condition alternative to it. Since, the conclusion drawn by the learned Commissioner in determining the compensation amount qua the claimants stands anvilled upon the deceased evidently drawing a sum of Rs.10,000/- per month as salary/wages from his employment under respondent No.5, necessarily with the learned Commissioner recording an apt conclusion qua the aforesaid facet, it hence begot satiation of the initial statutory condition embodied in the relevant provisions whereupon obviously the learned Commissioner did not err to mete thereto the relevant statutory deduction of 50%. Consequently, when the initial condition embodied in clause (a) to sub section (1) of Section 4 of the Act stands satiated, the condition alternative to it holding therewithin a mandate of the Commissioner standing enjoined for attracting hereat its application, to stand seized of firm evidence qua paucity of relevant evidence qua the actual amount of wages per mensem drawn by the deceased workman from his relevant employment under his employer, whereupon, he holds an empowerment to determine only a sum of Rs.80,000/- in lump sum as compensation to the dependents of the deceased workman. However, when as aforestated the initial statutory condition stand satiated, the learned Commissioner was not enjoined to place any dependence upon the statutory condition alternative to it. (ii) Also assumingly, if the condition alternative to the initial condition is also construed to be holding any attraction hereat yet with the relevant alternative statutory condition expostulating a sum of Rs.80000/- in lump sum being statutorily available for standing assessed as compensation by the learned Commissioner vis-a-vis the dependents of the deceased workman also assumingly its mandating qua with the Commissioner taking into account both the conditions embodied in the relevant statutory provisions wherefrom his apposite reckonings of the relevant compensation amount stand aroused unraveling qua the

relevant compensation amount arrived at by his applying the initial condition being higher vis-a-vis his applying the condition alternative to it, yet his standing enjoined by the statutory phrase "which ever is more" occurring in the relevant provisions to mete deference to the figure/amount of compensation which is higher whereupon obviously when the working of the initial statutory condition sequels computation of compensation vis-a-vis the claimants of the deceased workman at a figure higher than the one which would stand arrived at on the condition alternative to it also standing applied, the attraction besides workability of the condition alternative to the initial statutory condition stands negated, Imperatively, hence, with the attraction hereat of the primary statutory condition fetching a compensation amount vis-a-vis the dependents of the deceased workman in a sum higher than yielded by application hereat of the condition alternative to it, contrarily, renders hence the reckoning of the initial statutory relevant statutory condition by the learned Commissioner while determining compensation amount vis-a-vis the claimants of the deceased workman to be apt. As a corollary the initial condition when reckoned results in assessment of compensation amount higher than the one which would occur on application of the condition alternative to it embodied in the relevant statutory provisions besides when a literal reading of the condition alternative to the initial condition enshrines qua when on application of the initial statutory condition, compensation amount higher than Rs.80,000/- is assessable qua the claimants of the deceased workman renders it to be discardable whereupon hence the apposite quantification of compensation by the learned Commissioner renders it to fall within the apt relevant statutory ambit of the attractable relevant statutory condition embodied in clause (a) to subsection (1) of Section 4 of the Act.

> **4. Amount of Compensation.- (1) Subject to the provisions of this Act, the amount of compensation shall be follows, namely:-**
>
> (a) Where death result from the injury- an amount equal to (fifty per cent) of the monthly wages of the deceased workman multiplied by th relevant factor;
>
> or
>
> an amount of (eighty thousand rupees), whichever is more;
>
> (b)..............................

7. The learned counsel appearing for the appellant submits that the quantification by the learned Commissioner vis-a-vis respondents no.1 to 4 a sum of Rs. 40,000/- as funeral charges is beyond the statutory provisions engrafted in the Act. The aforesaid submission of the learned counsel appearing for the appellants holds vigour. Consequently, the quantification by the learned Commissioner under his impugned order qua a sum of Rs.40,000/- being defrayable to respondents No.1 to 4 as funeral charges is set aside.

8. The learned Commissioner in his impugned award has levied interest @ 12% per annum on the compensation amount assessed by him, levy whereof has been ordered to commence from the date of death of the deceased whereas under the relevant statutory provisions the commencement of levy of interest @12% was enjoined to occur on one month elapsing since the accident. Consequently, the levy of interest on the compensation amount assessed by the learned Commissioner shall commence on one month elapsing since the accident.

9. For the reasons recorded herein-above, the instant appeal is partly allowed and the award impugned before this Court is modified to the extent that a sum of Rs.40,000/- adjudged by the learned Commissioner vis-a-vis respondents No.1 to 4 towards funeral expenses of the deceased shall stand excluded from the compensation amount determined by him in their favour. Consequently, the levy of interest on the compensation amount assessed by the learned Commissioner shall commence on one month elapsing since the accident. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, *J.*

Shri Label Chand alias Albel Chand. ......Appellant.

Versus

Smt. Sita Devi & ors. ......Respondents.

RSA No. 126 of 2005.
Date of decision: November 16, 2016.

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that he is owner in possession of the suit land with his sister – defendant applied for partition- plaintiff raised objection but partition was ordered ignoring the objections raised by the plaintiff- plaintiff sought declaration that order of the partition is null and void – the suit was dismissed by the trial Court as barred by Section 171(XVII) of H.P. Land Revenue Act- an appeal was preferred, which was also dismissed- held in second appeal that when the Court had concluded that it had no jurisdiction, it should have returned the plaint for presentation before appropriate forum – the plaintiff was to file an appeal/revision before Revenue authorities – hence, the plaintiff permitted to withdraw the suit with liberty to take appropriate proceedings in the forum having jurisdiction. (Para-8 and 9)

Cases referred:

R.S.D.V. Finance Co. Pvt. Ltd., v. Shree Vallabh Glass Works Ltd., AIR 1993 Supreme Court 2094

Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar, AIR 1965 Supreme Court 338

Governing Council of Kayastha Pathshala, Prayag and others v. Ram Chandra Srivastava and others, AIR 1992 Allahabad 158

For the appellant	Mr. Kapil Dev Sood, Sr. Advocate with Mr. Mukul Sood, Advocate.
For the respondents	Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate for respondent No. 1. Mr. Ashwani K. Sharma, Sr.Advocate with Mr. Ishan Thakur, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

This appeal is directed against the judgment and decree dated 6.12.2004 passed by learned District Judge, Solan in Civil Appeal No. 39-S/13 of 2003 whereby learned Lower Appellate Court has dismissed the appeal and affirmed the judgment and decree dated 8.1.2003 passed by learned Sub Judge Ist Class, Kasauli at Solan district Solan in Civil Suit No. 100/1 of 1998.

2. The subject matter of dispute in the present *lis* is the land entered in Khewat Khatauni No. 43/53, Khasra Nos. 295/19, 34, 41, 297/48 and 81, Kitas 5, measuring 9 bighas 11 biswas situate in village Nandal, Pargana Keontan-I Tehsil and District Solan. The appellant (hereinafter referred to as the 'plaintiff') claims the same to be in his possession and that of his sister Sita Devi, the respondent (hereinafter referred to as the 'defendant') in equal shares. On an application filed by the defendant, learned Assistant Collector Ist Grade, Solan has ordered the partition of the suit land and ignored the objections the plaintiff raised against the partition proceedings. His claim is that he was in cultivating physical possession of the suit land since time immemorial and the defendant after her marriage in village Kyar never remained in possession of the suit land. The objections so raised were rejected by the Assistant Collector Ist Grade and while allowing the application for partition had approved the mode of partition. Consequently, the Khataunies and Sanad Taksim were prepared taking into consideration the

nature and possession of the suit land. According to the plaintiff though he had objected to the mode of partition and Sanad Taksim whereby the best piece of suit land was allotted to the defendant, however, the objections so raised by him were erroneously rejected. Therefore, by filing the suit he had sought the decree of declaration that the order of partition dated 7.5.1997 is null and void and also for permanent prohibitory injunction restraining the defendant from causing any interference in the suit land.

2. The defendant on entering appearance had contested the suit. In preliminary, she has raised the objections qua maintainability thereof and that the plaintiff is estopped due to his own act, conduct and acquiescences to file the suit and also that in view of the provision contained under Section 171(XVII) of the H.P. Land Revenue Act the civil court has no jurisdiction to try and entertain the suit. On merits, while denying the plaintiff's case being incorrect it has been asserted that the suit land was rightly ordered to be partitioned and the parties allotted the land taking into consideration its kind and possession.

3. On such pleadings of the parties, following issues were framed:

1. Whether the order dated 7.5.1997 qua Sanad Taksim is illegal null and void as alleged passed by Ld. A.C. Ist Grade Solan in case No. 14/9 of 1991/92 titled as Sita Devi Vs. Lavel Chand? ……OPP
2. In case issue No. 1 is decided in affirmative, whether the plaintiff is entitled to the relief of injunction? ….OPP
3. Whether the suit is not maintainable in the present form? ….OPD
4. Whether the plaintiff is estopped from filing the present suit by his own acts, conduct and acquiescence? ….OPD
5. Whether the suit is bad due to the provisions of section 171(XVII) of H.P. Land Revenue Act? ….OPD
6. Relief.

4. Learned trial Court after holding full trial has taken issues No. 1, 3 and 5 for consideration all together and while issue No. 1 has been answered against the plaintiff whereas issues No. 3 and 5 in favour of the defendant has dismissed the suit being not maintainable as well as barred under the provisions of Section 171 (XVII) of the H.P. Land Revenue Act. Consequently, the plaintiff was not held entitled to the relief of permanent prohibitory injunction and as such issue No. 2 was answered against him.

5. Learned Lower Appellate Court in appeal has affirmed the judgment and decree passed by the trial Court and dismissed the appeal.

6. The judgment and decree passed by learned Lower Appellate Court has been assailed in the present appeal on the grounds, inter-alia, that in view of Sanad Taksim was illegal, the order of partition was not executable. The suit as such was not barred under sub Section (1) of Section 171 (XVII) and XVIII) of the H.P. Land Revenue Act. The partition proceedings being not carried out in accordance with law, it is urged that the declaration as sought should have been granted. In any event the plaint should have been ordered to be returned for presentation in appropriate Court instead of dismissal of the suit or rejection of the plaint.

7. The appeal has been admitted on the following substantial question of law:

Whether in view of the findings that the Civil Court had no jurisdiction to try the suit, ordering rejection of the plaint is sustainable?

8. Mr. Kapil Dev Sood, learned Senior Advocate assisted by Mr. Mukul Sood, Advocate has argued that in the given facts and circumstances at the most the plaint should have been ordered to be returned to the plaintiff for presentation before the competent Court having jurisdiction to adjudicate the dispute between the parties. This is the short question which has been sought to be adjudicated in the preset appeal by Mr. Kapil Dev Sood, learned Senior

Advocate. In support of the submissions so made Mr. Kapil Dev Sood has placed reliance on the judgments of the Apex Court in ***R.S.D.V. Finance Co. Pvt. Ltd., v. Shree Vallabh Glass Works Ltd.,* AIR 1993 Supreme Court 2094, *Athmanathaswami Devasthanam v. K. Gopalaswami Ayyangar,* AIR 1965 Supreme Court 338** and that of the High Court of Allahabad in ***Governing Council of Kayastha Pathshala, Prayag and others v. Ram Chandra Srivastava and others,* AIR 1992 Allahabad 158.** The law laid down in these judgments amply demonstrate that where the Court arrives at a conclusion that it has no jurisdiction to try a suit the appropriate order to be passed should not be dismissal of the suit but qua the return of the plaint for presentation before the appropriate forum. Admittedly, the jurisdiction of the civil Court to try and entertain a suit of this nature is barred under Sub Section (1) of Section 171 clause (XVII) and XVIII) of H.P. Land Revenue Act. The remedy available against an order of partition is to file an appeal/revision before the revenue authorities i.e. Collector.

9. Divisional Commissioner and even Financial Commissioner also in hierarchy. Being so, there is substance in the submissions made on behalf of the respondent-defendant that an order to return the plaint in this case may not serve any purpose. According to Mr. G.D. Verma, learned Senior Advocate, an order allowing the plaintiff to withdraw the suit with liberty reserved to seek remedy against the order of partition available under the provisions of the HP Land Revenue Act would serve the ends of justice. Mr. Kapil Dev Sood, learned arguing counsel on behalf of the appellant-plaintiff is also not averse to the submissions so made on behalf of the defendant. Therefore, the judgment and decree under challenge in this appeal is ordered to be quashed and set aside and the plaintiff is permitted to withdraw the suit with liberty reserved to resort to the remedy available to him to challenge the order of partition before appropriate forum having jurisdiction to entertain and decide the controversy between the parties in accordance with law.

10. The present appeal is disposed of accordingly with no order so as to costs. Pending application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

State of Himachal Pradesh ......Appellant.
Versus
Mohinder Singh ......Respondent.

Cr. Appeal No. 339 of 2007
Date of decision: November 16, 2016.

Indian Penal Code, 1860- Section 279 and 337- HRTC bus and a private bus were in competition- the accused was driving the private bus in a rash and negligent manner and hit HRTC bus – the accused was tried and acquitted by the Trial Court- held in appeal that the rashness and negligence should be more than carelessness or error of judgment – prosecution is required to prove that the act on the part of the accused was responsible for the accident - PW-9 did not state that accused was driving the bus in a rash and negligent manner- PW-11 stated in cross-examination that accident had taken place due to the breakage of patta (leaf) of the bus – the prosecution case was contradictory and vague – the accused was rightly acquitted- appeal dismissed. (Para-9 to 15)

Cases referred:

Raj Kumar vs. State of H.P., 1997(2) Shim.L.C. 161
Manju Baradia vs. State of Chhatisgarh, 2002(1) Accidents Compensation Judicial Reports 24
Lalit Kumar vs. Union of India and another, 1990(2) Sim. L. C. 233

For the appellant Mr. Pramod Thakur, Addl. AG.
For the respondent Mr. K.S. Banyal, Sr. Advocate with Mr. Vijender Katoch, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

State of Himachal Pradesh aggrieved by the judgment dated 18.5.2007 passed by learned Additional Chief Judicial magistrate, Hamirpur, District Hamirpur in Police challan No. 194-I-98/195-II-98 has preferred the present appeal. The complaint is that learned trial Court has misread, misconstrued and misappreciated the evidence available on record and erroneously acquitted the respondent (hereinafter referred to as the 'accused') of the accusation put to him under Sections 279 and 337 of the Indian penal Code.

2. Accident of HRTC Bus No. HP-20-0676 and a private bus bearing registration No. HP-22-5785 had taken place at Chabuttra on Sujanpur-Hamirpur road on 15.8.1998 at 5:30 P.M. While the HRTC bus was enroute Palampur to Haridwar and on its way of Hamirpur from Sujanpur, the private bus was on its way from Hamirpur to Sujanpur. The record reveals that another private bus "Sheetla Bus Service" also plies from Palampur to Hamirpur simultaneously behind Palampur-Haridwar HRTC bus. The evidence as has come on record by way of the testimony of PW11 Om Parkash the driver of HRTC bus and PW5/1 Gorakh Ram reveal that on the fateful day also both i.e. HRTC bus and Sheetla bus service were being plied to its destination after each other. Both buses were in competition. According to PW11 it is the driver of Sheetla Bus Service who daily competes with HRTC bus. The case has been registered at the instance of PW9 Bhumi Chand on his statement Ext.PW6/A. It was reported by this witness that the accident occurred at such a stage when the offending bus HP-22-5785 being driven in a rash and negligent manner arrived at the place of accident and struck against the HRTC bus because on account of high speed its driver lost control over the same. The investigation has been conducted by Shri Bakshi Ram PW6, the then SI (SHO) Police Station, Sujanpur. During the course of investigation spot map Ext.PW6/C was prepared and the place of accident with both buses standing there also got photographed vide photographs Ext.P1 to Ext.P7. In the accident the passengers of both buses received minor injuries on their persons.

3. On the completion of investigation the police has filed the challan against the accused. Learned trial Magistrate on finding a prima-facie case having been made out against the accused had put notice of accusation to the accused that it is on account of rash and negligent driving attributed to him the accident had taken place and that he has committed an offence punishable under Sections 279 and 337 of the Indian Penal Code. He, however, pleaded not guilty and has claimed trial. The prosecution has examined 12 witnesses in all. The material prosecution witnesses are PW2 Chandu Lal, who was on duty as conductor with HRTC bus at the time of accident, PW5/1 Shri Gorakh Ram and PW9 Shri Bhumi Chand who were travelling in HRTC bus. The remaining prosecution witnesses are formal.

4. The accused in his statement recorded under Section 313 Cr.P.C. has denied all the incriminating circumstances appearing against him in the prosecution evidence being wrong and stated that the accident has occurred due to rash and negligent driving attributed to the driver of HRTC bus. No evidence, however, has been produced by him in his defence.

5. Learned trial Judge on appreciation of the evidence available on record and analyzing the rival submissions has arrived at a conclusion that the prosecution has failed to prove its case against the accused beyond all reasonable doubt. Consequently, the accused has been acquitted of the accusation as was put to him.

6. The legality and validity of the impugned judgment has been questioned on the grounds, inter-alia, that cogent and reliable evidence as has come on record by way of the testimony of PW2 Chandu Lal, PW5/1 Gorakh Ram, PW9 Bhumi Chand and PW11 Om Parkash has been ignored and brushed aside erroneously and to the contrary learned trial Court has based its findings on hypothesis conjectures and surmises. Irrespective of the prosecution having proved its case beyond all reasonable doubt that it is accused who was driving the offending bus at a high speed, the findings to the contrary recorded by the Court below being erroneous and

perverse the accused is stated to be wrongly acquitted. The impugned judgment as such has been sought to be quashed and set aside.

7. Mr. Parmod Thakur, learned Additional Advocate General has pointed out from the record that the ingredients of offence punishable under Sections 279 and 337 of the Indian Penal Code stand satisfactorily proved from the testimony of complainant PW9 and also that of the conductor of bus PW2 as well as its driver PW11. According to Mr. Thakur, the accused in all fairness and in the ends of justice should have been convicted for the commission of offence punishable under Sections 279 and 337 of the Indian penal Code.

8. On the other hand, Mr. K.S. Banyal, learned Senior Advocate assisted by Mr. Vijender Katoch, Advocate while repelling the arguments addressed on behalf of the appellant-State has urged that what to speak of cogent and reliable evidence the present is a case of no evidence and as such the accused according to Mr. Banyal has been rightly acquitted by learned trial Court.

9. Before coming to the given facts and circumstances and also the reappraisal of the evidence available on record it is desirable to take note as to in legal parlance what constitute an offence punishable under Sections 279 and 337 of the Indian penal Code. This Court in ***Raj Kumar*** vs. ***State of H.P., 1997(2) Shim.L.C. 161*** has held that mere rashness and negligence is not sufficient for recording the findings of conviction against an offender, however, such rashness and negligence must be criminal rashness and negligence which in view of the ratio of the judgment ibid is more than mere carelessness or error of judgment. The prosecution is also required to plead and prove that it was an act on the part of the accused alone responsible for the accident in question. The High Court of Chhatisgarh in ***Smt. Manju Baradia*** vs. ***State of Chhatisgarh, 2002(1) Accidents Compensation Judicial Reports 24*** has gone one step further while holding that the speed of offending vehicle alone is no criteria to come to the conclusion that the same was being driven in rash and negligent manner but other factors such as density of traffic, width of the road and the attempt of the driver to take precautions to avert the accident etc. also need to be taken into consideration. It is also observed in this judgment that the latest trend to hold a driver of the vehicle guilty in case of accident is contrary to the law unless it is shown by the prosecution by leading cogent, reliable and positive evidence that it was accused alone who was rash and negligent, hence responsible for the accident in question.

10. Therefore, in view of the above legal position, it is crystal clear that rashness and negligence due to which an accident is occurred should not be mere rashness and mere negligence and rather criminal rashness and criminal negligence.

11. Now it is to be determining from the evidence available on record that the prosecution has been able to show that it was the criminal rashness and criminal negligence on the part of the accused due to which this accident has occurred. The material prosecution witness who is complainant also Shri Bhumi Chand while in the witness box as PW9 has stated that the accident had occurred on account of the fault attributed to the driver of the offending private bus (the accused). He has nowhere stated that at the time of accident the accused was driving the bus in a rash and negligent manner. This witness, therefore, has made all together a contrary statement to his previous statement Ext.PW6/A recorded by the police under Section 154 of the Code of Criminal procedure. He, therefore, while in the witness box has not supported the version in his statement Ext.PW6/A qua the manner in which the accident had occurred. The another witness is PW5/1 Gorakh Ram. He was also travelling in HRTC bus enroute Palampur to Haridwar. As per his version the speed of the bus was normal. He also expressed his inability to tell the manner in which the accident had taken place. Since he resiled from his statement recorded by the I.O. during the course of investigation, therefore, was allowed to be cross-examined by learned Public Prosecutor. He has denied any statement made to the police. It is also denied that he has deliberately avoided to make a statement against the driver to save him. In his further cross-examination conducted on behalf of the accused he has admitted that the contents of his statements were readover and explained to him by the police. He however, expressed his ignorance that one private bus was in competition with HRTC bus in which he was travelling. If coming to the testimony of PW11 who happens to be the driver of HRTC bus, no

doubt, as per his version the offending bus was being driven in speed and on seeing it he stopped the bus being driven by him on road side. However, the accident could not be avoided because the driver of the private bus lost his control and hit the HRTC bus on which he was driver at the relevant time. However, if his statement in cross-examination is seen he admitted that after the departure of the Palampur-Haridwar HRTC bus from Palampur bus stand Sheetla bus also depart simultaneously from Palampur bus stand. Both buses are being plied after each other. He also admits that the driver of Sheetla bus used to be in competition with HRTC bus daily. This witness also admit a curve at the place of accident and as per his version the accident occurred on account of the patta (leaf) of the private bus broken and on account of that the bus skidded in one side of the road. According to him the accident had taken place on account of breakage of patta of the bus.

12. The only material witness is Chandu Lal who was on duty as conductor with HRTC bus on the date of accident. According to him the accident occurred on account of the rash and negligent driving attributed to the driver of Thakur bus (accused). In his cross-examination, he also tells us that the accident occurred at a place where there was curve. His denial that Sheetla bus was being driven behind HRTC bus is contradictory with that of Om Parkash PW11 the driver of the HRTC bus.

13. Now if the evidence as has come on record by way of the testimony of PW2, PW5/1, PW9 and PW11 is closely scrutinized, it is only PW2 who has stated that the offending bus was being driven by the accused in a rash and negligent manner. The testimony of the remaining three witnesses amply demonstrate that they have not said so while in the witness box. As per the testimony of PW5/1 the speed of the bus rather was normal. The close scrutiny of the evidence produced by the prosecution in support of its case that the accused was rash and negligent and as such responsible for the accident in question reveal that the same is contradictory and vague also. This Court in ***Lalit Kumar*** vs. ***Union of India and another, 1990(2) Sim. L. C. 233*** has held that where the evidence qua rashness and negligence on the part of the accused is vague and contrary to the facts of the case he cannot be convicted on the basis thereof.

14. There is ample evidence available on record to show that Sheetla Private Bus Service was also being plied simultaneously after the departure of the HRTC bus from Palampur. Both buses are in fact being driven in competition i.e. one after the other most probably on account of business rivalry. The testimony of PW11 the driver of HRTC bus that the accident has occurred on account of breakage of patta of Sheetla bus being driven by the accused has caused major dent in the prosecution story. Therefore, with such self contradictory evidence and there being no proof that the rashness and negligent if any on the part of accused was criminal rashness and criminal negligence the accused could have not been convicted at all. There is no need to discuss the remaining prosecution evidence being formal in nature and could have been of some help to the prosecution had its case that the accused was driving the offending bus in a rash and negligent manner been proved in accordance with law.

15. I, therefore, find no merit in the appeal. The same is accordingly dismissed. Consequently the judgment under challenge in this appeal is affirmed. Personal bonds furnished by the accused shall stand cancelled and surety discharged.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Cr. Revision No. 47 of 2009 a/w
Cr.Appeal No. 213 of 2009.
Date of Decision: 18.11.2016

<u>1. Cr.R. No. 47 of 2009</u>

Bharti Rana	.........Petitioner.
Versus	
State of Himachal Pradesh	.........Respondent.

2. Cr.A. No.213 of 2009

State of HP ....Appellant

Versus

Bharti Rana ....Respondent.

Indian Penal Code, 1860- Section 353 and 332- Informant was posted as a clerk in Rural Hospital, Chowari and accused was posted as staff nurse in the same hospital- the accused gave beating to the informant while he was discharging his duties – the accused was tried and convicted by the Trial Court- an appeal was filed, which was partly allowed and the sentence was modified – held in revision that cross complaints were filed by the accused and the informant against each other – both the parties were convicted by the trial Court- however, the informant was acquitted by the Appellate Court – statements of witnesses show that accused was asking for certain papers belonging to her – no person stated that accused had prevented the informant from discharging his duties – it was not proved that intention of the accused was to deter the informant from discharging the duties – the judgment passed by the Court set aside and the accused acquitted.(Para-9 to 28)

Cases referred:

State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
D. Chattaiah and Anr. V. State of Andhra Pradesh, (1979) 1 SCC 128

For the petitioner: Mr. V.S. Rathore, Advocate for the petitioner.

For the respondent: Mr. P.M. Negi, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General, for the respondent(s)-State.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Criminal revision petition No. 47 of 2009 filed under Section 397 of Cr.PC read with Section 401 of the Cr.PC, is directed against the judgment dated 23.3.2009, rendered by the learned Sessions Judge, Chamba Division, Chamba, HP, in Criminal Appeal No.20/2008, modifying the judgment of conviction recorded by the learned Judicial Magistrate, Ist Class, Dalhousie, District Chamba, H.P., in Cr. Case No.138-II of 1999, whereby the petitioner herein was held guilty of having committed offences under Sections 353 and 332 of the IPC and accordingly, was convicted and sentenced to undergo simple imprisonment for one year and to pay fine of Rs. 2000/- under Section 332 of the IPC and in default of payment of fine, to undergo further simple imprisonment for three months and under Section 353 of the IPC, simple imprisonment for one year and to pay fine of Rs. 2000/- and in default of payment of fine, to further undergo simple imprisonment for three months. However, fact remains that the petitioner herein feeling aggrieved and dis-satisfied with the judgment passed by the learned trial Court preferred an appeal before the learned Sessions judge, who vide judgment dated 23.3.2009, modified the judgment by convicting and sentencing the petitioner only under Section 332 of the IPC and imprisonment till the rising of the Court and to pay a fine of Rs. 2000/- and in default, to further undergo simple imprisonment for three months, whereas, criminal appeal No. 213 of 2009 has been filed by the State under Section 377 of the Cr.PC, against the judgment dated 23.3.2009, passed by the learned Sessions Judge Chamba in criminal appeal No. 20/2008, for enhancement of sentence of the petitioner.

2. Since both the cases have arisen from the common judgment dated 23.3.2009 passed in Criminal Appeal No. 20/2008, this Court vide order dated 4.10.2016 clubbed the same for final adjudication together, accordingly, same are being taken for disposal together since common question of law and facts are involved.

3. Briefly stated facts necessary for adjudication of the case are that on 18.5.1999, complainant Suresh Kumar lodged report with police Station R.H. Chowari, District Chamba, that petitioner-accused gave beatings to him while he was discharging his duty as a public servant. Police on the basis of aforesaid compliant registered FIR i.e. Ext.PA and thereafter carried out investigation. After the completion of investigation, police presented the challan under Sections 353 and 332 of IPC, in the competent Court of Law.

4. Learned Judicial Magistrate, Ist Class, Dalhousie, District Chamba, HP, after satisfying itself that prima facie case exists against the accused, put a notice of accusation, to which she pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record by the prosecution, found the accused guilty of having committed offence under Sections 353 and 332 of IPC and accordingly, convicted and sentenced her as per description already given above.

5. The present petitioner-accused being aggrieved with the judgment of conviction passed by the learned trial Court, filed an appeal under Section 374 of Cr.PC, before the Court of learned Sessions Judge, Chamba Division, Chamba, HP, who vide judgment dated 23.3.2009, modified the appeal (as has been mentioned herein above). Hence, this criminal revision petition before this Court.

6. Mr. Virendrer Rathore, Advocate representing the petitioner-accused vehemently argued that the impugned judgments of conviction and sentence recorded by the Courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record and as such, same deserve to be quashed and set-aside. While referring to the judgments passed by the Courts below, Mr. Rathore further contended that the entire prosecution evidence led on record is not worth lending any credence being unreliable and untrustworthy and as such, no conviction could be recorded on the basis of the same. Mr. Rathore further contended that both the courts below miserably failed to determine the question as to whether the complainant was performing the official duty when the alleged dispute in question occurred between the parties. With a view to substantiate his aforesaid argument, Mr. Rathore, invited attention of this Court to the fact that it has come in the statement of PW3 Rattan Chand that at that relevant time, the file was in his custody, which was demanded by the petitioner and he took out the file in question from the Almirah and showed to the petitioner. Mr. Rathore stated that in view of the aforesaid material fact, there was no occasion for the petitioner to ask file from the complainant Suresh Kumar. He also stated that it stands nowhere proved that Suresh Kumar (complainant) was in charge of the file and same was in his custody, rather it is ample clear from the evidence on record that Suresh Kumar prevented the petitioner from taking the file to SMO for initiating action against Kanchan Rana (nurse), who had in fact encroached upon the hospital land by constructing the septic tank. Mr. Rathore, with a view to prove motive of complainant Suresh Kumar in falsely implicating the petitioner accused, invited attention of this Court to the examination in chief as well as cross-examination conducted on prosecution witnesse Suresh Kumar (complainant), whereby he has admitted his relation with Kanchan Rana, who allegedly raised construction on govt. land by raising septic tank. While concluding his arguments, Mr. Rathore forcefully contended that bare perusal of the judgments vis-a vis statement adduced on record by the parties clearly suggest that both the courts below committed grave irregularity and illegality by ignoring the fact that both the parties (complainant as well as the accused) are public servants and complaint, if any, at the first instance, was lodged at the behest of the petitioner namely Bharti Rana. He further stated that Suresh Kumar only lodged complaint to counter the FIR of the petitioner. Mr. Rathore further informed that the complainant Suresh was also convicted under Sections 525 and 323 IPC in the FIR lodged by the petitioner accused by the learned trial Court. Mr. Rathore further stated that the courts below committed glaring mistake by not trying both the cases together especially in view of the fact that both the complaints had arisen from one event. In the aforesaid background, Mr. Rathore prayed that this petition may be allowed after setting aside the judgments passed by the Courts below. He also prayed that in view of the fats and circumstance of the case, there is no force, if any, in

the criminal appeal preferred by the State for enhancement of the sentence and same may be ordered to be dismissed, in the interest of justice.

7. On the other hand, Mr. P.M. Negi, learned Additional Advocate General duly assisted by Mr. Ramesh Thakur, Deputy Advocate General, representing the State supported the impugned judgments passed by the courts below. Mr. Negi, strenuously argued that the judgments passed by the courts below are based upon the correct appreciation of the evidence available on record and as such, in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted, especially in view of the fact that courts below have dealt with each and every aspect of the matter very meticulously. He further argued that learned first appellate Court while accepting the appeal preferred by the petitioner has taken very lenient view and has modified the sentence till rising of the Court, which is not in consonance with the alleged offence having been committed by the petitioner and as such, same deserves to be enhanced. He further stated that bare perusal of the statements adduced on record by the prosecution suggests that prosecution was able to prove its case beyond reasonable doubt and the petitioner-accused had given beatings to the complainant Suresh Kumar, who was discharging his official duty at the time of the incident and as such, no leniency, if any can be showed to the petitioner by this Court. While concluding his arguments, Mr. Negi, also reminded this Court that it has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC as far as re-appreciation of the evidence is concerned. In this regard, he placed reliance upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri*** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> "In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

8. I have heard learned counsel for the parties as well carefully gone through the record

9. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

10. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> 8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest

> continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

11. During the proceedings of the case, this Court had an occasion to peruse the entire evidence adduced on record by the respective parties, perusal whereof clearly suggests that complainant Suresh Kumar as well as the petitioner accused were posted and working as clerk and staff nurse, respectively in Rural Hospital, Chowari, at the time of alleged incident. It also emerge from the record that both the aforesaid persons lodged counter complaint against each other in the police station, which ultimately culminated into trial and conviction of both the parties, as recorded by the trial Court.

12. It appears that though complainant Suresh Kumar was convicted by the learned trial Court under Sections 325 and 323 IPC but later on he was acquitted of the charges by learned first appellate Court in the appeal preferred by him and thereafter, State chose not to file any appeal against his acquittal in FIR lodged by the petitioner accused. In the present case, which has arisen on the complaint of PW1, proseuciton with a view to prove its case examined was many as seven witnesses.

13. PW1 Dr. C.B.P. Singh, SMO, deposed before the Court below that on 18.5.1999, petitioner Bharti Rana reported to him that complainant Suresh Kumar (clerk) gave beatings to her. He further stated that thereafter Suresh also came there and stated that Bharti Rana gave him beating with slaps and shoes. He further stated that Prehlad Singh rescued Suresh Kumar from Bharti Rana and thereafter complainant also gave a slap to Bharti Rana. But in is cross-examination, he specifically denied that Suresh Kumar gave beatings to Bharti.

14. PW2 Suresh Kumar (complainant) deposed that on 18.5.1999, he was sitting in his office along with Rattan Chand and Yashpal. He further stated that in the meantime, accused came there and asked for file pertaining to some Govt. land. It has come in his statement that file was handed over to her but she insisted that papers were not complete. He further stated that thereafter he handed over the file to the Rattan Chand but accused demanded all the papers of file but she was advised to get the same with the permission of the Senior Medical Officer. PW2 further stated that thereafter accused mis-behaved and started pulling the file and thereafter accused snatched the file and started beating him with the shoe but he was rescued by the Rattan Chand and Yashpal Verma. He also stated that in the meantime, Sanjay Kumar also came to the room and also stopped the accused from beating him. PW2 also stated that after aforesaid incident, accused went to the office of SMO and accused again gave beating to him with shoe in the office of SMO. He further stated that he also slapped accused in order to rescue himself from being beaten by the accused however, in his cross-examination; he denied that he gave beatings to Bharti Rana and inflicted injuries on her person.

15. PW3 Rattan Chand also supported the version of PW2 by stating that at about 12 am, Bharti Rana demanded the file from PW2 concerning land papers. She asked him to separate the papers in the file but he showed is inability to do the same without the permission of SMO and thereafter the complainant closed the file and the accused started pulling the file. He specifically stated that when she pulled the file towards him, Bharti gave him beatings with Chappal. He further stated that Suresh Kumar was rescued by Yashpal, who was in the room. PW3 further stated that thereafter Bharti went to the room of SMO and Suresh also followed her.

However fact remains that in his cross examination, he denied that Suresh Kumar ever gave beatings to Bharti Rana.

16. PW4 Sanjay Gupta also supported the version of PW2 that on 18.5.1999, he was in the office of SMO, and while passing through the corridor, he heard noise of quarrel from the office room. He went inside the room and saw that accused was holding shoe in her hand to give beatings to the complainant. PW4 further stated that he advised both the complainant and the accused to report the matter to SMO. But in is cross-examination, he feigned ignorance, if the complainant had given beatings to Bharti Rana.

17. PW5 Dr. Rameshwar Jyoti, who medically examined the complainant Suresh Kumar stated that while examining the complainant, he found two injuries on his person as mentioned in the MLC Ext.PW5/A.

18. PW6 HC, Pritam Singh, I.O. stated that he had moved an application for medical examination of complainant Suresh Kumar and during investigation, he had prepared spot map Ext.PW6/A. He also stated that on 21.5.1999, Bharti Rana handed over one Sandal Ext.P1, which was taken into possession vide memo Ext.PW3/A.

19. Petitioner-accused in her statement recorded under Section 313 Cr.PC, denied the case of the prosecution and stated that the complainant Suresh Kumar is brother of Kanchan, who is having litigation with her and she has been falsely implicated by the complainant, Suresh Kumar at the behest of the Kanchan.

20. Close scrutiny of the prosecution evidence, as has been discussed in detail above, clearly suggests that on 18.5.1999, the complainant Suresh as well as petitioner accused had dispute over some file pertaining to land of RH hospital, which resulted in the allegation and counter allegation of assault on each other. PW1 Dr. CBP Singh categorically stated that the complainant Suresh Kumar also gave slap to the Bharti petitioner-accused. If his statement is read in its entirety, it clearly emerges from the record that both the parties (petitioner as well as complainant) gave beatings to each other. It is also undisputed that both the persons were posted and working as clerk and Staff nurse respectively in the same hospital and at that time, both were discharging official duties at that particular time.

21. PW2 in his own statement stated that accused came to his room and demanded file pertaining to govt. land from him, meaning thereby, she had asked for file, if any, in the capacity of official of that particular office because none of the prosecution witnesses have stated that documents as were asked for, by the petitioner accused, were of private in nature. PW2 in his statement specifically stated that he showed file to her, whereupon petitioner accused told that her papers were not on file and she started abusing him. He further stated that thereafter accused Bharti asked him to separate the documents from the file, which he refused to do by saying that same cannot be done without permission of SMO.

22. This Court, after perusing the aforesaid portions of statements made by PW2 as well as PW3, has reason to presume that petitioner accused was asking for certain papers which belonged to her. Though all the prosecution witnesses have stated that petitioner accused gave beatings to the complainant but none of the PWs have specifically stated that petitioner accused prevented Suresh Kumar from discharging his public duty. Though, PW1 in his cross-examination denied that Suresh Kumar gave beatings to her but in examination he specially stated that Prehlad Singh rescued him from Bharti and thereafter Suresh Kumar also gave slap to Bharti Rana, meaning thereby dispute in question between the parties, which ultimately resulted into scuffle, was admittedly personal in nature.

23. PW2 complainant also admitted that he slapped the accused in order to rescue himself from being beaten by the accused. It has come in the statements of PW2 i.e. the complainant Suresh Kumar and PW3 Rattan Chand clerk that the complainant Suresh Kumar was rescued by the Yashpal Verma, who was in the room but interestingly, he was not cited as prosecution witnesses and as such, no much reliance could be placed upon the statement of PW2

and PW3, who were admittedly in the room when scuffle between the parties took place. Rather after perusing the statements of PW2 and PW3, it clearly emerges that information, as was being asked by the petitioner-accused, was denied by tPW2 Suresh Kumar as well as Rattan Chand in whose custody those document were. PW4 Dr. Sanjay Gupta though stated that when he was going to office of SMO, he heard noise coming from the office room. He further stated that he saw Bharti Rana was holding a shoe in her hand to give beating to Suresh Kumar.

24. Careful perusal of statement of PW4 nowhere suggests that he saw Bharti Rana beating Suresh Kumar. He also stated that he advised both the complainant and the accused to report the matter to SMO. However, in his cross examination, he feigned ignorance, if Suresh PW2 also gave beatings to the petitioner but that may not be of any consequence, especially in view of the candid admission of the complainant himself that he gave beatings to the accused Bharti Rana with a view to rescue himself.

25. This Court, after bestowing thoughtful consideration upon the evidence led on record by the prosecution as well as stand taken by the petitioner-accused in her statement recorded under Section 313 Cr.PC, is of the view that prosecution was not able to prove its case that petitioner-accused Bharti tried to prevent/obstruct the complainant from discharging his duty and in this process, she gave beating to the complainant. At the cost of the repetition, it may be stated that none of the PWs stated that the petitioner obstructed the complainant from discharging his public duties and as such, this Court sees force in the contention raised by the petitioner that since prosecution was unable to prove that the complainant was given beating while he was discharging public duties, no conviction, if any, could be recorded under Section 332 of the IPC. Though , perusal of prosecution evidence available on record indicates towards the use of criminal force by the petitioner-accused over the complainant but definitely, there is no evidence to suggest that same was done to deter public servant from discharging his public duty and as such, conviction, if any, under Section 332 IPC, cannot be held to be valid and legal.

26. Moreover as emerge from the record that both the parties (petitioner and the complainant) were discharging their public duty in the same office at that relevant time. It also stands proved on record that both the parties gave beating to each other. Learned trial Court has also convicted the complainant under Sections 325 and 323 of the IPC, but later on he was acquitted by the learned first appellate Court.

27. This Court after carefully examining the evidence led on record has no hesitation to conclude that the prosecution was not able to prove the offence under Section 332 of the IPC allegedly having been committed by the petitioner-accused because there is no evidence on record to suggest that intention of petitioner-accused was to prevent or deter the complainant from discharge of his duty. None of prosecution witness has specifically sated that petitioner-accused made an attempt to prevent or deter complainant from discharge of his duty, rather, this Court, after perusing the entire evidence led on record, is of the view that dispute, if any, between the parties was personal in nature. Apart from above, prosecution has not been able to prove that alleged assault had any nexus or casual connection or consequent relation with the performance of the duty by the complainant as public servant. It is settled law that to punish a person under Section 332 of the IPC, there should be evidence suggestive of the fact that accused had intent to prevent or deter the victim from discharge of his duty as such public servant. In this regard, reliance is placed upon ***D. Chattaiah and Anr. V. State of Andhra Pradesh, (1979) 1 SCC 128***, wherein Hon'ble the Apex Court has held as under:-

> "10. It was thus manifest that the assault on the Typist (P.W.1) had no real nexus or casual connection, or consequential relation with the performance of his duty as public servant. There was not even a soientilla of evidence from which it could be reasonably inferred that the intent of the assailants was to prevent or deter P.W.1. from the discharge of his duty as such public servant,
>
> 11. In view of the above, the charge as laid under Section 332 I.P.C. and, the conviction of the appellant on that count, cannot be sustained. The appellants

could, at the most, be held guilty under Section 323 I.P.C. the injuries caused being simple."

28. Consequently, in view of the detailed discussion made herein above, present petition is allowed and judgments passed by the courts below are quashed and set-aside, as a result of which, criminal appeal preferred by the State for enhancement is also dismissed. Petitioner accused is acquitted of the charges framed against her. Interim order, if any, vacated. Bail bonds of the accused are discharged. Pending application, if any also stands disposed of

****

BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Shri Ram Swarup ….Petitioner

Versus

Smt. Lila Wati & Others ….Respondents

CMPMO No.192 of 2014
Judgment Reserved on: 24.10.2016
Date of decision: 18.11.2016

Code of Civil Procedure, 1908- Order 8 Rule 9- Plaintiff amended the plaint – L.Rs. Of defendant No. 1 filed an amended written statement- plaintiff filed an application for rejection of the amended written statement on the ground that it was beyond the scope of amendment - held, that defendant can amend the written statement to the extent of amendment in the plaint – if the defendant wants to amend the written statement, he has to seek permission from the Court – L.Rs had amended the written statement beyond the scope of the amendment- L.Rs. can file written statement appropriate to their character as L.Rs. but they have to seek permission from the Court before filing additional written statement – the order passed by trial Court set aside and amended written statement filed by the L.Rs. ordered to be rejected. (Para-9 to 25)

Cases referred:

V.K.N. Pillai vs. P.Pillai, AIR 2000 SC 614
Ram Chandra vs. Mahindra Singh, AIR 1980 Rajasthan 04 (303)
Sawan Singh and Others vs. Radha Kishan and Others, AIR 1980 HP 8
J.C. Chatterjee & Others vs. Shri Sri Kishan Tandon and another, AIR 1972 SC 2526

For the Petitioners: Mr.Bhupinder Gupta, Sr.Advocate with Mr.Himanshu Sharma, Advocate.
For Respondents 1 to 7: Mr.Bimal Gupta, Senior Advocate with Mr.Vineet Vashishta, Advocate.
For Respondent No.8: Mr.Rakesh Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

The instant petition filed under Article 227 of the Constitution of India is directed against the order dated 27.3.2014 passed by learned Civil Judge (Junior Division), Solan, District Solan, rejecting the application filed by the plaintiff-petitioner *(hereinafter referred to as the 'plaintiff')* under Section 151 read with Order 8 Rule 9 of the Code of Civil Procedure *(for short 'CPC')* praying therein for rejection of amended written statement filed by the respondents.- defendants *(hereinafter referred to as the 'defendants').*

2. Briefly stated the facts, as emerged from the record, are that the plaintiff filed a suit for specific performance of contract against the predecessor-in-interest of defendants No.1 to 7, whereas defendant No.8 was arrayed as proforma defendant. During the course of trial, plaintiff moved an application under Order 6 Rule 17 read with Section 151 CPC for carrying out amendment in the plaint since there was a clerical/mathematical error in the original plaint filed by the plaintiff. By way of amendment, plaintiff proposed to make change in para-2 of the plaint, whereby plaintiff intended to substitute dated 14.12.1976 by 14.12.1978. Plaintiff in application claimed that inadvertently date of agreement was mentioned as 14.12.1976, whereas agreement between the parties was entered into on 14.12.1978. Aforesaid application was resisted by the defendants, but fact remains that learned trial Court below allowed the aforesaid amendment. Accordingly, plaintiff filed amended plaint (Annexure P-2).

3. At this stage, it may be noticed that predecessor-in-interest of defendants No.1 to 7; namely Shri Sukh Ram, had already filed written statement to the un-amended plaint i.e. Annexure P-3. But since he expired during the pendency of the suit, his legal representatives *(for short 'LRs')* were brought on record and arrayed as defendants No.1 to 7. Consequent upon filing of amended plaint by plaintiff, LRs of deceased defendant No.1 i.e. 1(a) to 1(g) filed written statement. Plaintiff, being aggrieved with filing of amended written statement by the LRs of deceased defendant No.1, filed an application under Section 151 read with Order 8 Rule 9 CPC praying therein for rejection of written statement filed by the defendants as same was beyond the scope of amendment.

4. Learned trial Court vide order dated 27.3.2014 (Annexure P-8), rejected the application preferred on behalf of the plaintiff *(for short 'impugned order')*. Learned trial Court, while dismissing the application, came to the conclusion that since defendant No.2 had not filed any written statement before settlement of issues, written statement filed by him is liable to be rejected and he cannot take undue advantage of the fact that the plaintiff was allowed to amend the plaint. But as far as amended written statement filed by defendants No.1(a) to (g) is concerned, learned Court below came to the conclusion that defendant No.1 is free to take many pleas, whatsoever, of his choice and his written statement cannot be confined to amendment made in the plaint filed by the plaintiff. Learned Court below further concluded that perusal of the written statements filed by defendant nowhere suggests that defendant No.1 has withdrawn any statement made in his earlier statement but he has taken some additional plea in the amended written statement for which he is entitled. In this regard learned trial Court placed reliance upon the judgment passed by Hon'ble Apex Court in ***V.K.N. Pillai vs. P.Pillai AIR 2005 SC 614,*** wherein the Hon'ble Apex Court has observed that Courts should be more generous in allowing amendment of written statement as question of prejudice is less likely to operate in that event.

5. Plaintiff, being aggrieved and dis-satisfied with the impugned order dated 27.03.2014, passed by the learned trial Court, approached this Court by way of instant petition praying therein for quashing and setting aside of the same.

6. Mr. Bhupinder Gupta, learned Senior Advocate duly assisted by Mr.Janesh Gupta, Advocate, vehemently argued that impugned order is not based upon correct appreciation of the facts as well as law and as such same deserves to be quashed and set aside. Mr.Gupta termed impugned order as highly unjust, illegal, arbitrary, against facts and law and prayed that the same cannot be allowed to sustain. Mr. Gupta contended that no fresh plea could have been raised by defendants in the amended written statement while specifically filing reply to the amended petition preferred on behalf of plaintiff without leave of the Court. With a view to substantiate his arguments that there is drastic deviation/change in the amended written statement filed by defendants No.1(a) to 1(g), Mr. Gupta made this Court to travel through the original plaint vis-à-vis original written statement filed by the parties. While referring to the averments contained in the original plaint, Mr. Gupta stated that by way of amendment only correction of date was carried out with the permission of the Court by moving an application under Order 6 Rule 17 CPC, whereas defendants, without obtaining any leave from the Court,

made drastic changes in the written statement, wherein altogether new pleas have been taken in the written statement. As per Mr. Gupta, since amendment of plaint was only to rectify the clerical/mathematical mistake, no fresh plea could have been taken by the defendants for filing written statement, which have drastically changed the original stand taken by their predecessor-in-interest. He further stated that since defendants No.1(a) to 1(g) stepped into the shoes of original defendant No.1, they had not independent stand and they were bound by the written statement filed by their predecessor-in-interest, but bare perusal of amended written statement clearly suggests that defendants No.1(a) to 1(g) changed the entire complexion of the original pleadings placed on record by their predecessor-in-interest, which was not permissible without obtaining leave of the Court by moving appropriate application under Order 6 Rule 17 CPC. While concluding his arguments, Mr. Gupta forcefully contended that whole approach adopted by learned trial Court, while rejecting the application on behalf of plaintiff for rejection of written statement filed by defendants No.1(a) to 1(g) is not only erroneous but patently adverse and as such same deserves to be quashed and set aside.

7. Mr.Bimal Gupta, learned Senior Counsel, duly assisted by Mr.Vineet Vashishta, Advocate, supported the impugned order passed by the learned trial Court. While referring to the impugned order, Mr.Bimal Gupta, strenuously argued that there is no illegality/infirmity in the order passed by the learned trial Court, as such, there is no scope of interference as far as this Court is concerned, because bare perusal of impugned order suggests that same is based upon correct appreciation of law laid down by Hon'ble Apex Court and respective High Courts. Mr.Gupta further contended that when defendants No.1(a) to 1(g) were impleaded as LRs of defendant No.1, they have every right to file written statement and as such there is no illegality and infirmity in the impugned orders passed by learned trial Court and same deserves to be upheld. With a view to substantiate his aforesaid arguments, he invited the attention of this Court to Order 22 Rules 3 & 4 CPC to demonstrate that being LRs of original defendant No.1, they have every right to file additional written statement taking therein inasmuch as pleas appropriate to their character as LRs of the deceased defendant. However, Mr.Gupta, while refuting the contention put forth on behalf of the plaintiff that defendants by way of amended written statement carried out drastic deviation/changes in the written statement, made this Court to travel through the amended written statement to suggest that no additional pleas have been taken by the defendants in the amended written statement, rather pleas, already having been taken by original defendant, have been simply elaborated and explained and as such there is no inconsistency/ variation in the pleas taken in the pleadings originally made by deceased defendant No.1. In support of his aforesaid contention that being LRs of deceased defendant No.1, defendants No.1(a) to 1(g) were entitled to file independent defence appropriate to their character, Mr.Gupta placed reliance upon the judgments passed by Hon'ble Apex Court, our own High Court as well as other High Courts in ***Abdul Razak (Dead) through LRs and Others vs. Mangesh Rajaram Wagle and Others, (2010)2 SCC 432, Sumtibai and Others vs. Paras Finance Co.Regd.Partnership Firm Beawer (Raj.) thorough Mankanwar (Smt) w/o Parasmal Chordia (Dead) and Others, (2007)10 SCC 82, M.P. State Agro Industries Development Corpn.Ltd. and Another vs. Jahan Khan, (2007)10 SCC 88 and Sawan Singh vs. Radha Kishan, 1979 Law Suit (HP) 11, Smt.Amar Devi vs. Smt.Shakntla Devi, RSA No.81 of 1969, decided on May, 1, 1975, Sayed Sirajul Hasan vs. Sh.Syed Murtaza Ali Khan Bahadur and Others, AIR 1992 Delhi*** and ***Sri Srinivasmurthy Mandiram rep. by its Executive Trustee D.Srinivasan vs. Mrs.Gnanasoundari, AIR 2004 (Mad.) 513.***

8. I have heard learned counsel for the parties and gone through the record of the case carefully.

9. Before proceeding to decide the controversy at hand on merits, it would be appropriate to reproduce relevant provisions of Order 6 Rule 17 as well as Order 8 Rule 9 CPC, which are as follows:

> ***"ORDER 6 - PLEADINGS GENERALLY***
>
> *1.Pleading— "Pleading", shall mean plaint or written statement.*

2. Pleading to state material facts and not evidence

Rule 17*-Amendment of pleadings— The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."*

ORDER 8 - WRITTEN STATEMENT, SET-OF AND COUNTER- CLAIM.

Rule 9. Subsequent pleadings— No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than 30 days for for presenting the same."

10. The aforesaid provisions of law clearly suggests that in normal circumstances any party to lis can move an application under aforesaid provisions of law for carrying out amendment, which may be necessary for determining the real controversy between the parties. Though Court has power to allow amendments even after commencement of trial but in that eventuality party seeking amendment needs to prove on record that inspite of due diligence it could not have moved the application for amendment before the commencement of trial.

11. Similarly, Order 8 Rule 9 clearly suggests that no pleadings, subsequent to written statement of a defendant other than by way of defence to set up a counter claim, can be presented except by leave of Court. In the event of application having been made on behalf of party to carry amendment in the written statement, Court may fix time which may not exceed 30 days from presenting the same. But fact remains that for carrying out amendment, if any, in the written statement, prior leave of the Court is necessary.

12. Conjoint reading of aforesaid provisions of law i.e. Order 8 Rule 9 and Order 6 Rule 17 CPC clearly lays down a rule of pleadings. If a party intends to make further pleadings, after filing of the original plaint, on account of his having failed to make certain pleas in the original plaint, can certainly file an application under Order 6 Rule 17 CPC seeking leave of Court to carry out necessary amendment. Similarly, if defendant wants to make further pleading after the written statement having been filed to raise certain pleas in the original written statement can move an application under aforesaid provisions of law. But in both these eventualities, parties need to move an application seeking therein leave of Court to amend their respective pleadings.

13. Conjoint reading of the aforesaid provisions of law clearly suggests that party seeking to file amended plaint/written statement necessarily need to show to the Court the circumstances as to why they failed to raise plea in the original pleadings preferred by them and definitely amendment cannot be claimed as a matter of right because close reading of aforesaid provisions of law clearly suggests that Court in exercise of its discretion may or may not grant leave to present a fresh pleading.

14. In the instant case, as clearly emerge from the pleadings, as have been filed by both the parties, plaintiff moved an application under Order 6 Rule 17 CPC seeking therein relief to amend original plaint, wherein inadvertently date of agreement was not correctly mentioned, accordingly after obtaining leave of the Court plaintiff carried out amendment by substituting date of agreement from 14.12.1976 to 14.12.1978. At this stage it may be noticed that prior to aforesaid amendment in the plaint, original defendant No.1 had already filed written statement specifically answering all the averments contained in the original plaint. Since Court had allowed the amendment, defendants No.1(a) to 1(g) being LRs of original defendant No.1 filed amended written statement, perusal whereof certainly suggests that defendants No.1(a) to 1(g) raised many pleas which changed the complexion of original written statement filed by defendant No.1.

15. Mr.Bimal Gupta, learned Senior counsel representing defendants-respondents, while refuting the contention put forth on behalf of Mr.Bhupinder Gupta, learned Senior counsel for the plaintiff-petitioner, though stated that there is no drastic change/deviation from the original stand taken by the original defendant No.1 in original written statement, but this Court perused both the written statements i.e. amended and un-amended juxtaposing each other, which clearly suggests that defendants raised numerous new pleas, which were not originally taken in the original written statement filed by the deceased defendant No.1. True, it is that defendants No.1(a) to 1(g) by way of amended written statement made an attempt to elaborate and explain the pleas already taken by the deceased defendant No.1 in original written statement, but perusal of amended written statement clearly suggests that in the aforesaid process LRs of deceased defendant No.1 have carved out altogether new case to the detriment of plaintiff who only after seeking leave of the Court corrected date of agreement of contract. As has been discussed hereinabove, pleadings filed by both the parties can be suitably amended at any stage by the respective parties in terms of Order 6 Rule 17 CPC, but in that regard party, intending to carry out amendment, needs to file an appropriate application assigning therein the reasons for amendment and amendment, if any, can be carried out only after obtaining the leave of the Court.

16. In the present case, there is nothing on record suggestive of the fact that defendants No.1(a) to 1(g), before filing amended written statement, wherein entire complexion of original written statement has been changed, moved appropriate application under Order 6 Rule 17 CPC praying for amendment in the written statement. There is no dispute that defendants No.1(a) to 1(g) had right to file additional written statement to the amended plaint but definitely under the garb of that right defendants could not amend the entire written statement filed by their predecessor-in-interest. At best defendant, while filing reply to the amended petition, could only carry out amendment to the extent the plaint is amended. In case written statement in toto is/was to be amended, defendants ought to have filed an independent application under Order 6 Rule 17 CPC seeking leave of the Court to amend the written statement. Court, while exercising powers under Order 6 Rule 17 CPC, may or may not grant leave to amend written statement.

17. In the present case, this Court, after perusing the entire pleadings made available on record, has no hesitation to conclude that defendants No.1(a) to 1(g) without obtaining leave of the Court amended written statement beyond the pleadings of amended plaint and as such this Court is not in a position to accept the reasoning assigned by the Court below while rejecting the application under Order 8 Rule 9 CPC filed by the plaintiff to reject the written statement. This Court, while examining the correctness and genuineness of the impugned order passed by the learned trial Court below, made an attempt to lay its hand to the judgment of Hon'ble Apex Court as mentioned by trial Court i.e. ***V.K.N. Pillai vs. P.Pillai, AIR 2005 SC 614***, but there is no such judgment available in the book.

18. No doubt, Hon'ble Apex Court has repeatedly held that Court should be more generous in allowing amendments, but in that regard parties seeking amendment needs to apply in terms of specific provisions of law citing therein reasons for carrying out amendment in the pleadings. In the instant case, as has been discussed in detail, defendants No.1(a) to 1(g) being LRs of original defendant No.1 in the garb of reply to the amended plaint carried out whole sale amendment in the written statement that too without obtaining leave of the Court. Amendment, if any, in the written statement by the defendant was justified to the extent of amendment carried out in the plaint, but, as has been observed hereinabove, perusal of amended written statement clearly suggests that entire stand taken by original defendant in original written statement has been changed. Learned trial Court while rejecting the application has also placed reliance on the judgment passed by Hon'ble High Court of Rajasthan in ***Ram Chandra vs. Mahindra Singh, AIR 1980 Rajasthan 04 (303)***, but same may not be applicable in view of law laid down by our own High Court in ***Sawan Singh and Others vs. Radha Kishan and Others, AIR 1980 HP 8,*** wherein this Court has concluded that new or inconsistent pleas can only be taken by filing appropriate application for amendment under Order 6 Rule 17 CPC. In ***Sawan Singh's*** case *supra*, this Court in paras 11 and 12 has held as under:-

"11. As evident from the above noted observation, the learned Judge was led away by the consideration that rules of procedure are handmaids of justice, and since he was considering the amendment of written statement, he was inclined to hold that in defence all plausible pleas can be taken by a defendant. It was held that once the court directed the additional written statement to be filed, impliedly the court permitted the defendant to take up even inconsistent pleas without seeking for an amendment under Order VI, Rule 17. In the subsequent decision New Bank of India Ltd. v. Smt. Raj Rani, AIR 1966 Punj 162 (supra) the learned Judge, who spoke for the Bench in Girdharilal v. Krishan Datt, AIR 1960 Punj 575 (supra), was the Presiding Judge and once again he reiterated his previous view with slight modification that one has to see the order granting amendment of the plaint and permission for the filing of additional written statement. If the said order is unrestricted and merely says that additional written statement be filed, it would mean that the defendant gets the unrestricted right to take up any pleas he prefers, may be inconsistent with the original pleas or may be new pleas or may consist of new grounds.

In that case, the plaintiff sought for the amendment because a certain fixed deposit receipt had matured and he wanted a decree for that amount as well. The court asked for additional written statement. New pleas were taken and it was contended that without amendment in the pleadings, such new pleas could not be raised. The learned Judge upheld his previous view, and held that the defendant got untrammelled right to take up any pleas he preferred, and the order under Rule 9 of Order VIII was required to be seen and if there was nothing to indicate in that order that pleadings were restricted, new pleas or even inconsistent pleas could be taken up by the defendant. These two cases were followed in Lachhmi Devi (supra) and the learned Judge of this Court while allowing the plaintiff to amend the plaint because a certain party was to be added, asked for additional written statement. New and inconsistent pleas were taken in the additional written statement and the same were allowed by the court. Thus the above noted three cases took the view contrary to that in Tek Chand Chitkara v. Union of India, ILR (1974) Him Pra 616 (supra).

12. As we have already pointed out, Order VI deals with pleadings generally and the provisions of that order do apply to plaint as well as to written statement. Under Order VIII, Rule 9, there is a provision for subsequent written statement. Nevertheless Rule 9, Order VIII has to stand with Rule 7 and 17 of Order VI. Under Rule 9, Order VIII, additional written statement can be permitted to be filed. But that does not mean that Rule 7 and 17 of Order VI have been given a go-bye. If such additional written statement contains any departure in the pleadings within the meaning of Order VI, Rule 7, in our opinion Rule 17, Order VI will be effective and a proper amendment of the pleadings will have to be asked for. Without the court applying its mind as to whether there has been really a departure in the pleadings and as to whether the amendments should be permitted for the purpose of determining the real question in controversy, in OUT opinion, the mere fact that additional written statement has been permitted to be filed under Rule 9 of Order VIII will not give a right to the defendant to raise new or inconsistent pleas, or to make allegation contrary to the facts alleged in the previous pleadings.

The observations, of the learned Judge in Girdharilal (supra) and New Bank of India Ltd. (supra) depending upon the nature and application of the law of procedure, in our opinion will be of no avail, the reason being that it would by itself be a rule of law as to whether Rule 7 and 17 of Order VI are not required to be complied with and merely because Rule 9 of Order VIII has been observed, a departure would be permitted in the pleadings without seeking for an amendment

under Rule 17 of Order VI. That would not be a question of procedure, although while allowing or disallowing the amendment the court can always take a liberal view and may even permit the defendant to raise whatever defence he choses to take in his favour.

Therefore, in our opinion, it will be a question of the application of the law pointed out in Rule 7 and 17 of Order VI and not a pure question of procedure to be decided for allowing a departure in the pleadings under a pretence that additional written statement is permitted to be filed under Rule 9 of Order VIII. With respects to the opinion expressed in the above-noted two Punjab cases we have further to observe that the language used in the order allowing the amendment in the plaint or allowing the additional written statement to be filed would be of no consequence. It is obviously correct that under Order VIII, Rule 9 the Court would allow the subsequent written statement merely because the plaint was amended. While making that order the court is not expected to be aware of the pleas which may be taken while filing such additional written statement. It is only when the additional written statement is filed that the court will become conversant with the pleas taken in that additional written statement. At that point of time Rule 7 and 17 of Order VI will come into play and in case in the opinion of the court the additional written statement is not confined to the amendments sought for in the plaint, the defendant will be compelled to file an application for amendment of the pleadings under Rule 17 of Order VI. Thereafter the court will examine the entire matter, and if the amendments sought for were necessary for determining the real question in controversy the court may or may not allow the amendments. In fact, the mere direction by the court that additional written statement be filed, would convey only one meaning that the additional written statement hereinafter to be filed has to confine to the amendments already sought for by the plaintiff. If the court prejudges the issues and permits additional pleas to be taken by the defendant, in a particular case it may elaborate its order seeking for the additional written statement by making pertinent observations. But, as we have stated above, we cannot conceive of a case in which the court will be in a position to prejudge the issues and make an elaboration in its order to enable new pleas in additional written statement.

At any rate, in the case before us, the orders were simple under Order VIII, Rule 9 permitting additional written statements to be filed. After that stage the court was not aware as to what sort of pleas were likely to be raised in the additional written statements. The question arose at the time when the additional written statements were filed and the court found that there was departure in the pleadings and rightly asked for the amendment under Rule 17 of Order VI."

(pp.12-13)

19. Now, this Court would be adverting to the another contention put forth on behalf of the counsel representing the defendants that being LRs of deceased defendant No.1, they are entitled to file written statement appropriate to their character as LRs of deceased defendant. At this stage, it would be relevant to reproduce hereinbelow the provisions contained in Order 22 Rules 3 & 4 CPC:

"ORDER 22 - DEATH, MARRIAGE AND INSOLVENCY OR PARTIES

Rule-3. Procedure in case of death of one of several plaintiffs or of sole plaintiff—

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

> *(2) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.*
>
> ***4. Procedure in case of death of one of several defendants or of sole defendant—***
>
> *(1) ....*
>
> *(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant."*

20. Before perusing the aforesaid provisions of law, it may be stated that sub-rule 2 of Rule 4 of Order 22 definitely does not deal with rule of pleadings i.e. Order 6 Rule 17 and Order 8 Rule 9 CPC. Aforesaid provisions of law are nothing to do with Order 6 Rule 17 CPC and same are independent of Order 8 Rule 9. Close scrutiny of aforesaid provisions of law clearly suggests that it is complete in itself and it enables a person, who has been made a party under Order 22 Rule 4 to take any defence, which may be appropriate to his/her character as LRs of deceased defendant. The aforesaid provisions of law clearly suggests that being LRs of deceased i.e. the original defendant/party can file any defence which is appropriate to his character as LRs of deceased and Court has no discretion to stop or debar him from doing so. But careful perusal of the aforesaid provisions clearly suggests that a party, seeking to file an additional written statement being LRs of deceased defendant, necessarily need to move an application under Order 8 Rule 9 read with Order 22 Rule 4 CPC and seek permission of the Court before raising a defence appropriate to his character as LRs of deceased defendant. Party applying under Order 8 Rule 9 needs to assign cogent reason for additional written statement because written statement, if any, in terms of sub-rule 2 of Rule 4 of Order 22 would be additional written statement on behalf of LRs appropriate to their character as LRs of deceased defendant. Sub-rule 2 of Rule 4 of Order 22 is not a rule of pleading and it has no relation, whatsoever, with Order 6 Rule 17 CPC and similarly the same are independent of Order 8 Rule 9 CPC. Sub-rule 2 Rule 4 of Order 22 has its own application and limitation and it enables a person, who has been made a party under Order 22 Rule 4, to take any defence subject to the condition that defence so made should be appropriate to his character as LRs of deceased defendant. Whereas, Order 8 Rule 9 empowers the Court with a discretion to allow a defence or to file written statement; meaning thereby party cannot raise as a matter of right any fresh plea by way of filing written statement without obtaining leave of the Court, which the Court, in its discretion, may or may not grant.

21. But as per case titled: ***J.C. Chatterjee & Others vs. Shri Sri Kishan Tandon and another, AIR 1972 SC 2526***, Hon'ble Apex Court has held that if LRs of deceased defendant chooses to raise any such defence, he being entitled to do so, Court has no discretion to stop or debar him from doing so and in that eventuality Order 8 Rule 9 may not have any application. But aforesaid reference/observation in the judgment cited hereinabove was made by the Hon'ble Apex Court while dealing with the issue of entitlement of filing additional written statement by the LRs of deceased defendant under Order 22 Rule 4 CPC.

22. Close scrutiny of aforesaid provisions of law under Order 22 Rule 4 clearly suggests that leave is given to the substituted defendants to render appearance and to make any defence appropriate to their character as LRs of deceased defendant and leave is given to these defendants being LRs to file additional written statement. Once additional written statement in terms of Order 22 Rule 4 is filed by LRs of original defendant, Court before whom written statement is filed needs to examine whether defence taken by the LRs is appropriate to his/their character of LRs of the deceased defendant or not. Though plain reading of Order 8 Rule 9 CPC suggests that grant of leave before making amendment in written statement or filing additional statement is necessary, but if Order 22 Rule 4 CPC is read in its entirety with the judgment passed by Hon'ble Apex Court, referred hereinabove, it suggests that LRs have the right to make

the defence appropriate to their character as LRs and Order 8 Rule 9 has no application in that event and Court has no discretion to stop or debar them from doing so.

23. In the instant case there is nothing on record suggestive of the fact that defendants No.1(a) to 1(g) filed additional written statement in terms of Order 22 Rule 4 sub-rule 2 as LRs of the deceased defendant where they had independent right to raise any defence appropriate to their character as LRs of the deceased defendant. Rather, they filed amended written statement pursuant to amendment carried out by the plaintiff in plaint after seeking due leave of the Court by moving an application under Order 6 Rule 17 CPC. This Court is of the view that since defendants No.1(a) to 1(g) entered into the shoes of original defendant, who had already filed written statement to the plaint, they could only carry out amendment, if any, to the extent of amendment carried out in the plaint and by no stretch of imagination they could carry out wholesale amendment in the written statement, as has been observed above. There is no quarrel that under Order 22 Rule 4 sub-rule 2, defendants being LRs of deceased defendant have/had right to raise any defence, which is appropriate to their character as LRs, but in that eventuality they could only file an additional written statement in their independent capacity incorporating therein their defence appropriate to their character. But in the instant case, LRs of deceased defendant without resorting to the provisions contained in Order 22 Rule 4 sub-rule 2 CPC filed amended written statement to the original written statement, that is not permissible. Once LRs No.1(a) to 1(g) chose to file amendment to the written statement originally filed by their predecessor-in-interest, they could only restrict themselves to the stand already taken by their predecessor-in-interest. New pleas, if any, in defence appropriate to their character could only be taken by defendants No.1(a) to 1(g) being LRs of deceased defendant in terms of Order 22 Rule 4 by way of filing additional written statement.

24. Perusal of the judgments relied upon hereinabove by learned Senior counsel appearing on behalf of defendants clearly suggests that LRs of deceased defendant can raise, as a matter of right, any defence which is appropriate to his/their character as LRs of deceased defendant and Court has no discretion to stop or de-bar him/them from doing so. But in the present case, as has been discussed in detail, there is nothing on record suggestive of the fact that defendants 1(a) to 1(g) while carrying out amendment in the original written statement filed by their predecessor-in-interest exercised their right as envisaged under Order 22 Rule 4(2) because at no point of time additional written statement, if any, in terms of aforesaid provision of law was filed.

25. Consequently, in view of detailed discussion made hereinabove, impugned order passed by learned trial Court deserves to be quashed and set aside and amended written statement filed by defendants 1(a) to 1(g) is rejected. However, it may be clarified that defendants being LRs of original defendant No.1 are always at liberty to file additional written statement in terms of provisions of Order 22 Rule 4, if so advised. This petition is disposed of with the aforesaid observation. Interim order, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. …..Appellant.

Versus

Suman Sharma and others ….Respondents.

Cr. Appeal No. 755 of 2008.

Date of Decision: 18th November, 2016.

Indian penal Code, 1860- Section 451, 352 and 506 read with Section 34- Informant had gone to attend a local fair, where she was abused by the accused- the accused gave beatings to her on her return- the accused were tried and acquitted by the Trial Court- held in appeal that testimony

of the informant is corroborated by PW-2 and PW-3- there is nothing in their cross-examination to show that they were making incorrect statements – delay in reporting the matter was satisfactorily explained- appeal allowed- accused convicted of the commission of offences punishable under Sections 451, 352 and 506 read with Section 34 of I.P.C. (Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.
For the Respondents: Mr. Rakesh Dogra, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Sub Divisional Judicial Magistrate, Rampur Bushehar, District Shimla, H.P., rendered on 01.09.2008 in Case No. 111-2 of 2004, whereby, he acquitted the accused/respondents herein for theirs allegedly committing offences punishable under Sections 451, 352 and 506 of the IPC read with Section 34 of the IPC.

2. The facts relevant to decide the instant case are that on 15.05.2004 at about 8.30 p.m. at place Kumarsain complainant Rekha Devi resident as tenant of Subhash Bhardwaj with her children and niece Jogindra Devi. The niece of complainant Jogindra Devi solemnized the marriage with one Raju. The complainant was being harassed by the parents of Raju that she is the main culprit. She further narrated to the police that when she had gone to attend a local fair then accused persons abused her. When the complainant returned back to her home at about 8.30 p.m. then accused persons appeared on the spot and gave beatings to her. She brought the matter to the notice of Police Station Kumarsain wherein FIR Ex.PW1/A was lodged against the accused. During the course of investigating site plan of the site of occurrence was prepared. Statements of the witnesses were recorded as per their version.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for theirs committing offences punishable under Sections 451, 352 and 506 read with Section 34 of the IPC. In proof of the prosecution case, the prosecution examined 4 witnesses. On conclusion of recording of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the trial Court, in which they claimed innocence and pleaded false implication. However, they did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondents herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The testification of the complainant qua the relevant incident embodied in FIR comprised in Ex.PW1/A is free from any taint or blemish qua hers (a) either contradicting her previous statement recorded in writing (b) besides the sanctity of her testification comprised in her examination-in-chief stands uneroded given hers in her cross-examination not deposing contradictorily thereto. Consequently, the testification of the complainant unbereft of any blemish or taint for thereupon it being construable to be uncreditworthy warrants imputation of reliance thereupon. Moreover, the testifications of the eye witnesses to the occurrence, who deposed as PW-2 and PW-3 lend formidable vigour to the testification of PW-1. A perusal of their respective testifications unveils the trite factum qua theirs deposing qua the relevant incident in tandem with the testification of PW-1 also an incisive reading of their respective testification omits to disclose qua their respective testimonies standing ridden with any taint of their improving or embellishing upon their respective previous statements recorded in writing nor their respective cross-examinations unveil a version qua the occurrence contradictory to the one enunciated by them in their examinations-in-chief also the respective testifications of the prosecution witnesses are unbereft of any taint or stain of any intra se contradictions. Consequently, when the untaint ridden besides obviously creditworthy evidence qua the relevant occurrence stood adduced by the prosecution before the learned trial Court, the latter for merely frivolous reasons embedded in evidence disclosing the prevalence of enmity inter se the complainant and the accused arising from theirs rearing a vendetta against her for hers encouraging Raju son of accused No.1 and brother of accused No. 2 to solemnize marriage by elopement with one Jogindra, who stands related to the complainant besides though with the police station concerned standing located in proximity to the relevant site of occurrence, the incident standing not promptly reported thereat by the complainant, rather hers reporting the incident before the police station concerned with one day's delay, whereupon, it concluded qua the embodiments occurring in the FIR acquiring a stain of theirs holding a concocted besides an engineered version qua the incident.

10. The tenacity of the aforesaid reasons, is bereft of any vigour especially when all the prosecution witnesses render an untaint ridden creditworthy version qua the occurrence. The mere factum of PW-3 in her cross-examination echoing qua in her presence no scuffling or fighting occurring inter se the complainant with the accused/respondents herein stood also inaptly concluded by the learned trial Court qua hers hence not lending corroboration to the testimony of PW-1, whereas, with hers in her testification comprised in her examination-in-chief making a disclosure qua hers evacuating the complainant from the clutches of the accused/respondents herein, testification whereof when stood unconcerted to be shred of its efficacy by the learned defence counsel while holding her to cross-examination comprised in his not putting apposite suggestions to her, begets an inference qua hence the aforesaid testification of PW-3 comprised in her examination-in-chief qua hers evacuating the complainant from the clutches of the accused/respondents vividly unveiling qua the accused/respondents holding the complainant imperatively hence it also conveying qua there occurring a scuffle inter se the complainant with the accused/respondents herein whereupon the effect of the testification of PW-3 in her cross-examination wherein she had deposed qua no scuffle or fighting occurring in her presence inter se the complainant with the accused not acquiring any paramount worth, for constraining the learned trial Court to dispel the testification of PW-3 embodied in her examination-in-chief wherein she has with candor made a communication qua hers besides others evacuating the complainant from the clutches of the accused/respondents herein. Conspicuously, when hence there was an imminent display therein qua a scuffle occurring inter se complainant and the accused/respondents herein merely on hers desultorily deposing in her cross-examination qua no scuffling and fighting occurring inter se both would not benumb the effect of the relevant communications made by her in her examination-in-chief nor the learned trial Court could hence erode its effect.

11. Since, in explication of the apposite delay, the complainant has purveyed a tangible ground comprised in the factum qua at the relevant time her husband being unavailable at home also hers tending to her minor children hence when it did comprise a tangible ground

for the learned trial Court to dispel the vigour of the omission of the complainant to with utmost promptitude report the matter to the police station concerned, whereas, its negating the effect of the aforesaid explication purveyed by the complainant for the delay in the lodging of the FIR qua the relevant incident before the police station concerned, has hence committed a gross illegality in undermining the impact of the relevant explication besides it has committed a gross illegality in mis-appreciating the impact of the untaint ridden testimonies of prosecution witnesses thereto.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

13. Consequently, the instant appeal is allowed and the judgment of acquittal recorded by the learned trial Court in favour of the accused/respondents herein is set aside. Accordingly, the accused are held guilt for theirs committing offences punishable under Sections 451, 352 and 506 of the IPC read with Section 34 of the IPC. They be produced before this Court on 2.12.2016 for theirs being heard on quantum of sentence.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Anjana Devi ….Appellant/Petitioner.
Versus
Manjit Singh ….Respondent.

FAO No. 463 of 2012.
Reserved on : 10.11.2016.
Decided on : 21st November, 2016.

Hindu Marriage Act, 1955- Section 13- The marriage between the parties was solemnized on 4.12.1994 – two children were born- the husband assaulted the wife causing her injuries – she was residing with her parents – husband had not made any efforts to take her to matrimonial home- the petition was dismissed by the Trial Court- held in appeal that it was duly proved that husband had subjected the wife to physical cruelty – he had not made any efforts to bring the wife from her parental home- this proved the desertion on the part of the husband – the marital ties had broken down irretrievably – petition allowed and the marriage between the parties ordered to be dissolved.(Para-7 to 10)

For the Appellant: Mr. Amandeep Sharma, Advocate.
For the Respondent : Mr. Anil Jaswal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The instant appeal stands directed against the judgment rendered by the learned Additional District Judge, Fast Track Court, Hamirpur, H.P. ON 22.08.2012 in H.M.A. Petition No. 41 of 2009, whereby, the petition aforesaid constituted therebefore by the petitioner/appellant herein stood dismissed.

2. The brief facts of the case are that the marriage inter se the contesting parties hereat stood solemnized on 4.12.1994 at village Matwar, PO Jalari, Tehsil Nadaun, District Hamirpur, H.P. Two children stand begotten from their wedlock. In the apposite petition, the petitioner herein averred qua the respondent herein had at public place abused and assaulted her whereupon she stood constrained to lodge an FIR with the Police Station, Naudan. Also she

averred therein on 11.05.2007, the respondent herein assaulting her at bus stand Naudan, in sequel, whereto injuries stood inflicted upon her. She continued to aver therein qua the respondent herein being habitual drunkard besides his openly threatening to eliminate her. Since, three years hitherto, the institution of the apposite petition before the learned Additional District Judge, Hamirpur, she avers of her staying with her parents. She avers of the respondent herein not making any concerted efforts to retrieve her to her matrimonial home whereupon she deposes qua the respondent herein hence with his holding the apposite animus deserdendi alienating her from his matrimonial company. Moreover, she avers qua her stay at her matrimonial home being incongenial arising from the respondent herein perpetrating physical cruelty upon her rendering her stay with the respondent herein at latter's home to be unsafe.

3. The petition for divorce instituted by the petitioner/appellant herein before the learned Additional District Judge, Hamirpur stood contested by the respondent herein by his instituting reply thereto wherein he controverted all the allegations constituted against him in the apposite petition by the appellant herein in the petition.

4. The petitioner/appellant herein filed rejoinder to the reply of the respondent, wherein, he denied the contents of the reply and re-affirmed and re-asserted the averments, made in the petition.

5. On the pleadings of the parties, the learned trial Court struck the following issues inter-se the parties at contest:-

1. Whether the respondent has treated the petitioner, his wife with cruelty as alleged ?OPP
2. Whether the respondent has deserted his wife petitioner as alleged? OPP
3. Whether the petition is not maintainable, as alleged? OPR
4. Whether the petitioner is estopped to file the present petition by her own act and conduct, as alleged? OPR
5. Relief.

6. On an appraisal of evidence adduced before the learned Additional District Judge, he concluded qua the incidents of physical cruelty embodied in the apposite petition remaining unproven for paucity of adduction of germane apposite cogent evidence. Also he concluded of the petitioner/appellant herein against the wish besides without the consent of the respondent herein departing from her matrimonial home, wherefrom, he concluded qua proof of the imperative ingredient of the respondent herein holding the enjoined animus deserdendi not emanating, leading him to conclude of the entire evidence adduced before him not holding any formidable sinew to make a conclusion qua either the respondent herein treating the petitioner/appellant herein with physical beside mental cruelty also no clinching evidence standing adduced in portrayal of the respondent herein deserting the matrimonial company of his lawfully married spouse, constraining it to hence decline the relief claimed in the apposite petition preferred before him by the petitioner/appellant herein. The learned trial Court in making the aforesaid conclusions has remained grossly oblivious to the relevant germane evidence in portrayal of the incident(s) of physical cruelty averred in the petition sequeling the lodging of an FIR by the petitioner/appellant herein before the Police Station concerned. Even if, a copy of the FIR stood not tendered into evidence, its non adduction into evidence was insignificant especially when in his cross-examination to which the respondent herein stood subjected to by the learned counsel appearing for the petitioner/appellant herein, he acquiesces qua in the year 2007, an FIR standing lodged by the petitioner/appellant herein against him qua the incident of cruelty averred in the petition. In sequel whereto, he has also acquiesced qua his facing trial before the Court concerned. The further concomitant effect of the aforesaid acquiescences of the respondent herein is qua this Court standing entailed to record a firm inference qua thereupon the petitioner/appellant herein while imputing qua the respondent herein incidents of cruelty, her imputation not lacking in veracity besides obviously her departure in sequel thereto from her matrimonial home to her parental home standing prodded by a good and reasonable cause. The

incidents of physical cruelty perpetrated upon the petitioner/appellant herein by the respondent herein when stand concluded to constitute a reasonable cause for the lawfully married spouse of the respondent herein to depart from her matrimonial home to her parental home renders unbereft of vigour the conclusion recorded by the learned trial Court qua her departure to her parental home being against the wish besides without the consent of her husband wherefrom it also inaptly concluded qua her continuous stay at her parental home not warranting it to afford the relief claimed in the apposite petition.

7. Be that as it may, even if, the petitioner/appellant herein had for a prolonged and inordinate duration refrained from cohabiting with her husband yet the aforesaid omission of the appellant herein/petitioner to cohabit with her husband would not inhibit this Court to conclude qua the respondent herein not holding the requisite animus deserdendi unless evidence of immense potency stood adduced in portrayal of the respondent herein throughout the period when the petitioner/appellant herein continued to stay at her parental home, his making vigorous sincere, genuine efforts to retrieve her to his matrimonial company. Though, the respondent herein has in his testification made an attempt to articulate qua his concerting to retrieve his married spouse to her matrimonial home, yet his endeavour visibly appears to smack of ingrained falsity, inference whereof is derivable from the factum of his sister-in-law (sister of the appellant herein) while deposing as RW-4 making a communication in her examination-in-chief qua the petitioner/appellant herein unraveling her to qua her husband belabouring her at her matrimonial home whereupon she stands constrained to cohabit with him. Also she in her testimony comprised in her examination-in-chief unveils therein qua hers concerting to persuade her to return to her matrimonial home by guaranteeing her safe stay thereat. Moreover, in her cross-examination to which she stood subjected to by the learned counsel appearing for the appellant/petitioner she acquiesces to the suggestion put her by the learned counsel appearing for the petitioner/appellant herein qua the father of the petitioner/appellant herein receiving a telephonic call whereupon he stood apprised qua the respondent herein belabouring the petitioner/appellant herein. She has also acquiesced to the suggestion put to her by the learned counsel appearing for the appellant while holding her to cross-examination qua hers not making any personal effort along with the respondent herein to visit the parental home of the petitioner/appellant herein for thereupon theirs conjointly endeavouring to retrieve her to her matrimonial home. The effect of the aforesaid acquiescences made by the respondent's witness is qua the respondent herein at her matrimonial home belaboruing his married spouse also therefrom bely the proclamations made by him qua his making efforts to retrieve his married spouse to her matrimonial home.

8. In aftermath, with the conclusion recorded by this Court qua the petitioner/appellant herein holding a good reasonable cause to depart to her parental home when stands entwined with the inference aforesaid erected qua the respondent herein not making any sincere concerted efforts to retrieve his married spouse to her matrimonial home, begets a derivative of the respondent herein holding the animus deserdendi to permanently alienate himself from the matrimonial company of his married spouse. In sequel thereto, with the incidents of perpetration of physical cruelty upon the petitioner/appellant herein by the respondent herein standing emphatically established besides with the respondent herein evidently holding the relevant animus deserdendi to alienate himself from the matrimonial company of his married spouse though enjoined the learned trial court to render a decree in the apposite petition for dissolution of marital ties laid therebefore by the petitioner/appellant, whereas, it omitting to afford the relief as prayed for, has apparently committed a grave legal misdemeanor.

9. Moreover, RW-4 acquiesces in her cross-examination qua hers trying to prevail upon the respondent herein to wean himself from consuming liquor also hers concerting to dissuade him from belabouring the petitioner/appellant herein wherefrom also the apposite averments in consonance therewith constituted in the apposite petition acquire corroborative succor besides with hers in her cross-examination acquiescing to the suggestion put to her by the learned counsel for the petitioner qua hers concerting to wean the respondent herein from his ill

conduct towards the petitioner herein not yielding the appropriate result constrains an inference of the casting in the apposite petition an apposite averment qua the stay of the petitioner/appellant herein at her matrimonial home being both unsafe besides incongenial hence standing proved, wherefrom, it is inevitable to conclude of their being abysmal want of affability inter se the married spouses also their mutual discord not being amenable to any truce or improvement rather their marital ties standing irretrievably broken down, wherefrom the rendering of an apposite decree for dissolution of their marital ties is both befitting besides sagacious.

10. For the foregoing reasons, it is apt to clinchingly conclude of with the marital ties of the petitioner/appellant herein with the respondent herein standing broken down irretrievably hence, the rendition of a decree qua severance of their marital ties would be both just and expedient. Consequently, the instant appeal is allowed. Accordingly, the marriage inter se the petitioner/appellant and the respondent herein is ordered to be dissolved. In sequel, the judgment and decree impugned before this Court is quashed and set aside. Decree sheet be prepared accordingly. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Ashok Kumar and another ..Appellants-Defendants
Versus
Amrit Lal and others ..Respondents.

RSA No. 583 of 2006.
Reserved on: 16th November, 2016.
Date of Decision : 21st November, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land – the defendants have encroached upon a portion of the suit land – the suit was decreed by the Trial Court- an appeal was filed, which was dismissed- held in second appeal that the demarcation proved the encroachment – there was no infirmity in the process of demarcation – an owner has a right to claim possession of the encroached land- the suit was rightly decreed by the Courts- appeal dismissed.(Para-8 to 13)

Case referred:

Dr. Abdul Khair versus Miss Shella Myrtla James and another, AIR 1957, Patna, 308

For the Appellant: Mr. R.K. Gautam, Senior Advocate with Mr. Gaurav Gautam, Advocate.
For Respondents No.1 to 3: Mr. Bhupender Gupta, Senior Advocate with Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Regular Second Appeal stands directed by the defendants/appellants herein against the impugned rendition of the learned District Judge, Chamba, Himachal Pradesh, whereby he dismissed the appeal of the defendants/appellants herein and affirmed the judgment and decree rendered by the learned Cvil Judge (Senior Division), Dalhousie, District Chamba, H.P., whereby the latter Court decreed the suit of the plaintiff. The defendants/appellants herein stand aggrieved by the judgment and decree of the learned District Judge, Chamba. Theirs standing aggrieved, they have therefrom preferred the

instant appeal before this Court for seeking from this Court an order reversing the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff is owner in possession of the suit land comprising khata/khatauni No.39/54, khasra No.192, measuring 252-3 square yards situated in Mauza Kasba Chowari, Pargana Chowari, Tehsil Bhatiyat, District Chamba, H.P., alongwith proforma defendants No.3 and 4. The defendants are strangers to the suit land having no right, title or interest in the same. Land of the defendants comprising khasra No.193 is just adjacent to the suit land. Defendants have encroached upon the 49.0 sq. yards area of the suit land by raising structure and constructing sehan. Demarcation of the suit land was carried outon 27.05.2003 and it was found that defendants have encroached upon the khasra No. 192/1 measuring 49 sq. yards. It has been prayed that the suit of the plaintiff be decreed for possession of 49 sq. yards of suit land, specifically khasra No.192/1. It has also been prayed that the suit be decreed for permanent prohibitory injunction and defendants be restrained from raising any further structure on the suit land.

3. Defendants No.1 and 2 contested the suit and filed written statement, wherein, they have taken preliminary objections qua maintainability, estoppel and locus standi. On merits, it has been submitted that the demarcation report is illegal and the suit land has not been legally partitioned by Assistant Collector 1st Grade, Bhatiyat and it is not binding on the defendants.

4. The plaintiff/respondent herein filed replication to the written statement of the defendants/appellants herein, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is entitled to relief of possession as prayed for? OPP

2. Whether plaintiff is entitled to relief of mandatory injunction, as prayed for? OPP

3. Whether plaintiff is entitled to relief of permanent prohibitory injunction, as prayed for? OPP

4. Whether the suit in the present form is not maintainable as alleged? OPD

5. Whether the plaintiff has no locus standi to sue as alleged? OPD

6. Whether the plaintiff is estopped from filing the present suit as alleged? OPD

7. Whether suit land has not been legally partitioned by the A.C. 1st Grade, if so, its effect, as alleged? OPD.

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the respondent herein/plaintiff. In an appeal, preferred therefrom by the appellants/defendants before the learned first Appellate Court, the latter Court dismissed the appeal.

7. Now the defendants/appellants have instituted the instant Regular Second Appeal before this Court assailing the findings recorded by the learned first Appellate Court in its impugned judgement and decree. When the appeal came up for admission on 18.09.2007, this Court, admitted the appeal instituted herbeforeby the defendants/appellants against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

1. Whether the Courts below have wrongly given undue weightage to the demarcation report Ex.DW3/A which is otherwise not liable to be admitted being

based against the set provisions of law specially Instructions issued by the Financial Commissioner, H.P. regarding conducting of demarcation?

Substantial question of Law No.1:

8. The respective estates of the litigating parties adjoin each other. The best germane evidence for clinching the trite factum of the contesting defendants while raising construction upon their land contiguous to the land of the plaintiff, theirs also subjecting the land of the latter to construction, stands comprised in a demarcation report prepared by the demarcating officer concerned, in sequel, to his holding a valid demarcation of the contiguous estates of the parties at contest. The best evidence aforesaid stands comprised in Ex.PW3/A besides in Ex.PW3/B respectively comprising the demarcation report and the tatima, whereunder unravelments occur qua the extent of encroachment made by the defendants on the land owned and possessed by the plaintiff. However, the mere factum of the relevant enunciations occurring therein would not per se imbue any sanctity to them unless evidence stands adduced qua the demarcating officer concerned while holding demarcation of the contiguous estates of the parties at lis, his revering the mandate of the apposite rules and instructions. For validating the apposite demarcation held by PW-3, enjoined upsurging of evidence qua his preceding his holding the relevant demarcation his obtaining the consent of the litigating parties qua the fixed points wherefrom he stood authorized to conduct the relevant demarcation proceedings. However, satiation qua the aforesaid mandate stands evidently unbegotten. Even if, PW-3, preceding his holding the relevant demarcation of the contiguous estates of the contesting parties hereat omitted to obtain their consent qua the fixed points wherefrom he stood authorised to hold the relevant demarcation would not per se negate nor invalidate his demarcation report comprised in Ex.PW3/A unless potent unflinching evidence stood adduced before the learned trial Court depicting qua his not at the relevant time holding the relevant musabi also evidence standing adduced qua his therefrom not holding the apposite measurements besides potent evidence displaying his thereafter not relaying onto the relevant fields the apposite measurements borrowed by him from the relevant musabi standing adduced. However, the aforesaid evidence is amiss. In aftermath, the findings recorded by the demarcating officer comprised in Ex.PW3/A and in Ex.PW3/B qua the defendants subjecting the land owned and possessed by the plaintiff to unauthorized construction do not suffer from any inherent infirmity. Also conclusivity to the relevant pronouncements made therein are acquired by the factum of the defendants, on Ex.PW3/A and Ex.PW3/B standing adduced into evidence before the learned trial Court not thereat ventilating their apposite objections thereto holding portrayals qua on account of the demarcating officer infracting the apposite mandate of the relevant rules and instructions, theirs holding no tenacity. The effect of theirs omitting to before the learned trial Court prefer objections to the validity of Ex.PW3/A besides to the validity of Ex.PW3/B begets an inference qua theirs acquiescing to the relevant unfoldments occurring therewithin.

9. Be that as it may, the learned counsel appearing for the appellant has contended with much vigour qua with the prescriptions held in the relevant rules and instructions qua the demarcating officer at the relevant time holding the relevant “musabi” standing infracted, infraction whereof arising from PW-3 voicing in his cross-examination qua his not at the relevant time holding the relevant “musabi” rather his holding the “momy”, hence, the tenacity of the relevant pronouncements occurring in Ex.PW3/A besides in Ex.PW3/B suffering erosion, whereupon he contends qua the relevant concurrently recorded renditions of both the learned Courts below warranting theirs being set aside. However, the aforesaid submission lacks force or vigour arising from the factum of though the relevant rules prescribe qua the demarcating officer at the relevant time holding the relevant “musabi” yet the mere factum of his thereat not holding the relevant “musabi” rather his holding the “momy” which too carries replications of all the relevant reflections occurring in the “musabi” whereupon obviously the “momy” alike the “musabi” purveys leverage to the demarcating officer to borrow therefrom all the relevant measurements of the relevant fields, would not erode the efficacy of Ex.PW3/A and Ex.PW3/B unless forthright evidence stood adduced qua the “momy” carried at the relevant time by the demarcating officer not therein replicating the relevant manifestations borne on the relevant

“musabi”. However, when no evidence stood adduced qua the “momy” carried at the relevant time by the demarcating officer not replicating the relevant manifestations occurring in the apposite “musabi” constrains an inference qua the “momy” holding omnibus affinity with the “musabi” qua all the relevant manifestations also leads to a deduction qua the demarcating officer borrowing therefrom the relevant measurements , whereafter he relayed them onto the relevant fields, significantly, when no evidence to bely the aforesaid inference stood adduced by the defendants/appellants before the learned trial Court whereupon immense teancity stands acquired by Ex.PW3/A.

10. With this Court concluding qua the pronouncements occurring in Ex.PW3/A besides in Ex.PW3/B not standing bereft of tenacity, it is appropriate to adjudicate the submission addressed herebefore by the counsel for the defendants/appellant, anvilled upon the pronouncement made by this Court in RSA No.390 of 2002, titled as Prem Chand and others versus Kesho Ram and others, decided on 10.01.2013, whereupon, this Court after validating the relevant pronouncements occurring in the relevant demarcation report proceeded to in substitution of it rendering a decree of demolition of the structure raised by the delinquent litigant upon the land, owned and possessed by the persons aggrieved by the errant conduct of the delinquent, rendered a decree of compensation vis-a-vis the plaintiffs therein. A close reading of the pronouncement of this Court recorded in the aforesaid rendition unveils (a) the factum qua raising of construction by the defendant(s) on the land owned and possessed by the plaintiff(s) not begetting an inference of the latter acquiescing or abandoning or waiving his rights thereon unless evidence stood adduced in display of his despite knowing the factum of the defendant raising construction on land owned and possessed by him yet his permitting the defendants to raise construction thereon; (b) the demarcation report alone comprising the relevant best evidence also it constituting the relevant material wherefrom the relevant knowledge emanates qua the defendant(s) encroaching upon the land of the plaintiff(s) also no inference qua earlier thereto the plaintiff(s) deriving knowledge qua the defendant(s) raising construction upon the land owned and possessed by him/them can stand imputed to the plaintiff(s) nor also earlier thereto any inference being erectable qua the plaintiff(s) acquiescing besides abandoning or waiving his/their rights qua the land owned and possessed by him/them whereon construction stood raised by the defendant(s), whereupon the principle of waiver for estopping him/them to agitate his/their relevant grievance is unavailable for erection vis-a-vis the plaintiff(s) merely for his/their failing to make prompt concerts holding contemporaneity in timing vis-a-vis the the stage of raising of construction by the defendant(s).

11. With the mandate encapsulated in a decision reported in ***Dr. Abdul Khair versus Miss Shella Myrtla James and another, AIR 1957, Patna, 308***, the relevant paragraph 15 whereof stands extracted hereinafter, wherewithin the trite expostulation of law stands expounded qua the relief for compensation to the aggrieved plaintiff(s) in substitution to the rendition of a decree of demolition of the unauthorized construction raised by the defendant(s) upon his/their land being unamenable for standing pronounced by Courts of law, constrains this Court to not accept the submission addressed herebefore by the counsel for the defendants/appellants qua this Court modifying the concurrently recorded verdicts of both the Courts below by its awarding damages qua the plaintiffs. Relevant paragraph No.15 reads as under:

> “(15) the next important question for consideration is, is the decree for compensation in lieu of the ejectment, awarded by the first court of appeal, which has been affirmed by Mr. Justice Misra, correct in law. IN my opinion such a decree is contrary to law. When the first court of appeal found in agreement with the first court, that the land in question belonged to the plaintiff, such being the findings as to the property in the land, the courts could not compel the plaintiff to part with his legal rights and accept compensation against will, howsoever reasonable it might appear to be.
>
> A similar question came up for consideration before the Bombay High Court in two cases,- 'Govind Vankaji Kulkarni v. Sadashiv Bharma Shet', ILR Bom 771 (L);

and – Jethalal Hirachand v. Lalbhai', ilr 28 boM 298 (m). In the latter case, inw hich the first case was affirmed Chandavarkar J., while considering the finding of the learned District Judge that the plaintiff was entitled to no more than compensation, because there has been on the part of the defendant a technical encroachment in as much as a foot or so of the plaintiff ground had been taken to support the wall which divided the properties of the parties observed:

> "But if the foot or so of ground so taken by the defendant belongs to the plaintiff the act of the defendant is one of continuous trespass on the plaintiff's property and the wrongdoer cannot be heard to say that he has deprived the owner of only a little and that of not much use to the latter. Too allow such a defence and on the strength of it award compensation is to let a trespasser put a value of money's worth on another man's property and deprive him of its against his will".

His Lordship went on further to observe:

> "But where a man builds on another man's property against the will of the latter or without his consent, the invasion, is practically one where pecuniary compensation cannot be regarded as not only deprived of the property be he is also entitled to make. How are the damages to be estimated in such a case and and how can it be said that an award of compensation can do justice to the owner who leases the property, and all opportunity besides of using it for purposes which he may consider profitable, on beneficial to himself."

His Lordship for the above principle relied (N). I respectfully agree with his Lordship Chandavarkar J., with his above statement of law on the subject, and consider that his Lordship has laid down the correct statement of law on the point. Relief by way of compensation in such a case is tantamount to allowing a trespasser to purchase another man's property against that man's will.

On no principle of law or equity is that allowable. In my opinion therefore, the second question posed by me must also be answered in the negative by saying that the plaintiff cannot in law or equity be awarded compensation in lieu of ejectment to which he is legally entitled. His right to recover the encroached land arises out of his ownership and he is no t estopped, either by acquiescence or waiver, to estopped by conduct from claiming his right to possession."

12. Even otherwise, even if, assuming the aforesaid manner of redressing the grievance of the plaintiff/aggrieved holds any legal weight, it was enjoined upon the defendant(s) to raise it earlier before the Courts below also they stood enjoined to adduce evidence qua the value borne by the suit land whereon unauthorised construction stands raised by them, significantly, when it would facilitate this Court to record an order qua the quantum of damages assessable vis-a-vis the plaintiff(s). However, for lack of aforesaid concerts earlier hereto by the defendants/appellants does not empower them to espouse herebefore qua this Court in the manner aforesaid modifying the concurrently recorded decrees of demolition of the unauthorised construction raised by the defendants upon the suit land owned and possessed by the plaintiff(s).

13. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Consequently, substantial question of law is answered in favour of the respondent/plaintiff and against defendants/appellants herein.

14. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Harnam Dass .....Appellant-plaintiff.

Versus

Jagdish and others .....Respondents-defendants.

RSA No. 318 of 2003.
Reserved on: 16th November, 2016.
Date of Decision :21st November, 2016.

Specific Relief Act, 1963- Section 34- P was owner in possession of the suit land – plaintiff, defendant No.1 and father of defendants No.6 and 7 are the sons of P, who constituted a joint Hindu Family- P had 1/5th share – he is stated to have executed a Will – defendant No.2 executed a gift deed in favour of defendants No.5 to 12, which is impermissible- hence, a suit was filed for seeking declaration – the suit was partly decreed- an appeal was preferred, which was dismissed- held in second appeal that suit land located in C was proved to be coparcenary property- suit land located in L and H was not proved to be coparcenary property – it was not proved that land in L and H was acquired from the usufructs of land located in C- the Courts had rightly appreciated the evidence- appeal dismissed. (Para-7 to 11)

For the Appellant: Mr. Ashwani K.Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate.

For Respondents No.1 and 5 to 9: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Regular Second Appeal stands directed by the plaintiff/appellant against the impugned rendition of the learned District Judge, Bilaspur, Himachal Pradesh, whereby he dismissed the appeal of the plaintiff/appellant herein and affirmed the judgment and decree rendered by the learned Sub Judge 1st Class, Ghumarwin, District Bilaspur, H.P., whereby the latter Court partly decreed the suit of the plaintiff. The plaintiff/appellant herein stands aggrieved by the judgment and decree of the learned District Judge, Bilaspur. His standing aggrieved, he has therefrom preferred the instant appeal before this Court for seeking from this Court an order reversing the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff had instituted a suit for declaration with consequential relief of permanent injunction against defendants NO.1 to 12 on the allegations that Shri Puran son of Shri Ram Saran was owner in possession of land described in khasra Nos. 112/35, 74, 75, and 76 measuring 10-12 bighas situated in revenue estate Halwari, Khasra No. 499/1, measuring 2/3 bighas situated in revenue estate Ladda and Khasra Nos. 27, 146, 457/165, 209, 213, 249, 322, 388, 399 and 389 measuring 19-10 bighas situated in revenue estate, Chhaproh, Pargana Sarium, Tehsil Ghumarwin, District Bilaspur. The plaintiff, defendant No.1 and Shri Sita Ram (father of defendants No.6 and 7) are sons of Shri Puran. Defendants No. 3, 4 are sons of the plaintiff. It is stated that the parties were Brahmins by caste and were governed by Hindu Mitakshra Law in the matter of alienation and succession. The plaintiff, defendant No.1 and Shri Sita Ram along with their father Shri Puran constituted a joint Hindu family. The suit land was ancestral though recorded under the ownership and possession of Shri Puran in the books of the Collector. The suit was stated to be joint Hindu coparcenary property. As such, Shri Puran could not alienate the same through Will. The plaintiff had stated that he had 1/5th share in the suit land. Shri Puran had died in 1971. Much after the death of Shri Puran, the plaintiff had been informed of succession to the estate of his father. In the books of the Collector, defendant No.1 had been recorded owner in possession of

the suit land measuring 19-10 bighas of revenue estate, Chhaproh. Defendant No.2 had been recorded owner in possession of the rest of the suit land of revenue estates Ladda and Halwari. Mutation of the suit land had been attested in favour of defendants No.1 and 2 on the strength of Will dated 22.6.1965 purported to have been executed by Shri Puran in favour of defendant No.1 and his mother defendant No.2. It is stated that Shri Puran could not have executed the Will of the suit land in favour of his wife and defendant No.1. The plaintiff wanted to institute suit claiming his share in the suit land after the death of his father. Defendant No.1 as also defendant No.2 had requested the plaintiff not to institute the suit since the litigation would bring bad name to the family. Defendant No.1 had got suit land measuring 19.10 bighas of revenue estate Chhaproh of the share of the plaintiff and Sit Ram mutated in their favour as per relinquishment deed. Defendant No.2 had assured the plaintiff that after her death the suit land of revenue estate, Ladda and Halwari shall go to the natural male heirs. As such, the plaintiff did not institute the suit claiming his share in the joint Hindu coparcenary property in 1971. The plaintiff had stated that defendant No.2 on 5.9.1989 had gifted the suit land of revenue estates Ladda and Halwari in favour of defendants No.5 to 12. Defendant No.2 could not gift the joint Hindu coparcenary property of revenue estates Ladda and Halwari in favour of her daughters or their husbands. The plaintiff had, therefore, instituted suit for declaration to the effect that the defendants No. 1,3,4, 6 and 7 and himself constituted a joint Hindu family. The suit land was ancestral joint Hindu coparcenary property with Shri Puran. Shri Puran could not execute the Will of the suit land in favour of defendants No.1 and his mother. Also the defendant NO.2 could not execute gift of the suit land situated in revenue estates Ladda and Halwari in favour of defendants No.5 to 12. A permanent injunction had been sought restraining defendants No.1 to 12 from not allowing the plaintiff to enjoy his share of the joint property. Alternatively, the plaintiff had sought relief of possession of his share of the suit land.

3. Defendants No.1,2 and 5 to 12 contested the suit and filed written statement, wherein, they have taken preliminary objections qua maintainability, limitation, estoppel and misjoinder. It had also been averred that the plaintiff had not paid correct court fees and as such, the court could not proceed with the trial of the suit. On merits, the defendants admitted the relationship of the plaintiff and the defendants with Shri Puran. It had been stated that Shri Puran had been absolute owner of the suit land. The suit land was not ancestral property of Shri Puran qua the plaintiff. The plaintiff and defendants No.1,3,4,6 and 7 did not constitute a joint Hindu family. The parties were separate in mess and worship. Shri Puran was competent to execute the Will of the suit land in favour of defendants No.1 and 2. The Will dated 22.6.1965 executed by Shri Puran was stated valid and binding on the plaintiff. Mutation of the suit land had been rightly sanctioned in favour of defendants No.1 and 2 on the strength of the last and final Will dated 22.6.1965 of Shri Puran. The plaintiff had been notified of the Will executed by his father in favour of defendants No.1 and 2 in due course. Defendants No.1, 2 and 5 to 12 had denied having agreed to grant the share, if any, of the plaintiff in the suit land situated in revenue estate, Chhaproh. Defendant No.2 had no where stated that after her death, the suit land of revenue estates Ladd and Halwari shall go to male natural heirs. Defendant No.2 was absolute owner in possession of the suit land situated in revenue estates Ladda and Halwari. Defendants No. 5 to 12 had been looking after and maintaining defendant No.2 Defendant No.2 had been competent to gift her property in favour of defendants NO.5 to 12. The plaintiff was bound by the registered gift deed dated 5.2.1989. The plaintiff was not entitled to 1/5th share of the suit land. The plaintiff was not entitled to any relief much less to the discretionary relief of permanent injunction.

4. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the suit land is joint Hindu Family coparcenary and ancestral property in the hands of plaintiff and defendants Nos.1,3,4, 6 and 7?OPP

2. Whether the Will dated 22.06.1965 with regard to suit land executed by Shri Puran in favour of the defendants No.1 and 2 is illegal and void? OPP.

3. Whether the gift deed dated 5.2.1989 executed by Smt. Ajudhiya Devi in favour of defendants is wrong and void? OPP

4. Whether the plaintiff along with defendants No.1, 2, father of defendants Nos.6 and 7 and defendants No.9 and 10 are having 1/5th share in suit land after successor of Shri Puran? OPP

5. Whether the plaintiff is entitled to a decree for permanent prohibitory injunction? OPP.

6. Whether the suit is not maintainable? OPD.

7. Whether the suit is not within limitation? OPD

8. Whether the plaintiff is estopped to file the suit by his conduct and deeds? OPD

9. Whether the suit is not maintainable on the grounds of non-payment of court fee? OPD

10. Whether the suit is bad for misjoinder of necessary parties? OPD

11. Relief.

5. On an appraisal of evidence, adduced before the learned trial Court, the latter Court partly decreed the suit of the appellant herein/plaintiff. In an appeal, preferred therefrom by the appellant/plaintiff before the learned first Appellate Court, the latter Court dismissed the appeal.

6. Now the plaintiff/appellant has instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgement and decree by the learned first Appellate Court . When the appeal came up for admission on 16.03.2005, this Court, admitted the appeal instituted herebefore by the plaintiff/appellant against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether the Will of ancestral property can be validly executed without legal necessity by divesting any beneficiary of such ancestral property, having acquired right over the property by birth?

2. Whether the gift deed Ex.P-19 executed by Smt. Ajudiya Devi is without consideration and he same is illegal in as much as she is not the owner of the suit property to the extent of the share of the plaintiff; if so its effect?

Substantial questions of Law No.1 and 2:

7. Late Shri Puran, the predecessor-in-interest of the parties at contest, owned land located in mauza Chaproh besides in mauzas Halwari and Ladda. During his life time, he executed a testamentary disposition qua his land located in the aforesaid mohals/mauza vis-a-vis the contesting defendants No.1 and 2. Defendant Ajudhiya Devi, his surviving widow in pursuance to hers thereupon receiving the aforesaid estates of her pre-deceased husband executed a gift deed comprised in Ex.P-19. Both the learned courts below concurrently recorded qua the suit land borne in mauza Chhaproh partaking the trait of ancestral coparcenary property whereas the suit land borne in mauza Halwari and mauza Laddda not partaking the trait of ancestral coparcenary property rather the suit land located in the latter Mohals/mauzas comprising the self acquired property of deceased Puran. Both the concurrently recorded renditions of both the learned Courts below record a finding qua the apposite Will standing stained with a stain of illegality qua embodiments occurring therein qua land located in village Chhaproh standing bequeathed therein vis-a-vis defendants No.1 and 2. However, gift deed comprised in Ex.P19 stands concurrently concluded to be valid. The stain of illegality omnibusly imbuing the aforesaid documents qua lands borne in all mauza/mohals aforesaid stands canvassed by the counsel for the plaintiff/appellant to spur from one Puran, the common ancestor of the litigating parties hereat making acquisition of land(s) located in mauja Halwari and in mauja Ladda from the income earned by him from ancestral coparcenary property located

at Mohal Chhaproh rendering them hence to also acquire the characteristic trait of theirs being construable to be ancestral coparcenary property whereupon he qua them also stood interdicted to execute a valid testamentary disposition vis-a-vis defendants No.1 and 2. Significantly, he reiterates qua with the land held by Puran located in Village Chhaproh standing concluded by the concurrently recorded renditions of both the Courts below to partake the trait of ancestral property/coparcenary property also when evidently there occur enunciations qua the aforesaid Puran from the income derived by him from land located in village Chhaproh, his acquiring lands located in village Ladda and Harwali renders the estates occurring in latter mohals to acquire an alike trait.

8. Both the learned Courts below dispelled the vigour of the aforesaid espousal of the learned counsel for the plaintiff. However, the learned counsel for the plaintiff contends qua the appreciation meted by the learned Courts below of the relevant evidence suffering from a taint qua theirs mis-appraising besides omitting to appreciate its probative worth. The aforesaid submission made herebefore by the counsel for the plaintiff/appellant herein would yield formidability only on forthright evidence standing adduced in display of the plaintiff's espousal qua deceased Puran from the earnings reared by him from lands located in Village Chhaproh, his acquiring estates/properties located in village Halwari and in village Ladda. The best evidence qua the aforesaid facet stood comprised in the plaintiff adducing the relevant revenue records pertaining to the time contemporaneous to the year 1955 whereat Puran acquired properties/estates located in village Halwari and in village Ladda, holding a candid visible display therein qua the quality of land located at village Chhaproh besides its income generating capacity. However, the aforesaid evidence remained unadduced by the plaintiff before the learned trial Court. For omission of the plaintiff to adduce the aforesaid best evidence for clinching his espousal contrarily benumbs his contention qua one Puran acquiring, from the income reared by him from lands located in Village Chhaproh properties/estates located in village Ladda and Halwari besides thereupon the estates/properties of Puran located in the latter mohals/mauzas concomitantly do not partake or acquire any trait of ancestral coparcenary property. Concomitantly also the renditions concurrently recorded by both the learned Courts below qua hence with the aforesaid Puran standing bestowed with absolute title thereto, his thereupon holding the relevant capacity to execute vis-a-vis his properties/estates located in village Ladda and Halwari, a valid testamentary disposition vis-a-vis defendants No.1 and 2 do not suffer from any taint of any illegality. Also when Ajudhiya Devi has under a gift deed comprised in Ex.P-19 alienated her interest/title qua the lands located in villages Ladda and Halwari, hence, obviously does not render it to stand vitiated.

9. Even otherwise, the plaintiff in discharging the relevant onus of proving qua one Puran acquiring from his income reared from ancestral coparcenary property located in village Chhaproh, estates/properties located in villages Halwari and Ladda, had merely depended upon his bald oral testimony. His bald testimony carries no legal vigour for want of his omitting to adduce the aforesaid relevant best evidence. Also the testification of the plaintiff qua his since his employment in the year 1957 in Bharat Petroleum at New Delhi remitting funds to his father Puran through money orders, hence, his contributing to the income of the Hindu Undivided Family of which he was a constituent, wherefrom, he espouses qua the relevant acquisitions stood consummated by his deceased father Puran also does not hold any legal worth for want of his (a) not placing on record except one receipt of Rs.50/- pertaining to the year 1959, the relevant apposite documentary evidence for succoring his espousal; (b) with the relevant acquisition occurring in the year 1955 renders the effect, if any, of any remissions made by the plaintiff to his deceased father Puran in the year 1957 to not hold no vigour qua thereupon the latter in the year 1955 whereon the relevant acquisitions occurred hence utilizing any portion of remissions, if any, made by PW-1 to deceased Puran for thereupon facilitating the latter to purportedly therefrom acquire estates/properties located in village Halwari and Ladda and (c) reliable evidence standing adduced in portrayal of Puran, the common ancestor of the litigating parties hereat serving in the Indian Railway, wherefrom, it can be concluded qua his drawing salary from his relevant employment in the Indian Railway wherefrom it is to be concluded qua

his purchasing therefrom the estates/properties located in villages Ladda and Halwari, whereupon, hence, the properties located thereat partake the characteristic trait qua their being hence construable to be his self acquired properties.

10. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court are based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have not excluded germane and apposite material from consideration. Consequently, both the substantial questions of law are answered in favour of the defendants/respondents and against the plaintiff/appellant herein.

11. In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

CWP No. No.2392 of 2016 a/w
CWP No.1740 of 2016
Reserved on :10.11.2016
Date of Order: 24th November, 2016.

1. CWP No.2392 of 2016

Jyoti Education Welfare Society …Petitioner.
Versus
State of H.P. & another …Respondents.

2.CWP No.1740 of 2016

National Career Public Education Committee …Petitioner.
Versus
State of H.P. & others …Respondents

Constitution of India, 1950- Article 226- Petitioners made applications for grant of GNM and B.Sc. (Nursing) at Rohru and Tanda– the approval was granted in favour of respondent No.2- held, that no uniform yardstick was applied while carrying out the inspection- the authorities directed to carry out fresh inspection in terms of guidelines after affording opportunity of being heard to all the applicants. (Para-13 and 14)

Present: Mr. B.C.Negi, Senior Advocate with Mr. Pranay Partap Singh, Advocate, for the petitioner in CWP No.2392 of 2016.
Mr. Dushyant Dadwal, Advocate, for the petitioner in CWP No.1740 of 2016.
Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.k.Verma, Deputy Advocate General, for respondent No. 1 in CWP No.2392 of 2016 and for respondents No. 1 and 2 in CWP No.1740 of 2016.
Mr. N.K.Sood, Senior Advocate, with Mr. Aman Sood, Advocate, for respondent No.2 in CWP No.2392 of 2016 and for respondent 4 in CWP No.1740 of 2016.
Mr. Ravinder Thakur, Advocate, for respondent No.3 in CWP No.1740 of 2016.
Mr. Sunil Mohan Goel, Advocate, for respondent No.5 in CWP No.1740 of 2016.

The following judgment of the Court was delivered:

<u>Sandeep Sharma, Judge</u>

Since common questions of law as well as facts are involved in the present cases, this Court vide order dated 6.10.2016 clubbed aforesaid petitions and since then has been hearing them together with the consent of the parties.

2. By way of present Civil Writ Petition(s) filed under Article 226 of the Constitution of India, the petitioners have laid challenge to the decision of the respondent-State Annexures P-17 & P-11 respectively, whereby approval of Government has been conveyed for issuance of essentiality and feasibility certificate/NOC in favour of respondent No.2, Northern International Educational Society in CWP No.2392 of 2016 and respondent No.5, Kangra Valley Nursing College Educational Society in CWP No.1740 of 2016(in short 'Respondents societies') for starting GNM/B.Sc. Nursing courses attached to Dr. RPGMC, Tanda, District Kangra, H.P, whereby respondents-societies have been allotted 60 seats each in both courses.

3. In nutshell, case of the petitioners is that since the respondents-societies had not applied in terms of notice inviting expression of interest for opening of B.Sc. (Nursing) College and General Nursing & Midwifery (GNM) training schools in Himachal Pradesh in terms of the advertisement (Annexure P-3), dated 24.9.2014 published in daily news paper, there was no occasion for the respondent-State to consider the case of the 'Respondents-societies' for grant of courses and allotment of seats attached to Dr. RPGMC, Tanda, District Kangra, H.P. The Department of Medical Education & Research, Government of Himachal Pradesh vide Annexure P-3, invited expression of interest for opening of B.Sc (Nursing) College and General Nursing and Midwifery (GNM) training schools in Himachal Pradesh at two locations i.e. Rohru and Tanda. As per advertisement, Government of Himachal Pradesh expressed its intention to establish B.Sc Nursing College and General Midwifery Schools under Public Private Partnership in terms of notifications No. HFW-B(F)4-5/2013,dated 04-06-2013 and No. HFW-B(F)4-3/2014, dated 30.6.2013 and No. HFW-B(F)4-9/2014, dated 24.07.2014 at Rohru and Tanda. The aforesaid notifications issued by the respondent-State provided 40 seats in General Nursing and Midwifery at Rohru attached with Civil Hospital, Rohru and Jubbal, whereas 60 seats each in GNM and B.Sc Nursing were offered for location Tanda attached to Dr. RPGMC, Tanda. Note appended with the aforesaid advertisement clearly provided that the party/Trust/ Society which have already applied for opening of GNM Schools/B.Sc Nursing College under preferred location Rohru & Tanda are also required to submit fresh proposals alongwith supporting documents but no initial inspection fee would be charged from those institutions which had paid inspection fee earlier.

4. In the instant case pursuant to aforesaid advertisement, petitioners as well as respondents-societies made applications for grant of courses at Rohru and Tanda.

5. Documents annexed with the petitions suggest that respondent-authorities after evaluating the proposals submitted by the petitioners namely Jyoti Education Welfare Society and National Career Public Education Committee as well as respondents-Societies, submitted its evaluation report Annexure P-6. The final evaluation report submitted by the committee suggests that respondent Kangra Valley Nursing College Educational Society was awarded 36 points, whereas present petitioner Jyoti Institute of Nursing was awarded 32 points. But before some action could be taken on the aforesaid report having been submitted by the Directorate Level Evaluation Committee, Additional Chief Secretary(Heath) to the Government of Himachal Pradesh on the representation filed by the Chairman, Northern International Education & Research Centre, Ghurkhari, District Kangra, H.P., directed the Director Medical Education & Research, Himachal Pradesh to examine the case of Northern International Education & Research Centre for starting up GNM & B.Sc courses with annual intake of 60 seats each for preferred location at Tanda.

6. Perusal of Annexure P-9, dated 20.12.2014 suggests that the Director Medical Education & Research with reference to communication sent by the Additional Chief Secretary (Health) to the Government of Himachal Pradesh informed that the advertisement had been published in news paper dated 24.9.2014 inviting expression of interest from the interested parties for preferred location Rohru and Tanda on or before 15.10.2014. The Director, specifically informed the Additional Chief Secretary (Health) that as per the note appended in aforesaid notice inviting expression, "the party/Trust/ Society, which had already applied for opening of GNM Schools/ B.Sc Nursing College under preferred location Rohru & Tanda were also called/advised to submit fresh proposal alongwith supporting documents. The Director, Medical Education &

Research further informed that all the 11 applicants who had earlier applied for GNM & B.Sc Nursing courses under preferred location at Tanda in the year, 2008 could also respond to the EOI called by the department in the month of September, 2014 alongwith other applicants without any initial inspection fee, but none of the applicants except Kangra Valley Nursing College Educational Society submitted their proposals/ representations afresh in the light of advertisement dated 24.9.2014 and as such, department considered the proposals of four applicants for opening of Nursing Institution at Rohru and Tanda. The Director further informed the Additional Chief Secretary (Health) that evaluation report in respect of four applicants already stands submitted to the Government vide letter dated 18.12.2014 for taking further necessary action at Government level. But it appears that despite aforesaid communication having been sent by the Director Medical Education and Research, respondent–State directed the Director Medical Education & Research to carry out inspection of Northern International Education & Research Society Ghurkari alongwith other four applicants who had applied in terms of advertisement dated 24.9.2014. The communication (Annexure P-11), dated 19.5.2015 further suggests that the Directorate Level Evaluation Committee after carrying out necessary inspection submitted its report alongwith photocopy of inspection reports conducted by SDM level committee in respect of Northern International Education Society Ghurkhari, District Kangra, H.P. However, evaluation Committee, on the basis of inspection carried out by it, awarded 35 points in favour of Northern International Education & Research Centre Society. Aforesaid evaluation report submitted by the Director Medical Education, who is also Chairman of the evaluation committee did not recommend the case of aforesaid society. The Chairman Evaluation committee categorically stated that the applicant does not fulfill the parameters of the INC, hence, his application cannot be considered.

7. Further, perusal of communication (Annexure P-13), dated 30.11.2015, suggests that respondent-State again directed the Director Medical Education and Research Himachal Pradesh to carryout fresh inspection of Northern international Education & Research Centre Society on the basis of the criteria already in practice and send report to the department. Pursuant to the aforesaid communication, the Director Medical Education submitted Directorate level evaluation committee report in respect of Northern International Education & Research Centre Society, whereby society was declared qualified.

8. Accordingly, in view of aforesaid report submitted by the Directorate level evaluation committee, proposal regarding issuance of NOC/Essentiality certificate to start GNM and B.Sc Nursing courses under preferred location i.e. Dr. RPGMC, Tanda in favour of Northern International Education Society was placed before the cabinet in its meeting held on 14.1.2016.

9. It is undisputed that respondents-societies had not applied in terms of advertisement dated 24.9.2014 at first instance and as such, their cases were not considered by the SDM level evaluation committee while submitting evaluation report dated 18.12.2014, wherein respondent Kangra Valley Nursing College Educational Society was awarded 36 points and the petitioner Jyoti Institute was awarded 32 points. It emerges from the record that respondent Northern International Education & Research Centre Society filed representation (Annexure P-8) before Additional Chief Secretary (Health) to the Government of Himachal Pradesh in terms of the order dated 4.12.2014 passed by this Court in CWP No.209/2013, praying therein that it may be granted NOC for running courses in GNM and B.Sc Nursing with Dr. RPGMC Tanda.

10. Perusal of representation Annexure P-8, suggests that pursuant to different notifications issued by the respondent-State inviting applications for setting up GNM & B.Sc Nursing at Tanda, Northern International Education and Research Centre had applied and inspection of the premises was done but no NOC was issued in favour of this institute regarding Tanda and as such, it filed CWP No.1438 of 2009. During the pendency of aforesaid petition, Court was informed that though location at Dharamshala is vacant but same has been rejected by Indian Nursing Council. In the meanwhile, respondent-State issued notification dated 23.7.2011 providing therein that now there is no bar that only one Nursing Institution can be attached with one hospital, however, it was informed that Dr. RPGMC Tanda would not be

provided as preferred location since centre of excellence is proposed to be opened there. But subsequently, as per notification dated 30.9.2013, Dr. RPGMC Tanda was again preferred as a location for opening Nursing Institutes(s) in private sector with 60 seats each in GNM and B.Sc. (Nursing), accordingly, Northern International Education Society submitted its application on 3.7.2008, praying therein for starting B.Sc(Nursing) and GNM Courses at Ghurkhari attached with Dr. RPGMC at Tanda. But it appears that pursuant to aforesaid application having been preferred by Northern International Education Society, no decision could be taken by the authorities.

11. By way of aforesaid representation, respondent society prayed for granting essentiality certificate in view of the fact that its premises were earlier inspected on two occasions in the years 2005 and 2008 by the authorities pursuant to earlier application submitted by it.

12. Perusal of Annexure P-9 suggests that respondent-State taking cognizance on the aforesaid representation of the respondent society, directed the Director, Medical Education & Research to carry out inspection of Northern International Education & Research Centre alongwith other applicants, who had applied in terms of advertisement dated 24.9.2014. Thereafter, the Director, Medical Education & Research, after evaluating the premises, submitted its report declaring therein respondent to be qualified.

13. In the instant case, this Court after carefully perusing the material placed on record is not satisfied and convinced with the method adopted by the respondent authorities while analyzing/scrutinizing the applications submitted by the petitioners as well as respondents societies pursuant to the advertisement dated 24.9.2014 and we have no hesitation to conclude that no uniform yardstick was applied by the evaluation committee while carrying out the inspection of applicant institutions and as such, is of the view that it would be in the interest of justice if authorities are directed to conduct fresh inspection of all the institutions/societies, had applied in terms of the advertisement dated 24.9.2014 as well as Northern International Education and Research Centre, whose case was considered by the Government while accepting its representation dated 6.1.2015 so that allegations of bias as well as arbitrary exercise of power as alleged by the parties, is put to rest.

14. Needless to say, authorities would carry out fresh inspection strictly in terms of the guidelines framed in this regard by the respondent-State as well as INC after affording adequate opportunity of being heard to all the applicants including petitioners as well as respondents-societies. At this stage, it may be observed that this Court deemed to have passed this order while keeping in view the claims and counter claims of the parties viz-a-viz genuineness and correctness of the evaluation report submitted by the evaluation committee formulated by State of Himachal Pradesh while recommending issuance of NOC as well as feasibility certificate for setting up GNM & B.Sc nursing courses.

15. The observations made hereinabove shall not cause prejudice to the parties, in any way.

16. Respondent-State is directed to do the needful in view of the aforesaid observations within a period of two weeks from today and submit its report in sealed cover to this Court on or before the next date of hearing. List on 30.11.2016. Copy **Dasti.**

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Kubja Devi. ……Appellant.
Versus
Shri Ishwar Dass. ……Respondent.

FAO(HMA) No. 138 of 2010.
Date of decision: November 24, 2016.

Hindu Marriage Act, 1955- Section 25- Petitioner had applied for a decree of judicial separation – the parties agreed to dissolve their marriage by a decree of customary divorce – maintenance of Rs.450/- per month was awarded- petition for enhancement was filed, which was dismissed on the ground that maintenance amount was mutually settled by the parties and there was no provision for enhancement – held in appeal that agreement regarding the receipt of Rs.450/- per month as maintenance will not create estoppel to debar the petitioner from seeking enhancement of the amount of alimony in the changed circumstances- husband admitted that his salary was Rs.3,300/- per month when he had agreed to pay Rs.450/- as maintenance -he further admitted that his salary was Rs.16,000/- per month at the time of retirement – his total salary was Rs.23,204/- per month as per salary certificate – husband is getting handsome amount from pension – hence, maintenance enhanced to Rs.2,500/- per month. (Para-5 to 10)

Cases referred:
Harilal Sarkar vs. Subhra Sarkar, (2016) 165 AIC 784 : 2016 SCC OnLine Tri 356
Ram Shanker Rastogi vs. Smt. Vinay Rastogi, AIR 1991 Allahabad 255

For the appellant	Mr. Surinder Saklani, Advocate.
For the respondent	Mr. R.K. Gautam, Sr. Advocate with Ms. Megha Kapur Gautam, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

Appellant, hereinafter referred to as the petitioner, is divorced wife of the respondent. She is aggrieved by the order dated 2.3.2010 passed by learned Additional District Judge, Mandi in an application under Section 25(2) of Hindu Marriage Act registered as HMP No. 30 of 2005 whereby her prayer for enhancement of maintenance allowance/alimony amount from Rs. 450/- per month to Rs. 6000/- per month has been dismissed.

2. The facts are not in controversy. The petitioner was admittedly wife of the respondent. The petitioner-wife had filed a petition under Section 10 of the Hindu Marriage Act for a decree of judicial separation. The petition was allowed by learned District Judge Mandi, Kullu and Lahaul & Spiti districts at Mandi on 31.1.1983. The respondent-husband has filed an appeal registered as FAO No. 76 of 1983 in this Court against the judgment and decree passed by learned District Judge, Mandi. During the course of proceedings in the appeal before this Court the petitioner and respondent have agreed to dissolve the marriage by a decree of customary divorce. The divorce deed in original has been produced in evidence by the petitioner and marked as Ext.DA. In terms of this document, the parties mutually agreed for payment of Rs. 450/- per month towards alimony/maintenance allowance to the petitioner by her husband, the respondent, till her death or she remarried. There is no controversy so as to the payment of Rs. 450/- per month by the respondent to the petitioner for her maintenance. However, her grouse is that with the passage of time the income of her husband, the respondent, is increased, therefore the monthly maintenance Rs. 450/- also deserves to be enhanced accordingly and as such, in the petition under Section 25(2) of the Hindu Marriage Act she filed in the trial Court claimed a sum of Rs. 6000/- per month by way of such enhancement.

3. Learned trial Judge has framed the following issues in the petition:

1. Whether the petitioner is entitled for enhancement of the alimony amount, if so, to what extent? OPR
2. Whether the petition is not maintainable? OPR
3. Whether the petition is lamentably delayed and she is estopped from filing the petition? OPR

4. Relief.

4. Learned trial Judge after having taken on record the evidence and also hearing the parties on both sides has arrived at a conclusion that since the petitioner at the time of dissolution of her marriage with the respondent by a decree of customary divorce had agreed to receive Rs. 450/- per month till her death or remarriage as maintenance allowance and that there is no stipulation in the divorce deed Ext.DA that she will have right for further enhancement of the maintenance allowance, therefore, her claim for enhancement of the alimony/maintenance allowance is not sustainable. The petition, as such was ordered to be dismissed vide order under challenge in this appeal.

5. After hearing the matter at length, in the light of the given facts and circumstances and also the evidence available on record as well as the law cited at the Bar, it would not be improper to conclude that the agreement qua the payment of a sum of Rs. 450/- per month to the petitioner as maintenance allowance in terms of the divorce deed Ext.DA cannot be treated as an estoppal to debar the petitioner for seeking enhancement of the amount of alimony in the changed circumstances. The law on the issue is no more res integra. The High Court of Tripura at Agartala in ***Harilal Sarkar*** vs. **Subhra Sarkar, (2016) 165 AIC 784 :*2016 SCC OnLine Tri 356*** a case having similar facts has held that an order qua maintenance allowance based on the settlement/compromise during the course of proceedings in a divorce petition has to be treated an order of maintenance passed under Section 25(1) of the Hindu Marriage Act and as such a petition for enhancement of the amount filed under Section 25(2) of the Act is maintainable and not barred by the principle of estoppal. It is seen that three points were formulated by learned Judge after taking into consideration the provisions of law and also the law laid down by various high Courts by way of judicial pronouncements and has held as under:

> ***"10.*** *On the face of the submission made by the learned counsel for the parties, 3(three) pertinent questions have emerged for consideration, which are as under :*
>
> *(i) Whether by agreement the jurisdiction of the competent court under Section 25(2) of the Hindu Marriage Act, 1955 can be ousted?*
>
> *(ii) Whether the judgment and order dated 14.09.2010 is the order of maintenance under Section 25(1) of the Hindu Marriage Act or not?*
>
> *(iii) Whether the right to future maintenance is transferrable and if not whether the settlement is void, so far the terms of maintenance is concerned ?*
>
> ***WHETHER BY AGREEMENT THE JURISDICTION OF THE COMPETENT COURT UNDER SECTION 25(2) OF THE HINDU MARRIAGE ACT, 1955 CAN BE OUSTED?***
>
> ***11.*** *By agreement, jurisdiction of the court which has been created by a statute cannot be taken away. Section 25 as a whole confers the jurisdiction on the competent court to provide permanent alimony and maintenance " at the time of passing any decree or at any time subsequent thereto," on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay maintenance and*
>
> *support such gross sum (alimony) which is factored by various element as statutorily provided or by the law as developed in the course of time. It is no more res integra that if any agreement comes in conflict with any valid statute or its provision that becomes unlawful agreement and void in terms of Section 23 of the Indian Contract Act. Hence the jurisdiction of the court for granting maintenance at the time of passing any decree or subsequent thereto cannot be taken away by the settlement/agreement. It is true that if the order is passed under Section 25(1) of the Hindu Marriage Act, 1955 in that case the competent court may vary, modify or rescind any order of maintenance or gross maintenance in a change in the circumstance under Section*

25(2) of the Hindu Marriage Act, 1955. But at the same time, if any settlement which has been acted on by the court or recorded, the parties thereto cannot in the ordinary course take the stand contrary thereto and in that case, their action might be hit by the principle of estoppel, if not, such stand emanates from the statute.

WHETHER THE JUDGMENT AND ORDER DATED 14.09.2010 IS THE ORDER OF MAINTENANCE UNDER SECTION 25(1) OF THE HINDU MARRIAGE ACT OR NOT?

***12**. There was a compromise petition before the court on settlement of the quantum of the maintenance which was termed as the fixed maintenance and the court had given its approval by passing the compromise decree on granting divorce and maintenance. It is a well accepted proposition that compromise decree pertains the charter of agreement and the decree is drawn accordingly. It can perhaps be said that the quantum ofmaintenance under the decree was not the result of any decision by the court, it was the result of an agreement between the parties, which was acknowledged by the court, for purpose of making it executable at the instance of maintenance-holder.*

***13.** In Seshi Ammal and another Vs. Thaiyu Ammal, reported in AIR 1964 Madras 217(V 51 C 61), the Madras High*

Court has enunciated the law holding that such a case will be one where the maintenance is fixed by a decree of court though the basis of it was an agreement it will come directly under Section 25. Thus, the respondent will be entitled to have an enhancement of maintenance once she proves that there has been a material change in the circumstances justifying the enhancement. Therefore, even if agreement relating to the quantum may be the part of the settlement but when the decree passed on adopting the said settlement it becomes the order under Section 25(1) of the Hindu Marriage Act. And as such the court has the statutory jurisdiction under Section 25(2) to direct enhancement of the maintenance with a change in the circumstances. The said manner may not be applicable in the case where the permanent alimony has been settled and paid by means of one-time payment. That payment has to be treated as the property transferred for purpose of maintenance.

WHETHER THE RIGHT TO FUTURE MAINTENANCE IS TRANSFERRABLE AND IF NOT WHETHER THE SETTLEMENT IS VOID SO FAR THE TERMS OF MAINTENANCE IS CONCERNED ?

14. Section 6(dd) of the Transfer of Property Act has been incorporated by the Amending Act, 1929. Prior to the amendment there was a conflict of opinion on whether a right of future maintenance when it was fixed by a decree, was transferable. The Madras High Court held that it was, in (Rajah D.K. Thimmanayanim Bahadur Varu, Rajah of Kalahasti and others Vs. Rajah Damara Kumara Venkatappa Nayanim Bahadur Varu and others reported in AIR 1928 Madras 713), but the Calcutta High Court ruled that it was not. Asad Ali Mokat Vs. Haidar Ali reported in 1910 (ILR) 38 Cal 13 did not agree with the decision of Madras High Court. The words 'in whatsoever manner arising, secured or determined' as appearing are very comprehensive and it is submitted that they overrule cases in which when the right has been created by a deed of transfer, it was held that the question whether the right was alienable depends upon the intention of the parties as expressed in the deed.

***15.** The Privy Council in Lal Rajindra Narain Singh alias Lallu Sahib Vs. Mt. Sundar Bibi reported in AIR 1925 PC 176*

held that a right of future maintenance cannot be attached as the right to future maintenance is not capable of transfer. In this regard provisions of Section 60 of the Code of Civil Procedure, 1908 can be

referred as co-terminous provision of Section 6(dd) of the Transfer of Property Act as the said provision operates in the similar field, for protection of right of future maintenance from attachment. Therefore, so far the settlement is concerned the parties can determine in whatsoever manner the maintenance in the circumstances when the settlement or the compromise was struck. In this case, the decree dated 14.09.2010 as passed by the Judge, Family Court, West Tripura in T.S.(Divorce) No. 183 of 2010 is couched with the order of maintenance though the quantum, has emerged from an agreement as stated, and such order has been passed under Section 25(1) of the Hindu Marriage Act, 1956. There can be no other interpretation, harmonious to the object of Section 25 of the Hindu Marriage Act, 1955. The determination of the maintenance was in the circumstances which existed at the time of execution of the settlement/ compromise cannot extinguish the authority of the court as provided under Section 25(2) of the said Act. If the word 'fixed' quantifying the maintenance is attributed and read in its literal meaning, such agreement shall come in conflict with the statutory provision and the public policy, hence, that part of the agreement shall be void in terms of Section 23 of the Indian Contract Act. In the event of permanent alimony, as settled and as termed as the property for maintenance will not come within the province of Section 25(2).

16. *Hence, there is not illegality when the Judge, Family Court, Agartala exercised the jurisdiction under Section 25(2) of the Hindu Marriage Act by enhancing the maintenance from Rs.4000/-to Rs.6000/-. Even if, a fixed maintenance allowance is agreed upon towards a decree of divorce, the quantum if accorded and recorded by the court, has to be understood for purpose of maintenance within the ambit of Section 25(1) of the Hindu Marriage Act and with the change in the circumstances the same shall be liable to be re-assessed under Section 25(2) of the Hindu Marriage Act. The statutory purpose is very simple is to preserve the value of the maintenance allowance. This statutory principle shall equally apply when the maintenance to be paid periodically in terms of any settlement.*

17*.* *Having held so, we do not find any merit in this appeal from the order and accordingly the same is dismissed".*

6. Similar is the ratio of High Court of Allahabad in ***Ram Shanker Rastogi*** vs. ***Smt. Vinay Rastogi, AIR 1991 Allahabad 255***. The facts of this case were also identical to the present one before this Court. It has been held in this judgment that the plea of estoppal or *res judicata* cannot be invoked in a case of this nature nor the question of maintainability of petition under Section 25(2) for enhancement of maintenance allowance previously awarded by a consent order cannot be raised. This judgment reads as follows:

"10. Neither the provisions of S. 11 of the Code of Civil Procedure nor the principles of res judicata will bar a suit for maintenance on an enhanced rate for a different period under altered circumstances even though on an earlier occasion a maintenance decree had been passed and a certain rate of maintenance had been fixed thereunder. The reason being that such a decree as to the rate of maintenance is not final.

11. The case of Hirabai Bharucha v. Pirojshah Bharucha, AIR 1945 Bombay 537, stems from proceedings under S. 40 of the Parsi Marriage and Divorce Act, 1936. Under this provision, a Court is authorised to award permanent alimony to a wife either at the time of the passing of any decree under that Act or subsequently thereto. The wife is granted a decree of divorce. After the decree is passed, the

husband and wife arrive at certain consent terms. One of the terms of the consent order is :

"This Court doth declare that the defendant hereby agrees not to claim any alimony now or at any time in future.".

The wife applies under S. 40 for alimony. It is held that on grounds of public policy the wife cannot enter into a contract that she will not claim any alimony in future. The contract is void and the Court will take notice of that and ignore that part of the order although it was made by consent. Reliance is placed upon a remark by Lord Atkin :

"The wife's right to future maintenance is a matter of public concern which she cannot barter away."

Accepting this proposition, the learned Judge takes the view that the wife cannot barter away her right to future maintenance and enter into a contract to that effect and such a contract will be a void contract in the eye of law.

12. Let us now read Section 25. Subsection (1), inter alia, provides that any Court exercising jurisdiction under the Act may, at the time of passing any decree or at any time subsequent thereto, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and the other property of the applicant, the conduct of the parties and other circumstances of the case, which may seem to the Court to just. Sub-section (2) may be extracted :--

(2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just."

Admittedly, the Second Civil Judge exercised powers under the Act while passing a decree of divorce under S. 13 and, as already indicated, he passed an order fixing a certain sum as the monthly maintenance allowance for the wife. The Court did not pass any order that the wife will not claim an enhancement of the maintenance allowance in future Assuming a wife gives up her right to claim a higher rate of maintenance allowance in future her consent, in our opinion, will not bring into existence a valid contract. Such an agreement will not only defeat the provisions of subsection (2) of S. 25 but will also frustrate the purpose of giving maintenance allowance. Judicial notice can be taken of rising prices with the result that the cost of bare existence is regularly rising, rather mercurially. In principle, it makes no difference between an agreement by a wife not to claim any alimony at all and an agreement not to claim any enhancement of the rate of maintenance allowance, whatever be the change in the circumstances".

7. Now if adverting to the facts of this case, the respondent while in the witness box as RW1 has admitted that at the relevant time when the deed of divorce Ext.DA was executed and he agreed to pay Rs. 450/- per month as maintenance allowance to his wife the petitioner his salary was Rs. 3300/-. According to him, at the time of his retirement his salary was Rs. 16,000/- per month. The salary certificate Ext.PW2/A reveals that his total salary as on 31st January 2008 was Rs. 23,204/- per month. He retired as Regional Manager from Himachal Road Transport Corporation after superannuation on 29.2.2008. The petitioner though claimed that she has no source of income and that during these days of exorbitant prices it is not possible for her even to meet with requirement of both ends meal. However, even if it is believed that she is owner in possession of some land which according to respondent is measuring 4-2-10 bighas it cannot be believed by any stretch of imagination that income from the produce thereto is sufficient for her maintenance. The only plea of the respondent that she has earning from selling illicit liquor is not available to him because manufacturing of illicit liquor and its sale is an illegal

act and a husband is not expected to force his wife to indulge in any such illegal activity for earning her livelihood.

8. By way of leading additional evidence respondent intends to produce in evidence the copy of FIR No. 301 dated 27.8.2010 registered in Police Station Balh under Section 61 of the Punjab Excise (HP amendment) Act, 1965 which was registered against the petitioner. Since the maintenance allowance is not sufficient, therefore, in case the FIR is rightly registered against her it is her husband the respondent who by not maintaining her properly has compelled her to indulge in such unlawful activity. The FIR even if taken on record and allowed to be produced in evidence will hardly of any help to the case of the respondent. Therefore, the application being devoid of any merit is ordered to be dismissed.

9. Mr. Surinder Saklani, Advocate, learned Counsel has strenuously contended that the settlement of Rs. 450/- per month as maintenance allowance at the time of dissolution of the marriage of the parties by a decree under customary divorce is hardly of any consequences nor debar the petitioner from seeking enhancement of the maintenance allowance. According to Mr. Saklani there cannot be any estoppal against the statutory provisions and as Section 25(2) of the Hindu Marriage Act extends a right in favour of the wife for seeking enhancement of maintenance allowance. The agreement qua payment of Rs. 450/- towards maintenance allowance does not come in the way of petitioner to seek further enhancement.

10. The respondent is a retired officer from Himachal Road Transport Corporation. It can be reasonably believed that he is getting a handsome amount by way of pension and must have get some amount towards his retiral benefits. True it is, that number of dependants upon him is six. It can reasonably be believed that to maintain a family having six family members is difficult during these days. The facts, however, remain that the respondent must spare additional amount for the maintenance of the petitioner also so that she can lead honorable life and is also not forced to starve. Therefore, having regard to all pros and consthough the petitioner is not entitled to enhancement of the maintenance allowance at Rs. 6000/- per month, however, payment of Rs. 2500/- per month to be payable to her from the date of filing of this appeal in this Court i.e. 3.5.2010 would serve the ends of justice. The arrears towards maintenance allowance in terms of this judgment shall be deposited by the respondent in the trial Court in four equal installments. He shall deposit the first installment on or before 31st March, 2017, the second on or before 30th September 2017, the third by 31st March, 2018 and the last and final by 30th September, 2018. The maintenance allowance from December 2016 onwards shall however be paid by him at the enhanced rates i.e. Rs. 2500/-. The failure of the respondent to adhere to the payment schedule as directed shall result in initiation of execution proceedings against him and in that event he shall be liable to pay the amount/balance amount together with interest @6% per annum.

11. With the above observations, the appeal stands disposed of.

12. Pending application(s), if any, shall also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Partap Singh Rauaut ….Petitioner

Versus

Union of India & Others. ….Respondents

CWP No.2024 of 2015
Judgment Reserved on: 09.11.2016
Date of decision: 24.11.2016

Constitution of India, 1950- Article 226- Petitioner applied for establishing green house for growing agriculture and horticulture produce – he was to pay Rs.18 lacs and remaining amount of Rs.30 lacs was to be financed by the Bank- he was entitled to subsidy – the petitioner failed to repay the amount and notice under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was issued – he approached the writ Court, which passed an order for release of subsidy into the account of the petitioner- however, the subsidy was not released – held, that the project was to be implemented within a period of two years – issuance of letter of intent will not enable a person to get the subsidy – subsidy cannot be claimed as a matter of right- the petitioner had failed to furnish the certificate of completion of project and his case was rightly not considered by the respondents- writ petition dismissed.(Para-10 to 23)

Case referred:

Pashimanchal Vidyut Vitran Nigam Limited and Others vs. Adarsh Textiles and Another, (2014)16 SCC 212

For the Petitioner:	Mr.Ajay Vaidya, Advocate.
For Respondent No.1:	Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate.
For Respondents No.2 & 3:	Mr.L.S. Thakur, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

By way of present writ petition filed under Article 226 of the Constitution of India, the petitioner has invoked extra ordinary jurisdiction of this Court and has prayed for following main relief(s):-

“i) To quash and set aside annexure P-9 and to pass an appropriate writ, order or direction to Respondent No.2 to release the subsidy amounting to Rs.10 (substituted by Rs.10 lacs vide order dated 09.11.2016) in a time bound manner.

b) Respondent No.1 to respondent No.2 may kindly be directed to adhere to the contents of annexure P-2 in letter and spirit, that is to release the subsidy of Rs.Ten lac in a time bound manner.”

2. Briefly stated, facts as emerge from record are that the petitioner, who is an agriculturist, applied for Letter of Intent *(for short ‘LOI’)* under the “Development of Commercial Horticulture through Production and Post Harvest Management of National Horticulture Board”, Scheme, *(for short ‘Scheme’)* for starting the Project, i.e., Green House for growing agriculture and horticulture produces. Total cost of which was Rs.48 lacs, out of which petitioner had to pay Rs.18 lacs and remaining amount of Rs.30 lacs was to be financed by the Bank. Petitioner averred that the said application for LOI was approved by the respondent vide letter dated 08.08.2006 (Annexure P-2), which was valid for one year only. Thereafter, the petitioner approached respondent No.2 for granting of term loan of Rs.30 lacs, who, after verifying that all the formalities have been completed by the petitioner, sanctioned the term loan and then disbursed the same by Central Bank of India on different dates in his favour. As per terms and conditions of LOI, petitioner was entitled to the subsidy on the loan amount to be released by respondent No.2 within two years.

3. Records further reveal that theaforesaid business could not run successfully and due to financial constrains petitioner failed to repay the loan as per the agreement and as such default occurred for not paying the monthly installments. Accordingly, vide notice dated 03.10.2011 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 *(for short ‘SARFAESI’ Act)* Central Bank of India issued

notice to petitioner for taking possession of the immovable property on account of non-repayment of loan amount. It also emerges from the pleadings that petitioner conveyed the respondents that due to financial constrains he was/is not in a position to pay the total loan amount in one go and prayed for some reasonable installments to clear the same and thereafter petitioner has deposited an amount of Rs.20,98,125/- with the aforesaid Bank. Communication made to the aforesaid Bank by the petitioner also suggests that he was unable to repay the loan amount since he did not receive subsidy from respondent No.1 in terms of LOI (Annexure P-2).

4. In the aforesaid background, petitioner approached this Court by way of writ petition bearing CWP No.2310 of 2012-A, which was disposed of on 29.4.2014 with the direction to respondent No.2 to process the petitioner's case for subsidy, in terms of LOI (Annexure P-2); and the terms of Contract, after affording due opportunity of hearing to all concerned. While passing aforesaid order, this Court also held that amount of subsidy, to which the petitioner would be held entitled, shall be released directly into hisbank account with respondent No.3.

5. Pursuant to directions given in the aforesaid judgment dated 29th April, 2014, respondents No.2 and 3 passed fresh order dated 14th/19th August, 2014 (Annexure P-9), impugned herein, perusal where of suggests that same was passed after hearing the petitioner personally. But fact remains that vide aforesaid impugned order respondent No.3 rejected the case of the petitioner for grant of subsidy on the ground that he was unable to place on record any document suggestive of the fact that he had completed Project in terms of LOI (Annexure P-2) issued by the respondents.

6. Petitioner, being aggrieved and dis-satisfied with the impugned order dated 14th/19th August, 2014 passed by respondent No.3, approached this Court by way of instant writ petition praying therein the reliefs as reproduced above.

7. Shri Ajay Vaidya, learned counsel representing the petitioner, while referring to Annexure P-9, impugned order passed by respondent No.3, vehemently argued that same is not in consonance with the directions contained in judgment dated 29th April, 2014 passed by this Court in CWP No.2310 of 2012-A and as such same deserves to be quashed and set aside. Mr.Vaidya further contended that aforesaid impugned order passed by the authority is patently illegal and contrary to record because there was no question, if any, to submit completion certificate by the petitioner because bare perusal of LOI (Annexure P-2) suggests that the petitioner had completed the Project and he was entitled to the subsidy in terms of Scheme. While concluding his arguments, Mr.Vaidya forcefully contended that bare perusal of impugned order passed by respondent No.3 suggests that there is no application of mind and case of petitioner for grant of subsidy has been turned down on hyper-technical grounds and as such same deserves to be quashed and set aside and petitioner is required to be granted subsidy in light of LOI (Annexure P-2).

8. Mr.L.S. Thakur, learned counsel representing respondents No.2 and 3, supported the impugned order passed by respondent No.3 by stating that a bare perusal of the same suggests that despite ample opportunities, petitioner failed to furnish requisite information/documents to enable the respondents to process his case for subsidy claim. Shri Thakur, with a view to refute the aforesaid contention put forth on behalf of the counsel representing the petitioner that Project was complete in all respect, invited the attention of this Court to the reply filed by respondents No.2 and 3 to demonstrate that Project in question was never completed and same was sold to some other party without informing respondents No.2 and 3. He further stated that since no joint inspection, as per criteria laid down in the column could be conducted for assessment of subsidy, there was no question, if any, to release subsidy as is being claimed by the petitioner and in the aforesaid background he sought dismissal of the petition with costs.

9. We have heard learned counsel for the parties and gone through the record of the case.

10. Careful perusal of LOI (Annexure P-2) suggests that in response to application/proposal submitted by present petitioner, letter of expression was issued under the Scheme for the activity proposed in the application. But same suggests that its scope was limited to merely for approval of activity proposed in the application and in no manner it could be termed as endorsement or approval of the Project. Close scrutiny of documents referred to hereinabove also suggests that LOI issued in favour of present petitioner was subject to certain conditions which are reproduced hereinbelow:

"i) This LOI is being issued on the condition that the proposed activity is a completely new activity and it is not for any pre-existing activity or for any component thereof.

ii) The LOI will be valid for one year from the date of issue. The Promoter should accordingly approach a Bank/FI of his choice immediately after obtaining the LOI from NHB and get his term loan sanctioned by the Bank/FI.

(iii) Mere grant of LOI by NHB does not in any way obviate the responsibility of the Bank/FI to carefully scrutinize the project proposal. The Bank/FI shall be solely responsible for financial appraisal of the project. Therefore, the Bank/FI while sanctioning the project proposal has to cautiously examine/evaluate and appraise the proposal thoroughly after conducting a detailed field inspection to ensure the technical feasibility & financial viability of the project. The Bank after due field verification must ensure that this proposal is not for any pre-existing activity but is in respect of a completely new activity as proposed in the LOI application/DPR submitted by the beneficiary.

iv) The project should, however, be implemented within a period of two years from the date of sanction of loan. The payment of back-ended subsidy will be made after project has been successfully completed according to the term and conditions of the loan/or as per the approved feasibility cum project report, as the case may be.

v) The projects will not be eligible for NHB subsidy under this scheme where cultivation of seasonal/short duration horticulture crops is envisaged in open field.

vi) Mere issuance of LOI will not guarantee the grant of subsidy to the beneficiary unless the proposal is implemented in accordance with the information given in the application of LOI/Detailed Project Report (DPR) and within overall guidelines of the scheme. Any deviation in implementation of project will lead to rejection of proposal for which promoter will be solely responsible.

vii) The quantum of subsidy will be decided after taking into account the recommendation of the Joint Inspection Team as constituted by NHB and on the basis of cost norms of NHB in respect of different admissible items of expenditure in the project. However, in case there is a variation between the cost as appraised by Bank and the cost norms of NHB, the lowest cost will be considered. In addition, NHB will also have the right to restrict admissible components and expenditure thereon to such limit as may be considered justified.

viii) The project will not be eligible to receive subsidy under NHB schemes in case benefit of subsidy/grant-in-aid from other agencies of Govt. of India has been availed/is proposed to be availed.

ix) The Board reserves the right to cancel the LOI at any time in case there has been misrepresentation by the Promoter OR any information furnished by the Promoter is found false or there has been concealment of any facts.

x) NHB reserves the right to modify, add and decide any terms & condition to this LOI without assigning any reason thereof.

xi) NHB's interpretation on various terms & conditions of LOI will be final."

11. Clause-iv of the LOI mentioned hereinabove suggests that Project was required to be implemented within a period of two years from the date of sanction of loan and thereafter payment of back ended subsidy, if any, was to be made, that too, after successful completion of Project according to terms and conditions of the loan and was as per the approved feasibility-cum-project report.

12. Further clause-v clearly suggests that Project could not be granted NHB for subsidy in the Scheme where cultivation of seasonal/short duration horticulture crops is/was envisaged in open field.

13. Most importantly clause-vi suggests that mere issuance of LOI will not guarantee the grant of subsidy to the beneficiary unless the proposal is implemented in accordance with the information given in the application of LOI.

14. Finally quantum of subsidy in terms of Scheme was to be decided by joint inspection Team after taking into account the work done by the applicant.

15. Clause-ix of the LOI further gives liberty to respondents to cancel the LOI at any time in case of mis-representation/concealment of facts by the promoter.

16. Minute reading of aforesaid LOI clearly suggests that completion of Project is condition precedent for grant of subsidy. Similarly, quantum of subsidy is required to be determined by Joint Inspection Team which would visit the Project site and make recommendation qua the admissibility of subsidy.

17. Similarly, condition No.(iv) suggests that Project should be implemented within a period of two years from the date of sanction of loan.

18. This Court with a view to test the correctness and genuineness of submissions having been made on behalf of petitioner that the Project was complete examined LOI (Annexure P-2), but it nowhere suggests that petitioner had completed the Project within stipulated time and in this regard he had furnished information/claim with the respondents for grant of subsidy. Rather, perusal of Annexure P-2 suggests that on the application having been filed by petitioner, LOI was issued to him in token of approval for activity proposed in the application and in no manner it could be termed as an approval of the Project cost indicated in the application. Conditions contained in LOI (Annexure P-2), which have been reproduced hereinabove, itself suggest that it was incumbent upon the petitioner to comply with certain conditions before making himself eligible for grant of subsidy in terms of Scheme, referred hereinabove.

19. Apart from LOI (Annexure P-2), there is no document available on record by the petitioner suggestive of the fact that pursuant to LOI issued vide order dated 8.8.2006, Project was completed within stipulated time and thereafter same was examined by Joint Inspection Team, which had to recommend the case for grant of subsidy. All other documents, save and except Annexure P-2, placed on record by the petitioner relate to communication with the Central Bank of India from where petitioner had availed loan to the tune of Rs.30 lacs for setting up the Project. Hence, this Court has all the reasons to conclude that at no point of time petitioner completed the Project in terms of Annexure P-2, as such, he was rightly not granted subsidy. At this stage, it would be profitable to reproduce para-3 of preliminary submission and para-6 of preliminary objections to the reply filed by respondents No.2 and 3, which reads as under:

"Preliminary Submissions:

3. That it is respectfully submitted that Subsidy is a grant from the government and any citizen cannot claim a right to get subsidy. The sanction and disbursement of the subsidy is strictly governed by the terms and conditions of the scheme and also the Letter of Intent which are as follows:

- The LOI will be valid for one year from the date of issue. The promoter should approach the Bank/FI of his choice immediately after obtaining the LOI from NHB and get his term loan sanctioned by the bank/FI.
  - Mere grant of LOI by NHB does not in any way obviate the responsibility of the Bank/FI to carefully scrutinize the project proposal. The Bank/FI shall be solely responsible for financial appraisal of the project. Therefore, the Bank/FI while sanctioning the proposal has to cautiously examine/evaluate and appraise the proposal thoroughly after conducting a detailed field inspection to ensure the technical feasibility and financial viability of the project.
  - The project should, however, be implemented within a period of two years from the date of sanction of loan. The payment of back-ended subsidy will disbursed after project has been successfully completed according to the term and conditions of the loan/or as per the approved feasibility cum project report, as the case may be.
  - Mere issuance of LOI will not guarantee the grant of subsidy to the beneficiary unless the proposal is implemented in accordance with the information given in the application of LOI/Detailed Project Report (DPR) and within overall guidelines of the scheme. Any deviation in implementation of project will lead to rejection of proposal for which promoter will be solely responsible.
  - NHB reserves the right to modify, add and delete any terms and conditions to the LOI without assigning any reason thereof.
  - Bank/FI are advised to furnished the details as per operational guidelines to our State office immediately after release of full amount of term loan and completion of the project for conducting joint inspection and consideration of subsidy."

"Preliminary Objections:

6. In compliance of the directions passed by this Hon'ble Court, the Petitioner was given due opportunity to represent his case for subsidy along with supporting documents before answering Respondent twice. During personal hearing, Petitioner informed that the project work was not functional since long and he has sold out the assets of the project and the project is now abandoned. It is stated that neither the answering Respondent nor the bank was informed about the disposing of assets. As such joint inspection as per the criteria laid down was not possible for assessment of subsidy and thereby the case of the petitioner was duly rejected in accordance to the guidelines. Further, as per the term loan account provided by the petitioner, it was evident that the project was irregular in payment of installment since beginning and due to which his loan account was declared NPA. As per the guidelines, projects with NPA account are not considered with back end subsidy and the same was duly communicated to the petitioner vide letter dated 19th Aug, 2014 and the same is annexed as "ANNEXURE R-6". Further, the petitioner has deliberately not made Central Bank of India party to these proceedings for his oblique motives. Thus, this petition deserves to be dismissed at preliminary stage."

20. Reply filed by respondents clearly suggests that Project was required to be implemented within a period of two years from the date of sanction of loan and thereafter only payment of back ended subsidy could be disbursed after successful completion of Project in accordance with terms and conditions set out in LOI issued at the time of initial approval. It emerges from the reply filed by the respondents that after issuance of directions by this Court in CWP No.2310 of 2012-A, various opportunities were given to the petitioner to furnish documents in support of his claim, which were essential for taking the joint inspection, but same were not furnished, as a result of which, no assessment of quantum of subsidy could be made by Joint Inspection Team as prescribed in LOI. It also emerges from the record that even during personal

hearing having been afforded to the petitioner, he himself informed the respondents that Project work was not functional since long and as such he sold out the assets of the Project and the Project is now abandoned. But this Court sees no documents available on record suggestive of the fact that in this regard information, if any, was ever sent to the respondents. Perusal of communication dated 14th/19th August, 2014 (Annexure R-6) placed on record further suggests that as per own submission of petitioner that he had obtained Term Loan Account from bank i.e. Central Bank of India, he was irregular in re-payment of installments since beginning and due to his inconsistent default, loan account was declared Non Performing Assets *(for short `NPA')* vide notice dated 3rd October, 2011 under Section 13(2) of SARFAESI Act. Since loan account of petitioner was declared NPA, case of the petitioner for back ended subsidy could not be considered in terms of general guidelines issued for all the Schemes vide Annexure R-4. Otherwise also subsidy, if any, being concession, cannot be claimed as a matter of right, rather it is the prerogative of the State to extend the benefit of subsidy.

21. In this regard reliance is placed on ***Pashimanchal Vidyut Vitran Nigam Limited and Others vs. Adarsh Textiles and Another, (2014)16 SCC 212,*** wherein the Hon'ble Apex Court has held as under:-

> "26. It can be culled out from order dated 14.6.2006 that the State Government intended the benefit to be extended to power-loom 'weavers' alike farmers. The activity of manufacturing textile is generally understood as the weaving of such textile and man who is engaged in such power-loom activity is known as weaver. Weaving means: to form a fabric by interlacing yarn on a loom. It also means the method of pattern of weaving or the structure of a woven fabric, as observed by this Court in Ess Dee Carpet Enterprises v. Union of India (1990) 1 SCC 461. The State Government thus, never intended the benefit to be given to big industries like HV-2 industries. In the circumstances, it was incumbent upon the Commission to consult the State Government before passing clarification order dated 14-15/9/2006 while applying its order dated 11.7.2006 to HV-2 consumers. When the State Government has written to the Commission on 6.10.2006, thereafter there was no justification for the Commission not to recall the clarification issued on 14-15/9/2006 as it was the prerogative of the State Government to extend the benefit ofsubsidy to a class or particular class of consumers and subsidy being a concession could not have been enforced as a matter of right. The Commission was bound to act as per such directives of State Government. (p.220) (Emphasis supplied)

22. After carefully perusing the pleadings as well as documents made available on record, we are fully convinced and satisfied that the petitioner failed to comply with the conditions contained in the LOI (Annexure P-2) and at no point of time he furnished certificate of completion of the Project from the borrower bank and as such his case was rightly not considered by respondents No.2 and 3 for grant of back ended subsidy in terms of Scheme referred hereinabove. It is admitted case of the petitioner that due to financial constrains he was unable to run the Project and he sold the same to other person. It is also clear from the impugned order that the petitioner's account was declared NPA on account of non-repayment of loan advanced for the completion of the Project.

23. Consequently, in view of the detailed discussions made hereinabove, we do not see any illegality and infirmity in the impugned order dated 14th/19th August, 2014 (Annexure P-9) passed by the respondents rejecting the claim of the petitioner and as such this Court sees no occasion to interfere in the present case by invoking extra ordinary jurisdiction, as prayed for, by the petitioner in the present petition. Accordingly, the writ petition is dismissed.

24. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ....Appellant
Versus
Rajeev Kumar and others ....Respondents

Cr. Appeal No. 294 of 2014
Decided on: 24th November, 2016

Indian Penal Code, 1860- Section 363, 366-A, 376, 506 and 120-B- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Prosecutrix was taken to Beas and thereafter to Baba Bakala – she was subjected to sexual intercourse by accused No.1 without her consent – accused were tried and acquitted by the Trial Court- held in appeal that the age of the prosecutrix was stated to be below 16 years – reliance was placed on the parivar register but the parivar register is not a legal or acceptable piece of evidence to determine the age of person – it was not proved at whose instance the entries were recorded in the register on the basis of which birth certificate was issued – the prosecutrixwas admitted in the school at the age of 6 years – she had failed twice or thrice – she was studying in class 10th at the time of incident- therefore, she was aged (10+6+2/3) =18-19 years at the time of incident- the prosecutrix had accompanied the accused voluntarily and had stayed without lodging any protest –the prosecution version was not proved beyond reasonable doubt – accused were rightly acquitted by the Trial Court- appeal dismissed. (Para-9 to 19)

Cases referred:

State of Punjab Vs. Gurmeet Singh and others, AIR 1996 SC 1393
Ranjit Hazarika Vs. State of Assam, (1998) 8 SCC 635
Vimal Suresh Kamble Vs. Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175
Trilok Chand versus State of H.P. 1996(1) Sim. L.C. 187,

For the appellant: Mr. M.A. Khan, Addl. A.G.
For the respondents: Mr. Sunny Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Learned Special Judge, Hamirpur has acquitted respondent No. 1 (hereinafter referred to as 'accused No.1') of the charge framed against him under Section 363, 366-A, 376, 506 and 120-B of the Indian Penal Code and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 and his co-accused Chander Parkash, father (hereinafter referred to as 'accused No.2') and Salochna Devi, mother (hereinafter referred to as 'accused No.3') of the charge under Section 366-A read with Section 120-B of the Indian Penal Code vide impugned judgment dated 10.06.2014 passed in Sessions Trial No. 22/2013.

2. Accused Nos. 2 and 3 are parents of accused No. 1 Rajeev Kumar. The allegations against them are that on 01.08.2013 accused No. 1 had made a phone call to PW-1, the prosecutrix (name withheld) and asked her to come to Hamirpur. She went to Hamirpur and received there at bus-stand by Chander Parkash, accused No. 2. She was taken to their residence near Gandhi Chowk, Hamirpur, where accused No. 3 happens to meet her. She lived there in the Company of accused persons for five days. Thereafter, she went with accused No. 1 to Beas. They stayed at Beas for a day and then went to 'Baba Bakala'. They stayed there in a 'Saraye' (inn) for 4-5 days. It is at this place, the prosecutrix allegedly was subjected to sexual intercourse by accused No. 1 without her consent and against her will. After visiting 'Baba

Bakala', they went to 'Budha Samadhi'. There also she was subjected to sexual intercourse by the said accused forcibly. They stayed at 'Budha Samadhi' for five days and thereafter went to Amritsar. There, accused Nos. 2 and 3 also joined them. Accused No. 1 had taken her cellphone. She was also threatened by the said accused with dire consequences, if she revealed the incident to anyone else. While at Amritsar, they were traced by the police of Police Station, Hamirpur on 24.08.2013. The prosecutrix was entrusted in superdari to a Lady Constable vide seizure memo Ext. PW-1/A. All the three accused and the prosecutrix were brought by the police to Sujanpur on 25.08.2013. During the course of investigation, the clothes of prosecutrix were taken into possession. She was got medically examined in the hospital. Her statement Ext. PW-1/E was recorded in the Court.

3. On the completion of investigation report under Section 173 of the Code of Criminal Procedure was filed against all the three accused. Learned Special Judge on going through the report and documents annexed thereto and also hearing learned Public Prosecutor and learned defence counsel has found a prima-facie case under Section 363, 366-A, 376, 506, 120-B IPC and Section 4 of the Protection of Children from Sexual Offences Act, 2012 having been made out against accused No.1, whereas, under Section 366-A and 120-B IPC against accused No.2 and 3. The charge against them was framed accordingly. The accused, however, pleaded not guilty and claimed trial. The prosecution in order to sustain the charge against the accused persons had examined 25 witnesses in all.

4. On the other hand, accused No. 1 in his statement recorded under Section 313 of the Code of Criminal Procedure has admitted that they were traced by the police at Amritsar on 24.08.2013 and the prosecutrix was handed over to Lady Constable Praveen Kumari (PW-5) vide seizure memo Ext. PW-1/A. They were brought to Police Station, Sujanpur on 25.08.2013 by the I.O. ASI Ashok Kumar (PW-25). The Police got him medically examined and it is Dr. Mohinder Singh Rana (PW-14) who had examined him vide MLC Ext. PW-14/B. The rest of the prosecution case has either been denied by him being wrong or for want of knowledge. Similarly, his co-accused while admitting that they were brought to Police Station, Sujanpur by ASI Ashok Kumar (PW-25) on 25.08.2013, have denied all the incriminating circumstances appearing against them in prosecution evidence being wrong. In their defence, it was pleaded that a false case has been engineered against them and that the witnesses have deposed falsely under the pressure of local M.L.A Shri Rajinder Rana. They, however, opted for not producing any evidence in their defence.

5. Learned Special Judge on appreciation of the evidence comprising oral as well documentary has concluded that the prosecution failed to prove its case against the accused beyond all reasonable doubt. Also that, as per evidence available on record, the prosecutrix was above 18 years of age and as such, a consenting party, even if was subjected to sexual intercourse by accused No. 1. No evidence was found to be there on record showing the involvement of accused Nos. 2 and 3 in the commission of offence punishable under Section 366-A and 120-B IPC and the accused, as such, were acquitted of the charge framed against each of them.

6. The respondent-State aggrieved by the findings of acquittal recorded by learned Special Judge has questioned the legality and validity of the impugned judgment on the grounds inter-alia that the evidence available on record has been considered in a slip-shod and perfunctory manner. The impugned judgment has been passed on hypothesis, conjectures and surmises. The evidence as has come on record by way of testimony of the prosecution witnesses has been brushed aside for untenable reasons. The date of birth of the prosecutrix as 12.09.1997 though stands established from the certificate Ext. PW-11/B issued by the Secretary, Gram Panchayat, Chamyana and copy of parivar register Ext. PW-10/B, however, the same has erroneously been ignored and to the contrary learned Special Judge has erroneously concluded that her age was not less than 18 years. The testimony of the mother of the prosecutrix PW-2 and her brother PW-3 in this regard is stated to be misconstrued, misunderstood and mis-appreciated. Learned Special Judge is stated to have gone wrong while calculating the age of prosecutrix at his own in utter disregard to the cogent and reliable evidence produced by the

prosecution. The Court has erroneously swayed by the admission made by PW-2 and PW-3 that the prosecutrix failed twice/thrice while pursuing her studies in the school. Learned Special Judge was also wrong while holding that in view of there was no mark of injuries and symptoms of rape, the present was a case of consent. The prosecutrix has supported the prosecution case that she was called by accused No. 1 by making call to her over cellphone and while in his company, he subjected her to sexual intercourse without her consent and against her will. Such evidence is stated to be erroneously ignored. There is ample evidence to prove that accused Nos. 2 and 3 took active part in ensuring the kidnapping of the prosecutrix by accused No. 1 and thereafter to accompany accused No. 1 to different places under the threat that there is apprehension of they both were likely to be nabbed by the police, however, learned Special Judge has erroneously concluded that cogent and reliable evidence to show the involvement of accused Nos. 2 and 3 was not available on record.

7. Mr. M.A. Khan, learned Additional Advocate General has forcefully contended that the present is a case where a minor below 16 years of age has been sexually assaulted by accused no. 1 and thereby he has committed a heinous offence, however, acquitted by learned Special Judge below while mis-appreciating, mis-construing and misreading cogent and over whelming evidence having come on record.

8. On the other hand, learned defence counsel has urged that the prosecutrix being more than 18 years of age had voluntarily accompanied accused No. 1 and visited several places with him. Although, cogent and reliable evidence except for her own testimony to show that she was subjected to sexual intercourse forcibly by accused No. 1, however, even if ultimately it is held that she was subjected to sexual intercourse such an act was not without her consent and against her will and rather consensual. So far as accused Nos. 2 and 3 are concerned, according to learned defence counsel, the present is a case of no evidence against the said accused. It has, therefore, been urged that all the accused have rightly been acquitted by learned Special Judge and as such the impugned judgment calls for no interference.

9. The nature of the offence, the accused persons allegedly committed is not only heinous but also grievous in nature because as per the allegations, accused No. 1 has not only removed the prosecutrix, allegedly a minor from her lawful guardianship in connivance with his parents, accused Nos. 2 and 3, but also subjected her to sexual intercourse against her will and without her consent.

10. It is, however, yet to be determined by us with the help of evidence available on record that the prosecutrix at the relevant time was a minor or that removed from her lawful guardianship by the accused persons in connivance with each other and also that the sexual assault made on her by accused No. 1 was without her consent and against her will, however, it is desirable to take note as to under what circumstances the commission of offence allegedly committed by the accused can be inferred. A bare perusal of Section 361 IPC reveals that if a female under 18 years of age is enticed away by a person from her lawful guardianship without the consent of her guardian, such person can be said to have committed the offence of kidnapping. The essential ingredients to constitute an offence of kidnapping, therefore, is enticing away a minor from her lawful guardianship without the consent of her guardian or any other person legally authorized to consent on behalf of such guardian of minor. Such person can be said to have committed an offence of kidnapping punishable under Section 363 of the Indian Penal Code. Section 366-A IPC takes care of a situation where a girl below 18 years of age is induced to leave a place so that she can be forced to have illicit intercourse with another person and such person can be said to have committed offence punishable under Section 366-A of the Indian Penal Code.

11. Now if coming to Section 120-B of the Act, it is required to be pleaded and proved that a criminal conspiracy was hatched and the culprit was a party to such conspiracy.

12. Now if coming to the commission of offence punishable under Section 376 of the Indian Penal Code in a case of minor, the commission of offence can be said to have committed if

it is established that the prosecutrix has been subjected to sexual intercourse by the accused or in a case where the prosecutrix is not minor, the prosecution is additionally required to plead and prove beyond all reasonable doubt that such an act with her was against her will and without her consent.

13. Now if coming to the legal principles attracted in a case of this nature, in ***State of Punjab*** Vs. ***Gurmeet Singh and others, AIR 1996 SC 1393***, the Apex Court has held that the own statement of the prosecutrix if inspires confidence is sufficient to bring the guilt home to the accused. The apex Court in order to ensure that an innocent person is not implicated in the commission of an offence of this nature, while taking note of the judgment in ***Gurmeet Singh's*** case supra has however diluted the ratio thereof in ***Ranjit Hazarika*** Vs. ***State of Assam, (1998) 8 SCC 635*** and held that the statement of prosecutrix cannot be universally and mechanically applied to the facts of every case of sexual assault, as in its opinion, in such cases, the possibility of false implication can't also be ruled-out. Similar was the view of the matter taken again by the apex Court in V***imal Suresh Kamble*** Vs. ***Chaluverapinake Apal S.P. and another, (2003) 3 SCC 175***. While placing reliance on this judgment and the law laid down by the Apex Court in the judgment supra, this Court in ***Criminal Appeal No. 481 of 2009*** titled ***State of Himachal Pradesh*** V. ***Negi Ram***, decided on 27th May, 2016 has held as under:

> "15. Therefore, the legal position as discussed supra makes it crystal clear that irrespective of an offence of this nature not only grievous but heinous also, the Court should not got swayed merely by passion and influence only on account of the offence has been committed against a woman and rather keep in mind the cardinal principle of criminal administration of justice, that an offender has to be believed to be innocent unless and until held guilty by the Court after satisfying its judicial conscience on the basis of given facts and circumstances of each case as well as proper appreciation of the evidence available on record."

14. Now if coming to the merits of the case, in a case of this nature, it is the age aspect, which assumes considerable force. As noticed supra, the age of the prosecutrix, in the case in hand, has been claimed below 16 years. It is the extract of parivar register Ext. PW-10/B and the date of birth certificate Ext. PW-11/B have been relied upon by the prosecution to prove this part of the prosecution case. The extract of parivar register Ext. PW-10/B cannot be treated to be a legal and acceptable piece of evidence in order to determine the age of a person because it is the entries in the birth and death register, that too, when the person at whose instance the same were entered at the time of birth of that person, if examined qua authenticity and genuineness thereof can be treated as cogent and convincing evidence qua the exact age of the said person. Therefore, the evidence as has come on record by way of the testimony of Smt. Reeta Chandel (PW-10) who has proved the extract of parivar register Ext. PW-10/B is hardly of any help to the case of the prosecution.

15. Now if coming to the date of birth certificate Ext. PW-11/B issued by Pawan Kumar, Secretary Gram Panchayat, Chamyana, he has not said as to from which record this document was issued by him. Though, he has deposed while in the witness box that the certificate is true and correct as per original record brought by him to the Court and that as per such record, the date of birth of the prosecutrix is 12.09.1997, however, nothing has come on record that the record he had produced was original birth and death register. Even if it is believed that such record was original birth register, nothing has come on record as to at whose instance, the entries qua the birth of prosecutrix were recorded in the said register. On the other hand, he has admitted cutting in this register against the alleged entries qua the birth of the prosecutrix made. Therefore, Ext. PW-11/B cannot also be said to be legal and acceptable evidence in order to inter that the prosecutrix was born on 12.09.1997. In case Ext. PW-11/B is excluded, there hardly remains any other cogent and reliable evidence accept for oral evidence as has come on record by way of testimony of her mother Smt. Sunita Devi (PW-2) and Anil Kumar (PW-3).

16. Now if coming to the statement made by her mother PW-2, the prosecutrix was admitted in school at the age of six years. At the relevant time, she was a student of 10th class. According to this witness prosecutrix failed twice, whereas, as per testimony of PW-3 her brother, she failed twice or thrice. Learned Special Judge, therefore, has not committed any illegality or irregularity while arriving at a conclusion that the prosecutrix on the day of occurrence was above 18-19 years of age for the reason that had she failed before her admission in 10th class twice or thrice, she being admitted in the school at the age of six years was aged (10+6+2/3)=18-19 years. Learned Additional Advocate General, as such, is not right while arguing that evidence qua age aspect of the prosecutrix has not been considered by learned Special Judge in its right perspective. The present rather is a case where the prosecution has miserably failed to prove that on the date of occurrence, the prosecutrix was below 18 years of age. Except for the testimony of the prosecutrix that accused No. 2 met her at Hamirpur in the bus stand and that she was taken by the said accused to his quarter at Gandhi Chowk, Hamirpur, where accused No. 3 happened to meet her and that it is the said accused managed her elopement with accused No. 1 at the pretext that there was every likelihood of they being nabbed by the Hamirpur police, there is no corroboration thereto from any independent source. On the other hand, conduct and behaviour of the prosecutrix to be discussed hereinafter amply demonstrates that she accompanied the accused voluntarily and visited several places without lodging any protest at any stage of her stay with accused No. 1 lead to the only conclusion that she was not a minor below 18 years of age nor enticed away by accused No. 1 himself or at the behest of his parents, accused Nos. 2 and 3, after having hatched conspiracy, with a view to force her to sexual intercourse. The prosecutrix rather had attained the age of discretion and she was at the verge of reaching at the age of majority, hence left the house of her parents without any persuasion or deceitful means and rather voluntarily accompanied accused No. 1 and permitted him to take her away from one place to another. Merely a passing reference in her statement that her cellphone was taken from her by accused No. 1 and that she was threatened with dire consequences cannot be believed to infer that she was threatened to do away with her life by accused No. 1 had hue and cry been raised by her or protest lodged. Therefore, no case either under Section 363 or 366-A and for that matter under Section 506 and 120-B of the Indian Penal Code is made out against accused No. 1. Similarly, no case for the commission of an offence under Section 366-A or 120-B of the Indian Penal Code is made out against his co-accused also. Thus, the prosecution has failed to bring guilt home to any of the accused from the evidence available on record and as such, they have rightly been acquitted of the charge framed against each of them. We are drawing support in this regard from the judgment of this Court in ***Trilok Chand*** versus ***State of H.P. 1996(1) Sim. L.C. 187***, which read as follows:

> "9. After scrutinizing the available evidence carefully, I am of the considered opinion that no offence under Section 366, Indian Penal Code is made out. It may be that the prosecutrix was below eighteen years on the day of occurrence, however, it is absolutely clear from her conduct and the evidence that she had reached the stage of discretion. She was in complete love with the accused for along time. She had written number of letters to him disclosing her close intimacy and friendship with the accused. It is not possible to believe that the prosecutrix was in any way influenced or coerced by the accused either for friendship, or for marriage and providing her ornaments and clothes. It appears that she had already settled to elope with the accused that is why the accused came at that hour of night entering into the room where the prosecutrix was sleeping with her sister and two brothers and parents in the adjoining room. The fact that the prosecutrix had not bolted the door from inside also reinforces the conclusion that she had invited the accused to take her at that time of the night. She changed her clothes and left this place so secretly that the elopement was not noticed by any one of the inmates. There could be no reason for the prosecutrix to be under any kind of pressure from the accused. Voluntarily, she left the place and moved with the accused from place to place for days together without raising hue and cry. The facts rather disclose that it was the prosecutrix

> who played the dominant role in leaving the house. When the elopement was settled, it can be legitimately inferred that the accused may not have at all entered the room of the prosecutrix and coerced her to leave the place as alleged. Rather, she must be waiting for his appearance. At one time, she had gone out during the night looking for the accused, though, she had stated that she had done so for urination, yet the fact remains that when she returned to the room, she did not bolt the door from inside. Consequently, it is plainly clear that the prosecutrix left her father's guardianship voluntarily and the accused was not responsible for the same. The trial Judge has not appreciated the evidence correctly with the result that wrong conclusion has been drawn on this aspect of the case."

17. It is now to be seen that in the given facts and circumstances, the prosecution has been able to prove beyond all reasonable doubt that the prosecutrix has been subjected to sexual intercourse by accused No. 1 without her consent and against her will. As is held in para supra, the prosecutrix has not been proved to be below 16 years of age. She was major above 18 years of age. She, as per the prosecution case itself had received a call over her cellphone from accused No. 1 who asked her to come to Hamirpur. She boarded a bus from village Chhail(Patlandar) to Hamirpur. His mother, who is accused No. 3 also talked with her and told her that marriage will be solemnized with accused No. 1. She, therefore, boarded bus for Hamirpur and received there at bus stand by accused No.2. She was brought by the said accused to Gandhi Chowk to his quarter. There, she met with accused No. 3. She lived in that quarter for 4-5 days. Gandhi Chowk area of Hamirpur town is thickly populated. As a matter of fact, it is headquarter of Hamirpur district. There exists the Collectorate, Police Headquarter and also Judicial Court Complex nearby Gandhi Chowk. Though, no such evidence has come on record, however, judicial notice thereof can be taken. She, however, not raised any hue and cry during her stay in the quarter of accused at Gandhi Chowk. She went to Beas with accsued No. 1. They may have travelled by road from Hamirpur to Beas. There is no evidence that she lodged any protest against her being taken away by the said accused to that place. They stayed at Beas, a religious place, which place is visited by hundreds of devotees everyday. There is no evidence that she raised any hue and cry and lodged protest at Beas. On the other hand, she went along with accused No. 1 to Baba Bakala, where she allegedly was subjected to sexual intercourse for the first time. They stayed there for 4-5 days in a 'Saraye', however, she never lodged any protest at that place also. Then they went to Budha Samadhi and there also they lived for five days. She was subjected to sexual intercourse by accused at this place also. After staying at Budha Samadhi for five days, they came to Amritsar. It is at that place, she was apprehended by the police of Police Station, Sujanpur on 24.08.2013 in the company of accused. According to her, accused No. 1 was known to her one month prior to the occurrence. He used to call her over cellphone, however, she did not disclose the same to her mother and brother. Her brother Anil Kumar (PW-3) was working at the residence of Shri Rajinder Rana, a local M.L.A. No doubt, while in the witness box, it is stated that her cellphone was taken by accused No. 1 and she was threatened by him with dire consequences, in case disclosed anything to anyone. It is denied that accused No. 1 did not entice her away from her lawful guardianship and that she accompanied him voluntarily. It is also denied that the said accused did not subject her to forcible sexual intercourse. She, however, admitted that while she belongs to general category the accused belongs to reserve category.

18. Such evidence having come on record lead to the only conclusion that the accused never subjected the prosecutrix to sexual intercourse without her consent and against her will. Even if it is believed that she was subjected to sexual intercourse by accused No. 1, such an act cannot be said to be without her consent and rather consensual. The present is also not a case where her consent has been obtained by putting her or any person in whom she was interested in fear of death or of hurt. It is also not the prosecution case that she was of unsound mind and as such unable to understand the nature of the act allegedly committed by accused No. 1 with her. As a matter of fact, the present was a case based by the prosecution on 6th situation

below Section 375 of the Indian Penal code, however, failed to prove beyond all reasonable doubt that the prosecutrix was below 18 years of age on the date of occurrence. On the other hand, her conduct, as is apparent from her own testimony itself demonstrates that she was a consenting party to her elopement with accused No. 1. The scientific investigation conducted rule-out the possibility of commission of sexual intercourse with her as blood and semen could not be detected on either of the exhibits, which were sent for chemical analysis, however, the clinical examination conducted by PW-12 Dr. Rajneesh Thakur reveals that she was exposed to quietus. However, there being no evidence qua the mark of violence on her body, it cannot be believed that she was assaulted sexually against her will and without her consent. The evidence as has come on record by way of testimony of PW-2 and PW-3 being hearsay is not of much help to the prosecution case. Similarly, the remaining prosecution witnesses who remained associated during the course of investigation of the case in one way or the other are formal and their testimony would have only been termed as link evidence had the prosecution been otherwise able to bring guilt home to the accused persons beyond all reasonable doubt. The charge under Section 376 of the Indian Penal Code framed against the accused thus also bound to fall to the ground.

19. The reappraisal of the evidence on record leads to the only conclusion that the prosecution has failed to prove its case against the accused persons beyond all reasonable doubt and as such, they have rightly been acquitted of the charge framed against each of them by learned trial Court. Consequently, the findings recorded by learned trial Court calls for no interference. We, therefore, find no illegality, irregularity or infirmity in the impugned judgment. The same, as such, is ordered to be affirmed.

20. For all the reasons discussed hereinabove, this appeal fails and the same is accordingly dismissed. Personal bonds furnished by the accused persons shall stand cancelled and sureties discharged.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Cr. Appeal No.567 of 2000 alongwith
Cr. Appeal No.35 of 2001 and Cr. Revision No.155 of 2000
Judgment reserved on: 26.8.2016
Date of Decision: November 25, 2016

1. Cr. Appeal No.567/2000
Anil Katoch & another .... Appellants
Versus
State of H.P. ...Respondent

2. Cr. Appeal No.35 of 2001
State of H.P. ...Appellant
Versus
Anil Katoch & another ...Respondents

3. Cr. Revision No.155 of 2000
Mrs. Raman Katoch ...Petitioner
Versus
Anil Katoch and another ...Respondents

Indian Penal Code, 1860- Section 302 read with Section 34- Accused murdered A – they were convicted for the commission of offence punishable under Section 304(II) of I.P.C – held in appeal that the eye-witness had not disclosed the incident to the police at the first opportunity – the testimony of eye-witness was contradicted by other witnesses –persons who took the deceased to the hospital were not examined – the incident had taken place during the darkness and it was

difficult to identify the assailants- recovery of clothes did not establish the prosecution version as blood stains on the clothes were not connected to the deceased – the prosecution version was not proved beyond reasonable doubt- appeal allowed and accused acquitted.(Para-26 to 51)

Cases referred:
Sat Paul vs. Delhi Administration, 1976 (1) SCC 727
Ganesh Bhavan Patel vs. State of Maharashtra, 1978 (4) SCC 371
Randhir Singh alias Tira and others vs. State of H.P., 2007 (2) SLC 294
Kansa Behera vs. State of Orissa, 1987(3) SCC 480
State of H.P. vs. Edward Samual Chareton, 2000 (2) Shim. L.C. 228
Ajay Sharma vs. State of Himachal Pradesh, 2002 (3) Sim.L.C. 329

Cr. Appeal No.567 of 2000
For the appellants: Mr. Anup Chiktkara, Advocate with Ms. Rita Goswami, Advocate.
For the Respondents: Mr. D.S. Nainta, Additional Advocate General.
Cr. Appeal No.35 of 2001
For the appellant: Mr. D.S. Nainta, Additional Advocate General.
For the respondents: Mr. Anup Chiktkara, Advocate with Ms. Rita Goswami, Advocate.
Cr. Revision No.155 of 2000
For the petitioner: Mr. Surinder Sharma, Advocate.
For the respondents: Mr. Anup Chiktkara, Advocate with Ms. Rita Goswami, Advocate.
Mr. D.S. Nainta Additional Advocate General for the State.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary.J.

This judgment shall dispose of the present appeal (Cr. Appeal No. 567 of 2000), Criminal Appeal No. 35 of 2001 and Criminal Revision No. 155 of 2000, arising out of the judgment dated 21.8.2000, passed by learned Addl. Sessions Judge (I), Kangra at Dharamshala, H.P. in Sessions Case No. 40-P/97.

2. It is the convicts, (hereinafter referred to as the accused) who have preferred this appeal in this Court. They both were charged under Section 302 read with Section 34 of the Indian Penal Code, with the allegations that on 19.10.1996 around 10 p.m. at Village Sukarna, in furtherance of their common intention to kill one Arjun Singh Katoch, they assaulted him and he succumbed to the injuries inflicted by both of them and thereby they murdered said Shri Arjun Singh. They, however, were convicted by learned Additional Sessions Judge-I, Kangra at Dharamshala for the commission of offence, punishable under Section 304 (II) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 3 years and to pay a fine of Rs.5000/-. In default of payment of fine, each of them has to undergo rigorous imprisonment for a term of 6 months.

3. Connected Criminal Appeal No. 35 of 2001 has been filed by the State of Himachal Pradesh against the conviction and sentence of both convicts under Section 304 (II) read with Section 34 IPC instead of under Section 302 IPC read with Section 34 IPC.

4. If coming to Cr. Appeal No. 155 of 2000, the same has also been preferred against the judgment ibid by Ms. Raman Katoch, the widow of deceased Arjun Singh with a prayer to convict both accused for the commission of offence punishable under Section 302 IPC read with Section 34 IPC and accordingly enhance the sentencepassed against each of them.

5. The prosecution case, as disclosed from the report field under Section 173 of the Code of Criminal Procedure and the documents annexed therewith, in a nutshell, is that not only both the accused, but deceased Arjun Singh was also resident of village Nagehar under Police

Station, Baijnath, District Kangra. They were cousins in relation. The deceased was working as Branch Manager in a Company, namely Golden Land in its Shimla Office.

6. On 19.10.1996, marriage of a fellow villager namely Nagesh, was being solemnized. Deceased Arjun Singh had also gone from Shimla to his village to attend the marriage. The ***Baraat*** of Nagesh had to go to village Sukarna. Deceased Arjun Singh and his friend PW-1 Suresh Dhameja, PW-10 Yudhbir Singh, PW9 Yashbir Singh and PW5 Janak Chand also went to village Sukarna as ***Baraties*** (member of marriage party) in a Maruti Car bearing registration No.CH1-0J-3572. The deceased and his friends had dinner at the place of bride. Around 10 p.m. after having dinner they planned to come back to their native place, village Nagehar. They all boarded the car. Deceased Arjun Singh was on its wheel. They were hardly 100-150 yards away from the house of bride, when noticed that other ***Baraties***, including both the accused, were dancing on the tune of band and the band party following them. On noticing there being congestion over the road, deceased Arjun Singh stopped the vehicle in one side of the road. He switched off the engine and the lights also. He thereafter came out of the car for answering the call of nature. When he did not come back for about 10-12 minutes, other occupants of the car, including PW-1 Suresh Dhameja, who as a matter of fact, is the complainant in this case, noticed that the deceased was being beaten up by some persons. After some time, the front door of the car was opened by some one, who administered a blow on the hand of PW-1 Suresh Dhameja and also slapped him. He got frightened and fled away towards nearby fields. He hided himself in the bushes there. S/Shri Yudbir Singh, Yashbir Singh and Janak Chand, who were occupying the rear seat of the car, also got frightened and they also fled away. When the people who were present at the spot dispersed, someone started the car of the deceased and the deceased was taken to hospital at Baijnath. The complainant (PW1 Suresh Dhameja) went on foot to the hospital. They noticed the deceased in an injured condition there. They also noticed that blood was oozing out of his mouth, nose and head. The deceased was found to have been brought to hospital by one Rani alias Dilwar and Kamal Bhushan in his own car. In the hospital at Baijnath, first aid was given to the deceased. He thereafter was referred to Civil Hospital at Palampur. He was brought in the same car to Palampur. The Medical Officer on duty there, however, had referred the deceased to PGI Chandigarh. While being removed to PGI Chandigarh, he succumbed to the injuries received on his person around 2.30 a.m. on the way to Chandigarh. His dead body was brought back to Baijnath.

7. Consequent upon the information entered in Rapat Rojnamcha Ext.PW17/A of Police Station, Baijnath, police party headed by ASI Roshan Lal PW-17 and comprising HC Uttam Chand, Constable Tilak Raj, Rumal Singh and HHG Rajinder Kumar had already swung into action. They went to the hospital at Baijnath, where the deceased was shifted immediately after the occurrence.

8. Statement of PW-1 Suresh Dhameja to the aforesaid effect was recorded under Section 154 Cr. P.C and on the basis thereof FIR Ext.PW17/B under Section 302 read with Section 34 of the Indian Penal Code was registered against both the accused in Police Station, Baijnath. The investigation was initially conducted by ASI Roshan Lal PW-17. He prepared inquest papers Ext.PW3/A, and made an application Ext.PW2/B for getting the postmortem of the dead body conducted in Sub Divisional Hospital at Palampur. He also got the dead body photographed vide photographs Exts. P-12 to P-18, the negatives whereof are Exts. P-19 to P-25. It is thereafter, he went to the spot and prepared spot map Ext.PW17/C. Blood lying on the spot and broken pieces of wind screen of the car were taken into possession by PW-7.

9. It transpired during the investigation that on seeing the deceased driving his car to his native place after having dinner in the house of the bride and he having stopped the car on seeing the Barateis dancing on the road, both accused shouted on him that he is proud of his having the car and on this they started quarreling with each other. Accused Anil Katoch had given pushes to the deceased on account of which he fell down. Thereafter, both the accused, who happens to be real brothers, administered beatings to him with kicks and fisticuffs. The deceased fell down and became unconscious. It is Rani alias Dilwar and Kamal Bhushan, who

took the deceased from the place of occurrence and brought inside the car in an unconscious condition. While the deceased was being removed to Hospital, both accused warned said Shri Rani and Kamal Bhushan to tell the doctor in the hospital that it was a case of an accident and threatened them to meet the same fate had they failed to do so.

10. When the involvement of both the accused established during the investigation of the case, they were arrested at Dehra near Court Campus on 26.10.1996. During their interrogation, they both admitted their involvement in the murder of Arjun Katoch. Accused Anil Katoch, while in custody, made a statement under Section 27 of the Evidence Act and pursuant to it, identified the place of occurrence to the Police and also got recovered his clothes which he was wearing at the time of occurrence. The clothes of the accused were identified by PW-1 Suresh Dhameja. Investigating Agency recorded the statements of the witnesses under Section 161 Cr. P.C. The clothes of accused Anil Katoch and that of the deceased were sent to Forensic Science Laboratory for analysis. As per the report Ext.PX, received from the laboratory, human blood was found available on the clothes of the deceased, whereas blood was not found on the clothes of accused Anil Katoch.

11. The investigation conducted by the police further reveals that the deceased and the accused are the descendants of a common ancestor. They were quarreling with each other right from the time of their grand father. It is on account of enmity between the families of the accused and the deceased, the accused had shifted from village Nagehar to Bandiankhopa. On account of their enmity, Sub Divisional Magistrate, Palampur in the proceedings under Section 107 Cr. P.c., had released the mother of the accused, Smt. Sayongal, their uncles Shakti Chand and Bideshwari as well as grand father Lal Singh on their personal bonds with the condition to maintain peace and law and be of good behaviour for a period of one year vide order dated 3.10.1972. It is on account of such old enmity, both the accused taking benefit of the occasion of marriage, had beaten up deceased Arjun mercilessly and as a result thereof caused his death.

12. On the completion of the investigation, report under Section 173 Cr. P.C was filed by the Investigating Agency in the Court of learned Sessions Judge, Kangra at Dharamshala. The case was assigned to the Court of learned Additional Sessions Judge (I), Kangra at Dharamshala.

13. As noticed at the outset, learned trial Court after having gone through the Challan and the documents annexed therewith has framed charge under Section 302 read with Section 34 of the Indian Penal Code against each accused person. Since they pleaded not guilty to the charge, therefore, the prosecution was called upon to produce evidence in order to sustain the charge so framed against the accused persons.

14. PW-1 Suresh Dhameja, is a personal friend of deceased Arjun Singh. It is on the basis of statement Ext.PW1/A, he made under Section 154 Cr. P.C., FIR Ext.PW17/B was registered in Police Station, Baijnath. PW-2 Dr. O.P. Ramdev had examined the deceased in Civil Hospital at Baijnath, where he was brought in an injured condition for medical treatment. He has proved MLR Ext.PW2/A. The endorsement Ext.PW2/B on the application made by the police was also made by this witness. PW-3 Dr. D.S. Chandel has conducted the postmortem of the dead body of the deceased, on an application Ext.PW3/A made by the police for the purpose. This witness has proved postmortem report Ext.PW3/B. He has taken in possession shirt Ext.P2, pants Ext.P3, under-wear Ext.P4, vest Ext.P5, belt Ext.P6, golden ring Ext.P7 and other ring Ext.P8 of the deceased. The same were sealed by him in a parcel. PW-4 Dr. Jyotinder Pal, Medical Officer, Civil Hospital, Baijnath had examined injured Ranjit Singh vide MLR Ext.PW4/A, injured Pawan Kumar vide MLR Ext.PW4/B and also one Anish Sharma vide MLR Ext.PW4/D. According to him, the injuries mentioned in Exts. PW4/A and PW4/D could have been caused in a scuffle.

15. The star prosecution witness is PW-5 Janak Chand, who has been examined as an eye witness. PW-6 Tarlok Chand, is Patwari, who has prepared the copy of ***Latha Shajra*** Ext.PW6/A. PW-7 Ajay Kumar is photographer. He has proved photographs Exts. P-12 to P-18 and the negatives thereof Exts. P-19 to P-25. The remaining witnesses who have also been

associated as eye witnesses to the occurrence are PW-8 Yogeshwar Singh, PW-9 Yashbir Singh, PW-10 Yudhbir Singh and PW-11 Sushil Kumar. PW-12 Sanjeet Kumar is running a photo studio at Paprola. This witness had covered the marriage so far as photography and videography are concerned.

16. The other eye witnesses are PW-13 Ranjit, PW-14 Jaswant Kumar, PW-18 Gareesh Sharma and PW-21 Parveen Kumar. The remaining witnesses i.e. PW-15 LHC Dhruv Singh, PW-16 LHC Tilak Raj and PW-19 LHC Trilok Chand are police officials, who remained associated in one way or the other during the investigation of the case. PW-17 ASI Roshan Lal is Investigating Officer of this case. PW-20 Durga Chand is the real brother of deceased Arjun Singh. PW-22 Shakti Chand is the then Inspector/SHO, Police Station, Baijnath, who has investigated the case partly and also filed the Challan in the Court.

17. On the other hand, the statements of both the accused were also recorded under section 313 Cr. P.C. They, however, not opted for producing any evidence in their defence.

18. Learned trial Judge on appreciation of the evidence available on record and affording due opportunity of being heard to the prosecution as well as the accused, has held both the accused guilty for the commission of an offence punishable under Section 304 Part-II of the Indian Penal Code and they both have been convicted and sentenced in the manner, as pointed out at the outset.

19. In this appeal, it has been averred that out of 22 witnesses examined by the prosecution to bring guilt home to both accused, none of them has supported the prosecution case and some of them even were declared hostile also. However, irrespective of it, learned trial Court has erroneously convicted the accused for the commission of offence punishable under Section 304 (II) read with Section 34 IPC. The findings recorded by learned trial Court are stated to be against settled principles in criminal administration of justice. Learned trial Court has gravely erred in recording the findings of conviction against convicts solely on the basis of few sentences in the statement of PW-5 Janak Singh, irrespective of the fact that his statement was not reliable because he allegedly tried to save his nephew Ranjit and cousin Raju from their prosecution in this case. Also that as per the prosecution case, the deceased alighted from the Car whereas other occupants remained seated inside. The occurrence was, therefore, not witnessed by anyone as such there was no question of identification of the assailants by either of the witnesses. Therefore, how PW-5 Janak Singh could have seen the accused beating the deceased. The other occupants PW-1 Suresh Kumar, PW-9 Yashbir Singh and PW-10 Yudhbir Singh have categorically stated that since the deceased had alighted from the Car after switching off its engine and lights, therefore, they could not see as to what has happened outside and when someone hit PW-1, they all ran away from the spot. PW-5 Janak Singh, went to the hospital on the same day. On the next day also, he did not tell anything to the police though remained present in Police Station from 7:30 AM till 2:30 PM. He did not tell anything to the police at the time of prepration of the inquest report. It is only on 21.10.1996, in the evening, he has improved his version and named the accused as the assailants for the first time. Therefore, his testimony was highly undependable and unreliable and hence could not have been relied upon to record the findings of conviction against the accused. It has, therefore been urged that learned trial Court has convicted both the accused by placing reliance on highly inadmissible evidence.

20. If coming to the connected appeal preferred by the State of Himachal Pradesh, the legality and validity of the impugned judgment has been questioned on the grounds, *inter alia,* that the trial Court though has rightly appreciated the evidence in so far as commission of offence is concerned, however, it has gone wrong in holding that only an offence punishable under Section 304 (II) IPC is made out. The evidence available on record clearly establishes that the offence committed by the accused was punishable under Section 302 of the IPC and not under Section 304 (II) IPC. Therefore, the impugned judgment to this extent has been sought to be quashed. The deceased who had been mercilessly beaten up and injuries caused on vital parts of his body, the present was a clear cut case of intention to kill him. Therefore, the accused have allegedly committed his murder. The motive to kill him was old enmity between the two families.

The evidence, oral as well as documentary, to this effect was produced by the prosecution. Therefore, it has been urged that the offence committed by both accused is punishable under Section 302 read with Section 34 IPC and not under Section 304 (II) IPC.

21. If coming to Criminal Revision Petition No. 155 of 2000, the grouse of the widow of deceased Arjun Katoch is also similar to that of the State of Himachal Pradesh in Cr. Appeal No. 35 of 2001. As per her version, the only bread winner in the family consisting of herself and three children has been murdered by the accused, therefore, according to her, they are liable to be convicted under Section 302 IPC and not under Section 304(II) IPC. Her husband was beaten up to death mercilessly by both the accused due to enmity and lesser sentence awarded against them according to her neither commensurate with the heinous offence they committed with nor the sentencing policy. Since, learned trial Court has convicted them under Section 304 (II) of the IPC instead of under Section 302 IPC, therefore, it has been urged that while convicting them under Section 302 IPC, in the matter of awarding sentence they both be dealt with sternly.

22. Sh. Anoop Chitkara, Advocate learned counsel representing the accused has vehemently argued that the trial Court has placed reliance on the sole testimony of PW-5 Janak Chand and ignored the evidence as has come on record by way of remaining witnesses, including the complainant PW-1 Suresh Dhameja, the presence of whom on the spot is satisfactorily established and as such according to Mr. Chitkara, learned trial Court has erroneously concluded that a case punishable under Section 304(II) IPC read with Section 34 IPC is made out against them. According to Mr. Chitkara, the present is a case of no evidence and as such no findings of conviction could have been recorded against the accused. It has also been pointed out that as per the prosecution case itself, several persons were present at the place of occurrence and as nothing tangible suggesting the involvement of the accused in the commission of offence has come on record, therefore, it is not safe to place reliance on the sole testimony of PW-5 Janak Chand, who according to learned counsel is a liar and has deposed falsely.

23. On the other hand, Mr. D.S.Nainta, learned Addl. Advocate General, while repelling the arguments addressed on behalf of the accused, has urged that the sole testimony of PW-5 Janak Chand and the attendant surrounding circumstances leave no manner of doubt that the assailants were none else but both the accused. According to Mr. Nainta, both the accused have brutally murdered deceased Arjun Katoch in view of enmity between the two families i.e. the family of the deceased on one hand and that of the accused on the other. It has also been argued that both the accused were liable to be convicted and punished for the commission of offence punishable under Section 302 read with Section 34 IPC and not under Section 304(II) read with Section 34 IPC and as such the trial Court is stated to have misread and misconstrued the evidence while arriving at a conclusion that no case under Section 302 IPC was made out against the accused. It has, therefore, been urged that the judgment to the extent of the accused have committed the offence punishable under Section 304(II) IPC read with Section 34 IPC be quashed and set aside with further prayer that both the accused be convicted under Section 302 IPC read with Section 34 IPC and sentenced accordingly.

24. Mr. Surender Sharma, Advocate representing the widow of deceased Arjun Katoch in connected Cr. Revision No. 155 of 2000 while adopting the arguments addressed on behalf of the State of H.P. has further urged that the manner in which the deceased has been brutally murdered and a sole bread winner snatched from the members of his family rendering thereby them to starve, the accused may be convicted and sentenced under Section 302 of the IPC. A deterrent sentence has been sought to be passed against both the accused.

25. We have carefully analysed the rival submissions and also appreciated the entire evidence available on record.

26. Admittedly, the marriage of one Nagesh resident of village Nagehar was scheduled to be held on 19.10.1996 at his native place Nagehar, Tehsil Baijnath, District Kangra. The barat of Nagesh had to go to village Sukarna. Bridegroom Nagesh was co-villager of the deceased. The deceased and both accused were successors-in-interest of common ancestor. Both families

initially were residing at Village Bandiankhopan, however, on account of enmity, the family of deceased had shifted to Village Nagehar and constructed a house there. The deceased and both convicts as well as witnesses examined by the prosecution in support of its case had attended the barat of aforesaid Nagesh and they were present at the place of bride i.e. village Sukarna.

27. If coming to the prosecution case, the deceased was accompanied by his friends PW-1 Suresh Dhameja, PW-5 Janak Chand, PW-9 Yashbir Singh, PW-10 Yudhbir Singh and one Suresh Kumar Kapoor his servant. They had reached well before the arrival of barat at the place of bride. Not only this, but they also had their dinner before the baratis who reached later on in barat there. The complainant in this case is PW-1 Suresh Dhameja. He was residing at that time at Shimla. Since the deceased was also working as Branch Manager in a Company, namely, Golden Land at Shimla, therefore, they both were known to each other. It is, in this background, PW-1 Suresh Dhameja also accompanied the deceased to his native place village Nagehar in Tehsil Baijnath, Distt. Kangra and attended the barat with him at village Sukarna, the bride's native place.

28. PW-1 Suresh Dhameja, in his statement Ext. PW-1/A recorded under Section 154 Cr.P.C. has reported to the police that after having dinner they started their return journey to village Nagehar around 10:00 PM. While at a distance of 200 yards from the house of bride, they noticed barat proceeding towards her house and baratis in good number dancing on the tune of the band. Finding the road congested at that place, Arjun Stopped his Maruti Car bearing No. CH-01-J-3572 on road side and not only switched off its engine but also the lights in order to give safe passage to the procession. He himself opened the door and alighted from the Car to answer the call of nature. He, however, did not come back for 10-12 minutes. There was lot of commotion behind the Car. On this, he peeped out from the door of Car and noticed that out of the persons in procession/barat, few of them were beating the deceased. After some time, someone came near the window of front seat where he was sitting and gave a blow on his head on the back side and also slapped him twice or thrice. On this, he had fled away from the Car and hided himself in nearby fields. Later on, the occupants of the rear seat had also fled away from the Car. When the crowd in procession dispersed, that very car was started by someone and deceased was removed to the hospital at Baijnath in injured condition. He accompanied by PW-5 Janak Chand, PW-9 Yashbir Singh and PW-10 Yudhbir Singh also went to the hospital at Baijnath on foot and noticed the deceased lying there in injured condition and blood was oozing out from his nose, mouth and also the head. He was brought to hospital by Rani @ Dilawar, Kamal Bhushan and Om Prakash. The doctor on duty provided first medical aid to the deceased and he was referred to Sub Divisional Hospital, Palampur for further treatment. The doctor on duty there referred the deceased to PGI, Chandigarh. He, however, died on the way to PGI, Chandigarh around 2:30-3:00 AM on 20.10.1996. It was reported by PW-1 Suresh Dhameja that Arjun died on account of the injuries he sustained in the occurrence. He requested the appellants to enquire from the baratis about the occurrence. He, however, refused for his own medical examination as no visible injuries were on his person. It is, on the basis of this statement, FIR Ext. PW-17/B was registered in PS Baijnath and the police swung into action.

29. Besides the complainant PW-1 Suresh Dhameja, the prosecution has examined PW-5 Janak Chand another occupant of the car of the deceased, PW-8 Yogeshwar Singh, a witness to the inquest papers Ext. PW-3-A, PW-9 Yashbir Singh and PW-10 Yudhbir Singh who were also travelling in the same car being driven by the deceased. PW-11 Sushil Kumar, a member of band party, PW-13 Ranjt, PW-14 Jaswant Kumar, PW-18 Girish Sharma and PW-21 Parveen Kumar, who being in barat were present at the place of bride at village Sukarna. PW-20 Durga Chand is the elder brother of deceased Arjun Katoch. The remaining witnesses i.e. PW-6 Tarlok Chand Patwari Patwar Circle Bahi, PW-7 Ajay Kumar photographer and PW-12 Sanjeet Kumar another photographer are formal. The remaining prosecution witnesses PW-17 ASI Roshan Lal and PW-22 Insp. Shakti Chand are police officials who remained associated in one way or the other during the course of investigation of the case, hence formal. PW-17 ASI Roshan Lal has conducted the investigation of this case partly and partly by PW-22 Insp. Shakti Chand, the then Insp./SHO PS Baijnath.

30. The statements of both the accused under Section 313 Cr.P.C have also been recorded. They have denied the entire prosecution case for want of knowledge or being incorrect. They both pleaded in their defence that they have been implicated by the police in a false case.

31. There cannot be any dispute qua the presence of both accused and the deceased as well as witnesses aforesaid at village Sukarna, as they had gone to attend the barat of one Nagesh. There cannot also be any quarrel so as to vital injuries present on the person of deceased he sustained after alighting from the Car. There cannot also be any dispute qua deceased Arjun Katoch succumbed to injuries he received on the way to PGI Chandigarh.

32. According to PW-1 Suresh Dhameja when he saw behind from the window of the Car, he found that quarrel was going on behind the Car. Few persons were giving beatings to deceased Arjun Katoch. In the meantime, somebody came and gave him fist blows. That person also gave him 3-4 slaps. PW-1 Suresh Dhameja since ran away from the spot and hided himself in fields situate nearby, therefore, nothing has come in his statement as to who were the assailants and rightly so because he had no occasion to witness as to who were administering beatings to the deceased. Similarly, PW-9 Yashbir Singh and PW-10 Yudhbir Singh who were other occupants of the car while in the witness-box have not stated anything that it is the accused who were the assailants and rather as per their version, being pitch dark, they could not witness the occurrence. As per the version of PW-9 Yashbir Singh, 40-50 persons were dancing on the tune of band whereas as per PW-10 Yudhbir Singh, the number of such persons was 20-25. If coming to the testimony of PW-11 Sushil Kumar, a member of the band party, he admitted that both the accused were also in procession. While few baratis had left for dinner, the remaining 15-20 were dancing on the band which the band party was playing. The time was 10:00 PM when a Car approached them. The Car was stopped and as the band party left for the place of bride, therefore, nothing happened in their presence. Likewise, PW-9 Yashbir Singh and PW-10 Yudhbir Singh, PW-11 Sushil Kumar is also turned hostile to the prosecution. They all have been cross-examined at length by learned Public Prosecutor, however, their testimony that they have not witnessed the occurrence nor seen the accused administering beatings to the deceased remained un-shattered.

33. According to PW-13 Ranjit, he was having dinner when he heard about some quarrel having taken place. He had neither visited the place of occurrence nor the deceased was beaten by the accused in his presence. Similar is the version of PW-14 Jaswant Kumar. According to him, though he was present in the procession/barat and on a call to baratis to have dinner, he had gone to have dinner and nothing happened in his presence nor the deceased was beaten up by the accused in his presence. PW-13 Ranjit and PW-14 Jaswant Kumar were also allowed to be cross-examined by learned Public Prosecutor, however, nothing lending support to the prosecution case, could be elicited from their testimony.

34. Another witness PW-18 Girish Sharma, while admitting the presence of Arjun Katoch, the deceased and both the accused at village Sukarna in connection with marriage of Nagesh, has also denied any quarrel or occurrence having taken place in his presence because as per his version, he had already gone to have dinner. Therefore, the baratis present at village Sukarna in connection with marriage of Nagesh and cited as witnesses except for PW-5 Janak Chand have supported the prosecution case that it is the accused persons who have beaten up the deceased with kicks as well as inflicted fist blows and thereby caused multiple injuries, grievous in nature on his person.

35. It is seen that learned trial Court in order to record the findings of conviction against both the accused has heavily relied upon the sole testimony of PW-5 Janak Chand. Interestingly enough, in case PW-5 Janak Chand had witnessed that it were the accused, the assailants and administered beatings to the deceased, it is not understandable as to why he did not disclose so to the police at the first available opportunity i.e. on 19.10.1996 itself in the hospital at Baijnath, where he had gone with PW-1 Suresh Dhameja and as per the evidence available on record, the police of PS Baijnath had also arrived there by that time. Neither other occupants of the Car i.e. PW-1 Suresh Dhameja, PW-5 Janak Chand, PW-9 Yashbir Singh, PW-10

Yudhbir Singh nor other baratis were examined by the prosecution who could have corroborated the testimony of PW-5 Janak Chand to the effect that it is the accused who have administered beatings to the deceased. His testimony rather stands fully contradicted from that of other occupants of the car i.e. PW-1 Suresh Dhameja, PW-5 Janak Chand, PW-9 Yashbir Singh, PW-10 Yudhbir Singh and one Suresh Kumar Kapoor. PW-1 Suresh Dhameja has even not been declared hostile nor cross-examined on behalf of the prosecution. PW-17 ASI Roshan Lal met in Civil Hospital Baijnath with all the occupants of car, including PW-5 Janak Chand, however, none of them including this witness had revealed to PW-17 ASI Roshan Lal that it is the accused who had been quarrelling with the deceased and administered beatings to him. The statement of PW-1 Suresh Dhameja was recorded on the following morning i.e. on 20.10.1996 around 7:00 AM, after the death of Arjun Katoch, early in the morning i.e. at 2:30-3:00 AM. The police had also interrogated PW-5 Janak Chand, PW-9 Yashbir Singh and PW-10 Yudhbir Singh, however, it was not revealed by either of them that the assailants were the accused. PW-1 Suresh Dhameja has also not disclosed in his statement Ext. PW-1/A that the accused were the assailants. PW-5 Janak Chand is a witness to the inquest papers Ext. PW-3/A, however, at that time also, he did not inform the police that the assailants were the accused. He is also one of the signatory to the inquest papers.

36. The prosecution evidence reveals that it was during the night intervening 20-21.10.1996, PW-5 Janak Chand for the first time introduced the story that he had seen the accused quarrelling with deceased Arjun Katoch. This story to the reasons best known to the prosecution and for that matter to PW-5 Janak Chand, also is false and concocted in view of the reasons, as discussed hereinabove. When, as per the prosecution case itself, the deceased had not only turned off the engine but also switched off the head lights of the car and alighted alone therefrom to urinate, no doubt, the occupants of the car observed commotion at backside of the car. However, when PW-1 Suresh Dhameja was assaulted by un-identified persons, who even tried to damage the car also, all the occupants of the car alighted from it and ran away for their safety. The deceased was removed to hospital by Rani @ Dilawar, Kamal Bhushan and Om Prakash. They have not been cited as witnesses by the prosecution for the reasons best known to it.

37. If coming to the testimony of PW-2 Dr. O.P. Ramdev, who had examined the deceased in CH Baijnath, aforesaid Rani @ Dilawar, Kamal Bhushan and Om Prakash had disclosed that deceased had received injuries in a road accident. It is these three persons, who could have supplied some authentic and material information qua the manner in which the incident sparked off or the deceased received injuries in an accident. However, as already pointed out, the prosecution to the reasons best known to it has withheld them from the Court. In such circumstances, an adverse inference has to be drawn against the prosecution.

38. As noticed hereinabove, the police and all occupants of the car, including PW-5 Janak Chand had reached in the hospital at Baijnath. That was the earliest opportunity to PW-5 Janak Chand to have disclosed to the police that he had seen accused quarrelling with the deceased. No explanation, whatsoever, is forthcoming to show as to why their statements, including that of PW-5 Janak Chand were not recorded at the earliest possible occasion which was available to the police. The testimony of PW-5 Janak Chand that he could only identify the accused and not other baratis is highly unbelievable for the reason that being a co-villager, how it can be said that he could not identify the remaining 20-25 baratis and that too his co-villagers. His testimony to the effect that other occupants except for PW-1 Suresh Dhameja also alighted from the car and PW-1 Suresh Dhameja came to them with a complaint that somebody had administered beatings to him seems to be false because in view of the testimony of PW-1 Suresh Dhameja, PW-9 Yashbir Singh, PW-10 Yudhbir Singh, they all were sitting in the car when PW-1 Suresh Dhameja was assaulted by someone from behind. It is rather they all ran away from the spot to save their lives. The time being 10:00 PM, it can reasonably be believed that there was complete darkness, how PW-5 Janak Chand could have identified the accused persons alone to be the assailants, particularly when as per the prosecution case, the engine and lights of the car were turned off by the deceased before alighting therefrom. The testimony of PW-5 Janak Chand

that no one including him intervened in the fight between the accused persons and deceased could also not be believed for the reason that in case deceased was being beaten up by two persons i.e. accused in the presence of 20-25 persons, in ordinary course of circumstances, someone would have come forward for his rescue. This witness seems to have made a tutored version while in the witness-box. The story, he introduced, while in the witness-box that when Arjun Katoch stopped the Car, it was accused Anil Katoch who came nearer to him and started altercation with the deceased and it was on this score the deceased alighted from the car after turning off its engine and lights, is also far fetched because as per the own case of the prosecution, the car was stopped by the deceased on seeing baratis in a procession proceeding while singing and dancing towards the house of bride and there being congestion on the road at that place, he turned off the engine and also lights and then alighted from the car to call of nature and not after having altercation with accused Anil Katoch.

39. When the occurrence had taken place behind the car in complete darkness, how PW-5 Janak Chand who sitting in the car on seeing PW-1 Suresh Dhameja was assaulted by someone, ran away with other occupants to save their lives could have witnessed that it is the accused who were assailants and had beaten the deceased. The testimony of this witness that he was standing at a distance of 15 yards from the place of occurrence is again far fetched and not corroborated by any other and further evidence available on record. It is again far fetched that this witness could have identified a person up to a distance of 60-65 meters and that too when as per his own version it was not a full moonlit night nor he could see the moon. His testimony that when they returned to the spot Arjun was found to be taken to hospital by someone reveals that he had also ran away from the spot to save his life along with other occupants of the car and as such he had no occasion to witness that deceased was being beaten by the accused. PW-1 Suresh Dhameja has also stated that when he came out of the place where he had hided himself, the other occupants of vehicle, including PW-5 Janak Chand also met him and they all went to the hospital. Interestingly enough, the alleged history of road side accident given to PW-2 Dr. O.P. Ramdev by Rani @ Dilawar, Kamal Bhushan and Om Prakash remained unchallenged as the prosecution did not dispute the same at any stage during the course of trial.

40. The intimation to the police was given by PW-2 Dr. O.P. Ramdev at 10:45 PM over phone. The same was entered in daily diary vide Ext. PW-17/A and the police party led by PW-17 ASI Roshan Lal reached in the hospital at Baijnath. When all the occupants of the car, including PW-5 Janak Chand were present in the hospital at that time, this witness did not disclose to the police that he had seen the accused quarrelling with the deceased. He himself admitted the presence of police in the hospital well before their arrival. PW-17 ASI Roshan Lal has admitted in his cross-examination that when he reached in hospital, PW-1 Suresh Dhameja, Dilawar and Janak Chand were present there. PW-9 Yashbir Singh and PW-10 Yudhbir Singh also reached there, however, neither of them disclosed the manner in which the occurrence had taken place nor he recorded their statements. He admitted that when the statement of PW-1 Suresh Dhameja Ext. PW-1/A was recorded, Janak Chand was also present there. Had it been so, this witness could have revealed to the police that the assailants were the accused persons. The statement of PW-5 Janak Chand, therefore, seems to be recorded after due deliberation. In case the evidence as has come on record by way of his testimony is excluded, there hardly remains any evidence to implicate both the accused in the commission of the offence. Further testimony of PW-5 Janak Chand that he did not disclose the manner in which the occurrence had taken place at 7-7:30 AM on 20.10.1996 when interrogated by the police, when the inquest papers were prepared at 2-2:30 PM nor when the post mortem of the dead body was conducted in the hospital due to afraid of from accused Anil Katoch who is an Advocate and Pradhan of the Gram Panchayat as well as a Judo crate player is unbelievable. PW-5 Janak Chand, in our considered opinion, has rather made a false statement in the Court. PW-5 Janak Chand even did not disclose the manner in which the occurrence took place to anyone also because PW-8 Yogeshwar Singh has admitted while in the witness-box that PW-5 Janak Chand did not disclose anything even to him also.

41. Taking into consideration the entire gamut, the ratio of the judgment of the Apex Court in ***Sat Paul vs. Delhi Administration, 1976 (1) SCC 727,*** relied upon by Mr. Chitkara, learned counsel is fully attracted in the given facts and circumstances of this case and as such it would not be improper to place reliance upon the testimony of eye-witnesses who turned hostile, including that of PW-1 Suresh Dhameja that no one could witness that it is the accused who had administered beatings to the deceased. The relevant text of the judgment reads as under:

> "51. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as Washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of the other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. If in a given case, the whole of the testimony of the witness is impugned, and in the process, the witness stands squarely and totally discredited, the Judge should, as matter of prudence, discard his evidence in toto."

42. The ratio of the judgment again that of the Apex court in ***Ganesh Bhavan Patel vs. State of Maharashtra, 1978 (4) SCC 371,*** is also fully attracted in the case in hand because here also the I.O. has miserably failed to take down the statements, at least, of the occupants of the car at the earliest opportunity available to him and thereby rendered the entire prosecution story highly doubtful. The relevant text of the judgment reads as follows:

> "15. As noted by the Trial Court, one unusual feature which projects its shadow on the evidence of P.Ws., Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence, is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under Section 161 Cr. P.C. were recorded on the following day. Welji (P.W. 3) was examined at 8 a.m., Pramila at 9.15 or 9.30 a.m., and Kuvarbai at 1 p.m. delay of a few hours, simpliciler, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lend such significance to this delay, exists in the instant case."

43. Coming to the instant case, in view of the evidence having come on record by way of the testimony of PW-1 Suresh Dhameja, PW-9 Yashbir Singh, PW-10 Yudhbir Singh, PW-11 Sushil Kumar, PW-12 Sanjeet Kumar, PW-13 Ranjit and PW-14 Jaswant Kumar, no one could witness that the accused were the assailants and caused fatal blows on the person of the deceased leading to his death. PW-5 Janak Chand is a liar and in view of the discussion hereinabove, his testimony that it is the accused who were the assailants and administered beatings to the deceased, being not corroborated by any other independent source, cannot be believed to be true by any stretch of imagination. The prosecution rather has made an effort to engineer a false case against the accused by examining this witness. It is, therefore, not at all proved beyond all reasonable doubt that the assailants were the accused alone and none else. In the criminal administration of justice, the findings of conviction can only be based on cogent, reliable and clinching evidence, which in the present case is lacking. Learned trial Court was not at all justified in placing reliance on the sole testimony of PW-5 Janak Chand while recording the

findings of conviction against the accused. The present rather, in our considered opinion, is a case of no evidence.

44. If coming to the another aspect of the prosecution story that both the accused have beaten up the deceased to death on account of enmity between the two families, the prosecution has examined PW-20 Durga Chand, who is brother of the deceased. As per his version, both accused are sons of his real Uncle. They were not having cordial relations with the accused persons from the very beginning because of quarrelsome nature of their family. PW-5 Janak Chand has also admitted in his cross-examination that the accused were not having cordial relations with the deceased and his brothers nor were on speaking terms. He, however, has expressed his inability to tell that it was due to old enmity, PW-20 Durga Chand and his brother Ranvir had manipulated a false case against the accused. It is pertinent to note that the relations between the two families seems to be inimical, however, it cannot be said that the accused have killed the deceased due to enmity and rather as per the settled legal principles, the enmity is a double edged weapon and as such the possibility of the accused having been implicated in a false case by PW-20 Durga Chand and other relations of the deceased cannot be ruled out.

45. Undue weightage should not have been given by the learned trial Court to the alleged recovery of the clothes of accused Anil Katoch from the place of his in-laws for the reason that this part of the prosecution case has also not been satisfactorily proved. True it is that PW-5 Janak Chand and the I.O. PW-22 Insp. Shakti Chand have deposed about the recovery of the clothes Ext. P-9 to P-12 at the behest of accused Anil Katoch, however, nothing tangible has come on record to show that these clothes were blood stained and the blood, if any, thereon was of the same group as that of the deceased. Even if the blood stains were there on the clothes, the same could have been of the own blood of the said accused as one can receive injury on his person in ordinary course of circumstances also. Above all, no evidence has come on record to show that it were the same clothes worn by accused Anil Katoch at the time of so called occurrence. No witness from the place of the in-laws of accused Anil Katoch was associated at the time of alleged recovery of the clothes. This Court in ***Randhir Singh alias Tira and others vs. State of H.P., 2007 (2) SLC 294,*** has emphasized for the necessity of association of independent witnesses from the locality at the time of recovery. Above all, the report of Forensic Science Laboratory Ext. PX is inconclusive for want of the findings that the blood found on these clothes was of same person. It is also not the case of the prosecution that accused Anil Katoch has also received injuries on his person in the occurrence. The scientific officer who has prepared the report has not been examined. Therefore, the report is not admissible in evidence, being hit by the provisions contained under Section 293 Cr.P.C. The Apex Court in ***Kansa Behera vs. State of Orissa, 1987(3) SCC 480,*** a case where no evidence in the report of serologist about the group of blood was found during analysis of blood stained shirt/dhoti recovered at the instance of the accused, has held that on the basis of such recovery, the accused cannot be connected with the commission of the offence. The relevant text of this judgment reads as under:

> "11. As regards the recovery of a shirt or a dhoti with blood stains which according to the serologist report were stained with human blood but there is no evidence in the report of the serologist about the group of the blood and therefore it could not positively be connected with the deceased. In the evidence of the Investigating Officer or in the report, it is not clearly mentioned as to what were the dimensions of the stains of blood. Few small blood stains on the cloths of a person may even be of his own blood especially if it is a villager putting on these clothes and living in villages. The evidence about the blood group is only conclusive to connect the blood stains with the deceased. That evidence is absent and in this view of the matter, in our opinion, even this is not a circumstance on the basis of which any inference could be drawn."

46. Similar is the ratio of the judgments of this Court in ***State of H.P. vs. Edward Samual Chareton, 2000 (2) Shim. L.C. 228,*** and ***Ajay Sharma vs. State of Himachal Pradesh, 2002 (3) Sim.L.C. 329.***

47. When PW-1 Suresh Dhameja, while in the witness-box, has expressed his inability to tell the number of persons who allegedly were giving beatings to the deceased and as per that of PW-3 Dr. D.S.Chandel in his cross-examination that the injuries on the person of the deceased can possibly be sustained in an attack by mob whereas as per that of PW-2 Dr. O.P. Ramdev such injuries are possible by fist blows and kicks, the possibility of the deceased having been thrashed and assaulted by the mob cannot be ruled out. The perusal of Ext. PW-4/C reveals that Anish was one of the material witness in this case, however, he has been withheld and as such an adverse inference under Section 114 G of the Indian Evidence Act can be drawn against the prosecution on this score also. As per the own evidence produced by the prosecution, the injuries were there on the person of Ranjit Singh (PW-13), Pawan Kumar and Anish Sharma, corresponding to the period of scuffle with Arjun Singh deceased. They were medically examined by PW-4 Dr. Jyotindra Pal vide MLRs Ext. PW-4/A and PW-4/B, the possibility that they were got medically examined on account of police having suspected their involvement in the scuffle cannot be ruled out. Their medical examination vide Ext. PW-4/A and PW-4/B find support from the testimony of PW-4 Dr. Jyotinder Pal.

48. According to PW-18 Girish Sharma, Ranjit Singh, Pawan Kumar, Kaku, Anish and K.K. Thakur had also attended the barat. PW-5 Janak Chand is the brother of Ranjit Singh aforesaid. PW-5 Janak Chand has expressed his ignorance that Raju and Ranjit were also among those baratis who were singing and dancing. According to him, he had not stated so in his statement recorded under Section 161 Cr.P.C. He, however, when confronted with portion F to F of his statement Ext. PW-5/D it was found recorded therein that Raju and Ranjit had also attended the marriage. He has admitted that Ranjit is his real brother whereas Raju the son of his real Uncle. Though, the suggestion that it was Raju and Ranjit who were the main culprits having given beatings to Arjun Katoch is denied being wrong by PW-5 Janak Chand. However, the possibility of the said accused having deposed falsely to save both Raju and Ranjit from their prosecution in this case cannot be ruled out. The plea in defence raised by the accused to this effect appears to be nearer to the factual position.

49. Therefore, in view of the above, the prosecution story that the accused had mercilessly administered beatings to deceased and killed him on account of old enmity and that the recovery of clothes at the instance of accused Anil Katoch connect them with the commission of the offence also not substantiate the findings of conviction recorded against both the accused. On the other hand, as pointed out hereinabove, neither of the witness implicate the accused persons in the commission of the offence. It is, PW-5 Janak Chand, who alone has deposed against them. The possibility of he having deposed falsely to save his brother Ranjit and cousin Raju, in view of the detailed discussion hereinabove, can't also be ruled out.

50. Therefore, examining the prosecution case from any angle, no case either under Section 302 read with Section 34 IPC or for that matter under Section 304(II) read with Section 34 IPC is made out against either of the accused. In our considered opinion, learned trial Court has went wrong and recorded the findings of conviction against them erroneously on the basis of the sole testimony of PW-5 Janak Chand. Being so, what to speak of the conviction and sentence of both the accused for the commission of offence punishable under Section 302 IPC, as claimed by the State of H.P. in connected Cr. Appeal No. 35 of 2001 as well as by Smt. Raman Katoch widow of deceased Arjun Katoch in Cr. Revision No. 155 of 2000, no case is made out against the accused persons and they as such deserves to be acquitted from the charge framed against each of them.

51. In view of what has been said hereinabove, Cr. Appeal No. 567 of 2000 succeeds and the same is accordingly allowed. Consequently, the impugned judgment dated 21.8.2000 is quashed and set aside and both the accused are acquitted of the charge framed against each of them. Connected Cr. Appeal No. 35 of 2001 filed by the State of Himachal Pradesh and Cr.

Revision No. 155 of 2000 filed by Smt. Raman Katoch, being devoid of any merit are hereby dismissed. Consequently, personal bonds executed by both the accused are cancelled and sureties discharged.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Kalimudeen ....Petitioner.

Versus

State of H.P. ....Respondent.

Cr. Revision No. 115 of 2008.
Date of Decision: 28.11.2016.

Indian Penal Code, 1860- Section 279, 337, 338 and 304-A- Accused was driving a truck in a rash and negligent manner- Truck went off the road and fell into the gorge - the occupants sustained injuries and some of them died – the accused was tried and convicted by the Trial court- an appeal was preferred, which was dismissed- held, that accused has not disputed the accident or the fact that he was driving the truck – the material prosecution witnesses turned hostile – the truck was carrying 80-90 peoples, which by itself is an act of negligence especially when the truck is not meant to carry the passengers – benefit of Probation of Offenders Act cannot be granted in a case of rash and negligent driving- however, keeping in view the time elapsed since the incident, sentence modified. (Para-8 to 42)

Cases referred:

State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58
Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858
Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127
State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182

For the petitioner: Mr. Vinay Thakur, Advocate.
For the respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

The present criminal revision petition filed under Sections 397/401 of the Cr.PC, is directed against the judgment dated 2.5.2008, passed by the learned Sessions Judge, (F), Shimla, HP, in Criminal Appeal No. 1-S/10 of 2008/03, affirming the judgment of conviction dated 20.9.2003, passed by the learned Judicial Magistrate Ist Class, Chopal, District Shimla, HP, in Case No. 55-1 of 2003/24-II of 2003, whereby the accused-petitioner has been sentenced as per description given herein below:-

> ***"Section 279 IPC***
>
> *To undergo simple imprisonment for a period of six monthsand in case of default, to further undergo simple imprisonment for a period of one month.*
>
> ***Section 337 of IPC***
>
> *To undergo simple imprisonment for three months with fine of Rs. 500/- and in default of deposit of fine, further simple imprisonment for a period of one month.*

Section 338 of IPC

The convict is sentenced for six months with fine of Rs. 500/-.

Section 304 (A) *of IPC*

One year rigorous imprisonment with fine of Rs. 2000/- and in case of default of deposit of payment, to further undergo simple imprisonment for a period of two months."

2. Briefly stated facts as emerge from the record are that on 24.2.2003, one Sh. Rajinder Lal, got his statement recorded under Section 154 of Cr.PC, to the police stating therein that he was going with Dak to Post Office Nerwa and when he reached Rana Kiyar, he boarded the truck bearing No. HP-08-0811 and sat in the body of truck along with 80-90 persons. He further reported that vehicle in question was being driven by the petitioner accused namely Kalimudeen, who was known to him. As per, the complainant, when truck reached near Mahila Mandal Halao, it suddenly went off the road and fell into 150 feet deep gorge as a result of which, many people sustained injuries and some of them died on the spot. The complainant further stated that truck in question was being driven by the accused rashly and negligently, as a consequence, truck met with an accident. On the basis of aforesaid statement having been made by the complainant, police registered formal FIR Ext.PW17/A and I.O. visited the spot. After completion of investigation, police came to conclusion that accident occurred due to rash and negligent driving of the petitioner accused, and accordingly, presented the challan under Sections 279, 337, 338 and 304(A) of the IPC, before the competent court of law.

3. Learned Judicial Magistrate Ist Class, Chopal District Shimla, (HP), after satisfying itself that prima facie case exists against the accused put a notice of accusation, to which he pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record by the prosecution, found the accused guilty of having committed offence under the aforesaid Sections and convicted and sentenced him as per description already given above.

4. The present petitioner-accused being aggrieved with the judgment of conviction passed by the learned trial Court, filed an appeal under Section 374 of Cr.PC before the Court of learned Sessions Judge, (F), Shimla, HP, who vide judgment dated 2.5.2008, dismissed the appeal. Hence, this criminal revision petition before this Court.

5. Mr. Vinay Thakur, Advocate, representing the petitioner vehemently argued that the impugned judgments of conviction and sentence recorded by the Courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record, as such, same deserve to be quashed and set-aside. Mr. Thakur, while referring to the judgments passed by the courts below, strenuously argued that bare perusal of the same suggests that both the courts below have failed to appreciate the evidence in its right perspective, as a result of which, great prejudice has been caused to the petitioner, who was admittedly not driving the vehicle rashly and negligently. Mr. Thakur, further contended that both the courts below wrongly convicted the petitioner for the aforesaid offences because, none of the prosecution witnesses supported the case of the prosecution that vehicle in question was being driven rashly and negligently at that relevant time, rather all the material prosecution witnesses turned hostile. Mr. Vinay further, contended that learned courts below failed to appreciate the positive evidence available on record suggestive of the fact that accident occurred due to mechanical defect in the truck. He further stated that it has specifically come in the statement of PWs that after noticing the mechanical defect by the accused, he (accused) shouted to passengers to save their lives, if possible, because truck went out of the control of the petitioner but by no stretch of imagination, it could be concluded by the courts below on the basis of evidence available on record that the accident occurred due to rash and negligent driving of the petitioner, especially, when his own children were also travelling in the same. Mr. Vinay, while referring to the finding of the courts below to the effect that when the truck was in bad condition, petitioner should not have plied the same or he should have avoided the accident by applying brakes, contended that aforesaid

circumstances relied upon to the petitioner were never put to him under Section 313 Cr.PC and as such, trial was vitiated as petitioner has been prejudiced by not putting such circumstances/evidence to him. He further stated that case of the prosecution was that petitioner was driving the vehicle rashly and negligently as he was driving the vehicle in high speed but there is no evidence led on record by the prosecution to prove speed at that relevant time of the vehicle involved in the accident. While concluding his arguments, Mr. Vinay, invited attention of this Court to the judgment passed by the Hon'ble Apex Court, in case titled ***Jacob Mathew vs. State of Punjab, 2005 Cr. LJ. 3710*** to suggest that "to prove the criminal negligence, the mensrea has to be proved and the principle of res-ipsa liquitor is not applicable in the criminal case especially when the accused is sought to be punished for criminal negligence. He also invited attention of this Court to the statements having been made by the PWs to demonstrate that none of PWs supported the case of the prosecution that vehicle in question was being driven rashly and negligently by the petitioner-accused that too in high speed and as such, no conviction could be recorded by the courts below on the aforesaid evidence adduced on record by the prosecution. Mr. Vinay Thakur, also contended that the learned trial Court swayed with emotion while recording the conviction of the petitioner because many people died and some of them suffered injuries on account of accident. In the aforesaid background, Mr. Vinay, prayed for acquittal of the petitioner after setting aside the judgment of conviction recorded by the courts below.

6. Per contra, Mr. Ramesh Thakur, learned Deputy Advocate General, representing the State supported the impugned judgments passed by the courts below. He vehemently argued that bare perusal of the impugned judgments suggests that same are based upon the correct appreciation of the evidence available on record and prosecution has been able to prove its case beyond reasonable doubt. He further contended that in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted, especially, in view of the concurrent findings of fact recorded by the courts below. Mr. Ramesh, further argued that there is no force in the contention put forth by the counsel representing the petitioner that none of prosecution witness has supported the case of the prosecution because all the material PWs though turned hostile, but in their cross examination, they have categorically admitted that at that relevant time, 80-90 people were travelling in the truck being driven by the petitioner in high speed. Mr. Thakur, further contended that bare factum that at that relevant time 80-90 people were travelling in the truck, was sufficient to conclude sheer negligence of the petitioner accused, which was not a passengers vehicle but was meant for carrying goods. He specifically invited attention of this Court to the mechanical report Ext.PZ led on record by the prosecution to refute the contention put forth by the counsel representing the petitioner that there was mechanical defect, which led to the accident. While specifically referring to the mechanical report, Mr. Ramesh, vehemently argued that as per mechanical report, there was no defect in the truck at that relevant time, rather same was found to be in third gear, which suggest that vehicle in question was being plied in high speed at that relevant time. While concluding his arguments, Mr. Ramesh Thakur also reminded this Court that it has very limited powers while exercising its revisionary powers under Section 397 of the Cr. PC to re-appreciate the evidence, especially when it stands duly proved on record that the courts below have dealt with each and every aspect of the matter very meticulously. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (***1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> "In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the

> same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

7. I have heard learned counsel for the parties as well carefully gone through the record

8. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

9. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> 8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

10. Perusal of the records made available to this Court suggests that on 24.2.2003, truck bearing No. HP-08-0811, carrying 80-90 persons met with an accident, as a result of which several people suffered injuries whereas some occupants lost their lives. Petitioner accused has admitted in his statement under Section 313 recorded by the court below as far as death of various occupants is concerned but denied that vehicle was being driven by him rashly and negligently. Hence, in view of the aforesaid statement having been made by the petitioner accused under Section 313, there is no dispute, if any, qua the accident as well as driving of the vehicle by him at that relevant time. Accordingly this Court, with a view to ascertain the genuineness and correctness of pleas/submissions having been made/taken by the learned counsel for the petitioner that there is no evidence available on record suggestive of the fact that accident took place due to rash and negligent act of the driver, carefully perused the entire evidence adduced on record by the prosecution. Prosecution with a view to prove its case examined as many as 23 witnesses.

11. PW1 Rajinder Singh (complainant) while making deposition before the learned trial Court stated that at that relevant time, he was travelling in the truck along with other persons but he is not aware who was driving the vehicle and he heard some noise and truck rolled down. He further stated that he does not know who was at fault and accident took place and some people have died and some received injuries. This witness was declared hostile but in

his cross examination, aforesaid witness denied that he is not known to the accused. He also denied that accused was plying the vehicle rashly and negligently and caused accident.

12. Similarly, PW2 Kumari Savita stated that she was travelling in truck and accused was plying the truck and when they reached near Halao, truck rolled down, as a result of which, she sustained injury but she is not aware how accident occurred. This witness also turned hostile. But in her cross examination, she admitted that truck was in full speed and rolled down.

13. PW3 Govind (conductor of the truck) stated that there was a rally of Shatrughan Sinha at Nerwa and many people were sitting in truck and truck was being driven by the accused. He further stated that truck was in slow speed and he was seated on the conductor seat. He further stated that he heard the accused shouting that if any person can save himself, he can. This aforesaid witness was also declared hostile but in cross examination conducted by learned APP, he admitted that people were also sitting on the tool and body of the truck. He also in his cross examination denied the suggestion that vehicle in question was being driven rashly ad negligently by the petitioner accused.

14. PW4, Master Parkash (minor) also stated that he was not aware how accident took place but he was in the truck which rolled down.

15. PW5 Santosh Kumar stated that about 86 persons were sitting in the truck which met with an accident, as a result of which he sustained injuries. He also stated that his wife also sustained injuries but he is not aware about who was plying the truck.

16. PW6 Radho Devi stated that truck was in speed and it rolled down and she sustained injuries.

17. PW7 Ashok Kumar while deposing before the learned trial Court stated that at that relevant time there were about 75-80 persons in the truck. He further stated that people were sitting in the tool and body of the vehicle in question because there was a rally of BJP and truck was in speed and it rolled down due to negligent driving of the accused. However, in his cross examination, he stated that truck was in the speed of 100 km per hour. He denied that on that day, he came to Nerwa after running from house. He further admitted that he never drove the truck and cannot say about the speed of the truck.

18. PW8 Kumari Kaushalya and PW9 Kumari Devi also stated that at that relevant time, 70-80 persons were occupying the truck and truck was going to rally. In their cross-examination, they stated that they were not aware of the speed of the truck.

19. PW10 Parma Nand though stated that truck was in rash speed but in his cross examination, he admitted that there was defect in truck, as a result of which, accident took place. Aforesaid witness, on his re-examination on the aforesaid point again stated that he had heard the sound of breaking of “Kamani” of the truck, as a result of which, accident took place.

20. PW11 Sant Ram in his cross examination admitted that people were raising slogans and people were also telling the driver to ply the vehicle in speed as they wanted to reach the destination. But in his cross examination, PW11 specifically stated that since he never plied the vehicle, he cannot tell the exact speed of the vehicle.

21. PW12, Khiyali Ram stated that truck was full with people but he is not aware of the speed of the truck. PW 13 Rainu Devi stated that truck was in speed and rolled down.

22. PW14 Kumari Lalita stated that the truck was in speed. She also admitted in cross-examination that she was sitting in the back side of the truck. Similarly, PW15 Deeva Devi and PW16 Bali Devi also corroborated the version put forth by the PW14 that truck was in speed

23. PW17 ASI Yodha Ram only registered the FIR Ext. PW17/A. PW18 Bjagat Singh only identified the deceased.

24. PW19 Ran Singh, who also suffered injury on the accident also not supported the case of prosecution and as such, he was declared hostile. He in his cross examination by APP, also stated that he cannot tell about the actual speed of truck.

25. PW20 Jagat Ram also corroborated the version put forth by the other PWs that truck met with an accident, as a result of which some people died and some sustained injuries. But in his cross-examination, he was unable to state about the speed of the truck because many people had occupied the truck. PW21 Nek Mohammad (one of the injured) also supported the version put forth by PW10 that he heard some noise of breaking 'kamani'. He also stated that truck was in slow speed.

26. PW23 ASI Ramesh Chand, stated that accident occurred due to rash and negligent driving of the accused. In his cross examination, he admitted that no witness from the village of the accused was associated. He further admitted that there are four shops of photographs and he did not get photographs clicked from the place from where the truck was rolled down. He also admitted that three daughters of the accused were also sitting in the truck but he denied that anybody told him that accused was plying the vehicle in rash and negligent manner. He further admitted in his cross examination that from where the vehicle rolled down, there is no parapet but he is not aware about from which door mechanic entered into the vehicle.

27. Conjoint reading of aforesaid PWs clearly suggests that none of PWs supported the version put forth on behalf of the prosecution. True, it is that all aforesaid prosecution witnesses stated that vehicle in question was carrying 80-90 people at that relevant time and the vehicle in question was being driven by the petitioner accused. But fact remains that all material prosecution witnesses who were occupants at that time of accident turned hostile as far as factum of rash and negligent driving of the petitioner accused is concerned. PW8, PW 14, PW15 and PW16 though in their examination in chief stated that truck was in speed but in their cross–examination all these aforesaid prosecution witnesses stated that they are unable to tell the exact speed of the vehicle at that relevant time. Similarly, depositions made by other prosecution witnesses in examination-in-chief though suggests that truck was in rash speed but if their cross examination is perused carefully, it nowhere supports the case of the prosecution that vehicle in question was being driven rashly and negligently, at that relevant time by the petitioner. Admittedly, all the PWs in one voice stated that at that relevant time there may be more than 80-90 people sitting in the truck. True, it is that some of the PWs stated that truck was being driven rashly and in speed but admittedly, there was no evidence worth the name led on record by the prosecution suggestive of the fact that vehicle in question was being driven rashly and negligently by the petitioner accused at that relevant time because none of the prosecution witness stated something qua the exact speed, if any, of the vehicle.

28. True, it is that speed may not be exact criteria to determine the question with regard to rash and negligent driving of the accused, but while proving rash and negligent driving of the driver of the il- fated vehicle, prosecution is expected to lead positive evidence on record suggestive of the act that vehicle was in high speed or same was being driven in such a manner it endangered the human lives travelling in the same.

29. Though petitioner has made an attempt to demonstrate that accident occurred due to sudden mechanical defect occurred in the truck, which version of the petitioner, finds strength with statements of PW3, PW10 and PW21, wherein they stated that they heard some noise and thereafter, truck fell in the gorge. PW3 further stated that after noticing the mechanical effect petitioner accused, shouted and asked people to save their lives. But aforesaid attempt having been made by the petitioner accused could not succeed in view of the mechanical report i.e. Ext.PZ, whereby it has been specifically reported that truck was found in third gear and steering and break system were found in working order and there is no mention with regard to breakage of 'kamani' as claimed by the petitioner.

30. Leaving everything aside, this Court after perusing the entire evidence available on record is fully convinced and satisfied that prosecution was able to prove on record that at

that relevant time, vehicle in question was carrying 80-90 people. It also emerge from the statement of PWs that people were sitting on the tool box and body of the truck also. It has also come in the statement of PWs that people were going to attend some political rally at Nerwa, which suggest that vehicle in question was specifically engaged by the occupants of the ill fated truck on that relevant date for carrying them to the site of rally.

31. Now the question which arises for determination of this court is :-

> "Whether act of petitioner accused, who was driving the vehicle at that relevant time, in allowing 80-90 people to board the truck, which is admittedly not a passenger vehicle, is rash and negligent act or not?"

This Court has no hesitation to conclude that though, there may not be any evidence suggestive of the fact that vehicle in question was being driven in rash and negligent manner by the petitioner accused at that relevant time but admittedly there is ample evidence suggestive of the fact that petitioner accused was negligent in allowing 80-90 people to board the vehicle in question on that day. Suggestion put forth by the defence to some of the prosecution witnesses that some of the occupants of the vehicle were insisting upon driver of the vehicle to drive fast also supports the case of the prosecution that driver was negligent while driving the vehicle as a result of which so many people lost their lives and many sustained injury.

32. Hence, this Court sees force much less substantial in the argument having been made by the learned Deputy Advocate General that petitioner accused was negligent. Mere permission by the petitioner accused to allow 80-90 people to board the vehicle is itself a sheer negligence at his part. True, it is that concept of negligence differs in civil and criminal law and what may be negligence in civil law may not necessarily be negligence in criminal law. To prove negligence in criminal law, the element of mens rea must be shown to exist.In the ***Jacob Mathew***'s case supra, Hon'ble Apex Court has stated that 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. In the instant case, conduct of the petitioner in allowing 80-90 people to board the truck itself indicates towards the high degree of negligence.

33. It is not the case of the petitioner that he was compelled to drive ill fated truck, which was carrying 80-90 people at that relevant time, meaning thereby, decision, if any, to allow 80-90 people to board ill fated truck was of petitioner accused. There cannot be any quarrel with the argument having been advanced by the counsel representing the petitioner that driving of vehicle at fast speed cannot be termed as rash and negligent act but as has been discussed above, sheer conduct of the petitioner to allow large number of people in truck suggest that he was negligent and because of his rash and negligent act, many people lost their lives and others suffered injuries.

34. In the present case, it stands duly proved that accused allowed 80-90 people to board his truck, which was not meant for carrying the passengers. It also emerges from the evidence available on record that the petitioner accused allowed some passengers to sit in the tool box on a hilly road, which is certainly an act of serious negligence. It may be taken note of that there is no space or sitting for passenger, if any, in the truck, which is admittedly a goods transport vehicle.

35. This Court while sifting evidence also found that suggestion was put to PW11 Sant Ram that vehicle was not in good condition and more people should not have boarded the same. This aforesaid suggestion having been made by the defence also indicates towards the high degree of negligence on the part of the petitioner accused, because if at all, vehicle was not in good condition, petitioner ought not to have allowed the passengers to board the truck but in the present case, it stands duly proved on record that vehicle in question was carrying passengers to the rally at Nerwa. This Court cannot lose sight of the fact that due to aforesaid act of negligence, many people lost their lives and suffered several injuries, which fact stands duly proved by the medical evidence led on record by the prosecution.

36. Hence, this Court sees no illegality and infirmity in the judgments passed by the courts below and same deserve to be quashed and set-aside.

37. Faced with this situation, learned counsel for the petitioner-accused also prayed that accused may be given the benefit of probation under Section 4(b) of the Probation of Offenders Act, 1958 keeping in view his age and his being first offender. He also stated that mitigating circumstance in this case is that more than 13 years have passed after happening of that incident and passing the judgment dated 20.9.2003, whereby the accused was convicted and he has already suffered agony during the pendency of the appeal in the court of learned Sessions Judge, as well as in High Court of Himachal Pradesh. In support of the aforesaid arguments, Mr. Vinay Thakur, also invited the attention of this Court to the judgment passed by this Hon'ble Court in ***Yudhbir Singh versus State of Himachal Pradesh 1998(1)S.L.J. 58***, wherein it has been held as under:

> 9. The only mitigating circumstance that appears to be there is that the time gap of about six years between the date of occurrence as well as the date of decision of this revision petitioner. During this entire period sword of present case looming over the head of the petitioner was always there. That being so, this court is of the view that instead of sending the petitioner to jail as ordered by the courts below, he is given the benefit of Section 4 of the Probation of Offenders Act. Accordingly, it is ordered that he shall furnish personal bond in the sum of Rs. 5,000/- to the satisfaction of the trial Court within a period of four weeks from today to keep peace and to be of good behavior for a period of one year from the date of execution of the bond before the court below as well as not to commit any such offence. In addition to being given benefit of Section 4 of the Probation of Offenders Act, petitioner is further directed to pay a sum of Rs. 3,000/- each to PWs Baldev Singh and Dilbagh Singh injured as compensation. Shri R.K. Gautam submitted that this amount of compensation be deposited with the trial Court on or before 31.8.1997, who will thereafter pay the same to said persons.

38. In this regard, reliance is also placed upon Hon'ble Apex Court judgment ***Ramesh Kumar @ Babla versus State of Punjab 2016 AIR (SC) 2858***, wherein it has been held as under:

> "7. Accordingly the appeal is allowed in part by converting appellant's conviction under Section 307 IPC to one under Section 324 IPC. On the question of sentence, it is pertinent to note that the occurrence took place in 1997. In his statement under Section 313 of the code of Criminal Procedure the appellant gave his age in 2002 as 36 years. He claimed that he and others went to the place of occurrence on getting information that his brother Sanjay Kumar was assaulted by Ramesh Kumar (Complainant). He brought his brother to Police Station and lodged a report. As noticed by trial court, parties are involved in civil as well as criminal litigation from before. High Court has noted that appellant, as per custody certificate, is not involved in any other case. In such circumstances, it is not deemed necessary to send the appellant immediately to Jail custody after about 19 years of the occurrence when he appears to be 50 years of age and fully settled in life.
>
> 8. In view of aforesaid, in our view the ends of justice would be met by granting benefit of Probation of Offenders Act to the appellant. We order accordingly and direct that the appellant be released on executing appropriate bond before the trial court to appear and receive sentence of rigorous imprisonment for 1 (one) year when called upon to do so and in the meantime to keep the peace and be of good behaviour."

39. The reliance is also placed upon the Hon'ble Apex Court judgment ***Hari Kishan and State of Haryana versus Sukhbir Singh 1988 AIR (SC) 2127***, wherein it has been held as under:

"8. The question next to be considered is whether the accused are entitled to the benefit of probation of good conduct? We gave our anxious consideration to the contentions urged by counsel. We are of opinion that the High Court has not committed any error in this regard also. Many offenders are not dangerous criminals but are weak characters or who have surrendered to temptation or provocation. In placing such type of offenders, on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. In this case, the High Court has observed that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. These are not showing to be incorrect. We have already said that the accused had no intention to commit murder of any person. Therefore, the extension of benefit of the beneficial legislation applicable to the first offenders cannot be said to be inappropriate.

9. This takes us to, the third questions which we have formulated earlier in this judgments. The High Court has directed each of the respondents to pay Rs.2500/- as compensation to Joginder. The High Court has not referred to any provision of law in support of the order of compensation. But that can be traced to section 357 Criminal Procedure Code Section 357, leaving aside the unnecessary, provides:-

"357. Order to pay compensation:

(1) When a court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is in the opinion of the Court, recoverable by such person in a civil Court;

Xxxxxxxxxxxxxx

Xxxxxxxxxxx

Xxxxxx

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation. Such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been sentenced.

(4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its power of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this Section.

11. The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The Court may enforce the order by imposing sentence in default."

40. This Court also cannot lose sight of the stern observations made by the Hon'ble Apex Court in ***State of Punjab versus Saurabh Bakshi 2015 (5) SCC 182****,* while dealing with the accident case. Their lordships in the aforesaid judgment in paras No. 1, 14, 24 and 25 have held as under;

"1. Long back, an eminent thinker and author, Sophocles, had to say:

"Law can never be enforced unless fear supports them."

Though the aforesaid statement was made centuries back, it has its pertinence, in a way, with the enormous vigour, in today's society. It is the duty of every right thinking citizen to show veneration to law so that an orderly, civilized and peaceful society emerges. It has to be borne in mind that law is averse to any kind of chaos. It is totally intolerant of anarchy. If any one defies law, he has to face the wrath of law, depending on the concept of proportionality that the law recognizes. It can never be forgotten that the purpose of criminal law legislated by the competent legislatures, subject to judicial scrutiny within constitutionally established parameters, is to protect the collective interest and save every individual that forms a constituent of the collective from unwarranted hazards. It is sometimes said in an egocentric and uncivilised manner that law cannot bind the individual actions which are perceived as flaws by the large body of people, but, the truth is and has to be that when the law withstands the test of the constitutional scrutiny in a democracy, the individual notions are to be ignored. At times certain crimes assume more accent and gravity depending on the nature and impact of the crime on the society. No court should ignore the same being swayed by passion of mercy. It is the obligation of the court to constantly remind itself that the right of the victim, and be it said, on certain occasions the person aggrieved as well as the society at large can be victims, never be marginalised. In this context one may recapitulate the saying of Justice Benjamin N. Cardizo "Justice, though due to the accused, is due to the accuser too". And, therefore, the requisite norm has to be the established principles laid down in precedents. It is neither to be guided by a sense of sentimentality nor to be governed by prejudices.

14. In this context, we may refer with profit to the decision in Balwinder Singh (supra) wherein the High Court had allowed the revision and reduced the quantum of sentence awarded by the Judicial Magistrate, First Class, for the offences punishable under Section 304A, 337, 279 of IPC by reducing the sentence of imprisonment already undergone that is 15 days. The court referred to the decision in Dalbir Singh v. State of Haryana and reproduced two paragraphs which we feel extremely necessary for reproduction:- (Balwinder Singh case, SCC pp. 186-87, para12)

"12…1. When automobiles have become death traps any leniency shown to drivers who are found guilty of rash driving would be at the risk of further escalation of road accidents. All those who are manning the steering of automobiles, particularly professional drivers, must be kept under constant reminders of their duty to adopt utmost care and also of the consequences befalling them in cases of dereliction. One of the most effective ways of keeping such drivers under mental vigil is to maintain a deterrent element in the sentencing sphere. Any latitude shown to them in that sphere would tempt them to make driving frivolous and a frolic.

13. Bearing in mind the galloping trend in road accidents in India and the devastating consequences visiting the victims and their families, criminal courts cannot treat the nature of the offence under Section 304-A IPC as attracting the benevolent provisions of Section 4 of the Probation of

Offenders Act. While considering the quantum of sentence to be imposed for the offence of causing death by rash or negligent driving of automobiles, one of the prime considerations should be deterrence. A professional driver pedals the accelerator of the automobile almost throughout his working hours. He must constantly inform himself that he cannot afford to have a single moment of laxity or inattentiveness when his leg is on the pedal of a vehicle in locomotion. He cannot and should not take a chance thinking that a rash driving need not necessarily cause any accident; or even if any accident occurs it need not necessarily result in the death of any human being; or even if such death ensues he might not be convicted of the offence; and lastly, that even if he is convicted he would be dealt with leniently by the court. He must always keep in his mind the fear psyche that if he is convicted of the offence for causing death of a human being due to his callous driving of the vehicle he cannot escape from a jail sentence. This is the role which the courts can play, particularly at the level of trial courts, for lessening the high rate of motor accidents due to callous driving of automobiles." (Dalbir Singh case, SCC pp. 84—85 & 87, paras 1 &13)"

24. Needless to say, the principle of sentencing recognizes the corrective measures but there are occasions when the deterrence is an imperative necessity depending upon the facts of the case. In our opinion, it is a fit case where we are constrained to say that the High Court has been swayed away by the passion of mercy in applying the principle that payment of compensation is a factor for reduction of sentence to 24 days. It is absolutely in the realm of misplaced sympathy. It is, in a way mockery of justice. Because justice is "the crowning glory", "the sovereign mistress" and "queen of virtue" as Cicero had said. Such a crime blights not only the lives of the victims but of many others around them. It ultimately shatters the faith of the public in judicial system. In our view, the sentence of one year as imposed by the trial Magistrate which has been affirmed by the appellate court should be reduced to six months

25. Before parting with the case we are compelled to observe that India has a disreputable record of road accidents. There is a nonchalant attitude among the drivers. They feel that they are the "Emperors of all they survey". Drunkenness contributes to careless driving where the other people become their prey. The poor feel that their lives are not safe, the pedestrians think of uncertainty and the civilized persons drive in constant fear but still apprehensive about the obnoxious attitude of the people who project themselves as "larger than life". In such obtaining circumstances, we are bound to observe that the law-makers should scrutinize, relook and revisit the sentencing policy in Section 304-A IPC, so with immense anguish."

41. After giving my thoughtful consideration to the submissions as well as law cited by Mr. Vinay Thakur, Advocate representing the accused in the present case, I am of the view that same cannot be made applicable in the present case for granting the benefit of Section 4 of probation of Offenders Act, 1958. The Hon'ble Apex Court in the judgment cited above has deprecated the practice of courts in settling the matter by awarding compensation or releasing the accused by giving the benefit of Probation of Offenders Act, 1958.

42. After bestowing my thoughtful consideration to the evidence led on record, I have no hesitation to conclude that prosecution was not able to prove on record rash and negligent driving, if any, on the part of the petitioner accused. However, action of accused in allowing 80-90 persons to board the ill fated truck clearly suggests that he was negligent. It has also come in evidence that truck was not in good condition and as such, petitioner accused should not have allowed the people to board the truck, which is/was definitely meant for carrying passengers. Hence, this Court is of the view that boarding of 80-90 people in the ill fated truck, certainly indicates towards the negligent conduct on the part of the petitioner and as such, he deserves to

be convicted and sentenced for the same. In view of the above, judgment passed by the courts below deserve to be upheld. This Court is of the view that conviction recorded by the courts below is on higher side and same needs to be modified, especially, when prosecution was not able to prove the rash and negligent driving of the petitioner. Moreover, more than 13 years have passed after occurrence of the incident and during this period, petitioner must have suffered mental agony. It has also come in evidence that at the time of incident, his daughters were also travelling in the same. Hence, this Court deems it fit to modify the sentence as imposed by the courts below to three months for all the offences. Petitioner accused is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by learned trial Court, which has been further modified by this Court vide this judgment. Needless to say that order dated 22.10.2009, passed by this Court, whereby sentence imposed by the Court below was suspended, shall stand vacated automatically. Pending applications, if any, stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Lal Chand …….Petitioner

Versus

State of HP ……Respondent

Cr. Revision No. 193 of 2010.
Date of Decision: 28.11.2016.

Indian Penal Code, 1860- Section 341, 323, 326, 504 and 506- Wife of the accused knocked at the door of the informant saying that accused was beating her -when the informant and his wife went to the house of the accused, the accused abused them- he inflicted a blow with danda on her head – the accused inflicted a blow by darat on the left wrist of the informant – the accused was tried and convicted by the trial Court- an appeal was filed, which was dismissed- held in revision that parties were in litigation for 18-19 years – all the material witnesses had turned hostile – the defence version was rejected without any justification- there are material contradictions in the testimonies of the witnesses- there was no sufficient evidence to prove the prosecution case- revision allowed and accused acquitted.(Para-8 to 36)

Cases referred:

State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241

For the petitioner: Mr. Vijay Chaudhary, Advocate.
For the respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

The present criminal revision petition filed under Sections 397/ 401 of the Cr.PC, is directed against the judgment dated 18.8.2010, passed by the learned Sessions Judge, Hamirpur, HP, in Criminal Appeal No. 30 of 2010, affirming the judgment/order of conviction and sentence dated 31.5.2010 and 2.6.2010, passed by the learned Judicial Magistrate, Ist Class, Barsar, District Hamirpur, HP, in Criminal Case No. 19-II-2008/2007, whereby present petitioner has been sentenced as under:-

"Section 341 of IPC

To pay fine of Rs. 500/- and in default of payment of fine, simple imprisonment for one month;

Section 323 of IPC

To undergo six months rigorous imprisonment and pay fine of Rs. 500/- and in default, two months simple imprisonment;

Section 326 of IPC

To undergo three years rigorous imprisonment and to pay fine of Rs. 3500/- under Section 326 of the IPC and in default of payment of fine, simple imprisonment for one year;

Section 504 of IPC

To undergo six months rigorous imprisonment;

Section 506 IPC

To undergo six months rigorous imprisonment."

2. Briefly stated facts as emerged from the record are that during the intervening night of July 19/20, 2007, at about 10:40 pm, Police Post, Deothsidh received telephonic call from the Medical Officer, PHC, Bijhar that one Ram Chand and Urmila Devi had been brought to the hospital in injured condition. On the basis of aforesaid information, police entered rapat Ext.PW11/B and immediately, recorded statement Ext.PW1/A of the complainant namely Ram Chand, wherein the complainant stated that he is resident of Village Mangnoti and has three sons. He further disclosed to the police that they are residing outside due to employment and he is a handicap person and tailor by profession. He further stated that he and his wife have been residing together in the house. On 19.7.2007, after taking meals, when they were sleeping in their house, Anita Devi, wife of Lal Chand (accused) knocked at their door and told that Lal Chand (accused for the sake of brevity) was beating her and asked for help. The complainant suggested her to call respectable persons of the village but she insisted them to accompany her. When they accompanied her towards her house, the accused came there and started hurling abuses to them. The complainant and his wife asked him not to abuse, upon the same, the accused came in anger and assaulted his wife with "Danda" on her head. The complainant turned back out and wanted to run, but the accused assaulted him with a "Darat" on his left wrist causing grievous injury on his person. When he raised alarm, Sapna Devi, Ram Kishan, Baldev and other villagers came there and the accused ran away from there by threatening them. On the basis of aforesaid statement, police registered formal FIR Ext.PW14/A and conducted investigation. Police prepared the site plan Ext.PW16/B. As per story of prosecution, accused made a disclosure statement Ext.PW15/A, stating therein that he had concealed one "Darat" in his house about which he knows and that he can get the same recovered. Accordingly, "darat" Ext.P6 and Danda Ext.P5 were taken into possession vide memo Ext.PW7/A. Khaka of "Darat" Ext.PW15/E and map of the spot Ext.PW15/F, were also prepared. Police also recorded statement of witnesses under Section 161 and thereafter, presented challan under Sections 341,323, 326, 504 and 506 of IPC, before the competent Court of law.

3. Learned Judicial Magistrate, Ist Class, Barsar, District Hamirpur, HP, on being satisfied that prima facie case exists against the accused put a notice of accusation to him under Sections 341,323, 326, 504 and 506 IPC, to which he pleaded not guilty and claimed trial. Learned trial Court on the basis of evidence adduced on record, held the accused guilty of having committed offence under the aforesaid Sections and accordingly convicted and sentenced him as per description already given above.

4. Being aggrieved and dis-satisfied with the judgment of conviction passed by the learned trial Court, the petitioner-accused filed appeal under Section 374 of Cr.PC before the Court of learned Sessions Judge, Hamirpur, HP, who vide judgment dated 18.8.2010, dismissed the appeal preferred by the petitioner accused. Hence, this criminal revision petition before this Court.

5. At this stage, it may be noticed that sequel to order dated 30.9.2016, Registry issued notice to the petitioner, who has come present in the Court. Petitioner namely Lal Chand,

submitted that he is not in a position to engage the lawyer and as such, he may be given service of legal aid counsel. Accordingly, in view of the aforesaid request, this Court requested Mr. Vijay Chaudhary, Advocate, to conduct his case, who readily agreed for the same. Mr. Vijay Chaudhary, Advocate, representing the petitioner-accused vehemently argued that the impugned judgments of conviction and sentence recorded by the Courts below are not sustainable as the same are not based upon the correct appreciation of evidence available on record and as such, same deserve to be quashed and set-aside. Mr. Chaudhary, while referring to the judgments passed by the Courts below further contended that courts below have not read the evidence in its right perspective, rather judgments are based upon the conjectures and surmises, as a result of which great prejudice has been caused to the petitioner, who is an innocent person Mr. Chaudhary, further stated that the courts below have not taken into consideration that no explanation worth the name was rendered by the prosecution for delay in lodging the FIR because PW2 admittedly admitted that incident took place on 17.9.2007, whereas it was reported to the police on the intervening night of 19/20.9.2007 and as such, story put forth by the prosecution could not be accepted while recording conviction of the petitioner accused that too on the flimsy grounds. While referring to the statements made by the prosecution witnesses, Mr. Chaudhary, forcefully contended that none of the independent witness has supported the case of the prosecution, rather turned hostile, but despite that courts below merely on the statement of the complainant and his wife, recorded conviction of the petitioner accused. Mr. Chaudhary, further argued that both the courts below miserably failed to appreciate that the complainant had made an attempt to outrage the modesty of wife of the petitioner accused, which fact stands duly proved with the statement made by PW4 Sapna Devi, who in her cross examination specifically stated that the complainant had made complaint with regard to the alleged attempt to outrage the modesty of wife of the petitioner accused. While concluding his arguments, Mr. Chaudhary strenuously argued that the complainant himself admitted in his cross examination that there is a litigation pending between them, which clearly suggests that the complainant had motive to falsely implicate the accused, whereas court below despite noticing the factum qua litigation pending between the parties, wrongly came to conclusion that such defence is a double edged weapon and it has to be appreciated in the light of the facts of the each case and wrongly recorded the conviction of the petitioner accused. In the aforesaid background, Mr. Chaudhary, prayed that present petitioner accused may be acquitted of the charges framed against him after setting aside the judgment of conviction recorded by the courts below, which are not based upon the true facts.

6. On the other hand, Mr. Ramesh Thakur, learned Deputy Advocate General, representing the respondent-state supported the impugned judgments passed by the courts below. Mr. Thakur strenuously argued that the judgments passed by the courts below are based upon the correct appreciation of the evidence available on record and as such, in the given facts and circumstances of the case, no interference, whatsoever, of this Court, is warranted, especially in view of the fact that courts below have dealt with each and every aspect of the matter very meticulously. With a view to refute the contention put forth by Mr. Chaudhary, he also invited attention of this Court to the statement of PWs to demonstrate that there are no inconsistencies in the statements made by the PW1 and PW2, who in unequivocal terms have stated that they were given beatings by the petitioner-accused. Mr. Thakur further stated that though Independent witnesses turned hostile but if their statements are read in its entirety, it suggests that on that day, the complainant and his wife Urmila were given beatings by the petitioner accused and as such, there is no illegality and infirmity in the judgments passed by the courts below. He also invited attention of this Court to the medical evidence adduced on record by the prosecution to suggest that bare reading of MLC Ext. PW13/A and Ext.PW13/B suggests that the complainant as well as his wife suffered grievous injuries, which were admittedly caused by the petitioner accused and as such, he does not deserve any leniency and he has been rightly convicted by the courts below. While concluding his arguments, Mr. Thakur, reminded this Court that it has very limited powers while exercising its revisionary powers under Section 397 of the Cr.PC as far as re-appreciation of the evidence is concerned. In this regard, he placed reliance upon the judgment passed by Hon'ble Apex Court in case ***State of Kerala Vs.***

Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> "In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

7. I have heard learned counsel for the parties as well carefully gone through the record.

8. True, it is that this Court has very limited powers under Section 397 Cr.PC while exercising its revisionary jurisdiction but in the instant case, where accused has been convicted and sentenced, it would be apt and in the interest of justice to critically examine the statements of the prosecution witnesses solely with a view to ascertain that the judgments passed by learned courts below are not perverse and same are based on correct appreciation of the evidence on record.

9. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order. The relevant para of the judgment is reproduced as under:-

> 8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

10. During proceedings of the case, this Court had an occasion to peruse the judgments passed by both the Courts below as well as evidence adduced on record by the respective parties, perusal whereof suggests that on 19th July, 2007, the complainant Ram Chand and his wife Urmila received injuries on the arm and head respectively. Petitioner accused in his statement recorded under Section 313 denied the case of the prosecution in toto and produced DW1 as defence witness, who stated that Ram Chand and his wife resides at Chandigarh. He also stated that the petitioner accused had no quarrel with Ram Chan and Urmila Devi and false case has been prepared against the petitioner. He also stated that there is an illicit relation of

Ram Chand with the wife of the accused i.e. Anita. In his cross-examination, he admitted that Lal Chand is his younger brother.

11. Perusal of judgments passed by the courts below suggests that aforesaid version put forth by DW1 Amar Nath was altogether dis-believed on the ground that he was younger brother of the petitioner accused Lal Chand. Careful perusal of the record especially, statement of PW1 i.e. Ram Chand suggests that parties were in litigation for last 18-19 years with each other. PW1 specifically admitted in his cross-examination that his mother had litigation with father of the accused for the last 18-19 years. But it appears that court below brushed aside the aforesaid factum of having litigation between the parties by concluding that plea of litigation and enmity is a double edged weapon and it has to be appreciated in the light of facts of each case.

12. True, it is that plea of litigation and enmity is to be appreciated in the light of the facts of each case and it is a double edge weapon and courts while examining correctness and genuineness of such plea/defence taken by either of the party needs to carefully examine the evidence in its entirety vis-à-vis other material available on record.

13. After carefully examining the entire evidence available on record, especially, where all the material PWs have turned hostile, this Court has no hesitation to conclude that courts below have gravely erred in brushing aside the aforesaid plea of pendency of litigation and enmity between the parties by the petitioner-accused. Similarly, if the judgment passed by the courts below are read in its entirety, it also compels this Court to observe that court below while discarding the evidence adduced on record by the petitioner accused in the shape of DW1 Amar Nath, applied different yardsticks because apparently, version put forth by DW1 in his defence statement was discarded by the court below on the ground that he is a younger brother of the petitioner accused Lal Chand. But judgments passed by the courts below suggest that conviction of the petitioner has been only recorded on the statements of PW1 and PW2, who are admittedly husband and wife and none of the independent witness has corroborated the versions put forth by PW1 and PW2 and as such, it is not understood that when court below discarded the statement of DW1 on the ground that he is an interested witness, and then how conviction of petitioner could be based merely on the statements of PW1 and PW2, who are admittedly related to each other.

14. After observing the aforesaid discrepancies in the judgments passed by the courts below, this Court proceeded to critically examine the entire evidence led on record by the prosecution to ascertain the genuineness and correctness of the submissions having been made on behalf of petitioner accused and to ensure that impugned judgments are not perverse and same are based upon the correct appreciation of the evidence as submitted by the learned Deputy Advocate General appearing for the respondent State.

15. PW1 the complainant Ram Chand, stated that he and his wife were sleeping in their house when Anita (wife of the accused) knocked their door and informed that her husband was beating her. PW1 further stated that he advised her to call the respectable persons of the village but later on, on her asking, they went there, where petitioner accused started hurling abuses on them. He asked him not to abuse him but he snatched the 'danda' and inflicted a blow of the same on the head of his wife. He further stated that he tried to escape but accused also inflicted a sickle blow on his arm, as a result of which, blood started oozing out. He further stated that he raised alarm, upon which, Anil, Baldev, Sapna, Ram Kishan and other person of the village came at the spot. But in the meantime, accused fled away from the spot threatening him to kill him in future. He further stated that he was brought to the hospital in the Jeep of Papu and there, he got recorded statement, Ext.PW1/A, to the police and after discharge from the hospital, he took shelter in the house of Amar Nath DW1. He also stated that blood stained shirt Ext.P2, trouser Ext.P3 and wife's Dupatta Ext.P4 were handed over to the police, which were sealed in a parcel with seal "J" and taken into possession vide memo Ext.PW1/B. He further stated that he was medically examined vide MLC Ext.PW1/C. He also identified stick Ext.P5 as weapon of offence with which his wife was beaten. He also identified sickle Ext.P6 as the weapon of offence.

16. In his cross-examination, PW1 admitted that houses of Laxmi Ram and Anant Ram are at a height from their house and at the time of occurrence, nobody except his wife was present in the spot. He also admitted that ward member Sapna Devi had reached the spot. He also admitted that stick Ext.P5 belonged to him but self stated that it was snatched by the accused. He denied the suggestion put to him that accused had not given beatings to his wife with danda. Similarly, he stated that he did not disclose to the police that accused had snatched danda from his hand. Similarly, in cross examination, he feigned ignorance that he has signed Ext.PW1/B. Most importantly, in his cross examination, he admitted that litigation is pending between his mother and father of the accused for the last 18-19 years. He further denied the suggestion put to him by the defence that on 19.7.2007, he manhandled accused's wife Anita and attempted to outrage her modesty. He also denied that he had earlier tried to ravish Anita and matter was reported to ward member.

17. PW2 Urmila Devi corroborated the version put forth by her husband. She also identified the stick Ext.P5 as weapon of offence with which accused allegedly inflicted blow on her head. She also identified the sickle Ext.P6 with which her husband received injury on his arm. She also identified the accused in the Court. In her cross examination, she admitted that police recorded their statement on 17.7.2007, when she was confronted with her statement where she disclosed to the police that Anita had asked them to call village Panchayat, she feigned ignorance. She was also confronted with her statement made to police that she became unconscious and re-gained consciousness on hearing cries of her husband. She denied the suggestion put to her that stick and sickle were produced to the police by her husband. She also admitted that stick Ext.P5 belongs to her husband, but denied that sickle Ext.P7 also belongs to them. She also admitted that Anita Devi, Sapna Devi along with other villagers reached the spot. She also denied the allegation that accused had ravished the accused's wife Anita.

18. Conjoint reading of aforesaid PWs, who were present at the spot at the time of occurrence, though suggests that on 19.7.2007, they on insistence of Anita Devi, went to her house, whereupon they were given beatings by the petitioner but if their statements are read in its entirety, there are material contradictions with regard to weapon allegedly used by the petitioner accused for giving beatings to the complainant and his wife. PW1 specifically stated in his statement that accused snatched "danda" from his hand and then gave blow on the head of his wife. On the other hand, both the PWs made an attempt to prove on record that at the time of alleged occurrence, petitioner accused was carrying sickle in his hand. It is not understood that if petitioner accused was carrying sickle in his hand, where was the occasion for him to snatch the "danda" from the petitioner accused. Similarly, it is not understood that why at that time, petitioner complainant Ram Chand was carrying danda in his hand. It is admitted case of the prosecution that the complainant Ram Chand and his wife went to the house of Anita (wife of the accused) on her asking, meaning thereby, wife of the petitioner accused was known to the complainant and his wife. As per PW1, after alleged incident of inflicting injury on his arm, he raised alarm upon which Baldev, Subhash, Ram Kishan and other villagers came to the spot for his rescue and thereafter, he was brought to the hospital in Papu's Jeep. But PW1 in his cross examination feigned ignorance whether the statement of Papu was recorded by the police or not.

19. PW3, Anil Kumar while making statement before the Court stated that he is owner of Taxi No. HP-02-8718. He further stated that on the alleged day at about 10/11:00 pm, he heard noise and he went to the roof of his house to see the incident. He further stated that he saw that Ram Chand had sustained injury on his arm and wife of Ram Chand namely Urmila and Anita, wife of the accused, were also present on the spot. He further stated that he was told by the public to take injured to the hospital but he nowhere stated in his statement that, who gave injuries to Ram Chand and his wife. Aforesaid witness was declared hostile by the prosecution but in his cross examination by the prosecution, he admitted that alleged occurrence occurred on 19.7.2007. He denied that Ram Chand had disclosed him that he was given beating by Lal Chand. He admitted that he along with Ram Kishan and Baldev brought the complainant Ram Chand and his wife to Bijari Hospital. In his cross examination, he admitted that Ram Chand is his uncle.

20. PW4 Sapna Devi Ward Member also not supported the case of the proseuciton and accordingly, was declared hostile. In her cross-examination by prosecution, she denied that she resiled from her earlier statement. She further in her cross examination by defence admitted that accused and his wife had complained to her that Ram Chand had ravished Anita. She further stated that Sulochna and Biasan Devi also supported such allegation of the accused. She specifically stated that aforesaid complaint was made to her in the month of July. She further admitted that accused had not caused any hurt to the complainant and his wife. She further admitted that the complainant Ram Chand had illicit relations with the wife of the accused. It has also come in his cross examination that weapon of offence was produced to the police by Ram Chand and she had not taken any action on the complaint of the accused, rather tried conciliation.

21. PW5 Baldev Raj stated that on 20.7.2007, he came out of his house on hearing noise and noticed bleeding wound on the arm of the complainant Ram Chand. He also stated that accused was present on the spot. He further stated that he witnessed injury on the person of Ram Chand and his wife and both of them disclosed to him that accused had beaten them. He further stated that on 21.7.2007, police took into possession the cloths Exts.P.2 to P.4 vide memo Ext.PW1/B but in his cross examination, while admitting that the clothes were sealed by the police in his presence, he feigned ignorance that dupatta Ext.P1, was produced by the police by Sapna Devi. He denied that he has deposed, falsely against the accused due to enmity.

22. Similarly, PW6 Ram Kishan stated that on 19.7.2007, he visited the accused at around 8:00 pm and then he returned back to his house. He stated that at about 9:45 pm, he heard noise and came to spot where he saw injuries on the person of Ram Chand and his wife. He further stated that there was injury on the hand of Ram Chand and on the head of his wife. When he inquired from them, they disclosed that the accused gave beatings to them. He stated that he brought them to the hospital. Ram Chand had produced clothes Ext.P.2 to P4 to the police vide memo Ext.PW1/B. He also Identified the accused person in the Court. But in his cross-examination, he admitted that PW5 Baldev had not reached the spot but met them on the way.

23. Close scrutiny of aforesaid alleged independent witnesses, nowhere proves the case of the prosecution, rather all the prosecution witnesses, especially, PW3 and PW4 have turned hostile because they have specifically denied that petitioner accused gave beatings to the complainant and his wife. PW3 though in his examination in chief stated that the complainant Ram Chand had disclosed him that they have been beaten by the petitioner accused, but in his cross examination; he denied that Ram Chand had disclosed him that he has been beaten by the accused Lal Chand.

24. Similarly, PW4 Sapna specifically denied that petitioner accused gave beating to the complainant and his wife, rather, in her cross examination by the prosecution, she categorically admitted that accused had not caused any hurt to the complainant and his wife. She further stated that the complainant had illicit relation with the wife of the accused and weapon of the offence were produced by the Ram Chand.

25. Similarly, if statements of other independent witnesses Baldev PW5 and PW6 Ram Kishan are also read in juxtaposing each other, there are material contradictions qua the timing and date of incident. Similarly, both the PWs have contradicted each other with regard to their presence on the spot of incident at that relevant time. PW5 stated on 20.7.2007, he came out of his house on hearing noise and noticed bleeding wound on the arm of Ram Chand but the statement of PW6 suggests that he brought them to the hospital and he in his cross-examination admitted that Baldev had not reached the spot but met on the way, which clearly belies the statement of PW5 Baldev Raj, who claimed that he was present at the spot immediately after the alleged incident. Similarly, there are contradiction with regard to the production of Duppata Ext.P1 to the police by Sapna Devi. PW5 feigned ignorance that Dupatta was produced to the police by Sapna Devi, whereas Sapna Devi nowhere stated that Dupatta Ext.P1 was taken into custody by the police in her presence.

26. PW9 Suresh Kumar also not supported the case of prosecution. During his cross-examination by prosecution, he admitted his signatures on Mark-Z but he disowned the contents of the same, rather stated that he had signed the memo in good faith. He also denied that the accused made any disclosure statement in his presence. He also disowned portion A to A of statement Mark-Z recorded by the police.

27. PW7 Pritam Chand also not supported the prosecution case. In his statement, he stated that accused made disclosure statement in his presence. He also like PW9 Suresh, admitted his signature on Mark-Z but disowned the contents of the same. He also disowned portion A to A of the statement of Mark Z recorded by the Police. PW7 stated that on 25.7.2007, the accused led them towards the room of his house, from where he got recovered one sickle and stick to the police vide memo Ext.PW7/A. In his cross examination, he disclosed that he is resident of village Barla, which is 2 ½ k.m. away from the spot of recovery. He also admitted that he is a frequent witness for the police. He admitted in his cross examination that ASI Chhota Ram called him to the spot telephonically.

28. Perusal of the aforesaid PWs 7, 8 and 9, nowhere proves the recovery, if any, of weapon allegedly used by the petitioner accused for inflicting injury on the arm of the complainant and head of his wife Urmila Devi. None of the aforesaid witnesses supported the prosecution case, rather all these PWs before whom, police had allegedly recovered weapon denied that accused made disclosure statement in their presence. Moreover, no prayer, if any, could be made on the statement of PW7, who himself stated that on 25.7.2007, accused Lal Chand led them towards the room of his house from where he got recoverd one sickle and stick. He himself stated that he is a frequent witness to the police and came to the spot on asking of ASI Chhota Ram, who called him to come to the spot telephonically.

29. HC Jagdish Kumar who had conducted some part of the investigation appeared as PW16 and denied that the Sapna Devi had disclosed to him that no such occurrence ever took place. He further denied that Sapna had disclosed about the illicit relation of Ram Chand with the wife of the accused.

30. PW15 ASI Chhota Ram deposed that on July, 24, 2007, the case file was handed over to him for further investigation. He stated that accused Lal Chand had recorded his statement Ext.PW15/A, under Section 27 of the Indian Evidence Act in the presence of witnesses Jagtar Singh and Suresh. He also recorded statements Ext.PW15/B of Suresh Kumar and Ext.PW15/C of Jagtar Singh and thereafter they went to village Mangnoti where in the presence of Pradhan Pritam Chand and Up-Pradhan Mahinder Singh, accused identified his house. He further stated that he made khakha of Darat Ext.PW15/E and map of the spot Ext.PW15/F and handed over the case file to ASI Subhash Chand due to his transfer. In his cross examination, he denied that accused had not made any disclosure statement. It is also denied that he had recorded statements of Jagtar Singh and Suresh on his own.

31. Perusal of statement of PW9 Suresh, PW 7 Pritam Chand and PW15 ASI Chhota Ram, leaves no doubt in the mind of this Court that prosecution was not able to prove the recovery of weapon allegedly used by the petitioner accused while inflicting injury on the arm and head of the complainant and his wife. Aforesaid witnesses especially, PWs 7 and 9 nowhere supported the claim of PW15 that the petitioner made disclosure statement before aforesaid prosecution witnesses and as such, version put forth by PW15 could not be accepted in the absence of corroboration if any, from aforesaid witnesses, who allegedly signed the disclosure statement.

32. PW13 Dr. Shashi Dutt Sharma, who medically examined the complainant and his wife Urmila Devi, stated that he issued MLC Ext.13/A and injury was simple in nature, which could be caused by blow of danda. Similarly, he issued MLC Ext.PW13/B and after going through the X-ray he opined that the complainant Ram Chand had sustained grievous injury caused with sharp weapon possibly with sickle Ext.P6.

33. In his cross examination, he specifically denied that possibility of injury on the person of Urmila was, when a person falls from stairs and when person runs and strikes his-her fore-head with some object. He denied that possibility of injury on the person of the accused Ram Chand by way of fall or when a running person strikes with an object or when arm of a running person is pressed under its weight or if heavy material falls on the arm of a person. He further stated that object will not have enough force to cause such type of injury.

34. In the instant case, though medical evidence on record suggests that complainant and his wife sustained injuries but same was not sufficient to record conviction against the accused because prosecution remained unsuccessful in proving that injuries on the head and arm of PW1 and his wife was in fact caused by accused. None of independent witness associated by the prosecution supported the case of the prosecution, rather all the material witnesses have resiled. Even in the cross-examination, prosecution has not been able to extract anything contrary to what they stated in their examination in chief. Similarly, prosecution has not been able to prove the recovery of alleged weapon allegedly used for inflicting injury on the person of the complainant and his wife. Apart from above, as has been observed, in the earlier part of the judgment, courts below failed to apply same yardstick while weighing the evidence of prosecution as well as defence because evidence led on record by the defence in the shape of DW1 was solely discarded by the courts below on the ground that DW1 was related to the petitioner accused It is ample clear from the perusal of the judgment passed by the courts below that conviction of the petitioner accused has been recorded solely on the statement of PW1 and PW2, who are admittedly husband and wife.

35. This Court after examining the entire prosecution evidence available on record, has no hesitation to conclude that there was no sufficient evidence adduced on record by the prosecution to prove its case beyond reasonable doubt and both the courts below wrongly placed reliance upon the statement of PW1 and 2, who were the sole witnesses to alleged incident and recorded conviction of the petitioner accused, who successfully proved on record that families of the complainant as well as petitioner accused had litigation pending in court for the last 18-19 years. As noticed above this Court, noticed material contradiction in the statement of PWs and as such, same could not be relied upon while recording conviction of the petitioner accused, hence, judgments passed by the courts below deserve to be quashed and set aside.

36. Consequently, in view of the detailed discussion made herein above, present petition is allowed and judgments passed by the courts below are quashed and set-aside. Petitioner accused is acquitted of the charges framed against him. Interim order, if any, vacated. Bail bonds of the accused are discharged. Needles to say, Mr. Chaudhary, shall be entitled to fee as is admissible to the legal aid counsel as per law. Pending application, if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Mansarovar Infratech Private Limited ....Petitioner.

Versus

Neftogaz India Privat Limited and others. ....Respondents.

Arbitration Case No. 70 of 2015
Reserved on: 29.08.2016
Date of decision: 28th November, 2016

Arbitration and Conciliation Act, 1996- Section 8- The work of widening and strengthening of Theog-Kotkhai-Hatkoti-Rohru Road from 0+00 k.m. to 80+684 k.m. was awarded in favour of second respondent who executed a sub contract with the first respondent- first respondent entered into an agreement with the petitioner the -work was subsequently cancelled and the machinery of the petitioner was impounded along with the machinery of second respondent – a

civil suit was filed by the petitioner, which is pending disposal- a civil writ petition was filed, which was dismissed as not maintainable in view of the arbitration clause- the payment of the bill has not been made to the petitioner- hence, permission was sought to appoint the arbitrator – the respondent No.2 stated that it had not entered into any contract with the petitioner and the petition is not maintainable- held, that principal contractor is liable to indemnify the claim of the sub-contractor like the petitioner – however, in absence of any signed written agreement between the parties, the petition is not maintainable against the respondent No.2- however, there is written memorandum of understanding between the petitioner and the respondent No.1, which can be referred to the arbitrator – the petition allowed and Arbitral Tribunal appointed to adjudicate the claim of non-payment of the dues of the petitioner. (Para-9 to 16)

Cases referred:

Chloro Controls India Private Limited V. Severn Trent Water Purification Inc. and others, (2013) 1 Supreme Court Cases 641

Essar Oil Limited V. Hindustan Shipyard Limited and others, (2015) 10 Supreme Court Cases 642

For the petitioner: Mr. Rahul Singh Verma, Advocate.

For the respondents: Mr. N.K. Sood, Sr. Advocate with Mr. Aman Sood, Advocate for respondent No.2.
Respondents No. 1 and 3 already *ex-parte*.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

The petitioner is a Company registered under the Companies Act, 1956. This petition has been filed by the petitioner with a prayer to appoint an Arbitral Tribunal for resolution of its disputes with the respondents.

2. The Himachal Pradesh Road and other infrastructure Development Corporation (HPRIDC) had awarded the work namely “Widening and strengthening of Theog-Kotkhai-Hatkoti-Rohru Road from 0+000Km to 80+684 Km.” vide Contract No. (PW/SRP/RIDC/HP/5 (ICB)). An agreement came to be executed between the Government of Himachal Pradesh and the 2nd respondent in this regard. The 2nd respondent had executed a sub-contract with Naftogaz India Private Limited, the 1st respondent on 30.07.2011 and thereby tendered the execution of the aforesaid work by respondent No. 1. Respondent No. 1 had further executed memorandum of understanding (MoU)/agreement, Annexure P-1 with the petitioner-Company on 16.12.2011. Before that, letter of intent dated 01.11.2011, Annexure P-2 was issued by respondent No. 1 to petitioner-Company. In terms of Memorandum of Understanding, Annexure P-1, the residuary work was to be executed by petitioner and payment allegedly to be released in its favour by respondent No. 2 i.e. the Principal Contractor. Respondent No. 2 with respect to the work executed by the petitioner has made through RTGS, payment of Rs.1,75,00,000/- on 28.04.2012 and Rs.47,92,436/- on 28.06.2012 on verification of its bills by respondent No. 1 on approval thereof by respondent No. 2. The statement of accounts, Annexure P-3 has been produced by the petitioner in support of this aspect of its case.

3. The Government of Himachal Pradesh had cancelled the work tendered to the 2nd respondent on 2.7.2012. As a result thereof, the machinery of the petitioner deployed for execution of the work was also impounded by the employer along with machinery of Principal Contractor, the 2nd respondent. A Civil Suit for recovery of damages on this score filed by the petitioner is pending disposal in this Court. A Civil Writ Petition bearing No. 3195/2014 filed by the petitioner was dismissed by this Court being not maintainable, in view of the arbitration clause in the Memorandum of Understanding, Annexure P-1. The liberty was reserved to the petitioner to seek appointment of Arbitrator for resolution of disputes in accordance with law.

Since payment of pending bills i.e. dated 5.12.2013 in the sum of Rs.2,08,32,094/- and dated 04.01.2015 in the sum of Rs.3,35,98,304/- has not been made by the 2nd respondent for want of verification thereof by the 1st respondent and as there exist arbitration clause in the MoU, Annexure P-1 qua resolution of disputes between the parties by an Arbitrator, hence this petition.

4. The sub-contractor, the 1st respondent has failed to put in appearance despite due service of notice, therefore, was ordered to be proceeded against ex-parte. The proforma respondent No. 3 is also ex-parte. Now if coming to the reply filed on behalf of Principal Contractor, the 2nd respondent, in preliminary it is averred that there being no arbitration agreement in existence between the petitioner and the said respondent and that in terms of Arbitration and Conciliation Act, 1966, the arbitration can only be between two contracting parties i.e. the signatory to an agreement and also that since the 2nd respondent has never entered into any agreement with the petitioner, therefore, petition qua said respondent is devoid of merits and as such sought to be dismissed. The Memorandum of Understanding, Annexure P-1 is between the petitioner and the 1st respondent and as per the same, arbitral proceedings can only be held at Noida (U.P.), therefore, this petition is stated to be not maintainable in this Court. In view of Civil Suit No. 31/15 is stated to be filed by the petitioner in this Court for recovery of amount based upon similar claims/disputes, therefore, on this score also, this petition is not maintainable, because two parallel proceedings for adjudication of almost same and similar claims are not legally permissible.

5. On merits, while reiterating that there exists no agreement between the petitioner and the 2nd respondent, the petition against the said respondent is stated to be not maintainable. The payment of Rs.1,75,00,000/- on 28.04.2012 and Rs.47,92,436/- on 28.06.2012 by the 2nd respondent to the petitioner were not on account of its liability towards the petitioner nor the same were made towards the part payment for execution of work and rather to respondent No. 1 through bank transfer on account of advance and payment of salary etc., to its workers. The liability of the 2nd respondent qua execution of work in question was towards respondent No. 1 and not the petitioner. The agreement (MoU) dated 16.12.2011, Annexure P-1 is stated to be between the petitioner and respondent No. 1, hence an arrangement mutually binding them and not the 2nd respondent. The claims, if any, of the petitioner have to be met by the 1st respondent and the 2nd respondent is not liable to indemnify the same. The petition, as such, has been sought to be dismissed.

6. In rejoinder, the petitioner-Company has denied the contentions to the contrary being wrong and has reiterated its case as set out in the petition.

7. Mr. Rahul Singh Verma, learned counsel representing the petitioner has strenuously contended that respondents No. 1 and 2 both are liable to indemnify the claims of the petitioner, as according to him, in terms of Section 8 and 45 of the Act, the arbitral proceedings can be sought to be initiated against 3rd party like the 2nd respondent. The Principal Contractor, in the present case, according to Mr. Verma had sub-contracted the work to the 1st respondent and that the petitioner-Company has been associated vide Memorandum of Understanding, Annexure P-1 to execute the work at such sums and costs payable by the Principal Contractor, of course, through its sub-contractor, the 1st respondent. It has, therefore, been urged that in a situation, if arbitral proceedings are allowed to be initiated only against the 1st respondent, the sub-contractor the petitioner will have to file civil suit against the 2nd respondent for adjudication of his claims against the said respondent and in that event two parallel proceedings qua same subject matter of dispute will take place simultaneously. Mr. Verma in support of arguments, he addressed has placed reliance on the judgment of the Apex Court in ***Chloro Controls India Private Limited*** V. ***Severn Trent Water Purification Inc. and others, (2013) 1 Supreme Court Cases 641***.

8. In order to repel the arguments addressed on behalf of the petitioner-Company, Mr. N.K. Sood, learned Senior Advocate assisted by Mr. Aman Sood, Advocate has very ably argued that for want of a singed contract agreement between the petitioner and the 2nd respondent, the appointment of Arbitrator against the 2nd respondent cannot be sought and as

such, the petition qua said respondent has been sought to be dismissed. Mr. Sood has also urged the question of jurisdiction of this Court to entertain the petition. The ratio of judgment in ***Chloro Controls India Private Limited*** (Supra) according to Mr. Sood is not applicable and rather distinguishable in the given facts and circumstances of this case.

9. Analyzing the rival submissions in the given facts and circumstances and also the legal provisions, the sole question arises for determination in this petition is as to whether no arbitral proceedings can be sought to be initiated against the 2nd respondent, who is not signatory to the Memorandum of Understanding, Annexure P-1 nor any contract agreement exists between the said respondent and the petitioner. The answer to this poser in all fairness and in the ends of justice would be in affirmative for the reason that bare reading of Section 8 of the Act makes it crystal clear that it is only those parties who can be referred to arbitration where there exists an arbitration agreement between them and one of such party to such agreement personally or any person claiming through or under him may apply for appointment of arbitrator, however, not later than the date of submitting his first statement on substance of disputes. This Court in this regard is supported by the ratio of judgment of the Apex Court in ***Essar Oil Limited*** V. ***Hindustan Shipyard Limited and others, (2015) 10 Supreme Court Cases 642***, where in the similar facts and circumstances, the Apex Court has held as under:

> "22. We have heard the learned counsel for the parties at length and have also considered some judgments cited by them and the documents which had been placed on record and relied upon by them.
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> 23. Upon hearing the learned counsel and looking at the contract entered into between the appellant and the respondent and upon perusal of other letters, we believe that the view expressed by the High Court cannot be accepted.
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> 24. It is true that the ONGC had made payment to the appellant directly on several occasions. Upon perusal of the correspondence, we find that some understanding, but not amounting to any agreement or contract, was arrived at between the ONGC and the respondent for making direct payment to the appellant, possibly because the respondent was not in a position to make prompt payments to the appellant. It also appears that on account of the delay in making payment to the appellant, the work of the ONGC was likely to be adversely affected. The ONGC was interested in getting its work done promptly and without any hassles. In the circumstances, upon perusal of the correspondence, which had taken place between the ONGC and the respondent, it is clear that so as to facilitate the respondent, the ONGC had made payments on behalf of the respondent to the appellant directly.
>
> 25. Simply because some payments had been made by the ONGC to the appellant, it would not be established that there was a privity of contract between the ONGC and the appellant and only for that reason the ONGC cannot be saddled with a liability to pay the amount payable to the appellant by the respondent.
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> 26. It is also pertinent to note that the Arbitration Agreement was only between the appellant and the respondent. The ONGC was not a party to the Arbitration Agreement. When a dispute had arisen between the appellant and the respondent in relation to payment of money, the appellant had initiated the arbitration proceedings. As the ONGC was not a party to the Arbitration Agreement, it could not have been represented before the Arbitral Tribunal. If the ONGC was not a party before the Arbitral Tribunal, the Tribunal could not have made any Award making the ONGC liable to make payment to the appellant. In the aforestated factual and legal position, the Arbitral Tribunal could not have made the ONGC liable in any respect and rightly, the majority view of the Arbitral Tribunal was to the effect that the ONGC, not being a party to any contract or Arbitration

Agreement with the appellant, could not have been made liable to make any payment to the appellant.

27. We are in agreement with the view expressed by the majority of the Arbitral Tribunal. In our opinion, the High Court had committed an error by not considering the above facts and by observing that the appellant will have to take legal action against the ONGC for recovery of the amount payable to it. If one looks at the relationship between the appellant and the respondent, it is very clear that the respondent had given a sub-contract to the appellant and in the said agreement of sub-contract, the ONGC was not a party and there was no liability on the part of the ONGC to make any payment to the appellant. Moreover, we could not find any correspondence establishing contractual relationship between the ONGC and the appellant. In the circumstances, the ONGC cannot be made legally liable to make any payment to the appellant. As stated hereinabove, only for the sake of convenience and to get the work of the ONGC done without any hassle, the ONGC had made payment to the appellant on behalf of the respondent without incurring any liability to make complete payment on behalf of the respondent.

28. The learned counsel appearing for the appellant failed to show any document in the nature of a contract entered into between the appellant and the ONGC whereby the ONGC had made itself liable to make payment to the appellant. Even when the payment had been made by the ONGC, it was very clear that the payments were made on behalf of the respondent as the ONGC was debiting the account of the respondent by the amount paid to the appellant. It is important that the payment was made to the appellant only upon certification of work done by the respondent. The ONGC had given a contract to the respondent. The ONGC had never entered into any contract with the appellant and therefore, it did not rely upon any certification or any statement made by the appellant in relation to quantum of work done by the appellant. This fact also shows that the ONGC was concerned with the work which had been approved by the respondent and instead of making payment to the respondent, the ONGC had made payment to the appellant on behalf of the respondent, though there was no legal obligation on the part of the ONGC to make such a payment to the appellant.

29. For the aforestated reasons, we do not agree with the view expressed by the High Court and the impugned judgment delivered by the High Court is set aside. The ONGC shall not be liable to make payment, as rightly decided by the Arbitral Tribunal, to the appellant but the payment shall have to be made by the respondent, who had given a sub- contract to the appellant. Majority view of the Arbitral Tribunal on the above issue is confirmed and the view of the High Court is not accepted. The respondent shall accordingly make payment to the appellant."

10. The controversy in this petition is squarely covered by the ratio of the judgment ibid in favour of respondent No. 1 and against the petitioner. The law laid down by the Apex Court in ***Chloro Controls India Private Limited*** (Supra) being distinguishable on facts is not applicable to this case. In that case, the appointment of Arbitrator was sought under Section 45 of the Act, which pertains to the foreign arbitration and not domestic arbitration. True it is that the scope of Section 8 of the Act has also been discussed in this judgment, however, in order to find out a distinction between two provisions i.e. under Section 8 of the Act and also under Section 45. It has been held in this judgment that there is mark distinction between the provisions contained under Section 8 and Section 45 of the Act. As a matter of fact, it is Section 8 of the Act which pertains to the domestic arbitral proceedings in view of the judgment in ***Essar Oil Limited*** (supra). It has further been held in this judgment that the payment to the sub-contractor/an associate like the petitioner herein directly by the Principal Contractor should not be construed to infer that there being no contract agreement in existence, still the Principal

Contractor is liable to indemnify the claims of the associate/sub-contractor like the petitioner. Above all, the 2nd respondent has clarified to the satisfaction of this Court that a sum of Rs.1,75,00,000/- on 28.04.2012 and Rs.47,92,436/- on 28.06.2012 deposited by the 2nd respondent through RTGS in the account of petitioner is the payment made to respondent No.1. The appointment of arbitrator can be sought by a party to an agreement against the other party to such agreement, if there exists a signed contract agreement between the said parties. Being so, the petition against respondent No. 2 is not maintainable nor is there any question of any disputes between the said respondent and the petitioner.

11. There exists a contract agreement (MoU), Annexure P-1 between the petitioner and the sub-contractor i.e. the 1st respondent. The arbitration clause in existence in the contract agreement, Annexure P-1 reads as follows:

> "25. That in respect for the matters requiring resolution of dispute, the parties shall meaningfully negotiate in an endeavor to resolve such matters and will be sorted out amicably. If the matter, question or dispute to arbitration subject to the provision of the India Arbitration and conciliation act 1996 and contract act 1957 and they statuary modifications and enactment thereof. The language of the arbitration shall be the English language and arbitration proceeding shall be held in Noida (Uttar Pradesh)."

12. As noticed at the very out set, since the 1st respondent has not opted for putting appearance despite service and rather allowed itself to be proceeded against ex-parte, the petitioner-Company has been able to show that the disputes on account of non-payment of its dues have arisen. Therefore, such disputes in terms of arbitration clause referred to hereinabove can only be resolved by an arbitral tribunal. Therefore, a case for appointment of Arbitrator to adjudicate the disputes between the petitioner and the 1st respondent deserves to be appointed.

13. Now if coming to the arguments addressed on behalf of the petitioner that exclusion of the 2nd respondent from arbitral proceedings would result in filing a civil suit for recovery of claims against the said respondent and consequently would result into two parallel proceedings qua the same subject matter of dispute, the same in view of there being no contract between the petitioner and the 2nd respondent is far fetched. Whatever is the grouse of the petitioner, it is against respondent No. 1 and not against respondent No.2. Any how these findings shall remain continued to the decision of this petition, the suit or petition, if any, filed by the petitioner against the 2nd respondent will be decided by the Court concerned on its own merits and in accordance with law.

14. Therefore, though the 2nd respondent has denied any outstanding claims of the petitioner against it, however, if any such claims of the petitioner exist against the 2nd respondent, a suit can be filed for recovery of the same in appropriate Court having jurisdiction over the matter.

15. Now if coming to the 2nd limb of arguments that in terms of MoU, the arbitral proceedings can only be initiated in Noida (U.P.). True it is that it find so recorded under Clause 25 thereof, however, the same is only for the purpose of holding the arbitral proceedings and not oust the jurisdiction of this Court to entertain this petition and appoint the Arbitrator. Since the Theog-Kotkhai-Hatkoti-Rohru road, work whereof has been executed by the petitioner is situated within the territorial jurisdiction of this Court, therefore, the Arbitrator can only be appointed by this Court. A reference in this behalf can also be made to the provisions contained under Section 20 of the Code of Civil Procedure, which provides that the suit can be instituted either at a place where defendant resides or where the cause of action arose. In the case in hand, since the cause of action has arisen within the jurisdiction of this Court, therefore, this petition is absolutely maintainable.

16. In view of what has been said hereinabove, this petition succeeds and the same is accordingly allowed. Consequently, an Arbitral Tribunal comprising Shri Harish Bahl, Senior Advocate and Shri Chandranarayana Singh, Advocate, is appointed to resolve the disputes having

arisen on account of non-payment of claims of the petitioner i.e. Rs.2,08,32,094/- as per the bill dated 05.02.2013 and Rs.3,35,98,304/- dated 04.01.2015, total Rs.5,44,30,398/- the balance payment towards execution of work of Theog-Kotkhai-Hatkoti-Rohru road. Learned Arbitral Tribunal shall enter upon the reference within two weeks from the date of receipt of an authenticated copy of this judgment. It is left open to the Arbitral Tribunal to fix the fee at its own, of course taking into consideration the guiding factors in Schedule-IV to Arbitration and Conciliation Act. The parties on both sides shall share the fee so settled equally. A sum of Rs.1,00,000/- is to be deposited by them on the 1st date of hearing. Both the members of Arbitral Tribunal shall share this amount at per their entitlement. The remaining amount shall be payable to the Arbitral Tribunal on termination of proceedings i.e. on or before the pronouncement of award.

17. With these observations, the petition stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. …Appellant.
Versus
Ashok Kumar and others ….Respondents.

Cr. Appeal No. 606 of 2008
Decided on : 28/11/2016

Indian Penal Code, 1860- Section 323, 325 and 506 read with Section 34- Informant was in her house with her son – the accused came and made inquiry from the informant about her son- accused pulled the arm of the shirt worn by the informant and tore it from arm and neck – son of the informant came, who was beaten by the accused along with other co-accused – the accused were tried and acquitted by the Trial Court- held in appeal that the presence of accused K and A was not disputed in the cross-examination –the grievous hurt was not established as x-ray was not connected to the MLC- recovery of the torn short was proved, which corroborated the prosecution version - no person had deposed about the role of J- hence, he was rightly acquitted- appeal partly allowed and accused A and K convicted of the commission of offences punishable under Sections 451, 323 and 506 read with Section 34 of I.P.C. (Para- 9 to 17)

For the Appellant: Mr. R.S.Thakur, Additional. A.G.
For the Respondents: Mr. N.S.Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 7.6.2008 by the learned Judicial Magistrate, 1st Class, Ghumarwin, District Bilaspur, in Case No. 287/2 of 2004/2001, whereby she acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 15.2.2001 the complainant Kailash Devi came to the Police Station alongwith her son Mukesh Kumar and Kashmiri Devi Pradhan Berthin. The complainant reported that on 15.2.2001 in the morning they were in their house when at about 8.30 the accused Kishore Kumar came in side their house and asked where is Mukesh Kumar. She stated that Mukesh Kumar was in side the house. On this the accused Kishor Kumar asked her to bring Mukesh outside into the courtary. The complainant Kailash Devi asked the accused Kishore Kumar what the matter was, however, Kishor Kumar accused insisted that he shall himself ask to Mukesh Kumar and became angry. The accused Kishor Kumar

pulled the arm of shirt worn by the complainant and tore it from the arm and neck. The accused threatened that he will burn the vehicle belonging to the complainant and he will do away with like of Mukesh Kumar by using pistol. In the meanwhile, Mukesh Kumar came out side to rescue the complainant, however, accused Kishor Kumar pulled Mukesh Kumar towards the Berthin Chowk there accused Kishore Kumar along with his brother Ashok Kumar and co-accused Jeevan started beating Mukesh Kumar with kicks and fist blows. Due to these beatings Mukesh Kumar was injured in his stomach and back etc. On the statement of complainant the F.I.R. was registered. The injuries received by Mukesh Kumar were got medically examined. The injuries were found to be simple in nature except the dental injuries which were found to be grievous with the blunt weapon. Thus case under Section 325 IPC was made out against the accused. Police took into possession shirt belonging to Kailash Devi and prepared spot map and recorded the statement of witnesses. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. A charge stood put to the accused by the learned trial Court for theirs committing offences punishable under Sections 325, 323, 506 IPC read with Section 34 IPC to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 6 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Additional Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents has with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record by the learned trial Court and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The learned trial Court had pronounced a verdict of acquittal upon the accused respondents (a) on anvil of the complainants' testification before the learned trial Court holding visible digressions from the contents embodied in Ext. PW1-/A wherein she had unveiled qua Kishore Kumar visiting her house, whereas her testification in contradiction thereto holding echoings qua co-accused Ashok Kumar visiting her house; (b) hers while testifying embellishing besides improving upon the factum qua the wielding of a pistol by Ashok Kumar significantly when the factum aforesaid stood undisclosed by her in her previous statement recorded in writing; (c) the testifications of the prosecution witnesses omitting to unflinchingly unveil the factum qua denture of victim Mukesh Kumar suffering impairment also a tooth standing dislodged therefrom; (d) contradictions occurring in the testification of PW-4 vis.a.vis. the testification of PW-1 qua the place whereat shirt Ext.P-1 belonging to PW-1 begot tearings significantly with PW-1 deposing qua Ext.P-1 begetting tearings at her house whereas in contradiction thereof PW-4 testifying qua the relevant tearings borne thereon occurring near

Berthin Chowk; (e) Omission of examination by the prosecution of the doctor who prepared MLC qua Mukesh Kumar.

10. Insofar as the initial reason as stands propounded by the learned trial Court to pronounce an order of acquittal upon the accused respondents significantly its portraying qua thereupon the genesis of the prosecution case remaining unproven stands bereft of vigour arising from the factum of the learned defence counsel while subjecting PW-1 to cross-examination his putting a suggestion to her couched in an affirmative phraseology, holding therewithin unfoldments, qua both Ashok Kumar and Kishore Kumar visiting the house of PW-1, suggestion whereof obviously elicited from her an apposite affirmative response. However, the learned counsel appearing for the accused respondents contends of the impact of the aforesaid couching in an affirmative phraseology of the suggestion aforesaid put by the learned defence counsel to PW-1 while holding her to cross-examination is merely an attempt on his part to belittle her creditworthiness rendering them to be not readable to hold any communication qua any acquiescence thereof by the defence. However, the aforesaid submission is unacceptable to this Court as the learned counsel for the respondents while holding the prosecution witnesses to cross-examination stands enjoined to with utmost skill besides with extreme wariness formulate the suggestions to be put to the prosecution witnesses. A defence counsel for negativing the testifications of the prosecution witnesses occurring in their respective examinations in chief stands enjoined to put suggestions to them couched in a disaffirmative phraseology whereupon the prosecution witnesses would proceed to render their answer thereto either in the affirmative or in the negative. However, the learned defence counsel while holding PW-1 to cross examination rather has proceeded to couch in an affirmative phraseology the apposite suggestions which he purveyed to PW-1 while holding her to cross examination, answer(s) whereto also stood elicited from her in the affirmative. The sequel of the aforesaid affirmative couching of the phraseology of the apposite suggestions put by the learned defence counsel to PW-1 while holding her to cross-examination cannot hold any communication than of the defence acquiescing to the factum of both Kishore Kumar and Ashok Kumar recording their respective presence at the relevant site of occurrence at the stage when the genesis of the prosecution case erupted. Therefrom it was inapt for the learned trial Magistrate to conclude qua with PW-1 while testifying qua the aforesaid facet hers hence improving besides detracting from her previous statement in writing wherein she disclosed qua accused Kishore Kumar recording his presence at the relevant site of occurrence in contradiction whereof she testified qua rather accused Ashok Kumar recording his presence at the relevant site of occurrence her testification hence standing vitiated with the taints aforesaid nor it was apt for the learned trial Magistrate to conclude qua with blatant contradictions occurring in the testification of PW-1 embodied in her examination in chief vis.a.vis. her previous statement recorded in writing wherein the presence of both Ashok Kumar and Kishore Kumar at the relevant site of occurrence stood unembodied, its vigour hence standing eroded besides dispelled, conspicuously when the effect of the aforesaid acquiescence of the defence for reasons aforestated is qua both accused Ashok Kumar and co-accused Kishore Kumar recording their presence at the relevant site of occurrence.

11. Apparently in the previous statement qua the prosecution case embodied in F.I.R. comprised in Ext.PW-1/A there occurs a bespeaking therein by the complainant qua Kishore Kumar threatening to eliminate Mukesh Kumar by firing a pistol shot at him in consonance therewith the learned defence counsel while holding PW-1 to cross examination put a suggestion to her couched in an affirmative phraseology whereto PW-1 rendered an apposite affirmative answer thereupon the inevitable sequel which is warranted, is qua the defence acquiescing to the aforesaid factum yet unlike the sequel emanating from the precedingly alluded acquiescence made by PW-1, the effect of the acquiescence of the defence of Ashok Kumar at the relevant time wielding a pistol would not capitalize any inference qua thereupon the prosecution succeeding in proving qua accused Ashok Kumar wielding a pistol significantly when on a close reading of the cross-examination of the Investigating Officer it is apparent qua its unveiling qua during the course of his holding investigations his not recovering any pistol from the possession of the accused nor obviously any memo in consonance therewith neither stood adduced in

evidence nor stood concomitantly proven. In sequel thereto it appears of the prosecution not proving the factum of Ashok Kumar wielding a pistol more especially when on conclusion qua the investigations held by the Investigating Officer no recitals occur in the apposite report filed by him before the Court concerned holding therewithin echoings qua accused Ashok Kumar while holding a pistol his infracting the provisions of the Arms Act.

12. The learned trial Magistrate had concluded qua the prosecution abysmally wanting in adducing cogent proof for succoring the charge qua the accused respondents qua theirs committing an offence punishable under Section 325 IPC arising from the teeth of Mukesh Kumar standing dislocated from his denture on blows standing perpetrated upon him by the accused. Also on anvil of the prosecution witnesses deposing contrarily qua the factum aforesaid besides on anvil of the prosecution not proving the apposite MLC nor the prosecution proving the report of the radiologist concerned who conducted an x-ray examination of the denture of Mukesh Kumar, it concluded of hence the aforesaid factum remaining unsubstantiated. Initially the learned Additional Advocate General makes a submission qua with the prosecution witnesses in their respective cross-examinations significantly PW-1, PW-2 and PW-3 while meteing apposite affirmative answers to the suggestions couched in an affirmative phraseology as stood put to them by the learned defence counsel suggestion(s) whereof while encompassing the facet aforesaid hence holding a loud proclamation of the defence acquiescing qua the teeth occurring in the denture of Mukesh Kumar suffering dislocation besides their falling apart therefrom. However, the aforesaid submission warrants its standing discountenanced given the Investigating Officer in his cross-examination echoing therein qua on Mukesh Kumar recording his presence before him his complaining qua only his suffering pain in his denture whereas his thereat not detecting any of his teeth standing dislocated therefrom or their falling apart from his denture. The aforesaid unfoldments made by the Investigating Officer during the course of his standing subjected to cross-examination by the learned defence counsel when obviously is enjoined to be read in coagulation with the testifications occurring in the cross-examination of the prosecution witnesses who contrarily on apposite affirmative suggestions qua the facet aforesaid put respectively to them by the learned defence counsel meted affirmative answers thereto, in sequel whereto the apposite conclusion which warrants its standing formed by this Court significantly when the Investigating Officer on his standing subjected to cross-examination by the learned defence counsel he voices therein qua at the relevant time his not detecting the teeth occurring in the denture of Mukesh Kumar suffering any dislocation or theirs falling apart therefrom yet with the learned APP concerned not thereupon concerting to belie him by making a request upon the learned Magistrate for holding him to cross-examination qua the factum aforesaid begets an inference qua this Court standing constrained to conclude qua the prosecution acquiescing to the factum of the teeth occurring in the denture of Mukesh Kumar neither standing dislocated nor any of his teeth occurring therein falling apart.

13. Moreover, reiteratedly when this Court for reasons aforestated has concluded qua the Investigating Officer belying the testifications of other prosecution witnesses qua the facet aforesaid also when with his hence belying the testifications of the other prosecution witnesses qua the relevant facet aforesaid he stood not concerted by the learned APP to stand subjected to further examination or further cross-examination whereupon hence it is to be concluded of the prosecution acquiescing qua the factum of the relevant testifications qua the facet aforesaid occurring in the cross-examination of the Investigating Officer enjoying an aura of truth besides credibility. Also an inference stands erected qua the aforesaid testification of the Investigating Officer embodied in his cross-examination countervailing the effect of affirmative answers rendered by the prosecution witnesses to the apposite affirmative suggestion put to them by the learned defence counsel while holding them to cross-examination.

14. Furthermore, the prosecution was enjoined to significantly with the MLC concerned also the report of the Radiologist who subjected the denture of Mukesh Kumar to X-ray examination not falling within the ambit of Section 293 Cr.P.C whereupon alone the aforestated apposite report(s) hence falling within the statutory ambit of Section 292 Cr.P.C. would render

them to be per se admissible dehors their respective authors not stepping into the witness box. In sequel thereto it was imperative for the prosecution to prove the apposite MLC prepared by the doctor concerned qua victim Mukesh Kumar also to prove the apposite X-ray conducted by the radiologist concerned by its leading their respective authors into the witness box. The prosecution omitted to discharge the aforesaid onus of hence cogently proving the apposite MLC qua Mukesh Kumar besides the apposite report prepared qua him by the Radiological expert whereupon it is to be concluded of the prosecution not proving the contents existing therein. In sequel, thereto it is to be concluded of the prosecution not succeeding in proving the charge under Section 325 IPC against the accused.

15. Shirt Ext.P-1 stood recovered under memo Ext.PW-1/B and one of the witnesses thereto PW-4 has proven the factum of his signature occurring in memo Ext.PW-1/B whereunder its recovery stood effectuated. Also in his testification PW-4 echos qua Ext.P-1 belonging to PW-1 consequently with his admitting the occurrence of his signatures on Ext.PW-1/B wherein its recovery stood effectuated he stands estopped by the mandate of Sections 91 and 92 of the Indian Evidence Act to resile from its contents whereupon obviously an inference qua hence unflinching proof emanating from PW-4 qua effectuation of the relevant efficacious recovery thereunder can stand formidably erected besides with PW-4 also deposing qua Ext.PW-1/B standing owned by PW-1 whereupon his testification in contradiction with PW-1 qua its begetting tearings not as deposed by PW-1 at the latter's house but at Berthin Chowk pales into insignificance especially when the factum aforesaid of its begetting tearings at the house of PW-1 when stands unveiled in the examination in chief of PW-1 has remained unconcerted to stand rid of its sanctity by the learned defence counsel while holding her to cross-examination by his putting apposite suggestions for hence eroding the tenacity of the aforesaid unfoldments occurring in the examination in chief of PW-1. In sequel thereto also the effect of PW-4 contradicting PW-1 qua the relevant tearings brone on the shirt comprised in Ext.P-1 standing begotten not at the house of PW-1 rather at Berthin Chowk looses its force besides effect nor also thereupon the genesis of the prosecution case qua the relevant tearings qua the shirt of PW-1 standing begotten at her house stands uneroded of its sanctity. A close reading of the testifications of the prosecution witnesses does unfold of the learned defence counsel while holding them to cross-examination putting affirmative suggestion to them holding therewithin communication qua the accused dragging victim mukesh Kumar upto Berthin Chowk whereat they belaboured him whereto affirmative answer stood meted by the prosecution witness. The natural corollary thereof is of with the defence acquiescing to the factum of the accused respondent dragging victim Mukesh Kumar upto Berthin Chowk whereat they belaboured him, the factum aforesaid warranting imputation of credence thereupon.

16. Since none of the prosecution witnesses depose qua any incriminatory role in the alleged occurrence of accused Jeevan Kumar hence he stands acquitted of the charge framed against him in sequel whereto the judgement impugned herebefore against him is maintained and affirmed.

17. For the reasons which have been recorded hereinabove, this Court holds that the learned Judicial Magistrate has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned Judicial Magistrate suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record. In sequel thereto, I find merit in the instant appeal, which is accordingly allowed and the judgment of acquittal qua accused respondents Ashok Kumar and Kishore Kumar rendered by the learned Judicial Magistrate, Ghumarwin, District Bilaspur, is quashed and set-aside. Consequently, for the reasons aforesaid the accused respondents Ashok Kumar and Kishore Kumar stand convicted for theirs committing offences punishable under Sections 451, 323 and 506 read with Section 34 IPC whereas they stand acquitted for offences punishable under Section 325 IPC. They be produced before this Court on 16th December, 2016 for theirs being heard on the quantum of sentence.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Sub Division Officer (Civil)-cum-Land Acquisition Collector. .....Appellant.

Versus

Harbhagwant Singh .....Respondent.

RFA No.111 of 2009 along with
RFAs No. 304, 307, 308, 337, 344, 345, 346, 347, 348, 349, 350, 351 and 352 of 2011
Reserved on: 17th November, 2016.
RFA No. 358 of 2011 along with
RFAs No. 359, 360, 361, 362, 363 and 364 of 2011.
Reserved on: 18th November, 2016.
Decided on : 28th November, 2016.

Land Acquisition Act, 1894- Section 18- The land was acquired for the extension of Airport, Gaggal – the land owners sought reference and the Reference Court enhanced the compensation – aggrieved from the order, the present appeal was filed – held in appeal that exemplar sale deed was executed subsequent to the date of notification and cannot be relied upon - the benefit of 20% increase was also not permissible – appeal allowed- award of the reference Court set aside and that of the Land Acquisition Collector restored. (Para-6 to 13)

Cases referred:

A. Natesam Pillai versus Special Tahsildar, Land Acquisition, Tiruchy, (2010)9 SCC 118
K. Posayya and others versus Special Tahsildar, (1955)5 SCC 233
Bhakra Beas Management Board & Anr. Versus State of H.P. & others, Latest HLJ 2003(H)) 1202

For the Appellant (s): Mr. Vivek Singh Attri, Deputy Advocate General.
For Respondent(s) : Mr. R.K. Sharma, Senior Advocate with Mr. Mohan Sharma, Advocate.
For the applicants in CMP No. 9535 of 2016 in RFA No.352 of 2011 : Mr. Sanjay Jaswal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

All the aforesaid appeals are being disposed of by a common judgment as they all pertain to lands which stood acquired under a notification common each of them besides thereupon the Land Acquisition Collector pronounced a common award.

2. Under the impugned awards recorded by the learned Reference Court(s), the latter assessed compensation qua the lands of the landowners @ Rs.750/- per square meter, whereupon, the compensation amount assessed qua the lands of the landowners by the Land Acquisition Collector suffered a steep hike. The State of Himachal Pradesh, standing aggrieved by the impugned awards of the learned Reference Court whereupon it for begetting their reversal has instituted herebefore the instant appeal(s).

3. RFA No. 358 of 2011 stands directed against the impugned award rendered on 22.5.2010 in RBT Ref. Case No. 28-K/05/03 by the learned Reference Court whereby it on the anvil of previous awards comprised in Ex.PW1/B and in Ex. C-1 has qua lands of the respondents concerned herein assessed compensation amount at par with the compensation

amount determined qua the lands of the landowners in RBT Ref. Case No.47-K/05/03, wherefrom RFA No. 352 of 2011 has arisen.

4. The lands of the landowners were brought to acquisition for the purpose of extension of Air Port at Gaggal. In respect of the lands of the landowners as stood brought to acquisition, the Land Acquisition Collector, on anvil of the annual average market price of lands prevailing in the mohal concerned at the stage contemporaneous to the issuance of the apposite notification had thereupon, assessed compensation qua the lands brought to acquisition. The landowners standing aggrieved by the relevant pronouncement of the Land Acquisition Collector, had therefrom preferred reference petitions before the learned Reference Court whereupon the latter proceeded to pronounce the relevant awards impugned hereat.

5. The learned Reference Court while pronouncing its rendition in RBT Ref. Case No. 55-K/2003, (pronouncement whereof stood relied upon by the learned Reference Court concerned in making its pronouncement in RBT Ref. Case No. 47-K/05/03) wherefrom RFA No. 111 of 2009 has arisen had computed compensation qua the lands of the landowner(s) by placing reliance upon sale exemplar comprised in Ex.PW3/A. For reliance thereupon by the learned Reference Court to hold a sanctified aura of validity, it was incumbent upon the learned Reference Court to ensure qua existence therebefore of evidence pronouncing qua satiation standing begotten qua the twin legal parameters (a) proximity in location angle occurring inter se the lands/land comprised in sale exemplar Ex.PW3/A vis-a-vis the lands of the landowners as stood brought to acquisition and (b) The execution of Ex.PW3/A holding proximity in time angle vis-a-vis the issuance of an apposite notification for bringing to acquisition the lands of the landowners.

6. At the outset, it is imperative to determine from the evidence as exists herebefore qua satiation standing begotten qua the enshrined parameter qua proximity in time angle occurring inter se issuance of the apposite notification under the Act whereupon the lands of the landowners stood brought to acquisition vis-a-vis the execution of Ex.PW3/A, whereupon, reliance as stood placed thereupon would hold tenacity. The principle of proximity in time occurring inter se execution of Ex.PW3/A vis-a-vis the issuance of the apposite notification whereupon the land/lands of the landowners stood brought to acquisition would stand satiated on Ex.PW3/A standing provenly executed in close proximity preceding the issuance of a notification under Section 4 of the Land Acquisition Act (hereinafter referred to as the Act) or its execution occurring in contemporaneity vis-a-vis the issuance of the apposite notification under the Act whereupon the lands of the landowners stood brought to acquisition. However, hereat the execution of the sale exemplar embodied in Ex.PW3/A occurred on 3.11.2000 whereas the apposite notification under the Act whereupon the lands of the landowners stood brought to acquisition, stood prior thereto issued on 28.6.1999. However, the mere factum qua the occurrence of execution of Ex.PW3/A taking place subsequent to the issuance of the apposite notification under the Act, would not dispel its sanctity nor thereupon the learned Reference Court would stand faulted in placing reliance thereupon unless as mandated in a verdict recorded by the Hon'ble Apex Court reported in ***A. Natesam Pillai versus Special Tahsildar, Land Acquisition, Tiruchy, (2010)9 SCC 118,*** the relevant paragraph No.13 whereof stands extracted hereinafter, unflinching evidence stood adduced before the learned Reference Court in portrayal of the market value borne by the lands occurring in proximity to the location of the land(s) which stood brought to acquisition earlier thereto besides thereupto its execution remaining unfluctuated besides stable also evidence standing adduced qua their occurring no apparent upsurgings or hikes in the market value of the apposite lands borne on the apposite post notification executed sale exemplar since the issuance of the apposite notification under the Act upto the execution of the sale exemplar comprised in Ex.PW3/A. However, with a portrayal standing embodied in Ex.PW3/A qua the value of the lands depicted therein standing constituted in a sum of Rs.45,000/- per kanal at a stage subsequent to the issuance of the apposite notification under Section 4 of the Act whereas with PW2 Vinod Kumar in his testification communicating therein qua the land(s) brought to acquisition holding a value Rs. 5 to 6 lacs per kanal whereupon obviously an evident steep hike since the issuance of the apposite notification

under Section 4 of the Act vis-a-vis the occurrence of execution of a sale exemplar embodied in Ex.PW3/A, stands evidently evinced. Accentuated vigour to the inference aforesaid qua since in close contemporaneity to the issuance of the apposite notifucation under the Act whereunder the lands of the landowners stood brought to acquisition upto the stage of post notification executed sale exemplar comprised in Ex.PW3/A, the market value of lands occurring in close proximity vis-a-vis the lands of the landowners noticing fluctuations besides escalations stands galvanized from the testification of RW-1, who has therein unveiled qua in close contemporaneity to the issuance of the apposite notification, the market value borne by the lands in the mohal concerned standing constituted in a sum of Rs.14,974/- per kanal, whereas, with the market value of land comprised in Ex.PW3/A pronouncing therewithin qua its sale consideration standing constituted in a sum of Rs.45,000/- per kanal, is a loud besides an apparent disclosure qua the mandate of the Hon'ble Apex Court qua any reliance placed upon Ex.PW3/A being unbereft of any stain of vitiation unless evidence stands adduced in portrayal of the market value of the relevant lands at the stage contemporaneous to the issuance of the apposite notification upto the execution of the post notification executed sale exemplar comprised in Ex.PW3/A not unraveling fluctuations or escalations since therefrom upto the execution of Ex.PW3/A, whereas, with hereat stark noticeable fluctuations besides steep hikes in the value of the relevant lands since the stage contemporaneous to the issuance of the apposite notification upto the execution of Ex.PW3/A are vividly apparent thereupon the mandate of the Hon'ble Apex Court for reliance being placed upon a post notification executed sale exemplar comprised in Ex.PW3/A stands infracted, rendering reliance placed thereupon by the Reference Court to hold no vigour. Necessarily when reiteratedly the market value of the relevant lands located in proximity to the lands brought to acquisition display a visible escalation contrarily when there was a surging ahead of the market value of lands occurring in proximity to the land(s) brought to acquisition, the principle envisaged in the relevant paragraph of the aforesaid citation qua a post notification executed sale exemplar being amenable for reliance being placed thereupon only on evidence surging forth in personification qua the market value of lands prevailing in the locality whereat the lands of the landowners brought to acquisition stood located at the time contemporaneous to the issuance of the apposite notification or in close preceding proximity prior thereof remaining upto the occurrence of execution of Ex.PW3/A stable besides unfluctuated, hence, standing visibly transgressed. Moreover, infraction of the principle encapsulated in the aforesaid citation qua a post notification executed sale exemplar holding probative sinew for reliance being placed thereupon for determining compensation amount qua the apposite lands as stood prior thereto subjected to initiation of acquisition proceedings in respect thereof, on eruption of evidence qua since the issuance of the apposite notification upto the execution of the apposite post notification executed sale exemplar there occurring no visible steep hike in the value of lands located in proximity to the relevant lands, stands also reiteratedly triggered, by the factum of RW-1 testifying qua the five year average market value of the lands located in proximity to the lands of the landowners as stood brought to acquisition at the stage contemporaneous to the issuance of the apposite notification standing detected to be in a sum of Rs.14,974/- per kanal whereas with the relevant apposite post notification executed sale exemplar comprised in Ex.PW3/A depicting therewithin the market value of the land borne thereon to hold a value of Rs.45000/- per kanal does hold a stark display qua the prices of the relevant lands prior to or at the stage contemporaneous to the issuance of the apposite notification under the Act upto the execution of Ex.PW3/A noticing a steep hike rather than there occurring no apposite fluctuations since the issuance of the apposite notification under Section 4 of the Act upto the execution of Ex.PW3/A, whereupon imputation of reliance upon the apposite post notification executed sale exemplar Ex.PW3/A, is bereft of sanctity. Paragraph No.13 of the aforereferred verdict of the Hon'ble Apex Court reads as under:-

> "This Court in Administrator General of W.B. v. Collector, Varanasi (1988)2 SCC 150 has held:
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> > "13. ….Such subsequent transactions which are not proximate in point of time to the acquisition can be taken into account for purposes of determining

whether as on the date of acquisition there was an upward trend in the prices of land in the area. Further under certain circumstances where it is shown that the market was stable and there were no fluctuations in the prices between the date of the preliminary notification and the date of such susbequent transaction, the transaction could also be relied upon to ascertain the market value. This Court in State of U.P. v. Major Jitendera Kumar, (19082)2 SCC 382 observed:

"3..... It is true that the sale deed, Ex. 21 upon which the High Court has relied is of a date three years later than the notification under Section 4 but no material was produced before the court to suggest that there was any fluctuation in the market rate at Meerut from 1948 onwards till 1951 and if so to what extent. In the absence of any material showing any fluctuation in the market rate the High Court thought it fit to rely upon Ext. 21 under which the Housing Society itself had purchased land in the neighbourhood of the land in dispute. On the whole we are not satisfied that any error was committed by the High Court in relying upon the sale deed, Ext. 21."

But this Principle could be appealed to only where there is evidence to the effect that there was no upward surge in the prices in the interregnum. The burden of establishing this would be squarely on the party relying on such subsequent transaction." (emphasis supplied)." ....(p.122).

7. The further effect of the landowners not adducing evidence within the ambit of the aforesaid exception to the normal rule qua an apposite post notification executed sale exemplar not warranting imputation of reliance thereupon, is qua also an inference standing erected qua the apposite;y executed post notification sale exemplar holding a vice of rigidness also the sale consideration embodied therein being unamenable for any apposite reliance standing placed thereon, significantly, when it stood evidently executed with the executants thereto while perceiving the impending launching of acquisition proceedings qua lands occurring in proximity thereof, theirs inflating the sale consideration pronounced therein merely for begetting qua the lands of the landowners determination of an unfair and unjust compensation amount. In formulating the aforesaid expostulation of law, this Court is supported by a verdict of the Hon'ble Apex Court reported in ***K. Posayya and others versus Special Tahsildar, (1955)5 SCC 233***, relevant paragraph No.4 whereof stands extracted hereinafter:-

"4. The question, therefore, is what is the correct principle of law to be applied in determining the market value of vast extent of lands acquired for a project. Admittedly, Ex. A-1 dated 31.12.1980 is the torchlight for the claimants to lay higher claim. It is a post notification sale of the land situated in Chakrdevrapalli. According tot he claimants, it is situated at a distance of 3 to 4 kms from Village Alivelu. According to Land Acquisition Officer, the distance between the two villages is 30 kms. Possession of these lands admittedly was taken between 15.4.1977 i.e. prior to the notification under Section 4(1) and 14.7.1980, shortly after the notification under Section 4 (1). It would, thus, be clear that the sale deed was brought into existence after the notification and possession was taken of the lands. This is the notorious document relied in all the subsequent references. Only the attestor was examined in proof of the documents. It would be obvious that it was a brought-up document to inflate the market value of the lands under acquisition not only in this village but in the surrounding villages. The High Court, therefore, was right in rejecting the said document and refusing to place reliance for determination of the compensation, Exhibit !-2, judgment of the Single Judge of the High Court in AS No. 2500 of 1986 arising out of OP No.49 of 1984 of the same reference court. The lands therein were acquired for Vengalrayasagar project. They are the wet lands. Since the counsel for the Government did not appear and no material was placed on record and since in earlier cases, award was confirmed for a sum of Rs.22,000 per acre, the Single Judge enhanced the compensation to Rs.22,000. That is obviously

> an illegal approach adopted by the High Court in determining the market value of project area i.e. large tracts of lands covered by the project. It would appear that the other references were not brought to the notice of the learned Judges. Therefore, it cannot be formed the basis to fix the market value at higher rate, though the judgment may be wrong." ...(p.236)

8. Be that as it may, the non existence at the apposite stage of sale exemplar(s) executed prior to or in contemporaneity to the issuance of the apposite notification under the Act whereupon alone the learned Reference Court held the requisite facilitation for its thereupon assessing a just, reasonable and fair compensation amount vis-a-vis the lands of landowners, was not a sufficient factor for it to rely upon a legally frail Ex.PW3/A rather it was enjoined to mete reverence to the award of the Land Acquisition Collector, who while determining compensation amount qua the lands of the landowners meted deference to the apposite market value as stood approved by the District Collector concerned.

9. The learned Senor Counsel appearing for the respondents herein has concerted to validate the verdicts recorded by the Reference Court by making an espousal qua with the learned Reference Court meteing 50% deduction from the value of the land borne in Ex.PW3/A, renders the apposite verdicts recorded on the land reference petitions constituted therebefore by the landowners to fall within the ambit of the principle enshrined by this Court in a decision reported in ***Bhakra Beas Management Board & Anr. Versus State of H.P. & others, Latest HLJ 2003(H)) 1202*** wherein this Court has proceeded to mere 40% deduction qua the value of the land(s) borne on the sale exemplar existing therebefore, wherefrom this Court assessed compensation qua the lands of the landowners, arrayed as respondents therein. The pronouncement recorded by this Court in the aforereferred case would hold vigour only when Ex. Px which existed therebefore as a recoknable sale exemplar for assessment of compensation qua the lands of the landowners therein alike Ex.PW3/A embodying therein a post notification executed sale exemplar. However, an incisive, close circumspect reading of the pronouncement relied upon by the learned Senior Advocate appearing for the respondents herein unveils qua Ex. Px which constituted therebefore the relevant sale exemplar standing executed six year's prior to the issuance of the apposite notification under the Act whereunder the lands of the landowners therein stood brought to acquisition. The aforesaid factum per se brings-forth a visible distinctivity inter se Ex. Px vis-a-vis Ex.PW3/A. Consequently, when thereat Ex. Px stood executed prior to the issuance of the apposite notification under the Act whereas with hereat Ex.PW3/A evidently comprising a post notification executed sale exemplar, thereupon the verdict relied upon by the learned Senior Counsel for the respondents herein does not fall within the ambit of the rule encapsulated in the binding judgments of the Hon'ble Apex Court for thereupon reliance thereon holding any validation.

10. Consequently, with Ex.PW3/A being wholly unreliable rather warranting its standing discarded, the mere factum of the learned Reference Court meteing 50% deduction vis-a-vis the price of land comprised therein for thereupon its awarding compensation amount qua the lands of the landowners herein neither falls within the ambit of the ratio propounded in the judgment relied upon by the learned Senior Counsel appearing of the respondents herein nor also thereupon the relevant material pronouncing upon the market value borne by the lands of the landowners at the apposite stage in contemporaneity vis-a-vis the issuance of the apposite notification under the Act depicting therein the relevant reliable approved assessment meted thereto by the District Collector warranted any disimputation of credence as untenably done by the learned Reference Court. Reiteratedly when Ex.PW3/A is wholly discardable also when for reasons aforestated reliance thereupon by the learned Senior Counsel when stands hinged on anvil of an evident inapplicable pronouncement hereat recorded previously by this Court in the afore referred citation renders any reliance thereupon to be grossly untenable, corollary whereof is the mere factum of meteing of a 50% deduction from the value of the land borne therein vis-a-vis the lands of the landowners herein for thereupon assessing compensation amount qua the respondents herein would not validate any reliance placed thereupon by the learned Reference Court. The learned Senior Counsel has remained grossly unmindful qua in the citation relied

upon by him, this Court has meted a 40% deduction from the value of lands borne in Ex. Px, a pre-notification executed sale exemplar therein, whereupon it determined the compensation amount therein merely on the anvil of disproportionateness in size of land borne therein vis-a-vis the size of acquired lands therein, his unmindfulness qua the gravity of the aforestated ratio propounded therein has led him to misespouse qua parity emerging in the factual matrix prevailing therein vis-a-vis the factual matrix herein whereupon naturally he mis espouses qua its applicability hereat.

11. Furthermore, the learned Reference Court has held qua landowners standing entitled to 20% per anum increase on the market value assessed on the anvil of Ex.PW3/A by him qua the lands of the landowners, entitlement whereof stands concluded by it commence from 28.6.1999 whereat the apposite notification issued, upto 16.11.2011 whereat the relevant award(s) stood pronounced by it. However, the aforesaid benefit bestowed by the learned Reference Court upon the landowners is ridden with a gross vice of untenability arising from the factum of it bestowing the aforesaid benefit upon the landowners/respondents herein on the anvil of the aforesaid discradable post notification executed sale exemplar embodied in Ex.PW3/A also its thereupon detracting from the trite expostulation of law qua the judicially determined market value of lands prevalent at the stage contemporaneous to the issuance of the apposite notification alone constituting the anvil wherefrom the statutory price hike was meteable.

12. For the reasons aforestated, the award(s) of the Reference Court suffers from a gross illegality spurring from gross mis-appreciation of the import of Ex.PW3/A besides its undermining the impact thereon of the mandate of the verdicts of the Hon'ble Apex Court referred to hereinabove. Consequently, the instant appeals are allowed and the award(s) rendered by the learned Reference Court are set aside. In sequel, the award(s) of the Land Acquisition Collector is maintained and affirmed.

CMP No. 9535 of 2016 in RFA No.352 of 2011.

13. During the pendency of the aforesaid RFA, CMP No. 9535 of 2016 stands filed herebefore by the applicants, namely, Vipin Kumar, Bhupinder Kumar and Ravinder Kumar claiming therein a relief qua theirs being permitted to be impleaded as party(ies) in the array of respondents, on ground of the impugned rendition assessing compensation qua the respondent(s) therein standing constituted in a sum in gross disproportion qua his entitlement thereto, entitlement whereof stands borne in the apposite revenue record. However, in the face of an averment standing recorded therein qua Civil Suit bearing No. 56/2014, titled as Bhupinder Kumar & others versus Neeru Ram and others pending before the Civil Court concerned for rendition of a decree for declaration, permanent prohibitory injunction and mandatory injunction, qua the facet aforesaid, thereupon the relief for impleading of the applicants herein in the apposite array of the parties to the lis hereat also in-consequence to their impleadment any pronouncement thereupon would forestall the Civil Court concerned to record its apposite verdict on the relevant issue(s) raised therebefore. For obviation whereof the application stands dismissed. However, for not prejudicing the rights canvassed in the Civil Suit by the applicants herein, it is directed qua till the Civil Court concerned records its decision in the aforesaid Civil Suit, the compensation amount, if any, which remains undisbursed qua the respective landowners in RFA No. 352 of 2011 shall not be released in their respective favour.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Ganga Devi ….Petitioner.
Versus
Om Prakash ….Respondent.

C.R. No. 66 of 2016.
Date of decision: 29th November, 2016.

Code of Civil Procedure, 1908- Order 9 Rule 13- Applicant filed an application for setting aside ex-parte decree on the ground that she was not properly served – the application was dismissed by the Trial Court- an appeal was filed, which was also dismissed – held, that process server had made the endorsement on the back of the summons regarding the personal service along with the copy of plaint – the endorsement was not proved to be false – the service was properly effected – appeal dismissed.(Para-3 to 5)

For the Petitioner: Mr. P.S. Goverdhan, Advocate.
For Respondent : Mr. Dinesh Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

Under Ex. AW1/D, the learned Civil Judge (Junior Division), Solan, ex-parte decreed the suit of the plaintiff. The pronouncement of the Civil Court aforesaid occurred on 23.8.2011. On 7.03.2012, the defendant/petitioner herein motioned the learned trial Court under an application constituted there before under Order 9, Rule 13 of the CPC, wherein, she concerted to beget quashing of the ex-parte pronouncement recorded by the learned trial Court, on anvil of hers not coming to be properly served in consonance with the mandate of Order 5, Rule 2 of the CPC constituted in the factum of the process server concerned in transgression thereof while proceeding to effectuate personal service of the apposite summons upon her, the latter remaining unappended with a copy of plaint nor obviously the process server concerned delivering its copy to the defendant at the stage when he effectuated personal service of summons upon her in Civil Suit No. 47/1 of 2010.

2. The aforesaid ground stood discountenanced by the learned trial Court. In an appeal carried therefrom by the defendant before the learned District Judge, the latter affirmed the pronouncement recorded by the learned trial Court on the application moved therebefore by the defendant/petitioner herein under Order 9, Rule 13 of the CPC. Consequently, the defendant standing aggrieved by the concurrently recorded renditions of both the learned Courts below has instituted the instant revision petition whereby she concerts to beget their reversal hereat.

3. As aforestated with the defendant in her apposite application constituted under Order 9, Rule 13 of the CPC before the learned trial Court canvassing therein qua the copy of summons at the relevant stage when the process server effectuated personal service of summons upon her, remaining unappended with a copy of plaint, is an abundant portrayal of the defendant acquiescing to the factum of the process server concerned effectuating personal service of summons upon her. In sequel, thereto, the trite factum warranting adjudication is whether the contention of the learned counsel for the defendant qua the reason assigned in the concurrently recorded renditions of both the learned Courts below qua at the relevant time whereat the process server concerned effectuated upon her personal service of summons, the latter standing accompanied by a copy of the plaint also the latter standing delivered to the defendant not holding any tenacity acquires any succour.

4. The counsel for the defendant/petitioner in making the aforesaid submission qua it not holding any tenacity hinges it upon the factum qua with the process server concerned recording an endorsement on the reverse of the relevant summons wherewithin a display is held qua his at the relevant time also delivering a copy of the plaint to the defendant enjoined the plaintiff/respondent herein to examine the process server concerned for thereupon facilitating unearthings from him qua the veracities of the recitals occurring on the reverse of the summons, whereas the plaintiff omitting to examine the process server rendered the endorsement made on the reverse of the summons by the process server concerned to not hold any validity or authenticity. However, the aforesaid contention holds no force as apparently the onus in proof qua the factum of the defendant standing not come to be properly served arising from the factum

of the summons at the relevant time they stood uncontrovertedly delivered to her theirs remaining unaccompanied by a copy of the plaint nor the latter standing delivered upon her, was squarely cast upon the defendant/petitioner herein. Also the defendant/petitioner herein stood enjoined to by adducing emphatic sustainable evidence hence discharge the onus qua the aforesaid issue. In sequel, thereto, obviously, the plaintiff/respondent herein was not enjoined to discharge the onus on the aforesaid issue. In aftermath, with the onus qua the aforesaid issue remaining undischarged by the defendant/petitioner herein comprised in hers summoning the process server concerned for hers thereupon subjecting him to examination for making apposite elicitations from him for belying the efficacy of the endorsement made by him on the reverse of the summons wherein recitals stood embodied qua his alongwith personally serving a copy of summons upon the defendant his also thereat delivering a copy of the plaint to her, besides when the aforesaid endorsement would stand belied by the defendant by hers procuring the relevant apposite records available with the establishment of the learned trial Court. However, the defendant/petitioner omitted to make the aforesaid efforts for belying the efficacy of the endorsement made by the process server on the reverse of the summons wherein echoings are held qua his along with the summons delivering also a copy of the plaint to her, whereupon the apt sequel is of it holding validity. In aftermath, the argument addressed by the counsel for the petitioner before this Court qua the mandate of Rule (2) of Order 5 of the CPC standing infringed whereupon he submits qua no proper service standing effectuated upon the defendant holds no force also thereupon he cannot espouse qua the ex-parte decree pronounced upon the defendant wanting in efficacy. .

5. For the foregoing reasons, there is no merit in the instant petition, which is accordingly dismissed. The renditions impugned before this Court are maintained and affirmed. All pending applications also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Hem Ram & Another ….Appellants-Defendants

Versus

Bhagwan Dass & Others ….Respondents-Plaintiffs

Regular Second Appeal No.428 of 2006.
Judgment Reserved on: 21.11.2016
Date of decision: 29.11.2016

Transfer of Property Act, 1882- Section 60- Plaintiffs filed a civil suit for redemption of mortgage pleading that the land was mortgaged for Rs.240/- defendants pleaded that mortgagor had lost the right of redemption – the suit was dismissed by the Trial Court – an appeal was filed, which was allowed – held in second appeal that the land was mortgaged in the year 1930 and the period of redemption expired in 1971- however, Debt Redemption Act, 1976 furnished a fresh opportunity for getting the relief – mere expiry of 30 years from the date of mortgage does not extinguish the right of mortgagor- appeal dismissed. (Para-10 to 26)

Cases referred:

Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and Others, AIR 2014 SC 3447
Kanshi Ram and Another vs. Lachhman (Dead) Through LRs and Others, (2001)5 SCC 546
Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and others, AIR 2014 SC 3447
Ram Kishan & Ors. vs. Sheo Ram & Ors., AIR 2008 Punjab & Haryana 77
Bhandaru Ram vs. Sukh Ram, AIR 2012 HJP 1

For the Appellants: Mr.G.R. Palsra, Advocate.

For the Respondents: Mr.Ajay Kumar, Sr.Advocate with Mr.Dheeraj K. Vashishta, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-defendants against the judgment and decree dated 5.8.2006, passed by the learned District Judge, Solan, District Solan, H.P., reversing the judgment and decree dated 05.12.2005, passed by the learned Civil Judge(Senior Division) Kasauli, District Solan, H.P, whereby the suit filed by the appellants-plaintiffs has been dismissed.

2. Briefly stated facts, as emerged from the record, are that the respondents-plaintiffs *(hereinafter referred to as the 'plaintiffs')* filed a suit for possession by way of redemption of the mortgage to the effect that the land measuring 1-7-18 bighas and land measuring 1-1-11 Bigha comprised in Khata/Kthatauni No.28/55 and 13/16, total measuring 2-9-9 bighas, situated in Mauza Bandh and Bani, Pargana Ghar, Sub Tehsil Krishangarh was earlier owned by one Ram Baksh and thereafter on his death by his legal heirs Shiv Ram, Kanchnoo, Thankiya etc. out of whom Gopala successor-in-interest of Thankiya, one of the sons of Ram Baksh, had mortgaged his 1/5th share in this land in favour of one Shangaru for a sum of Rs.240/- in the year 1930. It is averred by the plaintiffs that on the death of Shangaru, he was succeeded by Chet Ram and on the death of Chet Ram by his wife Banto, who was recorded as mortgagee in possession of the entire suit land. It is further averred by the plaintiffs that in the year 1974 Banto sold her mortgagee rights in favour of appellants-defendants *(hereinafter referred to as the 'defendants')* 1 and 2 and mutation to this effect was accordingly attested by revenue authorities. The plaintiffs alongwith other share holders claiming to have succeeded to the entire land filed a suit for redemption of the mortgage in the trial court.

3. Defendants by way of filing written statement denied the locus standi of the plaintiffs to file the suit and their right and title to the property. It is averred by the defendants that they have purchased the land through registered sale deed. However, it is admitted that Shingaru was mortgagee of the suit land and after his death his estate was succeeded by Chet Ram and on his death Banto stepped into his shoes. It is denied that Banto had remarried after his death in 1953 and she had no right or interest in this suit land. It is also denied that Gopala had mortgaged 1/5th share out of the suit land. It is also alleged by the defendants that the mortgager had lost right, title or interest in the land in the year 1970, therefore, no question of redemption arose. In the aforesaid background, the defendants claimed themselves to be the owners of the suit land and sought dismissal of the suit.

4. On the pleadings of the parties, the learned trial Court framed the following issues for determination:-

"1. Whether the plaintiff is entitled to a decree of redemption and possession, as alleged? OPP.

2. Whether the sale deed No.136 dated 24.8.1974 is wrong, illegal and without jurisdiction and consequently mutation No.224 and 125 are null and void, as alleged? OPP.

3. Whether the plaintiff is entitled to a consequential relief of permanent prohibitory injunction ? OPP.

4. Whether the suit is not properly valued for the purpose of court fee and jurisdiction, as alleged ? OPD.

5. Whether the plaintiff has no locus standi to file the present suit, as alleged ? OPD.

6. Whether the suit lacks material better particulars, as alleged? If so its effect? OPD.
7. Whether the suit is not maintainable in the present form, as alleged? OPD.
8. Whether the suit is barred by limitation ? OPD.
9. Whether the defendants have spent more than Rs.75,000/- on the development of land, as alleged? If so, its effect? OPP.
10. Relief."

5. Subsequently vide judgment and decree dated 5.12.2005 learned trial Court dismissed the suit of the plaintiffs. Being aggrieved and dis-satisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiffs preferred an appeal before the learned District Judge, Solan, which came to be registered as Civil Appeal No.8-S/13 of 2006. Learned District Judge allowed the appeal and set aside the judgment passed by the learned trial Court. Resultantly, the suit of the plaintiffs for possession by redemption of the mortgage is decreed and the defendants are ordered to deliver the possession of the suit land, description whereof has been given above. Hence present Regular Second Appeal has been preferred by the appellants-defendants praying therein for setting aside the impugned judgment and decree dated 5.8.2006 passed by the learned appellate Court below.

6. This Court vide order dated 11.5.2007 admitted the appeal on the following substantial questions of law:-

"1. Whether the ld.first appellate court has misread the provisions of The H.P. Debt Reduction Act, 1976, which has materially prejudiced the case of the appellants?
2. Whether the provisions of Limitation Act, 1963 have overriding effect over The H.P. Debt Reduction Act, 1976?"

7. Mr.G.R. Palsra, learned counsel appearing for the appellants-defendants, vehemently argued that judgment passed by the first appellate Court is not sustainable in the eyes of law as the same is not based upon the proper appreciation of facts as well as law on the point and as such same deserves to be quashed and set aside. Mr.Palsra contended that learned first appellate Court misread the provisions with regard to redemption of mortgage and wrongly placed reliance upon the provisions of H.P. Debt Reduction Act, 1976 *(hereinafter referred to as 'Debt Reduction Act')* which was not applicable and attracted in the present case. While inviting the attention of this Court to the judgment passed by learned trial Court, Mr.Palsra strenuously argued that learned trial Court rightly came to the conclusion that the provisions of the *'Debt Reduction Act'* are not applicable in the present case since the plaintiffs had lost their right of redemption in the year 1970 i.e. prior to commencement of *'Debt Reduction Act'* in the year 1976. He further invited the attention of this Court to Section 6 of the Act to suggest that same was prospective in nature and in no situation could be made applicable in the case of plaintiffs who had admittedly lost their right to redeem the mortgage in the year 1970. He further invited the attention of this Court to Section 27 of the aforesaid Act to suggest that provisions contained in the Act referred to hereinabove could not be made applicable in the present case, especially in view of the fact that loan in terms of Act was advanced to the plaintiffs by predecessor-in-interest of the defendants prior to commencement of this Act and as such judgment passed by learned first appellate Court deserves to be quashed and set aside.

8. Mr.Palsra further argued that by no stretch of imagination provisions contained in the aforesaid Act could override the provisions of Limitation Act, 1963, wherein specific period of limitation of redemption of mortgage is prescribed for 30 years and grace period of 7 years has further been provided for old cases and as such, findings of the learned first appellate Court that the plaintiff was entitled to file suit at any time after commencement of the aforesaid Act deserves to be quashed and set aside being contrary to the provisions contained in the Act itself. While concluding his arguments, Mr.Palsra forcefully contended that bare perusal of judgment passed by learned first appellate Court itself suggests that appellate Court restricted its findings only qua

the issue of limitation, whereas all the other material points, as raised in the ground of appeal, were ignored. Whereas, being last fact finding Court, learned first appellate Court was expected to return findings qua all the issues and as such, judgment, totally being contrary to the provisions of law, as alleged, deserves to be quashed and set aside. He further stated that sale deed was executed in the year 1974, but there is nothing on record to suggest that it was challenged by the plaintiffs till 3rd June, 1996, when they filed suit which was completely time barred because limitation for challenging the sale deed is three years, but this aspect of the matter has been totally ignored by the learned first appellate Court and as such judgment deserves to be quashed and set aside.

9. In the aforesaid background, Mr.Palsra prayed that instant appeal may be accepted and judgment passed by learned first appellate Court may be quashed and set aside.

10. Mr.Ajay Kumar Sood, learned Senior Counsel duly assisted by Mr.Dheeraj K.Vashishta, Advocate, supported the judgment passed by learned first appellate Court. Mr.Sood, while referring to the judgment passed by learned first appellate Court, vehemently argued that same is based upon correct appreciation of facts as well as law on the point and as such there is no scope of interference, whatsoever, in any manner, as the learned first appellate Court has dealt with each and every aspect of the matter very meticulously. While refuting the contentions, having been put forth by Mr.Palsra, Mr.Sood invited the attention of this Court to the judgment passed by Hon'ble Apex Court in case titled: ***Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and Others, AIR 2014 SC 3447*** to demonstrate that special right of usufructuary mortgagor under Section 62 of the Transfer of Property Act to recover possession commences when mortgage money is paid out of rents and profits or partly by payment or deposit by the mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. Mr.Sood, while placing reliance upon judgment *supra*, forcefully contended that an usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. Mr.Sood further contended that it is undisputed that mortgage of land in favour of predecessor-in-interest of the defendants had been effected in the year 1930 and it was usufructuary mortgage as the possession of the property was delivered to the mortgagee with authority to enjoy all rights of the owner. He further stated that earlier period of 30 years was provided for redemption of usufructuory mortgage under Limitation Act, but with the introduction of *'Debt Reduction Act'* debtor could file the suit for redemption of mortgage or for accounts at any time after the commencement of the Act, which admittedly came into force in the year 1953 and as such learned first appellate Court, while accepting the appeal having been preferred by plaintiffs, rightly came to the conclusion that plaintiffs had right to file suit for redemption by virtue of provisions of aforesaid Act because the amount taken under mortgage by the mortgagee was nothing but a loan as defined in definition of land in *'Debt Reduction Act'*.

11. Lastly, Mr.Sood strenuously argued that now, in view of latest judgment *supra*, there is no force in the present appeal having been preferred by the appellants-defendants because it has been specifically held in the aforesaid case that mere expiry of period of 30 years from the date of mortgage does not extinguish the right of the mortgagor under Section 62 of the Transfer of Property Act. In the aforesaid background, Mr.Sood prayed for dismissal of the appeal.

12. I have heard learned counsel appearing for the parties and gone through the record of the case carefully.

13. After carefully perusing the pleadings on record as well as provisions of law applicable in the present case, this Court deems it fit to take both the substantial questions of law together for adjudication, as they are closely linked to each other.

14. It clearly emerges from the record that plaintiffs mortgaged the suit land in favour of predecessor-in-interest of appellants-defendants in 1930 and there is no dispute that it was usufructuary mortgage because possession of the property was delivered to mortgagee with

the authority to enjoy all rights of the owner. There is also no dispute with regard to the fact that earlier period of redemption of mortgage was 60 years, but, on coming into operation the Limitation Act, 1963, it was reduced to 30 years. But, in the cases where old Limitation Act applied, period of 7 years was given as grace period.

15. In the present case, as per defendants, period of limitation of 30 years is provided under Limitation Act after adding grace period of 7 years, which came to an end in the year 1971 and as such suit filed in the year 1996 by the plaintiffs was rightly dismissed being time barred by learned trial Court. Defendants further claimed that provisions of *'Debt Reduction Act'* cannot be made applicable in the present case because the same was applicable to only to that mortgage which was subsisting at that time and no benefit, if any, could be taken by mortgagee whose right to redeem has expired prior to commencement of provisions of *'Debt Reduction Act'*. Learned trial Court, while dismissing the suit of the plaintiffs being time barred, came to the conclusion that mortgagee had lost his right for redemption in the year 1970 i.e. 26.6.1970, after expiry of 30 years of period provided under Limitation Act. Learned trial Court further concluded that the provisions of *'Debt Reduction Act'* cannot be made applicable in the case of plaintiffs because this Act itself came in existence in the year 1976 and by that time right of mortgagor to redeem the mortgage had already extinguished. As per trial Court, provisions contained in *'Debt Reduction Act'* were not applicable in the case because it was prospective in nature. Accordingly, learned trial Court dismissed the suit of the plaintiffs being time barred by observing that a dead relief cannot be revived by coming into existence the provisions of *'Debt Reduction Act'* which already came into force in 1976.

16. Learned first appellate Court, taking contrary view, came to the conclusion that as per Section 6 of the *H.P. Debt Reduction Act, 1953,* mortgagor could file suit for redemption at any time after commencement of this Act because at that relevant time property mortgaged on 1930 was subsisting at the time of commencement of the Act. Apart from above, learned first appellate Court came to the conclusion that admittedly mortgagee Banto had transferred her mortgage rights in favour of defendants No.1 and 2 in the year 1974 vide sale deed Ex.DW-2/A in favour of appellants-defendants, which clearly suggests that, while making sale of mortgagee rights in favour of defendants, she made acknowledgement of her mortgagee right. Perusal of Ex.DW-2/A i.e. mortgage clearly suggests that mortgagee Banto transferred her mortgagee right in favour of defendants No.1 and 2 in the year 1974 vide sale deed. Perusal of aforesaid document Ex.DW-2/A clearly suggests that Banto had not sold the land as an absolute owner, rather she clearly stated in the sale deed that she has the mortgagee right in the landed property and selling the land as mortgagee, meaning thereby that defendants No.1 and 2 entered her shoes as a mortgagee. By no stretch of imagination, they became absolute owners as claimed by them. Now in view of aforesaid background, this Court would proceed to specifically answer the substantial question of law and it would be profitable to reproduce here Section 6 of H.P. Debt Reduction Act, 1976:-

> "6. Debtor's right to sue.-Notwithstanding the terms of any contract regarding the date or dates on which a debt shall become due, a suit to which this Act applies for the redemption of a mortgage or for accounts may be instituted by a debtor at any time after the commencement of this Act."

17. The use of expression *"at any time"* for filing a suit clearly indicates the intention of legislature to provide a fresh opportunity to the debtor for getting relief under the Act and as such, in no situation, it can be concluded that the aforesaid provision is prospective in nature. After carefully perusing the aforesaid provision of law, it is not understood as to how learned trial Court concluded that provision of this Act is applicable prospectively and debtors, who had taken loan as defined under the Act by mortgaging their property prior to commencement of this Act, had no right to institute a suit under Section 6 of this Act. Judgment passed by learned trial Court though suggest that during arguments, having been made by the parties before the trial Court, attention of the trial Court was invited to the judgment passed by the Hon'ble Apex Court in ***Kanshi Ram and Another vs. Lachhman (Dead) Through LRs and Others, (2001)5 SCC***

546, but learned trial Court was of the view that same is not applicable in the facts and circumstances of the case. However, this Court, after carefully perusing the law *supra* laid down by Hon'ble Apex Court, is of the view that the view taken by trial Court, while dismissing the suit, was blatantly incorrect, especially in view of aforesaid law laid down by Hon'ble Apex Court wherein, in the aforesaid case Hon'ble Apex Court, while setting aside the judgment passed by High Court, categorically observed that reason given by High Court in support of the findings that the suit was barred by limitation is that more than 30 years had elapsed since the date of mortgage when the suit was filed and as such mortgagor lost his right to redeem the property mortgaged is fallacious because it defeats the object and the purpose of the statute enacted by the legislature especially to give relief to debtors in the State.

18. At this stage, it would be profitable to reproduce the following paras of the judgment in ***Kanshi Ram's*** case *supra*:

> "8. Chapter III in which sections 5 to 9 are included deals with "Suits and Decrees". The sections in the chapter contain non-obstante clauses giving the provisions therein overriding effect over any law for the time being in force or decree or contract or agreement to the contrary.
>
> 9. Section 6 provides that notwithstanding the terms of any contract regarding the date or dates on which a debt shall become due; a suit to which this Act applies for the redemption of a mortgage or for accounts may be instituted by a debtor at any time after the commencement of this Act. (emphasis supplied).
>
> 15 The object of the Act and the scheme underlying it as obtained from the provisions made therein is to grant relief to debtors and enable them to get back properties mortgaged by them with possession for a loan. The use of expression "at any time" for making an application or filing a suit is indicative of the legislative intent that the Act provides a fresh opportunity to the debtor for getting relief under the Act. The legislature has taken care to make the relevant provisions of the Act granting relief to debtors by giving overriding effect over any law, agreement, contract or decree contrary to the provisions of the Act. It was not disputed before us during hearing of the case that the plaintiffs filed the suit under provisions of the Act for restoration of the possession of the mortgaged property. Undisputedly there is no decree for foreclosure in favour of the creditor/mortgagee.
>
> 16. In the backdrop of the above the question of limitation is to be considered. The reason given by the High Court in support of the finding that the suit was barred by limitation is that more than 30 years had elapsed since the date of the mortgage (February, 1946) when the suit was filed in 1981. Therefore the mortgagor had lost his right to redeem the property mortgaged. The provisions in section 27 of the Limitation Act have been considered in support of the finding. This reasoning appears to us to be fallacious. It defeats the object and the purpose of the statute enacted by the legislature specially to give relief to debtors in the State. The first appellate Court had given cogent reasons in support of its finding in favour of the appellants. The Court held and in our view, rightly that the suit was one for recovery of possession from the mortgagee who was in unauthorised possession of the mortgaged property after the mortgage loan was satisfied. The cause of action for filing such a suit under the Act arose when the enactment was enforced in 1979. Viewed from that angle the suit was filed in time and the trial court and the first appellate Court rightly recorded the findings to that effect. The High Court erred in reversing the concurrent finding of the courts below on the erroneous assumption that the suit was one for redemption of the mortgage simpliciter. It is relevant to note here that the present suit is not one filed under section 60 or 62 of the Transfer of Property Act. It is a suit filed for relief on the basis of the Himachal Pradesh Debt Reduction Act, 1976." (pp.548-551)

19. After carefully perusing the aforesaid law laid down by Hon'ble Apex Court, this Court sees no force in the contention put forth by the counsel representing the appellants-

defendants that the learned first appellate Court mis-read the provisions of *'Debt Reduction Act'*, rather judgment passed by learned first appellate Court is strictly in conformity with the view taken by the Hon'ble Apex Court in the aforesaid judgment and learned first appellate Court has rightly come to conclusion that suit for redemption under Section 6 of the *'Debt Reduction Act'* could be filed at any time after commencement of the Act. Moreover, mortgage made in the year 1930 was subsisting at the time of coming into force the aforesaid Act because there is nothing on record suggestive of the fact that decree, if any, for foreclosure in favour of mortgage was ever passed by any competent Court of law. Hence, this Court sees no illegality in the findings returned by the learned first appellate Court that the plaintiffs had right to file suit for redemption by virtue of provisions of aforesaid Act as undisputedly plaintiffs had taken amount under mortgage by mortgaging land.

20. As far as substantial question of law No.2 is concerned, undoubtedly Limitation Act, 1963 provides limitation for filing the suit, if any, for redemption of mortgage. But, with the introduction of *'Debt Reduction Act'* State Government intended to grant relief to debtors and to enable them to get back properties mortgaged by them with the possession for a loan. Perusal of *'Debt Reduction Act'* clearly suggests that Legislature, while invoking aforesaid Act, has specifically taken care to make the relevant provisions of the Act granting relief to debtors by giving over-riding effect over any law, agreement, contract or decree contrary to the provisions of the Act. Though, after perusing the aforesaid Act, this Court is of the view that after promulgation of the same debtors, as defined in the aforesaid Act, could file suit for redemption at any time after commencement of the Act, but perusal of aforesaid Act suggests that no limitation was provided in the Act; meaning thereby that for determining limitation, if any, for filing suit under *'Debt Reduction Act',* ultimately parties were to fall back upon Limitation Act, 1963. It is settled law that special Act brought by legislature has over-riding effect over any law. But in the present facts and circumstances of the case, wherein Hon'ble Apex Court has specifically held that usufructuary mortgagor right under Section 62 of the Transfer of Property Act continuous till mortgage money is paid and mere expiry of period of 30 years from the date of mortgage does not extinguish right of mortgagor under Section 62 of the Transfer of Property Act, provisions of Limitation Act, 1963 may not be applicable in the present case.

21. Hon'ble Apex Court in ***Singh Ram (D) Thr.L.Rs. vs. Sheo Ram and others, AIR 2014 SC 3447,*** has upheld the view taken by Full Bench of Punjab and Haryana High Court in ***Ram Kishan & Ors. vs. Sheo Ram & Ors., AIR 2008 Punjab & Haryana 77,*** and over-ruled the judgment passed by Full Bench of this Court in ***Bhandaru Ram vs. Sukh Ram, AIR 2012 HJP 1,*** wherein Full Bench of this Court had held that for redemption of usufructuary mortgage, where no time fixed for redemption of mortgage money, limitation period would be 30 years as prescribed under Article 60 of Limitation Act.

22. At this stage, it would be apt to reproduce the view taken by Full Bench of Punjab and Haryana High Court in ***Ram Kishan's*** case supra:-

> "Since the mortgage is essentially and basically a conveyance in law or an assignment of debt or for discharge of some other obligation for which it is given, the security must, therefore, be redeemable on the payment or discharge of such debt or obligation. Fact that at one point of time the mortgagor for one or the other reason mortgaged his property to avail financial assistance on account of necessities of life, the mortgagor's right cannot be permitted to be defeated only on account of passage of time. The mortgagee remains in possession of the mortgaged property; enjoys the usufruct thereof and, therefore, not to lose anything by returning the security on receipt of mortgage debt.
>
> The limitation of 30 years under Article 61(a) beings to run "when the right to redeem or the possession accrues". The right to redemption or recover possession accrued to the mortgagor on payment of sum secured in case of usufructuary mortgage, where rents and profits are to be set off against interest on the mortgage debt, on payment or tender to the mortgagee, the mortgage money or balance thereof

or deposit in the Court. The right to seek foreclosure is coextensive with the right to seek redemption. Since right to seek redemption accrues only on payment of the mortgage money or the balance thereof after adjustment of rents and profits from the interest thereof, therefore, right of foreclosure will not accrue to the mortgagee till such time the mortgagee remains in possession of the mortgaged security and is appropriating usufruct of the mortgaged land towards the interest on the mortgaged debt. Thus, the period of redemption or possession would not start till such time usufruct of the land and the profits are being adjusted towards interest on the mortgage amount. In view of the said interpretation, the principle that once a mortgage, always a mortgage and, therefore, always re-deemable would be applicable. The plea that after the expiry of period of limitation to sue for foreclosure, the mortgagees have a right to seek declaration in respect of their title over the suit property would not be tenable. The mortgage cannot be extinguished by any unilateral act of the mortgagee. Since the mortgage cannot be unilaterally terminated, therefore, the declaration claimed is nothing but a suit for foreclosure. It is equally well settled that it is not title of the suit, which determines the nature of the suit. The nature of suit is required to be determined by reading all averments in plaint. Such declaration cannot be claimed by an usufructuary mortgagee. Therefore, in case of usufructuary mortgage, where no time-limit is fixed to seek redemption, the right to seek redemption would not arise on date of mortgage but will arise on date when mortgagor pays or tenders to the mortgagee or deposits in Court, the mortgage money or the balance thereof. Thus, it was held that once a mortgage always a mortgage and is always redeemable."

23. Hon'ble Apex Court in view of conflicting decision on the point having been rendered by Full Benches of two High Courts, referred hereinabove, laid down law in ***Singh Ram's*** case *supra* affirmed the view taken by Full Bench of Punjab and Haryana High Court asunder:-

"10. We have given our anxious consideration to the question of law arising in the cases.

11. We are in agreement with the view taken in the impugned judgment that in a usufructuary mortgage, right to recover possession continues till the money is paid from the rents and profits or where it is partly paid out of rents and profits when the balance is paid by the mortgagor or deposited in Court as provided under Section 62 of the T.P. Act.

12. It will be appropriate to refer to the statutory provisions of the T.P. Act and the Limitation Act:-

"T.P. Act

58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgaged" defined.

(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage-Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the

mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale-Where, the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

PROVIDED that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

(d) Usufructuary mortgage-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called a usufructuary mortgage and the mortgagee a usufructuary mortgagee.

(e) English mortgage-Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re- transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

(f) Mortgage by deposit of title-deeds-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title- deeds.

(g) Anomalous mortgage - A mortgage which is not a simple mortgage, a mortgage by conditional sale, a usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage.

60. Right of mortgagor to redeem At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage- money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a court.

xxx xxx xxx

62. Right of usufructuary mortgagor to recover possession

In the case of a usufructuary mortgage, the mortgagor has a right to recover possession of the property together with the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee,-

(a) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the property,-when such money is paid;

(b) where the mortgagee is authorised to pay himself from such rents and profits or any part thereof a part only of the mortgage-money, when the term (if any) prescribed for the payment of the mortgage-money has expired and the mortgagor pays or tenders to the mortgagee the mortgage money or the balance thereof or deposits it in court hereinafter provided.

xxx xxx xxx

Limitation Act:-

Art. 61 By a mortgagor

a)	*To redeem or recover possession of immovable property mortgaged.*	*Thirty years*	*When the right to redeem or to recover possession accrues*
b)	*xxxxxxxxx*	*xxxxxx*	*xxxxxxxxx*

(emphasis supplied)

A perusal of above provisions shows that Article 61 refers to right to redeem or recover possession. While right of mortgagor to redeem is dealt with under Section 60 of the T.P. Act, the right of usufructuary mortgagor to recover possession is specially dealt with under Section 62. Section 62 is applicable only to usufructuary mortgages and not to any other mortgage. The said right of usufructuary mortgagor though styled as 'right to recover possession' is for all purposes, right to redeem and to recover possession. Thus, while in case of any other mortgage, right to redeem is covered under Section 60, in case of usufructuary mortgage, right to recover possession is dealt with under Section 62 and commences on payment of mortgage money out of the usufructs or partly out of the usufructs and partly on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition under Section 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary

mortgage. Accordingly, we uphold the view taken by the Full Bench that in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor under Section 62 of the T.P. Act.

13. We may now refer to decisions of this Court.

(i) In Prabhakaran & Ors. vs. M. Azhagiri Pillai & Ors., (2006) 4 SCC 484, suit of mortgagor for redemption was held to be within limitation. However, in para 13, it was observed:-

"13. Article 148 of the Limitation Act, 1908 (referred to as "the old Act") provided a limitation of 60 years for a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged. The corresponding provision in the Limitation Act, 1963 ("the new Act" or "the Limitation Act" for short), is Article 61(a) which provides that the period of limitation for a suit by a mortgagor to redeem or recover possession of the immovable property mortgaged is 30 years. The period of limitation begins to run when the right to redeem or to recover possession accrues. In the case of a usufructuary mortgage which does not fix any date for repayment of the mortgage money, but merely stipulates that the mortgagee is entitled to be in possession till redemption, the right to redeem would accrue immediately on execution of the mortgage deed and the mortgagor has to file a suit for redemption within 30 years from the date of the mortgage. Section 27 of the Limitation Act provides that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished". This would mean that on the expiry of the period of limitation prescribed under the Act, the mortgagor would lose his right to redeem and the mortgagee would become entitled to continue in possession as the full owner."

The above observations do not take into account the special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession which commences after mortgage money is paid out of rents and profits or partly out of rents and profits and partly paid or deposited by mortgagor. Thus, we are unable to accept the same as correct view in law.

(ii) In Jayasingh Dhyanu Mhoprekar & Anr. vs. Krishna Babaji Patil & Anr., 1985 (4) SCC 162, the question of limitation for redemption was not involved. Question was whether mortgagor's right of redemption was affected when mortgaged land was allotted to mortgagees by way of grant under the provisions of the Bombay Paragana and Kulkarni Watans (Abolition) Act, 1950, it was observed:-

"6. The only question which arises for decision in this case is whether by reason of the grant made in favour of the defendants the right to redeem the mortgage can be treated as having become extinguished. It is well settled that the right of redemption under a mortgage deed can come to an end only in a manner known to law. Such extinguishment of right can take place by a contract between the parties, by a merger or by a statutory provision which debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property under a mortgage will have to give up possession of the property when the suit for redemption is filed unless he is able to show that the right of redemption has come to an end or that the suit is liable to be dismissed on some other valid ground. This flows from the legal principle which is applicable to all mortgages, namely "Once a mortgage, always a mortgage". It is no doubt true that the father of the first defendant and the second defendant have been granted occupancy

right by the Prant Officer by his order dated February 5, 1964 along with Pandu, the uncle of Defendant 1. But it is not disputed that the defendants would not have been able to secure the said grant in their favour but for the fact that they were in actual possession of the lands. They were able to be in possession of the one-half share of the plaintiffs in the lands in question only by reason of the mortgage deed. If the mortgagors had been in possession of the lands on the relevant date, the lands would have automatically been granted in their favour, since the rights of the tenants in the watan lands were allowed to subsist even after the coming into force of the Act and the consequent abolition of the watans by virtue of Section 8 of the Act. The question is whether the position would be different because they had mortgaged land with possession on the relevant date."

Apart from judgments mentioned in reference order, reference may be made to some other judgments dealing with the issue. (iii) In Harbans vs. Om Prakash, (2006) 1 SCC 129, this Court upheld the view that limitation for redemption does not start from date of mortgage in a usufructuary mortgage and held that view in State of Punjab & Ors. vs. Ram Rakha & Ors., (1997) 10 SCC 172 was contrary to earlier view in Seth Gangadhar vs. Shankar Lal, 1959 SCR 509. It was observed:-

"7. Reference may be made to certain paragraphs in Seth Gangadhar v. Shankar Lal, 1959 SCR 509 which read as follows:

"[4.] It is admitted that the case is governed by the Transfer of Property Act. Under Section 60 of that Act, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage money to require the mortgagee to reconvey the mortgaged property to him. The right conferred by this section has been called the right to redeem and the appellant sought to enforce this right by his suit. Under this section, however, that right can be exercised only after the mortgage money has become due. In Bakhtawar Begam v. [pic]Husaini Khanam,ILR (1914) 36 All 195 (IA at p. 89) also the same view was expressed in these words:

'Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period.'

Now, in the present case the term of the mortgage is eighty-five years and there is no stipulation entitling the mortgagor to redeem during that term. That term has not yet expired. The respondents, therefore, contend that the suit is premature and liable to be dismissed.

* * *

[6.] The rule against clogs on the equity of redemption is that, a mortgage shall always be redeemable and a mortgagor's right to redeem shall neither be taken away nor be limited by any contract between the parties. The principle behind the rule was expressed by Lindley, M.R. In Santley v. Wilde, (1899) 2 Ch. 474 in these words:

'The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is

therefore void. It follows from this, that "once a mortgage always a mortgage".'

[7.] The right of redemption, therefore, cannot be taken away. The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. One thing, therefore, is clear, namely, that the term in the mortgage contract, that on the failure of the mortgagor to redeem the mortgage within the specified period of six months the mortgagor will have no claim over the mortgaged property, and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, cannot be sustained. It plainly takes away altogether, the mortgagor's right to redeem the mortgage after the specified period. This is not permissible, for 'once a mortgage always a mortgage' and therefore always redeemable. The same result also follows from Section 60 of the Transfer of Property Act. So it was said in Mohd. Sher Khan v. Seth Swami Dayal, AIR 1922 PC 17:

'An anomalous mortgage enabling a mortgagee after a lapse of time and in the absence of redemption to enter and take the rents in [pic]satisfaction of the interest would be perfectly valid if it did not also hinder an existing right to redeem. But it is this that the present mortgage undoubtedly purports to effect. It is expressly stated to be for five years, and after that period the principal money became payable. This, under Section 60 of the Transfer of Property Act, is the event on which the mortgagor had a right on payment of the mortgage money to redeem.

[14.] In comparatively recent times Viscount Haldane, L.C. repeated the same view when he said in G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd, 1914 AC 25 (AC at pp. 35-36):

'This jurisdiction was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. The case of the common law mortgage of land was indeed a gross one. The land was conveyed to the creditor upon the condition that if the money he had advanced to the feoffor was repaid on a date and at a place named, the fee simple would revest in the latter, but that if the condition was not strictly and literally fulfilled he should lose the land forever. What made the hardship on the debtor a glaring one was that the debt still remained unpaid and could be recovered from the feoffor notwithstanding that he had actually forfeited the land to the mortgagee. Equity therefore, at an early date began to relieve against what was virtually a penalty by compelling the creditor to use his legal title as a security.

My Lords, this was the origin of the jurisdiction which we are now considering, and it is important to bear that origin in mind. For the end to accomplish which the jurisdiction has been evolved ought to govern and limit its exercise by equity judges. That end has always been to ascertain, by parol evidence if need be, the real nature and substance of the transaction, and if it turned out to be in truth one of mortgage simply, to place it on that footing. It was, in ordinary cases, only where there was conduct which the Court of Chancery regarded as unconscientious that it interfered with freedom of contract. The lending money, on mortgage or otherwise, was looked on with suspicion, and the court was on the alert to discover want of conscience in the terms imposed by lenders.'

[15.] The reason then justifying the Court's power to relieve a mortgagor from the effects of his bargain is its want of conscience. [pic]Putting it in more familiar language the Court's jurisdiction to relieve a mortgagor from his bargain depends on whether it was obtained by taking advantage of any

difficulty or embarrassment that he might have been in when he borrowed the moneys on the mortgage. Was the mortgagor oppressed? Was he imposed upon? If he was, then he may be entitled to relief.

[16.] We then have to see if there was anything unconscionable in the agreement that the mortgage would not be redeemed for eighty-five years. Is it oppressive? Was he forced to agree to it because of his difficulties? Now this question is essentially one of fact and has to be decided on the circumstances of each case. It would be wholly unprofitable in enquiring into this question to examine the large number of reported cases on the subject, for each turns on its own facts.

The section is unqualified in its terms, and contains no saving provision as other sections do in favour of contracts to the contrary. Their Lordships therefore see no sufficient reason for withholding from the words of the section their full force and effect.'

[17.] First then, does the length of the term — and in this case it is long enough being eighty-five years itself lead to the conclusion that it was an oppressive term? In our view, it does not do so. It is not necessary for us to go so far as to say that the length of the term of the mortgage can never by itself show that the bargain was oppressive. We do not desire to say anything on that question in this case. We think it enough to say that we have nothing here to show that the length of the term was in any way disadvantageous to the mortgagor. It is quite conceivable that it was to his advantage. The suit for redemption was brought over forty-seven years after the date of the mortgage. It seems to us impossible that if the term was oppressive, that was not realised much earlier and the suit brought within a short time of the mortgage. The learned Judicial Commissioner felt that the respondents' contention that the suit had been brought as the price of landed property had gone up after the war, was justified. We are not prepared to say that he was wrong in this view. We cannot also ignore, as appears from a large number of reported decisions, that it is not uncommon in various parts of India to have long-term mortgages. Then we find that the property was subject to a prior mortgage. We are not aware what the term of that mortgage was. But we find that that mortgage included another property which became free from it as a result of the mortgage in suit. This would show that the mortgagee under this mortgage was not putting any pressure on the mortgagor. That conclusion also receives support from the fact that the mortgage money under the present mortgage was more than that under the earlier mortgage but the mortgagee in the present case was satisfied with a smaller security. Again, no complaint is made that the interest charged, which was to be measured by the rent of the property, was in any manner high. All these, to our mind, indicate that the mortgagee had not taken any unfair advantage of his position as the lender, nor that the mortgagor was under any financial embarrassment.

[18.] It is said that the mortgage instrument itself indicates that the bargain is hard, for, while the mortgagor cannot redeem for eighty-five years, the mortgagee is free to demand payment of his dues at any time [pic]he likes. This contention is plainly fallacious. There is nothing in the mortgage instrument permitting the mortgagee to demand any money, and it is well settled that the mortgagee's right to enforce the mortgage and the mortgagor's right to redeem are coextensive."

8. On the contrary, learned counsel for the respondent submitted that in Panchanan Sharma v. Basudeo Prasad Jaganani, 1995 Supp (2) SCC 574 it was clearly held that when there is no stipulation regarding period of

limitation it can be redeemed at any time. It was, inter alia, held as follows: (SCC p. 576, para 3)

"The sale certificate, Ext. C-II does not bind the appellant and, therefore, the mortgage does not stand extinguished by reason of the sale. It is inoperative as against the appellant."

9. Though the decision in State of Punjab case prima facie supports the stand of the appellant, the decision rendered by a three-Judge Bench of this Court in Ganga Dhar case according to us had dealt with the legal position deliberately and stated the same succinctly."

(iv) In Parichhan Mistry (Dead) by L.Rs. & Anr. vs. Acchiabar Mistry & Ors., (1996) 5 SCC 526, it was observed:-

"2. The High Court came to the conclusion that the mortgagors having failed to pay a portion of the rent for realisation of which the landlord had filed a suit and obtained a decree and that said decree being put to execution and the mortgagee having paid up the decretal dues, the mortgagor loses his right of redemption and, therefore the suit for redemption must fail. The [pic]learned Judge came to the conclusion that the equity of redemption, in the facts and circumstances of the case was extinguished and, therefore, the mortgagor is not entitled to redeem. The short question that arises for consideration is whether in the facts and circumstances of the case the High Court was right in coming to a conclusion that right of redemption got extinguished and the mortgagor had no right of redemption. It is true that a right of redemption under a mortgage deed can come to an end, but only in a manner known to law. Such extinguishment of right can take place by contract between the parties or by a decree of the court or by a statutory provision which debars the mortgagors from redeeming the mortgage. The mortgagor's right of redemption is exercised by the payment or tender to the mortgagee at the proper time and at the proper place, of the mortgage money. When it is extinguished by the act of the parties the act must take the shape and observe the formalities which the law prescribes. The expression "act of parties" refers to some transaction subsequent to the mortgage and standing apart from the mortgage transaction. A usufructuary mortgagee cannot by mere assertion of his own or by a unilateral act on his part, convert his position on moiety of the property as mortgagee into that of an absolute owner. It is no doubt true that the mortgagee would be entitled to purchase the entire equity of redemption from the mortgagor. The mortgagee occupies a peculiar position and, therefore, the question as to what he purchases at a court sale is a vexed question, but being in an advantageous position where the mortgagee availing himself of his position gains an advantage he holds, such advantage is for the benefit of the mortgagor. It has been so held by this Court in the case of Sidhakamal Nayan Ramanuj Das v. Bira Nayak, AIR 1954 SC 336 and Mritunjoy Pani v. Narmanda Bala Sasmal, (1962) 1 SCR 290. This being the position of law if for some default in payment of rent a rent decree is obtained and the mortgagee pays off the same even then the mortgage in question is liable to be redeemed at the option of the mortgagor. The mortgagee cannot escape from his obligation by bringing the equity of redemption to sale in execution of a decree on the personal covenant. By virtue of purchase of the property by the mortgagee in court sale, no merger takes place between the two rights nor the mortgage stands extinguished."

(v) In Achaldas Durgaji Oswal (Dead) Thr. L.Rs. vs. Ramvilas Gangabisan Heda (Dead) Thr. L.Rs. & Ors., (2003) 3 SCC 614, this Court upheld the view that right of redemption was not lost despite failure of a mortgagor in a

usufructuary mortgage to make deposit in terms of a preliminary decree for redemption. It was observed:-

"7. Mr Mohta, learned Senior Counsel appearing on behalf of the respondents on the other hand, would submit that whereas Order 34 Rule 7 would apply both in respect of the suit for foreclosure and redemption of mortgage, Order 34 Rule 8 thereof refers to final decree in redemption suit only. The learned counsel would contend that having regard to the well-established rule "once a mortgage always a mortgage", the right of a mortgagor to redeem the mortgage would continue unless the same is extinguished either by reason of a decree passed by a court of law or by an agreement of parties. The learned counsel pointed out that in this case the application for drawing up of a final decree was filed within a period of three years from the date of making the deposit and thus the same was not barred by limitation.

Findings

8. Usufructuary mortgage is defined in Section 58(d) of the Transfer of Property Act in the following terms:

"58. (d) Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in [pic]lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee."

9. Mortgagor, despite having mortgaged the property might still deal with it in any way consistent with the rights of the mortgagee. He has an equitable right to redeem the property after the day fixed for payment has gone by but his right or equity of redemption is no longer strictly an equitable estate or interest although it is still in the nature of an equitable interest. (See Halsbury's Laws of England, 4th Edn., Vol. 32, p.264.)

10. The right of the mortgagor, it is now well settled, to deal with the mortgaged property as well as the limitation to which it is subject depends upon the nature of this ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem and on his fully performing his obligations under the mortgage.

11. The doctrine of redemption of mortgaged property was not recognised by the Indian courts as the essence of the doctrine of equity of redemption was unknown to the ancient law of India. The Privy Council in Thumbasawmy Mudelly v. Mohd. Hossain Rowthen called upon the legislature to make a suitable amendment which was given a statutory recognition by reason of Section 60 of the Transfer of Property Act which reads thus:

"60. Right of mortgagor to redeem.—At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to

the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has [pic]been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money."

12. A right of redemption, thus, was statutorily recognized as a right of a mortgagor as an incident of mortgage which subsists so long as the mortgage itself subsists. The proviso appended to Section 60, as noticed hereinbefore, however, confines the said right so long as the same is not extinguished by an act of the parties or by a decree of court.

13. In the Law of Mortgage by Dr Rashbehary Ghose at pp. 231-32 under the heading "Once a mortgage, always a mortgage", it is noticed:

"In 1681 Lord Nottingham in the leading case of Howard v. Harris4 firmly laid down the principle: 'Once a mortgage, always a mortgage'. This is a doctrine to protect the mortgagor's right of redemption: it renders all agreements in a mortgage for forfeiture of the right to redeem and also encumbrances of or dealings with the property by the mortgagee as against a mortgagor coming to redeem. In 1902 the well-known maxim, 'once a mortgage, always a mortgage', was supplemented by the words 'and nothing but a mortgage' added by Lord Davey in the leading case of Noakes v. Rice5 in which the maxim was explained to mean 'that a mortgage cannot be made irredeemable and a provision to that effect is void'. The maxim has been supplemented in the Indian context by the words 'and therefore always redeemable', added by Justice Sarkar of the Supreme Court in the case of Seth Ganga Dhar v. Shankar Lal.

It is thus evident that the very conception of mortgage involves three principles. First, there is the maxim: 'once a mortgage, always a mortgage'. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, modus et conventio vincunt legem (custom and agreement overrule law). Secondly, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first another principle may be deduced, namely, 'once a mortgage, always a mortgage, and nothing but a mortgage'. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.

The maxim 'once a mortgage always a mortgage' may be said to be a logical corollary from the doctrine, which is the very foundation of the law of mortgages, that time is not of the essence of the contract in such transactions; for the protection which the law throws around the mortgagor might be rendered wholly illusory, if the right to redeem could be limited by

contract between the parties. Right to redeem is an incident of a subsisting mortgage and is inseparable from it so that the right is coextensive with the mortgage itself. The right subsists until it is [pic]appropriately and effectively extinguished either by the acts of the parties concerned or by a proper decree of the competent court."

4. In The Law of Mortgages by Edward F. Cousins at p. 294, in relation to protection of the right to redeem, it is stated:

"But the protection of embarrassed mortgagors could not be achieved by the mere creation of the equitable right of redemption. As soon as the practice in equity to allow redemption after the contract date became known, mortgagees sought to defeat the intervention of equity by special provisions in the mortgage-deed. These provisions were designed either to render the legal right to redeem illusory, and thus prevent the equity of redemption from arising at all, or to defeat or clog the equity of redemption after it had arisen. For example, the mortgage contract might provide for an option for the mortgagee to purchase the mortgaged property, thus defeating both the legal and equitable right to redeem, or might allow redemption after the contract date only upon payment of an additional sum or upon performance of some additional obligation. Consequently, the Chancellor began to relieve mortgagors against such restrictions and fetters on the legal and equitable rights to redeem imposed by special covenants in the mortgage.

The protection of a mortgagor against all attempts to defeat or clog his right of redemption involved the creation of subsidiary rules of equity, invalidating the various contrivances which ingenious conveyancers devised. These rules are sometimes summed up in a maxim of equity 'once a mortgage always a mortgage'. This means that once a contract is seen to be a mortgage no provision in the contract will be valid if it is inconsistent with the right of the mortgagor to recover his security on discharging his obligations. Provisions offending against the maxim may either touch the contractual terms of redemption, rendering the right to redeem illusory, or they may touch only the equitable right to redeem after the passing of the contract date, hampering the exercise of the right. Provisions of the latter kind are termed 'clogs' on the equity of redemption. Greene, M.R. in Knightsbridge Estates v. Byrne7 emphasized that provisions touching the contractual right to redeem are not properly to be classed as clogs on the equity of redemption. But it is evident that such provisions are in substance clogs on the equity of redemption, since they tend to defeat it altogether."

15. In Fisher and Lightwood's Law of Mortgage, the nature of the right of redemption is stated thus:

"The rights of redemption.— The right to redeem a mortgage was formerly conferred on the mortgagor by a proviso or condition in the mortgage to the effect that, if the mortgagor or his representative should pay to the mortgagee the principal sum, with interest at the rate fixed, on a certain day, the mortgagee, or the person in whom the estate was vested, would, at the cost of the person redeeming, reconvey to him or as [pic]he should direct (a). This is still the practice in the case of a mortgage effected by an assignment of the mortgagor's interest (b). A proviso for reconveyance was no longer appropriate after 1925 for a legal mortgage of land [which has to be made by demise (c)], and it is not necessary to have a proviso for surrender of the term in such a mortgage, since the term ceases on repayment (d). Nevertheless, in order to define the rights of the mortgagor and the mortgagee, a proviso is inserted expressly stating that the term will cease at the date fixed (e).

It has been seen (f) that, at law, whatever form the mortgage took, upon non-payment by the appointed time, the estate of the mortgagee became absolute and irredeemable, but that equity intervened to enable the mortgagor to redeem after the date of repayment.

There are, therefore, two distinct rights of redemption — the legal or contractual right to redeem on the appointed day and the equitable right to redeem thereafter (g). The equitable right to redeem, which only arises after the contractual date of redemption has passed, must be distinguished from the equity of redemption, which arises when the mortgage is made (g)."

16. The question which falls for consideration in this appeal must be considered keeping in view the statutory right of the mortgagor in terms of Section 60 of the Transfer of Property Act. By reason of Article 61 of the Limitation Act, 1963, the limitation provided for a suit to redeem or recover the possession of immovable property mortgaged by a mortgagor is thirty years from the date of accrual of right to redeem or recover possession. Article 137 which is a residuary provision provides for limitation of three years in a case where no period of limitation is provided.

20. The statutory provisions, as noticed hereinbefore, are required to be construed having regard to the redeeming features of usufructuary mortgage, namely, (a) there is a delivery of possession to the mortgagee, (b) he is to retain possession until repayment of money and to receive rents and profits or part thereof in lieu of interest, or in payment of mortgage- money, or partly in lieu of interest and partly in payment of mortgage- money, (c) there is redemption when the amount due is personally paid or is discharged by rents or profits received, and (d) there is no remedy by sale or foreclosure.

21. Order 34 Rules 7 and 8 do not confer any right upon the usufructuary mortgagee to apply for final decree which is conferred on the mortgagee on other types of mortgages. By reason of sub-rule (1) of Rule 8 of Order 34, a mortgagor is entitled to make an application for final decree at any time before a final decree debarring the plaintiff from all rights to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this Rule. No such application is again contemplated at the instance of the usufructuary mortgagee. By reason of sub-rule (1) of Rule 8 of Order 34, a right of redemption is conferred upon the mortgagor of a usufructuary mortgage. Such a provision has been made evidently having regard to the right of redemption of a mortgagor in terms of Section 60 of the Transfer of Property Act and further, having regard to the fact that a usufructuary mortgagee would be entitled to possess the property in question till a final decree of redemption is passed.

22. The right of redemption of a mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either by a decree or by act of parties. [pic]Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor has such right come to an end by act of the parties.

23. A right for obtaining a final decree for sale or foreclosure can be exercised only on payment of such money. Such a right can be exercised at any time even before the sale is confirmed although the final decree might have been passed in the meanwhile. The mortgagee is also not entitled to receive any payment under the preliminary decree nor is the mortgagor required to make an application to recover before paying the same.

24. Even, indisputably, despite expiry of the time for deposit of the mortgaged money in terms of the preliminary decree, a second suit for redemption would be maintainable."

(vi) In Prithi Nath Singh vs. Suraj Ahir, (1963) 3 SCR 302, this Court approved the observations of Allahabad High Court in Rama Prasad vs. Bishambhar Singh, AIR 1946 All 400, that Sections 60 and 62 of T.P. Act make distinction in right of a usufructuary mortgagor and other mortgagor as follows:-

"11. In Ramprasad v. Bishambhar Singh, AIR 1946 All 400, the question formulated for determination was whether the suit being a suit to recover possession of the mortgaged property after the mortgage money had been paid- off was a suit "against the mortgagee to redeem" or "to recover possession of immovable property mortgaged". Braund, J., said, at p. 402:

"Now, it is quite obvious that that section (Section 60 of the Transfer of Property Act) can only refer to a case in which a mortgagor under a subsisting mortgage approaches the Court to establish his right to redeem and to have that redemption carried out by the process of the various declarations and orders of the Court by which it effects redemption. In other words, Section 60 contemplates a case in which the mortgage is still subsisting and the mortgagor goes to the Court to obtain the return of his property on repayment of what is still due. Section 62, on the other hand, is in marked contrast to Section 60. Section 62 says that in the case of a usufructuary mortgage the mortgagor has a right to "recover possession" of the property when (in a case in which the mortgagee is authorised to pay himself the mortgage money out of the rents and profits of the property) the principal money is paid-off. As we see it, that is not a case of redemption at all. At the moment when the rents and profits of the mortgaged property sufficed to discharge the principal secured by the mortgage, the mortgage came to an end and the correlative right arose in the mortgagor "to recover possession of the property". The framers of the Transfer of Property Act have clearly recognised the distinction between the procedure which follows a mortgagor's desire to redeem a subsisting mortgage and the procedure which follows the arising of a usufructuary mortgagor's right to get his property back after the principal has been paid-off."

(vii) In Hamzabi & Ors. vs. Syed Karimuddin & Ors., (2001) 1 SCC 414, it was observed:-

"2. The right of the mortgagor to redeem had its origin as an equitable principle for giving relief against forfeiture even after the mortgagor defaulted in making payment under the mortgage deed. It is a right which has been jealously guarded over the years by courts. The maxim of "once a mortgage always a mortgage" and the avoidance of provisions obstructing redemption as "clogs on redemption" are expressions of this judicial protection. (See: Pomal Kanji Govindji v. Vrajlal Karsandas Purohit (1989) 1 SCC 458 in this context.) As far as this country is concerned, the right is statutorily recognised in Section 60 of the Transfer of Property Act. The section gives [pic]the mortgagor right to redeem the property at any time after the principal money has become due by tendering the mortgage money and claiming possession of the mortgaged property from the mortgagee. The only limit to this right is contained in the proviso to the section which reads:

"Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a court."

3. While the expression "decree of court" is explicit enough, the phrase "act of parties" has given rise to controversy. One such act may be when the mortgagor sells the equity of redemption to the mortgagee. This Court in Narandas Karsondas v. S.A. Kamtam, (1977) 3 SCC 247 has said that: (SCC p. 254, para 34)"

(viii) Contrary view has been expressed in Sampuran Singh & Ors. vs. Smt. Niranjan Kaur (smt.) & Ors., (1999) 2 SCC 679 as follows:-

"14. Submission was, as aforesaid, that right to redeem only accrues when either the mortgagors tender the amount of mortgage or the mortgagees communicate satisfaction of the mortgage amount through the usufruct from the land. This submission is misconceived, as aforesaid, if this interpretation is accepted, then till this happens the period of limitation never start running and it could go on for an infinite period. We have no hesitation to reject this submission. The language recorded above makes it clear that right of redemption accrues from the very first day unless restricted under the mortgage deed. When there is no restriction the mortgagors have a right to redeem the mortgage from that very date when the mortgage was executed. Right accruing means, right either existing or coming into play thereafter. Where no period in the mortgage is specified, there exists a right to a mortgagor to redeem the mortgage by paying the amount that very day in case he receives the desired money for which he has mortgaged his land or any day thereafter. This right could only be restricted through law or in terms of a valid mortgage deed. There is no such restriction shown or pointed out. Hence, in our considered opinion the period of limitation would start from the very date the valid mortgage is said to have been executed and hence the period of limitation of 60 years would start from the very date of oral mortgage, that would be from March 1893. In [pic]view of this, we do not find any error in the decision of the first appellate court or the High Court holding that the suit of the present appellants is time-barred."

However, facts mentioned in para 3 show that possession remained with mortgagor and it was not a case of usufructuary mortgage.

14. We need not multiply reference to other judgments. Reference to above judgments clearly spell out the reasons for conflicting views. In cases where distinction in usufructuary mortgagor's right under Section 62 of the T.P. Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of right of redemption after 30 years.

15. We, thus, hold that special right of usufructuary mortgagor under Section 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. We answer the question accordingly.

16. On this conclusion, the view taken by the Punjab and Haryana High Court will stand affirmed and contrary view taken by the Himachal Pradesh High Court in Bhandaru Ram (D) Thr. L.R. Ratan Lal vs. Sukh Ram (supra) will stand over-ruled." (pp.3452-3464)

24. Since Hon'ble Apex Court has held that mere expiry of period of 30 years from the date of mortgage does not extinguish the right of the mortgagor under Section 62 of the

Transfer of Property Act, there may not be any application of provisions of Limitation Act, 1963 and as such substantial question of law is answered accordingly.

25. Perusal of judgment passed by learned trial Court clearly suggests that suit of the plaintiffs was dismissed being time barred and as such this Court sees no force much less substantial force in the contention of Mr.Palsra that learned first appellate Court failed to deal with the other relevant issues apart from limitation, while accepting the appeal having been preferred by the plaintiffs because perusal of judgment passed by learned first appellate court clearly suggests that learned first appellate Court has dealt with each and every aspect of the matter meticulously.

26. Consequently, in view of the detailed discussion made hereinabove, this appeal is dismissed. The judgment passed by the learned first appellate Court below is upheld and that of the learned trial Court is set aside and the suit filed by the plaintiffs is decreed.There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

ICICI Lombard General Insurance Company Ltd., ...Applicant.

Versus

Smt. Leela Devi & others ....Respondents.

CMP(M) No. 1204 of 2015
Decided on : 29.11.2016

Limitation Act, 1963- Section 5- An appeal was against the award of Workmen Compensation Commissioner filed, which was barred by limitation – an application for condonation of delay in filing the appeal filed- held that appellant had deposited the amount before the Commissioner on 24.1.2011, which shows that it had notice regarding the award – the appeal was filed in the year 2015- no satisfactory explanation for the delay has been given – delay cannot be condoned- application dismissed. (Para-3)

For the applicant: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr. P.P Chauhan, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral)

Respondent No. 3 despite service, omitted to appear either in person or through counsel. Hence, proceeded against ex-parte.

2. Respondent No.1 stands served through publication under an apposite notice published in "Divya Himachal", notice whereof is placed on record. However respondent No.1 despite service standing effectuated upon her through substituted mode omits to record her appearance before this court either in person or through counsel. Hence she is proceeded against ex-parte.

3. In the impugned rendition recorded by the learned Commissioner under the Workmen's Compensation Act, he fastened liability upon the insurer qua the compensation amount assessed thereunder vis-à-vis the claimants. The impugned rendition stood recorded on 17.3.2009 whereas the insurer has belatedly concerted to beget its reversal by preferring in the year 2015 an appeal therefrom before this Court. The insurer in the instant application has made a painstaking effort to purvey the good and sufficient cause which precluded it to earlier within

limitation institute an appeal herebefore against the impugned judgment recorded on 17.3.2009 by the learned Commissioner. The appeal stands instituted herebefore with a gross besides with an inordinate delay occurring since the recording of the impugned judgment by the learned commissioner yet the immensity of delay would not constrain this Court to allow this application unless tangible material in portrayal of the insurer only nowat acquiring knowledge of the impugned judgment stood evinced. However a perusal of the judgment impugned hereat displays qua the insurer impleaded as respondent No.2 therein standing represented therebefore by its Counsel besides a receipt personificatory of the insurer in discharge of its liability fastened upon it under the impugned judgment depositing cheque No. 051589 before the learned Commissioner wherefrom an inference is erectable qua the insurer holding the apposite knowledge at the time contemporaneous to the recording of the impugned judgment by the learned Commissioner also an inference stands aroused qua its holding knowledge on 24.1.2011 whereat in discharge of its liability it deposited cheque bearing No. 051589 before the learned Commissioner. Consequently though with the insurer acquiring knowledge thereat qua the impugned judgment its yet omitting to assail it within limitation cannot at all render its belated apposite concert standing engendered by it standing beset with bonafide constraints or fetters in its relevant omission. Contrarily it stands concluded qua the insurer deliberately omitting to assail the impugned judgment. In aftermath, there is no merit in the application and the same is accordingly dismissed.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Krishna Devi. ….Petitioner

Versus

State of H.P. & others. ….Respondents

CWP No. 4601 of 2010
Date of decision: 29.11.2016

Constitution of India, 1950- Article 226- Petitioner challenged the appointment of respondent No.6 as Part Time Water Carrier – petitioner claims that she belongs to an IRDP family and has been included in the National Health Insurance Scheme – she had submitted an application and her name was recommended by Gram Panchayat – however, respondent No.6 was appointed – respondents No.1 to 4 stated that approval was granted for appointment of respondent No.6 as Part Time Water Carrierbefore the consideration of the case of the petitioner - held, that Rule 12 empowers the State to make the appointment on compassionate ground without following the selection process from amongst widow, women deserted by their husbands, or otherwise destitute, handicapped persons if such candidate falls below the poverty line - the petitioner had applied for recruitment under this Rule – the Rule was subsequently quashed but the appointment was made prior to the quashing- respondent No.6 is a widow and has placed on record BPL certificate – no document establishing the claim of the petitioner was filed – the appointment of respondent No.6 cannot be faulted- writ petition dismissed. (Para-12 to 16)

For the Petitioner: Mr.Anil Kumar, Advocate.
For the Respondents: Mr.Varun Chandel, Additional Advocate General with Mr.Pankaj Negi, Deputy Advocate General, for respondents No. 1 to 4.
None for respondent No. 6.

The following judgment of the Court was delivered:

Vivek Singh Thakur J. (Oral).

In present petition, appointment of respondent No. 6 as Part Time Water Carrier (herein after referred to as PTWC) in Government Primary School, Tipp, Education Block Dehra, District Kangra, H.P. has been challenged.

2. I have heard learned counsel for parties and perused the documents placed on record.

3. Clause/Rule 12 of Recruitment Scheme for the appointment of Part Time Water Carriers in schools of Education Department (herein after referred to as 'Scheme') (Annexure P-1) empowers respondent-State to appoint PTWC on compassionate grounds, without following the selection process, amongst widows, women deserted by their husbands or otherwise destitute, handicapped persons if such candidate falls below the poverty line as defined by Rural Development Department from time to time.

4. Petitioner claims that she belongs to an IRDP family and no member of her family is serving in Government Department or Public Sector Undertaking and since she belongs to below poverty line family, thus has been included in the National Health Insurance Scheme. Therefore, as per Scheme she was most suitable person to be appointed as PTWC in Government Primary School, Tipp.

5. As per claim of the petitioner, post of PTWC in Government Primary School, Tipp was advertised by respondents No. 3 to 5 and in response to the said advertisement, she had submitted her application and her name was recommended by Gram Panchayat, Surani by passing an unanimous resolution dated 4.4.2010 (Annexure P-4).

6. It is contended on behalf of petitioner that name of respondent No. 6 was neither recommended nor was she eligible for appointment as PTWC under the provisions of Scheme (Annexure P-1), whereas, name of petitioner was recommended for appointment as water carrier in the Government Primary School, Tipp as her name was included in list of approved candidates. For substantiating her plea, she has relied upon Annexure P-5, claiming the same as list of candidates approved/recommended for appointment as PTWC in the schools mentioned against their names. In this list, name of petitioner has been shown at Sr. No. 6 against Government Primary School, Tipp.

7. It is further alleged by the petitioner that respondent No. 6 is joint owner of about 112 Kanal land in her village and her husband was working in a private firm/concern at Ludhiana Punjab, who expired in an accident during the course of his employment and as such, respondent No. 6 had received more than Rs. 3,00,000/- under Workmen Compensation Act and therefore, she was not eligible to be appointed under clause/Rule 12 of the Scheme.

8. Respondents No. 1 to 4 have filed reply to the petition, justifying appointment of respondent No. 6 as PTWC on compassionate grounds under clause/Rule 12 of the Scheme, as respondent No. 6 was below poverty line and a widow. It has further been clarified by respondent-State that Annexure P-5 is not a list of candidates approved or recommended for appointment as PTWC, but the same is list of candidates whose names were referred to the office of Deputy Director of Elementary Education for examination and prior to examination and approval for appointment of petitioner, approval for appointment of respondent No. 6 was granted and as such she was appointed as PTWC who joined her duties after completing all codal formalities under Clause/Rule 12 of the Scheme.

9. In reply, respondents 1 to 4 have denied claim of petitioner that post of PTWC in Government Primary School, Tipp was advertised for filling up through interview and it is stated that case of petitioner was received for examination, whereas in the meantime name of respondent No. 6 was approved by Government, in pursuance to which respondent No. 6 was appointed and allowed to join her duty.

10. Respondent No. 5, Gram Panchayat has not chosen to contest the petition and no reply has been filed on its behalf.

11. Respondent No. 6 has filed separate reply stating therein that being a widow and belonging to BPL family, she was eligible and entitled to be appointed on compassionate grounds under Clause/Rule 12 of the Scheme. She has placed on record copy of BPL certificate and certificate of income below Rs. 10,500/- per annum as Annexures R-6/A and R-6/B. Respondent No. 6 has also alleged concealment of material facts by petitioner by stating that

petitioner is working as cook under Mid Day Meal Scheme in the same school, i.e. Government Primary School, Tipp. Respondent No. 6 has also clarified in reply that she was not only recipient of amount of compensation under Workmen Compensation Act on account of death of her husband, but it was disbursed amongst all dependents of deceased and share of respondent No. 6 in joint holding is meager one. It is also alleged that to the contrary, Sh. Braham Dass father-in-law of the petitioner being an ex-serviceman is receiving substantially handsome amount of pension.

12. Petitioner has not preferred to file rejoinder and also averments of replying respondents No. 1 to 4 and 6 have been otherwise rebutted Learned counsel for petitioner has also relied upon judgment dated 15.5.2015 passed by Division Bench of this Court in CWP No. 7498 of 2014, titled as Mangla Devi Vs. State of H.P. and others, vide which Clause/Rule 12 of the Scheme has been quashed and set aside being ultra virus and thus he has prayed for quashing and setting aside the appointment of respondent No. 6, made exercising power under Clause/Rule 12 of the Scheme.

13. In judgment rendered by Division Bench in CWP No. 7498 of 2014 Clause/Rule 12 of Scheme has been struck down by declaring it ultra virus. In present case petitioner has not challenged the vires of clause/rule 12 of the Scheme, rather has claimed right under the same Clause/Rule 12 itself and clause/rule 12 of the Scheme was struck down on May 15, 2015 without any direction with respect to appointments made before striking down of the said Clause/Rule 12 of the Scheme as all appointments made prior to 15.5.2015 under this clause/Rule were neither in question in that petition nor the candidates appointed prior to the said date were party before the Court. Therefore, candidates appointed under Clause/Rule 12 of Scheme prior to striking down of the said Clause/Rule will not be liable to be ousted automatically or otherwise on the basis of ratio laid down by the Division Bench in judgment referred supra, unless their appointments are assailed on that ground.

14. In present case, petitioner herself is banking upon provisions of Clause/Rule 12 of the Scheme. Therefore, striking down of Clause/Rule 12 of the Scheme is not advantageous to her, rather it has adverse effect on her claim as except claiming her entitlement for appointment under provisions of Clause/Rule 12 of the Scheme, there is no other ground for her appointment to the post of PTWC against which respondent No. 6 has been appointed.

15. Respondent No. 6 is serving till date and concealment of appointment of petitioner as Mid Day Meal worker has also not been disputed. At the time of appointment of respondent No. 6 Clause/Rule 12 of Scheme was in force and she was considered and found within criteria fixed for appointment under the said Clause/Rule. It is admitted fact that respondent No. 6 is widow and she has also placed on record BPL certificate Annexure P-6/A and Income Certificate Annexure P-6/B, whereas petitioner, though, has claimed her belonging to below poverty line family but no document substantiating her claim has been placed on record. Petitioner has not questioned power of respondent-State to appoint a candidate under Clause/Rule 12 of Scheme but has claimed her right for appointment in exercise of power under Clause/Rule 12 of the Scheme.

16. In view of above discussion, present petition, being devoid of merits is dismissed, along with pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Kusum Lata ....Petitioner
Versus
State of Himachal Pradesh and others ....Respondents

CWP No. 6472 of 2014
Decided on : November 29, 2016

Constitution of India, 1950- Article 226- Petitioner applied for the post of PGT English along with other candidates – respondent No.5 was selected – petitioner claimed that marks were wrongly awarded to respondent No.5 – held, that as per the communication made by Secretary, Gram Panchayat and Revenue Authorities, respondent No.5 is not a permanent resident of patwar circle – 10 marks were wrongly awarded to him- writ petition allowed – appointment of respondent No.5 set aside and respondent/State directed to offer appointment to the petitioner.

(Para-4 to 13)

For the petitioner : Mr. K.C. Sankhyan, Advocate.

For the respondents : Mr. Ramesh Thakur, Deputy Advocate General for respondents No.1 to 3.
Respondents No.4 and 5 ex parte.
Mr. Rajinder Singh Dogra, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of present petition under Article 226 of the Constitution of India, petitioner has prayed for following main reliefs:

"i) That the selection and appointment of respondent No.5 Sh. Paras Ram as PGT (Eng) SMC issued vide order dated 18th July,2014 (Annexure P-9) may kindly be quashed and set aside and the respondents may kindly be directed to appoint the petitioner as PGT(Eng) under SMC Govt. SSS Gadagussain, Distt. Mandi forthwith.

ii). That the respondents particularly respondent No. Director, Hr.Edu. HP Shimla be directed to conduct detailed enquiry into the matter and panelize the respondent concerned for the act of commission & omission in deliberately ignoring the petitioner for her appointment."

2. Briefly stated the facts, as emerge from record are that the School Management Committee of Government Senior Secondary School Gadagussain (in short, 'SMC') advertised one post of PGT (English) as per "policy to engage Teacher(s) through the School Management Committee purely on period basis in Elementary/Higher Education Department of Himachal Pradesh in Tribal/Difficult areas" (annexure P-6 dated 17.7.2012). Petitioner being eligible candidate also applied for the post of PGT (English) on SMC basis for GSSS Gadagussain alongwith other fourteen candidates. As per record, interview was conducted on 26.6.2014 by respondents No.2 and 3, wherein eight candidates including petitioner and respondent No.5 appeared. On the basis of aforesaid interview held on 26.6.2014, SMC declared result on 18.7.2014, wherein respondent No.5 was declared selected. After the selection of respondent No.5, petitioner procured copy of appointment letter issued in favour of respondent No.5 and also the result sheet of the interview held on 26.6.2014, under Right to Information Act. On the perusal of result sheet procured by the petitioner under Right to Information Act, petitioner came to know that respondent No5. has been given 10 marks being permanent resident of Patwar Circle Gadagussain, whereas respondent No.5 was permanent resident of village Pattan, Mohal Seraj, Tehsil Banjar, District Kullu (Annexure P-7). Since respondent No. 5 was awarded 10 marks for his being permanent resident of Patwar Circle, he had procured 35.17 marks in total, whereas petitioner who was actually resident of Patwar Circle Gadagussain procured 33.99 marks. As per the petitioner, if 10 marks awarded to respondent No. 5 on account of his being permanent resident of Patwar Circle Gadagussain are deducted as per policy, he could not have been at Sr. No. 1 and selected to the post of PGT (English) in the School concerned, as such, selection of respondent No. 5 deserves to be quashed and set aside being contrary to the recruitment procedure as laid down under the Policy. Petitioner, after coming to know of aforesaid illegality having been committed by the interview committee, made a representation to respondent Nos. 3 and 4 praying therein for reviewing the wrong selection but when no action was taken, he

got issued a legal notice (Annexure P-11) on 7.8.2014 under Section 80 CPC, to the respondents calling upon them to review selection of respondent No.5. Since no action whatsoever, pursuant to issuance of legal notice was taken by the respondent, she was compelled to file instant writ petition before this Court.

3. Pursuant to issuance of notice by this Court, respondent No. 5 i.e. selected candidate Paras Ram, filed reply, wherein he refuted the claim of the petitioner by stating that he was also permanent resident of village Thachadhar, Gram Panchayat Thachadhar, PO Gadagussain, Sub-tehsil Balichowki, District Mandi, which falls within Patwar Circle, Gadagussain, as per certificate, annexure R-5/A. He further claimed that he was rightly awarded 10 marks on the basis of his being resident of Patwar Circle Gadagussain.

4. Respondents No.1 to 4 failed to file any reply. However, during the course of hearing today, learned Deputy Advocate General, made available copy of communication sent by the Principal, Government Senior Secondary School Gadagussain, District Mandi, enclosing therein written statement/para-wise reply on behalf of respondent No.3, which is taken on record. Aforesaid communication also enclosed therewith communication dated 23.5.2015 sent by Naib Tehsildar Sub Tehsil Balichowki, and certificate issued by Gram Panchayat, Thachadhar, Development Block Seraj, Mandi, HP. Perusal of aforesaid communication/ proposed reply sent by the Principal, GSSS suggests that the matter regarding awarding of 10 marks on the basis of local Patwar Circle was taken up with the revenue authorities i.e. Naib Tehsildar/Tehsildar of the area concerned for clarification. Naib Tehsildar Balichowki District Mandi, HP and Secretary Gram Panchayat concerned, i.e. Thachadhar have clarified that Paras Ram (respondent No. 5) was not bonafide resident of Patwar Circle Gadagussain. It would be apt to reproduce para-7 of the aforesaid communication /proposed reply as under:

> "7. With reference to the office letter No. EDN-H(19)B(1)-14/2012-SMC-CC dated 30-04-2015 pertaining to para No. 7 of CWP No. 6472 of 2014 the matter regarding awarding of 10 marks on the basis of local Patwar Circle was taken up with the revenue authorities i.e. Tehsildar/Naib Tehsildar of the Area concerned for clarification. The Naib Tehsildar Balichowki District Mandi (HP) and Secretary, Gram Panchayat concerned (i.e. GP Thachadhar) clarified that Sh. Paras Ram was not Bonafide resident of Patwar Circle Gadagusain Tehsil Balichowki District Mandi (HP) on the date interview (i.e. 26-06-2014) for the post of PGT English. Hence 10 marks cannot be awarded to him. The copy of letter No. NT/Balichowki/dk0dk0/2014-830 dated 23/05/2015 of the Naib Tehsildar Balichowki District Mandi (HP) and certificate issued by the Secretary of Gram Panchayat Thachadhar, are enclosed herewith for ready reference please."

5. Further perusal of communication dated 23.5.2015 of Naib Tehsildar, Sub Tehsil Bali Chowki, annexed with the communication sent by Principal, GSSS, suggests that respondent No.5, Paras Ram was not permanent resident of Patwar Circle Gadagussain till 8.5.2015 . Similarly, certificate dated 8.5.2015 suggests that the name of respondent No.5 Paras Ram son of Atma Ram, was not entered in the *Parivar Register* of Gram Panchayat Thachahar.

6. Perusal of annexure P-6 provides for appointment of teachers by the School Management Committee, relevant portion whereof reads as under:

> " Procedure for the appointment of a Teacher by the SMC to the educational institutions of Tribal/ difficult Areas"
>
> The School Management Committees of the educational Institutions located in the Tribal/Difficult areas have requested to fill up vacant posts of teachers in their schools. The Government is making all efforts to fill up all the vacant posts in the educational institutions in the State but even then some posts in the Tribal/Difficult areas remain vacant due to retirement, transfers, promotions etc. As such the studies of the students suffers badly. Keeping in view the betterment

of the study of students in these areas, it has been decided by the Government to permit the School Management Committees of educational institution situated in Tribal/Difficult areas as notified by the Department of Personnel (Annexure-I), to provide the teachers against vacant post as per the clause 15 of the "Right of Children to Free and Compulsory Education Act, 2009".

The Government hereby frames the following procedure for the appointment of teachers through the SMCs purely on period basis:

1. ...
2. ...
3. ...
4. Member of the selection committee will be as under:-
   1. President SMC
   2. Head of the Institution-cum-Member Secretary of SMC
   3. Subject expert from outside the concerned Institution.
   4. Senior most Regular Teacher of the concerned Institution, (if the regular Teacher is not available, in the concerned institution, the same be called from the adjoining institution).
   5. The SMC will conduct an interview and follow distribution of Marks for evaluation during the course of Selection Process as per Annexure-II. Preference will be given to local eligible candidates."

7. Further, the scheme for evaluation of SMC's during the course of selection process suggests that 10 marks can be awarded to a candidate on account of his/her being permanent resident of Patwar Circle, where School is located. In this regard relevant portion of the scheme providing for Distribution of Marks* for evaluation of SMCs during the course of Selection Process, is reproduced herein below:

ANNEXURE-II

Distribution of Marks* for evaluation of SMCs during the course of Selection Process.

	Qualification	PGT	TGT	LT Shastri	JBT
1.	Matric	-	-	5	5
2.	10+2	-	-	5	5
3.	Graduation/Shastri	10	10	10	10
4.	B.Ed. for PGT TGT JBT Certificate for JBT posts	10	10	-	-
5.	Post-Graduation	10	5	10	-
6.	TET	-	10	10	10
7.	Ph.D	10			
8.(a)	Permanent resident of the concerned Panchayat where the Primary /Middle School located.	-	10*	10*	10*
8.(b)	Permanent resident of the concerned Patwar Circle where the High Senior Secondary School located.	10*	-	-	-

9	Interview	10	10	10	10
		60	60	60	60

8. Perusal of clause 8 (b) suggests that 10 marks can only be awarded to those candidates, who are permanent residents of concerned Patwar Circle where higher/senior secondary school is situated. In the present case, as emerges from record, respondent No.5 was not permanent resident of concerned Patwar Circle Gadagussain and as such he could not be awarded 10 marks on account of his being permanent resident of Patwar Circle Gadagussain where School was located. In the instant case, perusal of annexure P-10 (result sheet) suggests that respondent No.5 was awarded 10 marks for being permanent resident of Patwar Circle Gadagussain, as a result of which he secured 35.17 marks in total, whereas petitioner secured 33.99 marks in total.

9. By way of present petition, petitioner claimed that if 10 marks wrongly awarded to respondent No.5 under aforesaid head are deducted, she comes at Sr. No.1 of merit list and deserves to be appointed as PGT (English).

10. It duly stands proved on record that respondent No.5 was wrongly awarded 10 marks on account of his being permanent resident of Patwar Circle Gadagussain because, admittedly, at that time, he was not the resident of Patwar Circle Gadagussain. As such, this Court has no hesitation to conclude that he was wrongly awarded 10 marks.

11. In view of detailed discussion herein above, present petition is allowed and appointment order of respondent No.5 (annexure P-9 dated 18.7.2014, as PGT (English) in Government Senior Secondary School Gadagussain on period basis is hereby quashed and set aside. Respondent-State is directed to offer appointment as PGT (English) in Government Senior Secondary School Gadagussain to the petitioner., who was next in merit.

12. Pending applications are disposed of.

****

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Narain Singh ………Petitioner
Versus
State of Himachal Pradesh and others ………Respondents

CWP No. 2865 of 2011
Decided on : November 29, 2016

Industrial Disputes Act, 1947- Section 25- Petitioner was engaged on daily wage basis- his services were terminated- he filed original application before Administrative Tribunal, which was allowed – the services of the petitioner were disengaged without following the procedure – the Labour Court dismissed the reference – held, that the petitioner had worked for three days in July, 2001- the plea of the petitioner that he had completed 240 days and his services were illegally terminated was not proved – the Labour Court had rightly dismissed the reference – writ petition dismissed. (Para-5 to 14)

Cases referred:

Relip Nagarpalika Vs. Babuji Gabhaji Thalore and others reported in 2009 (120) FLR 1007
Ocean Creations Vs. Manohar Gangaram Kamble 2013 SCC Online Bom 1537:2014)140 FLR 725
D.K. Yadav vs J.M.A. Industries Ltd reported in 1993 (3) SCC 259

For the petitioner : Ms. Taman Rana and Ms. Kiran Bala, vice Counsel.

For the respondents : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of present petition under Article 226 of the Constitution of India, petitioner has prayed for following main reliefs:

"(a) to issue a writ of certiorari or direction in nature thereof, quashing, quashing the impugned award dated 01/10/2010 being Annexure P-4 of the writ petition, as unconstitutional and illegal and contrary to the law;

(b) to issue a writ of mandamus, appropriate writ, order or direction in nature thereof, directing the respondent to re-engage the petitioner with full back wages wef illegal termination of services alongwith interest on the arrears @ 18% pa;

(c) to issue an appropriate writ, order or direction in nature thereof to give full justice to the petitioners in the circumstances of the case and may pass such further writ, order or orders as this Hon'ble Court may deem fit, proper, just and expedient in the circumstances of the case;"

2. Briefly stated the facts of the case are that petitioner was initially engaged as daily wager with effect from 3.10.1998 at Rohnat. He further claimed that he worked for 240 days in each calendar year, prior to his alleged termination. One Shri Bir Singh filed an Original Application before the Hon'ble Tribunal i.e. OA No. 2604/1999 wherein petitioner was impleaded as respondent No.5. Since Bir Singh in his Original Application claimed that the present petitioner, who was junior to him, has been retained, department, in order to defeat the claim of the applicant Bir Singh, also disengaged his services being junior without complying with the mandatory provisions of law. Petitioner being aggrieved, filed an OA No. 2968/2000 titled Narain Singh vs. State of Himachal Pradesh and others before the Himachal Pradesh Administrative Tribunal. The learned Tribunal vide order dated 30.11.2000, held his disengagement to be *void ab initio* and directed to re-engage the petitioner in the same capacity at the same place or in the vicinity where the work was available, with the direction that his services may not be disengaged save and except in accordance with law. Pursuant to aforesaid direction issued by the Tribunal, Department re-engaged the petitioner. Petitioner further claimed that the respondents solely with a view to harass him, repeatedly called him to join duties but at no point of time, he was allowed to mark his attendance so as to deprive him from claiming regularization in future. Petitioner also claimed that the department had been giving fictional breaks in service and ultimately in August, 2006, his services were disengaged without resorting to statutory provisions of Industrial Disputes Act, despite the fact that he had completed 240 days in a calendar year. Petitioner claimed that since his services were disengaged in violation of provisions of Sections 25F, 25G and 25H of Industrial Disputes Act, he deserves to be reinstated with all consequential benefits. Petitioner raised industrial dispute before appropriate Government, which in turn made following reference to the learned Industrial Tribunal-cum-Labour Court, for adjudication:

"Whether the termination of services of Shri Narain Singh S/o Shri Singhe Ram workman by the Divisional Forest Officer, Forest Division, Renukaji, District Sirmour, HP w.e.f. 1.8.2006 without complying the provisions o the Industrial Disputes Act, 1947 is proper and justified? If not, what relief of back wages, seniority, pas service benefits and amount of compensation, the above aggrieved workman is entitled to?

3. Respondent-State, by way of filing reply, contested the aforesaid claim of the petitioner-workman (hereinafter, 'workman') by stating that during October, 1998, petitioner was engaged as a seasonal/casual worker and one Bir Singh filed OA No. 2604/1999. But the respondents specifically denied that the services of the petitioner were disengaged with a view to

defeat the claim of Bir Singh, who had filed aforesaid Original Application. Department further refuted the claim of the petitioner that he had completed 240 days in each calendar year except 1999. Rather, respondents claimed that pursuant to the direction passed by the Himachal Pradesh Administrative Tribunal, in OA No. 2968/2000, filed by the petitioner, he was re-engaged but he himself left the job and as such there was no occasion for them to resort to the provisions of Industrial Disputes Act before disengaging the petitioner. Learned Industrial Tribunal, on the basis of material on record, came to the conclusion that the petitioner has miserably failed to prove that after his re-engagement upon order of Himachal Pradesh Administrative Tribunal, his services were again disengaged/ terminated in the month of August, 2006. Learned Tribunal below further came to the conclusion that it is abundantly clear from the Man Day's chart that in the year 1998, petitioner worked for 89 days, in 1999 for 256 days and in 2000 for 191 days and for 3 days in 2001 (July), as such respondents were not required to comply with the provisions of Section 25 of the Act. Learned Tribunal below also came to the conclusion that the Department has been able to prove on record that the workman himself left the job and as such there was no such requirement of resorting to the provisions of Section 25 of the Act, as claimed by the petitioner. Petitioner being aggrieved and dissatisfied with the aforesaid findings recorded by the Learned Tribunal below vide Award date 1.10.2010, preferred the present petition, praying therein for the main reliefs as have been reproduced herein above.

4. It is ample clear from the Award passed by the learned Tribunal below that dispute prior to 30.10.2001 raised by the petitioner qua his disengagement of his services was adjudicated by the Himachal Pradesh Administrative Tribunal by holding the disengagement to be *void ab initio* in OA No. 2968/2000, filed by the petitioner and as such Industrial Tribunal-cum-Labour Court was only required to adjudicate whether termination of services of petitioner by Divisional Forest Officer, Renukaji, with effect from 1.8.2006 without complying Section 25 of the Industrial Disputes Act, is legal or not. Petitioner before the learned Tribunal below claimed that his services were disengaged by the respondent in August, 2006 without complying the provisions of the Act ibid and as such his disengagement deserves to be quashed and set aside. Petitioner claimed before Industrial Tribunal-cum-Labour Court that pursuant to order passed by Himachal Pradesh Administrative Tribunal in OA No. 2968/2000, he was called for duty but his attendance was not marked.

5. Respondents, by way of written statement, refuted the aforesaid claim of the petitioner and claimed that consequent to order passed by Himachal Pradesh Administrative Tribunal on 30.11.2000, services of petitioner were re-engaged but he himself abandoned the job.

6. It emerges from the impugned award that no documentary evidence worth the name was placed on record by the petitioner in support of his claim that his services were disengaged in contravention of the provisions of the Act ibid and that in the preceding calendar months i.e. before the date of termination, he had completed 240 days. Perusal of impugned award suggests that the petitioner tendered affidavit Ext. PA and copy of order passed by Himachal Pradesh Administrative Tribunal Ext. PB, wherein admittedly he did not file any Man Days chart to demonstrate that he had worked till August, 2006, when his services were terminated by the respondents without resorting to the provisions of the Act. Learned Tribunal below also observed that no steps were taken by the petitioner to get relevant record summoned from the Department, with a view to substantiate that he had worked till August, 2006 and that in every calendar year, he had completed 240 days. It is settled law that burden of proof lies on the workman to show that he has worked continuously for 240 days in the preceding year and in this regard, workman is/was under obligation to adduce positive documentary evidence apart from examining himself to prove the factum of his being in service. In this regard, reliance is placed upon **Relip Nagarpalika Vs. Babuji Gabhaji Thalore and others** reported in 2009 (120) FLR 1007.

7. Respondents have examined RW-1 Vijay Pal, who has categorically stated that petitioner had never completed 240 days in any calendar year and in support of their claim, they produced Man Days chart Ext. RA. Perusal of Man Days chart suggests that the petitioner has

worked for 89 days in 1998, 256 days in 1999 and 151 days in 2000 and 3 days in July 2001. It further suggests that prior to the illegal, termination of petitioner, as claimed by him, he has worked for 3 days that too in July 2001. Since the Himachal Pradesh Administrative Tribunal had ordered for re-engagement of petitioner vide order dated 30.11.2000, this Court sees no force in the contention put forth by the petitioner that though he was re-engaged but was not allowed to mark his presence in the attendance register. Learned Tribunal below rightly concluded that had the petitioner been attending his duties, and his attendance was not marked, he could have complained to the higher officers or could file contempt petition before the Himachal Pradesh Administrative Tribunal for non-compliance of order dated 30.11.2000. Similarly, it can not be believed that the petitioner kept on working till 2006 from 2001 without there being any payment of wages to him. Perusal of Ext. RA, Man Days chart clearly suggests that the petitioner has not actually worked after 2001 and he only worked for 3 days in July 2001.

8. In view of above, this Court sees no illegality in the findings recorded by the learned Tribunal below that since petitioner failed to prove on record that he had completed 240 days in a calendar year preceding the date of termination, there was no requirement for the Department to resort to the provisions of Industrial Disputes Act before disengaging the petitioner.

9. As far as plea of abandonment having been taken by respondent is concerned, same needs to be examined. Undisputedly, as emerges from impugned award, while refuting claim of the petitioner, specific stand of the department before learned Tribunal below was that the petitioner was re-engaged pursuant to order dated 30.11.2000 passed by Himachal Pradesh Administrative Tribunal in OA No. 2968/2000, filed by the petitioner. Respondents further claimed that pursuant to his re-engagement, petitioner only worked for 3 days in July 2001 and thereafter he, himself, abandoned the job and as such there was no requirement for the Department to issue notice under Section 25F of the Industrial Disputes Act. This Court, while deciding issue with regard to non-compliance of provisions of Industrial Disputes Act, especially in view of plea taken by the petitioner that he had complete 240 days in preceding calendar year, examined entire evidence led on record by both the parties, perusal whereof nowhere suggests that any evidence was led on record by the respondent-State in support of their claim of abandonment of job by the petitioner. Though this Court, after perusing evidence available on record, is satisfied and convinced that the workman had only worked for 3 days in 2001 after his re-engagement pursuant to order passed by Himachal Pradesh Administrative Tribunal, but there is nothing on record suggestive of the fact that before allegedly terminating services of the workman on account of his having abandoned the job, respondents at any point of time, issued notice specifically calling upon the workman to explain why his services may not be dispensed with since he has failed to join his duties. Respondents categorically, in their reply before learned Tribunal below stated that the petitioner himself abandoned the job and as such there was no requirement of issuance of notice in terms of Industrial Disputes Act before terminating his services but as has been discussed above, this Court was unable to lay hand on any document suggestive of the fact that respondent issued communication/notice, if any, asking/advising the workman to join duty, failing which he would be inviting termination.

It is settled law that plea of abandonment taken by employer may not be sufficient to prove abandonment, rather it is necessary for the employer to place on record that specific notice was issued to the workman before alleged abandonment asking the workman to join duty within a stipulated period. In this regard, reliance is placed upon the judgment passed by Bombay High Court in case titled **Ocean Creations Vs. Manohar Gangaram Kamble** 2013 SCC Online Bom 1537:2014)140 FLR 725. It is profitable to reproduce paras No.8,9 and 10 of the judgment herein:-

> "8. The legal position is also settled that 'abandonment or relinquishment of service' is always a question of intention and normally such intention cannot be attributed to an employee without adequate evidence in that behalf. This is a question of fact which is to be determined in the light of surrounding

circumstances of each case. It is well settled that even in case of abandonment of service, unless the service conditions make special provisions to the contrary, employer has to give notice to the workman calling upon him to resume duties and where he fails to resume duties, to hold an enquiry before terminating services on such ground.

9. In somewhat similar circumstances a Division Bench of this court comprising P.B.Sawant, J.(as he then was) and V.V.Vaze, J. in the case of Gaurishanker Vishwakarma v. Engle Spring Industries Pvt. Lted. Observed thus:

> "…..it is now well settled that even in the case of the abandonment of service, the employer has to give a notice to the workman calling upon him to resume his duty and also to hold an enquiry before terminating his service on that ground. In the present case the employer has done neither. It was for the employer to prove that the workman had abandoned the service….. It is therefore difficult to believe that the workman who had worked continuously for six to seven years, would abandon his service for no rhyme or reason. It has also to be remembered that it was the workman who had approached the Government Labour Officer with a specific grievance that he was not allowed to join his duty. It was also his grievance that although he had approached the company for work from time to time, and the company's partner Anand had kept on promising him that he would be taken in service, he was not given work and hence he was forced to approach the Government Labour Officer. In the circumstances, it is difficult to believe that he would refuse the offer of work when it was given to him before the Labour Officer…."

10. Again a learned Single Judge of this court R.M.Lodha, J(as he then was) in the case of Mahamadsha Ganishah Patel v. Mastanbaug Consumers' Co-op. Wholesale & Retail Stores Ltd. Observed thus:-

> "….The legal position is almost settled that even in the case of abandonment of service, the employer has to give notice to the employee calling upon him to resume his duty. If the employee does not turn up despite such notice, the employer should hold inquiry on that ground and then passs appropriate order of termination. At the time when employment is scarce, ordinarily abandonment of service by employee cannot be presumed. Moreover, abandonment of service is always a matter of intention and such intention in the absence of supportable evidence cannot be attributed to the employee. It goes without saying that whether the employee has abandoned the service or not is always a question of fact which has to be adjudicated on the basis of evidence and attending circumstances. In the present case employer has miserably failed to discharge the burden by leading evidence that employee abandoned service. The Labour Court has considered this aspect, and, in my view rightly reached the conclusion that the employer has failed to establish any abandonment of service and it was a clear case of termination. The termination being illegal, the Labour Court did not commit any error in holding the act of employer as unfair labour practice under Item-I, Schedule IV of the MRTU & PULP Act….."

10. Apex Court in **D.K. Yadav vs J.M.A. Industries Ltd** reported in 1993 (3) SCC 259, has held that it is fundamental rule that no decision must be taken, which will affect right of any person without first being informed of the case and giving him/her opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. The Apex Court has held as under:

> "9. It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and be given him/ her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural

justice. In Mohinder Singh Gill & Anr. v. The Chief Election Commissioner & Ors. [1978] 2 SCR 272 at 308F the Constitution Bench held that 'civil consequence' covers infraction of not merely property or personal right but of civil liberties, material deprivations and non- pecuniary damages. In its comprehensive connotion every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th Edition, page 1487 defined civil rights are such as belong to every citizen of the state or country they include rights capable of being enforced or redressed in a civil action. In State of Orissa v. Dr. (Miss) Binapani Dei & Ors., this court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice.

10. In State of West Bengal v. Anwar Ali Sarkar [1952] SCR 289, per majority, a seven Judge bench held that the rule of procedure laid down by law comes as much within the purview of Art. 14 of the Constitution as any rule of substantive law. In Maneka Gandhi v. Union of India,. [1978] 2 SCR 62 1, another bench of seven judges held that the substantive and procedural laws and action taken under them will have to pass the test under Art, 14. The test of reason and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to he reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirements of natural justice."

11. Apex Court has further concluded that the management had power under Clause 13 of the Certified Standing Order to terminate the services of the appellant but principles of natural justice must be read into with the Standing Order, otherwise it would become arbitrary, unjust, unfair and violative of Article 14 of the Constitution of India. The Apex Court has held as under:

"15. In this case admittedly no opportunity was given to the appellant and no enquiry was held. The appellant's plea put forth at the earliest was that despite his reporting to duty on December 3, 1980 and on all subsequent days and readiness to join duty he was prevented to report to duty, nor he be permitted to sign the attendance register. The Tribunal did not record any conclusive finding in this behalf. It concluded that the management had power under Cl. 13 of the certified Standing Orders to terminate with the service of the appellant. Therefore, we hold that the principles of natural justice must be read into the standing order No. 13 (2) (iv). Otherwise it would become arbitrary. unjust and unfair violating Arts. 14. When so read the impugned action is violative of the principles of natural justice.

16. This conclusion leads us to the question as to what relief the appellant is entitled to. The management did not conduct any domestic enquiry nor given the appellant any opportunity to put forth his case. Equally the appellant is to blame

himself for the impugned action. Under those circumstances 50 per cent of the back wages would meet the ends of justice. The appeal is accordingly allowed. The award of the Labour Court is set aside and the letter dated December 12, 1980 of the management is quashed. There shall be a direction to the respondent to reinstate the appellant forthwith and pay him back wages within a period of three months from the date of the receipt of this order. The appeal is allowed accord- ingly. The parties would bear their own costs."

12. In the instant case, as has been mentioned above, no evidence, be it ocular or documentary, has been led on record by the respondents in support of their claim that petitioner himself abandoned job, whereas petitioner in his claim petition specifically alleged that after his re-engagement in the year 2001, he was not allowed to mark his attendance. In the judgment referred to herein above, it has been repeatedly held that abandonment of service is a matter of intention and such intention in the absence of supportive evidence, can not be attributed to the employee. Whether the employee has abandoned service, is a question of fact which needs to be adjudicated on the basis of evidence. In the present case, respondents have failed to discharge the burden by leading evidence that employee abandoned service and as such respondents failed to establish abandonment of service and it is clear cut case of termination.

13. In the instant case, it may be noticed that petitioner was initially engaged by the respondents as daily wager in 1998 i.e. 3.10.1998. He kept on working as daily wager till his disengagement. On 30.11.2000, Himachal Pradesh Administrative Tribunal passed interim order in OA No. 2968/2000 directing the respondents to re-engage the workman in the same capacity and same place and vide order dated 30.10.2001, disposed of Original Application by affirming interim order and by holding termination of workman *void ab initio,* learned Administrative Tribunal vide aforesaid order, also directed to count period served by him in view of interim order for the purpose of seniority, meaning thereby petitioner was held entitled to seniority with effect from initial engagement i.e. 3.10.1998. Since respondents never assailed order dated 30.10.2001 passed by Himachal Pradesh Administrative Tribunal, it attained finality, meaning thereby that petitioner rightly claimed benefit of re-instatement alongwith all consequential benefits by way of claim before the Industrial Tribunal-cum-Labour Court.

14. Consequently, in view of aforesaid discussion, this Court sees force in the contention put forth on behalf of the workman that he never abandoned job after his reinstatement pursuant to order passed by Himachal Pradesh Administrative Tribunal and impugned award passed by the Industrial Tribunal-cum-Labour Court deserves to be quashed and set aside.

15. Accordingly, in view of detailed discussion as well as law discussed herein above, impugned award dated 1.10.2010 passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla in Reference No. 39 of 2009 is set aside. Respondents are directed to reinstate the workman from the date of termination, with seniority and continuity in service, but without back wages.

16. Pending applications are disposed of.

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Nishu ....Petitioner.

Versus

State of Himachal Pradesh. ....Respondent.

Cr.MMO No. 353 of 2015

Date of decision: 29th November, 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Sections 498-A and 506 read with Section 34 of I.P.C – the police sought cancellation of FIR – the Court ordered the cancellation of the FIR with liberty to file a private complaint- held, that after the cancellation of FIR, filing of criminal complaint would amount to abuse of the process of the Court – order set aside and case remanded to the Trial Court with a direction to decide the same afresh. (Para-2 to 4)

For the petitioner: Mr. N.S. Chandel, Advocate.
For the respondents: Mr. Neeraj K. Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)**.**

Complaint herein is that learned trial Court vide impugned order dated 03.09.2015, Annexure P-4 has went wrong while ordering the cancellation of FIR No. 173/14 registered against her husband and his relations under Section 498-A, 506 read with Section 34 of the Indian Penal Code in Police Station, Manali, District Kullu, H.P.

2. The petitioner herein is the complainant in FIR, Annexure P-1. She was married to accused Vinay Kumar as per Hindu Rites and Customs. She, however, later on was turned out from the matrimonial home allegedly after being tortured by her husband and his relations at the pretext of demand of dowry. At her instance, FIR, Annexure P-1 was registered against her husband Vinay Kumar and his father Kashmir Singh. The police on completion of the investigation has filed the report under Section 173 of the Code of Criminal Procedure and sought thereby cancellation of the FIR. The petitioner-complainant was summoned and associated by the Court below before passing the impugned order, Annexure P-4 qua cancellation of the FIR.

3. The perusal of impugned order reveals that FIR was ordered to be cancelled and liberty reserved to the complainant to file private complaint, if so advised. As a matter of fact, no such order could have been passed nor in view of the FIR already registered in the matter, the liberty in favour of the petitioner-complainant to file a criminal complaint could have been reserved, because in view of the cancellation of FIR any criminal complaint filed afresh would amount to abuse of process of the Court. The appropriate course available to learned trial Court was to have taken on record any other and further details pertaining to the occurrence and it is thereafter the matter considered afresh for passing an appropriate and reasoned order. In the event of any other details qua occurrence furnished by the petitioner-complainant to have considered the same while passing the order qua cancellation of FIR or otherwise in the cancellation report. In the event of any substance find out in the additional material/details if so furnished by the petitioner-complainant the matter could have been returned to the investigating agency for conducting further investigation in terms of the provisions contained under Section 173(8) of the Code of Criminal Procedure. The impugned order, in the considered opinion of this Court, is, therefore, not legally sustainable and as such, quashed and set aside. Learned trial Court to decide the fate of cancellation report afresh after affording opportunity of being heard to the petitioner-complainant and in the light of material/details if any furnished by her in the trial Court. The parties through learned counsel representing them are directed to appear in the trial Court on ***30th December, 2016***. The record be sent back along with a copy of this judgment so as to reach in the trial Court well before the date fixed.

4. The petition is according allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

****

BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Raj Kumari ….Appellant-Defendant

Versus

Sheela Devi & Others ….Respondents-Plaintiffs

Regular Second Appeal No.109 of 2008.
Judgment Reserved on: 04.11.2016
Date of decision: 29.11.2016

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that suit land was jointly owned and possessed by the parties – mutation wrongly attested in favour of defendant No.1 exclusively - the defendant No.1 pleaded that land belonged to H who had sold some portion of the suit land and had executed a Will in her favour – the suit was decreed by the Trial Court – an appeal was preferred, which was dismissed- held in second appeal that no attesting witness was examined to prove the execution of the Will- however, the execution of the sale deed was duly proved – the Courts had correctly appreciated the evidence and no interference was warranted with the same – appeal dismissed.(Para-13 to 36)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264
H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443
Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529
Daulat Ram and Others vs. Sodha and Others, (2005)1 SCC 40

For the Appellant: Mr.Subhash Sharma, Advocate.
For Respondents 1 to 3: Mr.N.K. Thakur, Sr.Advocate with Ms.Jamuna, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

This appeal has been filed by the appellant-defendant *(hereinafter referred to as the `defendant')* against the judgment and decree dated 17.9.2007, passed by learned Additional District Judge, Fast Track Court, Una, District Una, H.P. affirming the judgment and decree dated 8.9.2000, passed by learned Sub Judge 1st Class, Court No.II, Amb, District Una, H.P., whereby the suit filed by the respondents-plaintiffs *(hereinafter referred to as the `plaintiffs')* for declaration with permanent injunction and in the alternative suit for possession was partly decreed and they were declared joint owners in possession of suit land i.e. land measuring 2-19-70 Hects being 1/3rd share out of land measuring 6-59-11 Hects comprised in Khewat No.72, Khatauni No.131 to 134 and at present Khasra Nos.897, 900, 904, 909, 1197, 1558, 1684, 896, 905, 907, 1205, 1207, 1208, 895, 896/1, 906, 908, 1198, 1199, 898, 899, 901 to 903, 1203 and 1204 as entered in the Missalhaquiat Settlement for the year 1988-89, situated in village Pirthipur, Tehsil Amb, District Una, H.P. except the land measuring 0-56-74 Hects being 1/3rd share out of land measuring 1-70-22 Hects as it has been sold by Hari Singh to defendant vide sale deeds Ex.D-1 and Ex.D-3 to the extent of 1/5th share each and defendant was restrained from ousting the plaintiffs from joint possession, raising any construction till partition.

2. Briefly stated facts, as emerged from the record, are that the respondent-plaintiff Sheela Devi filed a suit for declaration to the effect that land measuring 2-76-44 Hects., description whereof has been given in the head-note of the plaint, situated in village Pirthipur, Tehsil Amb, District Una, H.P. is jointly owned and possessed by the parties to the extent of 1/5th share each, and mutation Nos.35 and 75, dated 21.10.1991 of the estate of Shri Hari Singh son

of Shri Jallu deceased exclusively in the name of defendant No.1 are absolutely, wrong, false, frivolous, baseless, illegal, at the back of the plaintiff, null and void and confer no valid title on the defendant No.1, consequential suit for issuance of permanent injunction restraining defendant No.1 from ousting the plaintiff from joint possession, raising any construction, transferring or alienating the suit land in any manner till partition, in the alternative suit for joint possession. Plaintiffs averred in the plaint that the suit land was owned and possessed by Hari Singh son of Shri Jallu and he died intestate leaving behind the parties i.e. plaintiff and defendants who succeeded him after his death and are joint owners in possession of the same. Plaintiff claimed that defendant No.1, who is a headstrong and influential lady, in connivance with the revenue staff got sanctioned mutation Nos.34 and 75 dated 21.10.1991 from Assistant Collector 2nd Grade exclusively in her name as the successor of deceased Hari Singh. Plaintiff further claimed that at the time of sanctioning of aforesaid mutations, she was never informed and as such, these mutations are wrong, illegal, baseless as Hari Singh died intestate and after his death all the parties are entitled to succeed him. Plaintiff further claimed that despite there being several requests, defendant No.1 refused to admit her claim as a result of which she filed suit for declaration to the effect that the suit land is jointly owned and possessed by the parties to the extent of 1/5th share each.

3. Defendant No.1, by way of filing written statement, refuted the claim of the plaintiffs on the ground of maintainability and estoppel. On merits defendant claimed that her late father Shri Hari Singh was residing with her and she was looking after him. She further claimed that Shri Hari Singh sold some portion of the suit land to her as the plaintiffs had refused to look after him and to take his property. Defendant No.1 further averred that since the deceased was living with her, he, out of love and affection, disposed of whole of his property in favour of defendant No.1 by way of registered Will dated 9.3.1990. Defendant No.1 further averred that the Will was executed with the consent of the plaintiffs, but the plaintiffs at the instance of one Duni Chand, who intended to purchase the suit property, filed this suit against defendant No.1. In the aforesaid background the defendant sought dismissal of the suit.

4. By way of replication, the plaintiffs, while denying the allegations made in the written statement, reaffirmed the averments made in the plaint and controverted the contrary averments made in the written statement. It is specifically averred by the plaintiffs that there is neither any such sale deed nor Will which was ever executed by late Shri Hari Singh in favour of the defendant during his life.

5. On the pleadings of the parties, the learned trial Court framed the following issues for determination:-

> "1. Whether the suit land is owned and possessed by the parties as alleged? OPP.
>
> 2. Whether the plaintiffs are entitled to the relief of injunction as prayed for? OPP.
>
> 3. Whether deceased Hari Singh executed a valid Will dated 9.3.1990 in favour of defendant as alleged? OPD.
>
> 4. Whether the suit is not maintainable in the present form? OPD.
>
> 5. Whether the plaintiffs are estopped to file this suit by their acts and conduct? OPD.
>
> 6. Relief."

6. Subsequently, vide judgment and decree dated 8.9.2000 learned trial Court decreed the suit of the plaintiffs declaring the parties to the suit joint owners in possession of the suit land to the extent of 1/5th share each except the land which was sold by Hari Singh to defendant No.1 vide sale deeds Ex.D-1 and Ex.D-3.

7. Being aggrieved and dis-satisfied with the aforesaid judgment and decree passed by learned trial Court, defendant preferred an appeal before the learned Additional District Judge, Fast Track Court, Una, which came to be registered as Civil Appeal No.192/2K RBT 153/04/2000, but fact remains that appeal preferred by the defendant was dismissed as a result

of which judgment and decree passed by the trial Court came to be upheld. Hence, present Regular Second Appeal has been preferred by the defendant praying therein for setting aside the judgment and decree passed by both the Courts below.

8. This Court vide order dated 9.11.2010 admitted the appeal on the following substantial questions of law:-

"1. Whether the learned courts below were correct in accepting the validity ofthe execution of the sale deed Ext.D-1 and out-rightly rejecting the validity and authenticity of the registered Will i.e. Ext.D-2 when the same were executed in the same circumstances?

2. Whether the learned courts below could have ignored the due registration of the Will Ext.D-2 wherein the marginal witnesses had clearly identified the status of testator before Sub Registrar?"

9. Shri Subhash Sharma, learned counsel appearing for the appellant-defendant, vehemently argued that judgments passed by both the Courts below are not sustainable and same are not based upon correct appreciation of evidence adduced on record by the respective parties as well as law and as such same deserve to be quashed and set aside. While referring to the judgments passed by both the Courts below, Mr.Sharma forcefully contended that bare perusal of the same suggests that evidence led on record by the defendant was not appreciated in its right perspective. Rather, judgments are based upon conjectures and surmises and as such same cannot be allowed to sustain. Mr.Sharma further argued that bare perusal of evidence led on record by the defendant would go to show that defendants were able to prove on record by leading cogent and convincing evidence that deceased Hari Singh had executed a Will bequeathing his entire property in favour of defendant. With a view to substantiate his aforesaid arguments, he invited the attention of this Court to the depositions made by defendant witnesses to demonstrate that all the defendant witnesses in no uncertain terms stated that Will in question was duly executed by late Shri Hari Singh in favour of defendant and as such judgment which is not based upon correct appreciation of evidence adduced on record deserves to be quashed and set aside. Mr.Sharma further argued that being a propounder of Will defendant No.1 discharged his onus by proving on record that Will in question was executed by late Shri Hari Singh in sound and disposing state of mind bequeathing his entire property in favour of defendant No.1, but despite that Courts below returned erroneous findings as a result of which great prejudice has been caused to the defendant. While referring to the statement of DW-1, who is deed writer, Mr.Sharma stated that Court below itself appreciated his statement because bare perusal of statement suggests that two documents i.e. sale deed, Ex.D-1 and Will Ex.D-2 have been written on the direction of deceased Shri Hari Singh and thereafter it has been read over to the executant, who upon hearing and admitting the contents to be correct, put his signatures in Urdu upon the documents and the witnesses also put their signatures on the documents. He further stated that Ex.D-3 also being a sale deed finds mention at the relevant place. He forcefully contended that both the learned Courts below have applied different yardsticks while accepting the execution of sale deed Ex.D-1 and rejecting the authenticity, if any, of Will Ex.D-2. He further stated that the Courts below have come to believe the execution of the said sale deed and at the same time have not believed the veracity of the said registered Will executed by deceased Hari Singh in favour of his daughter i.e. appellant-defendant. He stated that both the documents were duly recorded in the register maintained by DW-1 and as such there is no occasion with the learned Courts below to believe veracity of the sale deed and to disbelieve the veracity of the said registered Will. While concluding his arguments, Mr.Sharma stated that there was no suspicious circumstance, as has been held by the learned trial Court, with which Will was termed to be shrouded, rather there was overwhelming evidence available on record suggestive of the fact that Will was free from suspicion and was executed by deceased Hari Singh in sound and disposing state of mind without there being any coercion and undue influence. In the aforesaid background, Mr.Sharma, prayed for acceptance of appeal after setting aside the judgment and decree passed by the Courts below.

10. Mr.N.K. Thakur, learned Senior Counsel appearing for the respondents-plaintiffs, supported the judgment passed by both the Courts below. Mr.Thakur, vehemently argued that bare perusal of the judgment and decree passed by both the Courts below suggests that the same are based upon correct appreciation of evidence available on record and there is no scope, whatsoever, of interference of this Court. While referring to the judgment passed by both the Courts below, Mr.Thakur argued with full vehemence that bare perusal of impugned judgments suggest that both the Courts below have dealt with each and every aspect of the matter meticulously and as such there is no scope, whatsoever, to re-appreciate the evidence especially in view of concurrent findings of fact and law recorded by both the Courts below. While refuting the contention put forth on behalf of the learned counsel representing the appellant-defendant that there is total misreading and mis-appreciation of evidence, Mr.Thakur invited the attention of the Court to the evidence led on record by the respective parties to demonstrate that at no point of time defendant was able to prove on record byleading cogent and convincing evidence that Will Ex.D-2 was duly executed by deceased Shri Hari Singh. At this stage he invited the attention of this Court to the provisions of Section 63 of the Indian Succession Act and Section 68 of Indian Evidence Act to demonstrate that it was incumbent upon the defendant being propounder of the Will to cite either of two marginal witnesses as a witness in support of valid execution of Will. He contended that it is undisputed that no marginal witness was cited as a witness in support of Will Ex.D-2 and as such there is no illegality and infirmity in the judgment passed by both the Courts below.

11. Mr.Thakur, learned Senior Counsel appearing for the respondents-plaintiffs, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

12. I have heard learned counsel for the parties and have gone through the record of the case.

13. Keeping in view the text and nature of the substantial questions of law reproduced hereinabove, this Court would be taking up both the questions together for consideration. During proceedings of the case, this Court had an occasion to peruse the impugned judgments as well as evidence led on record, be it ocular or documentary, by respective parties, perusal whereof nowhere suggests that there is any illegality and infirmity in the judgments passed by both the Courts below, rather same appear to be based upon correct appreciation of evidence led on record by the respective parties. However, this Court, solely with a view to explore the answer to the aforesaid substantial questions of law, criticallyanalysed the evidence on record.

14. In the instant case, plaintiff Smt.Sheela Devi filed a suit for declaration and permanent prohibitory injunction that suit land, as described above, is jointly owned and possessed by the parties being successor of Hari Singh son of Jallu and mutation No.75, dated 21st October, 1991 exclusive in the name of defendant No.1 is baseless, wrong, frivolous, null and void. Plaintiff claimed that suit land was owned and possessed by Hari Singh and he died intestate leaving behind the parties as his successor-in-interest to succeed his moveable and immovable propertyand as such after his death they are joint owners in possession of the property, whereas, defendant, though not disputed the relationship with the plaintiff, claimed that suit land was disposed of by the deceased by way of sale deed in her favour and since she was looking after the deceased and was living with him, he (deceased Hari Singh) out of love and affection bequeathed the entire property in her favour and as such plaintiffs are not entitled to

any share in the land as being claimed in the plaint. Defendant also claimed herself to be in possession of the property left by deceased by way of Will and by way of purchase.

15. Since plaintiffs claimed themselves to be the joint owners in possession of the suit land being successors of deceased Hari Singh, question which arises for consideration of this Court is, *"whether findings returned by both the Courts below that Will Ex.D-1 is not a valid, legal and genuine Will of the deceased Hari Singh, is sustainable in view of the evidence adduced on record or not?"* Defendant, while refuting the claim of the plaintiff set up a case that vide Will Ex.D-1 and Sale Deed Ex.D-2, deceased Hari Singh bequeathed and sold his property in her favour. She further claimed in written statement that deceased Hari Singh executed a Registered Will dated 9.3.1990, on account of love and affection, in sound and disposing state of mind, in favour of the defendant and Will was executed with the express and implied consent of the plaintiffs and the husband of plaintiff Urmila Devi was an attesting witness to the Will and the Will was executed with his consent.

16. Needless to say that law regarding nature and onus of the proof of the Will is by way of propounder and in that regard the manner, in which the evidence is required to be appreciated, has been duly prescribed in the judgment passed by the Hon'ble Apex Court in ***H.Venkatachala Iyengar vs. B.N. Thimmajamma and others, AIR 1959 SC 443***.

17. Guidelines framed in ***H.Venkatachala Iyengar*** case (*supra*) were further reiterated by Constitutional Bench of Hon'ble Apex Court in ***Shashi Kumar Banerjee and Others vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and others, AIR 1964 SC 529.*** The Court held:

> "4. The principles which govern the proving of a will are well settled; (see H. Venkatachala Iyengar v. B. N. Thimmajamma, 1959 (S1) SCR 426 : 1959 AIR(SC) 443) and Rani Purniama Devi v. Khagendra Narayan Dev, 1962 (3) SCR 195 : 1962 AIR(SC) 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no. such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the will was duly executed and attested. (Page-531)

18. Though normally onus to prove the execution and validity of the Will lies upon the propounder but in case when it is alleged by the opposite party that Will is not genuine document, onus shifts on the person who alleges the Will to beforged, to prove the same.

19. In ***Daulat Ram and Others vs. Sodha and Others,*** (***2005)1 SCC 40,*** the Hon'ble Apex Court held:

> "10. Will being a document has to be proved by primary evidence except where the Court permits a document to be proved by leading secondary evidence. Since it is required to be attested, as provided in Section 68 of the Indian Evidence Act, 1872, it cannot be used as evidence until one of the attesting witnesses at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. In addition, it has to satisfy the requirements of Section 63 of the Indian Succession Act, 1925. In order to assess as to whether the Will has been validly executed and is a genuine document, the propounder has to show that the Will was signed by the testator and that he had put his signatures to the testament of his own free will; that he was at the relevant time in a sound disposing state of mind and understood the nature and effect of the dispositions and that the testator had signed it in the presence of two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. But where there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. The burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so." (Page 43)

20. In the present case, defendant with a view to prove valid execution of the Will examined eight witnesses and placed documents Ex.D-1 to Ex.D-3 on the record. DW-1 is the scribe of the documents Ex.D-1 to D-3. DW-2 to DW-4 and DW-6 have been examined to prove the registration of Will Ex.D-2. DW-3 and DW-5 are the marginal witnesses to the sale deed Ex.D-3. DW-7 is the Secretary, Gram Panchayat, Dangoh, who was examined to prove a copy of family register Ex.DW-7/A of late Shri Hari Singh. DW-8 is the defendant herself.

21. As per defendant, Will Ex.D-2, dated 9.3.1990 was executed by late Shri Hari Singh in her favour. While perusing aforesaid documents, this Court found that there were two marginal witnesses; namely; Bal Kishan Namberdar and Hardeep Singh. But, unfortunately, none of these aforesaid marginal witnesses i.e. attesting witnesses were ever examined by the defendant as a witness in the Court to prove the execution of Will Ex.D-2. Similarly, none of the defendant witnesses, as have been detailed hereinabove, has stated anything with regard to non-citing of marginal witnesses. There is no explanation, worth the name, on record that why these marginal witnesses were not examined to prove the valid execution of Will Ex.D-2. At this stage, it would be profitable to reproduce Section 63 of the Indian Successions Act, 1925 as well as Section 68 of Indian Evidence Act:

> "<u>Section 63 of Indian Succession Act, 1925</u>
>
> "63. Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [12] [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—
>
> (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
>
> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

"Section 68 of Indian Evidence Act, 1872"

"68 Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: 1[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]"

22. Bare perusal of the aforesaid provisions of law clearly suggests that execution of Will needs to be proved by examining at-least one of attesting witnesses. In the instant case, as has been noticed above, none of marginal witnesses i.e. Bal Kishan Namberdar and Hardeep Singh have been examined to prove the valid execution of the Will and as such Courts below rightly came to the conclusion that defendant was not able to prove on record valid execution of Will Ex.D-2.

23. Similarly, as per Section 68 of the Indian Evidence Act once existence of some documents is denied, same cannot be taken into consideration in evidence unless one attesting witness is called/examined to prove the execution of the document, if alive. At the cost of repetition, it may be mentioned that there is no explanation, if any, with regard to absence of attesting witness; there is no whisper, if any, with regard to the whereabouts of the attesting witnesses. None of defendant witnesses have stated anything whether attesting witnesses were alive or not at the time of proving the same in the Court of law. Since defendant miserably failed to prove the valid execution of the Will Ex.D-2 strictly in terms of Section 63 of the Indian Succession Act and 68 of Indian Evidence Act, this Court sees no illegality and infirmity in the judgment passed by both the Courts below.

24. True, it is that in the case at hand defendant by way of examining scribe of the Will as well as Sub Registrar before whom the Will in question was registered and Registration Clerk, made an attempt to prove the valid execution of Will Ex.D-2, but, as has been noticed and observed above, that no marginal witness, who had appendedtheir signatures at the time of scribing of Will has been examined and as such there is no force much less substantial in the contention raised on behalf of learned counsel representing the defendant that defendant was able to prove on record, by leading cogent and convincing evidence, that the Will ExD-2 was validly executed by deceased Hari Singh.

25. As far as execution of sale deed i.e. Ex.D-1 is concerned, it emerge from the record that defendant though relied upon same set of evidence, which was applied in the case of proving the Will Ex.D-2, but in that case defendant successfully proved on record that sale deed Ex.D-1 was validly executed in her favour by deceased Shri Hari Singh.

26. DW-1 Amin Chand, while deposing in the witness box, stated that he prepared two documents, entered in his register at Sr.No.84 and 25, in favour of defendant Raj Kumari and both these documents were witnessed by two witnesses; namely; Bal Kishan and Hardeep Singh. He stated that documents i.e. sale deed Ex.D-1, Will Ex.D-2 and sale deed Ex.D-3 were written by him at the direction of executant Hari Singh. But, as has been noticed above, defendant has not

examined any of the aforesaid marginal witnesses to prove the valid execution of Will Ex.D-2. He has further stated that documents Ex.D-1 and Ex.D-2 were written by him at the direction of late Shri Hari Singh (executant) and thereafter it was read-over to him and after hearing and admitting the contents of same correct, the executant put his signatures in Urdu upon the documents and the witnesses had also put their signatures on the same. He further stated that he has seen sale deed dated 19.10.1990, Ex.D-3, which was also written by him.

27. DW-2 Gurbachan Singh, Registration Clerk, deposed on oath before the Court that on document Ex.D-1, he has seen endorsement Ex.DW-2/A, which was signed by Sub-Registrar. Ex.DW-2/B and Ex.DW-2/C were also signed by Shri Ratti Ram Sharma, Registrar (Naib Tehsildar). It also emerge from the record that on the same day defendant No.1 got executed a sale deed Ex.D-1 of same land in favour of defendant from late Shri Hari Singh and both these documents i.e. sale deed Ex.D-1 and Will Ex.D-2 were executed on 9.3.1990.

28. Similarly, DW-3 Bakil Chand also deposed on oath that he was witness to tatima sale deed Ex.D-3 and he also put his signatures on the document which was also read over to them by the person who has written it. He also admitted his signatures under red circle in Ex.D-3 on endrosment Ex.DW-2/B.

29. DW-4 Shri S.L. Negi also stated that he has seen documents Ex.D-1, Ex.D-2 and Ex.D-3 and his signatures are not appearing on these documents and signatures of Ratti Ram appear on the said documents as he recognize his signatures.

30. DW-5 Renu Devi deposed on oath before the Court that she is Numberdar of village Anora. She stated that she has seen Tatima sale deed Ex.D-3 upon which she put her signatures as witness and petition writer also read-over the contents of said documents to Hari Singh and he put his signatures in Urdu upon the said documents after admitting it to becorrect. She further stated that Tehsildar also obtained the signatures of parties on the sale deed endorsement Ex.DW-2/B and Hari Singh executant also put his signatures on the same. She further admitted that police case pertaining to false identification is under trial in the Court at Dehra.

31. DW-6 Ratti Ram deposed before the Court that in the year 1990 he was posted as Naib Tehsildar-cum-Sub Registrar, Amb. Will Ex.D-2 came to him for registration on 9.3.1990 which was presented by Hari Singh testator. He further stated that Hari Singh testator was identified by witnesses Bal Kishan Numberdar and Hardeep Singh.

32. DW-2 Gurbachan Singh, Registration Clerk in the office of Sub-Registrar also stated that endorsement Ex.DW-2/A has been made by Sub Registrar, Amb and Sub-Registrar obtained the signatures of the witnesses and parties on Ex.D-1. He further stated that documents Ex.D-1 and Ex.DW-2/B and Ex.DW-2/C were signed by Shri Ratti Ram, Naib Tehsildar.

33. Conjoint reading of aforesaid evidence led on record by the defendant suggests that the defendant was able to prove on record that sale deed Ex.D-1 was registered but admittedly, as has been noticed above, defendant was not able to prove on record by way of pleadings, cogent and reliable evidence that Will Ex.D-2 in question was validly executed. At the cost of repetition it may be stated that there is non-compliance of provisions contained in Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act and as such both the Courts below rightly came to the conclusion that defendant was not able to prove on record that Will was validly executed. But if evidence led on record by defendant is read in its entirety, it stands duly proved on record that defendant was able to prove on record that sale deed Ex.D-1 was duly executed by Shri Hari Singh in her favour and same was registered with the Sub Registrar, Amb, who before registering the same, read over and explained the same to Hari Singh, who lateron appended his signatures upon the same in the presence of witnesses. Moreover, careful perusal of plaint filed by the plaintiff nowhere suggests that there was challenge, if any, to the sale deed, rather plaintiff, while terming mutation Nos. 34 and 75, dated 21.10.1991 wrong, false, frivolous has only stated that deceased Hari Singh died intestate and as such there was no

occasion to enter mutation in the name of defendant. Defendant by way of written statement claimed herself to be owner of the land on the strength of sale deed Ex.D-1 and Will Ex.D-2 executed in her favour by the deceased Hari Singh.

34. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter, since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." (p.269)

35. As has been noticed above, it was essential for thedefendant being propouder of the Will to cite one of the marginal witness to prove the valid execution of Will in terms of Section 63 of the Indian Succession Act and Section 68 of Indian Evidence Act and requirement of law could not be overlooked or filled up solely in viewof the statement of Sub Registrar who registered the Will Ex.D-2, wherein he stated that marginal witnesses had identified the status of testator before him. Hence, in view of detailed discussion made hereinabove, this Court sees no illegality and infirmity in the judgment passed by both the Courts below.

36. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which was further upheld by the first appellate Court, do not warrant any interference of this Court as finding given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appears to be based on correct appreciation of oral as well as documentary evidence, moreover, as has been discussed in detail that the defendant has not been able to make out a case to persuade this Court that document Ex.D-2 is a validly executed Will by deceased Hari Singh in sound disposing state of mind. Hence, present appeal fails and is dismissed, accordingly. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Amrish Kamal & another. ……Petitioners.

Versus

State of Himachal Pradesh. ……Respondent.

Cr.MP(M) No. 1349 of 2016.
Date of decision: November 30, 2016.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 147, 148, 149, 307, 323 and 506 of I.P.C – the petitioners are students, who had assaulted the members of rival students' union – held, that the violence in the University campus has become a permanent feature due to frequent fights between the members of rival unions- the petitioners have committed heinous offences and stringent conditions are required to be imposed to ensure cordial atmosphere – the petitioners are the permanent residents of Himachal Pradesh- hence, they are ordered to be released subject to conditions. (Para-6 to 13)

For the petitioners Mr. Virender Thakur, Advocate.
For the respondent Mr. Pramod Thakur, Addl. Advocate General.
Mr. D.W. Negi, S.P. Shimla with Mr. ASI Ashwani Sharma, P.P., Summerhill in person.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

Petitioners are accused in FIR No. 236 of 2016 registered against them and their co-accused in Police Station, West, Shimla under Sections 147, 148, 149, 307, 323 and 506 of the Indian Penal Code.

2. Accused-petitioner Amrish Kamal is pursuing his studies in Law department of Himachal Pradesh University, whereas accused-petitioner Jeewan Singh is a student of Tribal studies. On 1.10.2016, an information qua clash between student organizations having taken place was received in Police Post, Summerhill. The Incharge, Police Post rushed to the spot. The victim of the occurrence Shri Ashish Kumar has reported that 25-30 students belonging to Student Federation of India (SFI) who were reinstated by the University Authority only on that day assaulted the complainant and his companion with Khukri, Darat, Rods and Dandas in a planned manner and as a result therefof the members of the complainant party Pankaj Kumar, Ramesh Bisht, Praynjal Joshi, Rahul Sudan, Fakir Chand, Akshay, Vishal Verma, Deepak, Ashish and others had sustained injuries on their person. The complainant allegedly was thrown out from Y.S. Parmar hostel by the assailants. He was found to have received multiple grievous injuries on various part of his body. The accused party allegedly threatened the complainant party to do away with their lives and also proclaimed "have you forgotten past incidents". The names of the assailants were disclosed to be the co-accused of the accused-petitioners. The complainant did not disclose the name of the accused-petitioners being the assailants in the report he lodged with the police. On the basis of the report lodged by Ashish Kumar aforesaid the police has lodged the FIR and started conducting investigation in the case. The names of the assailants disclosed by the complainant in the report were arrayed as accused in the FIR.

3. During the investigation, it transpired that the accused persons after forming an unlawful assembly attacked the complainant party and had threatened to do away with their lives to achieve the common objective of the unlawful assembly. The accused-petitioners as such were arrested on the next day i.e. 2.10.2016. The injured Pankaj Kumar, Ramesh Bisht, Vishal Verma and Praynjal Joshi had disclosed the names of the accused-petitioners being also the assailants in their statements recorded on 3.10.2016. Being so, accused-petitioner Amrish Kamal was arrested on 3.10.2016, whereas accused-petitioner Jeewan Singh on 4.10.2016. They both are now lying confined in judicial custody.

4. This petition has been sought to be dismissed on the grounds, inter-alia, that the accused-petitioners are involved in the commission of a heinous crime. Also that past criminal history is in their credit as FIR No. 219/2014 was registered against accused-petitioner Amrish Kamal under Sections 143, 149 and 34 of the Indian Penal Code at Police Station, Sadar Solan, whereas FIR No. 147/2016 under Sections 143 and 188 of the Indian penal Code against

accused-petitioner Jeewan Singh in Police Station, Sadar Shimla. Criminal cases so registered against them are now pending disposal in the Court. It has also been urged that both accused are habitual offenders and previously also were found to have indulged in committing violence and rioting in the University campus.

5. While Mr. Thakur, learned Counsel representing the accused-petitioners has argued that the accused-petitioners are not hardened criminals and that they being the students of University were pursuing their studies sincerely may be dealt with leniently in the matter of grant of bail. Mr. Pramod Thakur, learned Additional Advocate has, however, urged that the on account of repeated incidents of violence and rioting in the University campus, it has become a great challenge to the University authorities and also the local police to maintain peace and congenial atmosphere in the University. The accused-petitioners and their companions are frequently indulging in the incidents of violence and rioting in the University campus. They have spoiled the teaching atmosphere and as a result thereof the career of other students who want to pursue their courses has been affected adversely.

6. I find considerable force in the submissions made by learned Additional Advocate General because due to frequent fights between the members of different students organizations, the violence in the University campus has become a permanent feature. This Court feels that the office bearers of various student organizations are not fighting for common cause i.e. to maintain congenial atmosphere in the University nor keeping in mind the welfare of the students and rather settling their scores with each other and perhaps at the behest of some outside forces. Being so, though to enlarge an offender like the accused-petitioners on bail, some time may amount to a misplaced sympathy, however, at the same time the Court has also to strike out balance between the magnanimity of offence allegedly committed and the liberty of a person booked as an offender in connection with the commission of such offence.

7. True it is, that the offence the accused-petitioners allegedly have committed is not only serious but heinous in nature. However, the only distinction in their case as compared to their co-accused is that the victim of the occurrence Ashish Kumar aforesaid did not disclose their names at the first available opportunity i.e. at the time of reporting the occurrence to the police of Police Post, Summerhill being also the assailants. Their names were rather disclosed by the injured witnesses Pankaj, Ramesh Bisht, Vishal Verma and Praynjal Joshi when their statements were recorded on the third day of the occurrence i.e. 3.10.2016. Undoubtedly, stringent conditions are required to be imposed upon both accused-petitioners in the event of they are admitted on bail. Order which reads as follows to this effect was passed in this application on 15.11.2016:

> "Learned Deputy Advocate General has placed on record the status report. ASP, Shimla Arjit Sen and Inspector/SHO Sanjeev Kumar, Police Station (East), Shimla have produced the record. Heard for sometime. This Court feels that in the event of the accused-petitioners are ordered to be admitted on bail, stringent conditions are required to be imposed upon them in order to ensure that there is no breach of peach in the University and teaching atmosphere is also not spoiled. Learned Counsel representing the petitioners sought adjournment to have instructions. Allowed. List on 21st November, 2016."

8. Not only this, but as per the order passed on 21.11.2016 fathers of both accused-petitioners were called upon to attend this Court in person. The order reads as under:

> "Heard further. Let Sh. Rattan Singh Kamal, father of accused-petitioner No. 1 and Sh. Narayan Singh, father of accused-petitioner No. 2 to attend this Court in person on the next date. List on 24th November, 2016."

9. Consequently, Satish Pal, elder brother of accused-petitioner Amrish Kamal and Narayan Singh, father of accused-petitioner Jeewan Singh had attended this Court on 24.11.2016.

10. The respondent-State was also called upon through learned Additional Advocate General to assist this Court as to what should be the appropriate conditions to be imposed upon the accused-petitioners so that they being student can be ordered to be admitted on bail and the teaching atmosphere in the University can also be maintained. Mr. D.W. Negi, the Superintendent of Police, Shimla district remained associated during the course of hearing in this petition and he is present in person even today also.

11. The situation in the University campus may be tense. It can also be believed reasonably that the administration had deployed sufficient manpower to take stock of the situation in the University campus and avert an untoward incident. However, this Court is seized of this petition filed by the accused petitioners, two in number for the grant of bail on the ground that their names were never disclosed by the complainant to be the assailants and that they have been falsely implicated by the police after the occurrence i.e. 1.10.2016. They are in custody from the date of their arrest. They belong to district Sirmour and district Mandi respectively. They are students of Himachal Pradesh University. Being so, there is no likelihood of their jumping over the bail or ultimately non-availability at the time of trial. They are, therefore, ordered to be admitted on bail subject to their furnishing personal bond in the sum of Rs. 50,000/- each with 2-2 sureties each out of whom one shall be in their close relations i.e. father/brother to the satisfaction of learned Chief Judicial Magistrate, Shimla district at Shimla. They shall further abide by the following conditions:

1. If they are still students of University and not disqualified to be a student of University and if they intend to pursue their further studies, shall have to disclose the proof of their place of abode in Shimla town to the satisfaction of learned Chief Judicial Magistrate at the time of furnishing bail bonds and in the event of pursuing their respective courses further they shall have to visit the University campus from such place of abode in Shimla town;
2. They are directed to report to Incharge, Police Post Summerhill before going to their respective department to attend the classes and shall also apprise the said Incharge of Police Post of their departure from the campus after attending classes. The Incharge of Police Post shall maintain record in this regard;
3. This arrangement shall continue for one month from the date the accused-petitioners are released on bail and shall be subject to review by learned Chief Judicial Magistrate thereafter on a report in this regard to be filed by the Incharge of police post;
4. The entries of the accused-petitioners in any of hostel of the University shall remain banned either in the capacity of a hosteller or guest of any other inmate who has been allotted hostel by the University;
5. They shall not be the member of any procession, dharana or of any unlawful assembly in the University campus;
6. On their release from custody they shall not attend any welcome party/function or any procession by their fellow students/organization inside or outside the University campus;
7. They shall not displace any party symbol or sticker except for identity card issued by the Competent authority in the University nor shall stand on the main gate of the University or any department wearing such stickers or badges showing their affiliation to a particular student organization or political party while in the University campus;
8. The sureties i.e. father/brother, as the case may be, shall keep on visiting the Dean/head of the department concerned to find out that the accused-petitioners are attending their classes regularly and also their performance in study once in a month;

9. The Dean/head of department shall maintain record of such visits so that the same is readily available if requisitioned by this Court or the Court of learned Chief Judicial Magistrate, Shimla for perusal.
10. shall join the investigation of the case as and when called upon to do so & on filing of challan against them regularly attend the trial Court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;
11. shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;
12. shall not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Investigating Officer;
13. shall not leave the territory of India without the prior permission of the Court.

12. It is clarified that if the accused-petitioners misuse their liberty or violate any of the conditions imposed upon them; the Investigating Agency shall be free to move this Court for cancellation of the bail.

13. The observations hereinabove shall remain confined to the disposal of this petition and have no bearing on the merits of the case. The application stands disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

RSA Nos.367 and 368 of 2007.
Judgment Reserved on :11.11.2016
Date of decision: 30.11.2016

1. RSA No.367 of 2007

Baldev Singh ....Appellant-Defendant
Versus
Chet Ram & Ors. ....Respondents-Plaintiffs

2. RSA No.368 of 2007

Baldev Singh ....Appellant-Plaintiff
Versus
Chet Ram & Ors. ....Respondents- Defendants

Specific Relief Act, 1963- Section 38- Plaintiffs pleaded that they are recorded as gairmaurusi tenants and had become the owners after the commencement of H.P. Tenancy and Land Reforms Act – the defendant threatened to encroach upon the land – the defendant pleaded that revenue entries in favour of the plaintiffs were wrong – a counter-claim was also filed by the defendant – the Trial Court decreed the suit and dismissed the counter-claim – an appeal was filed, which was dismissed – held in second appeal that the original owner had not challenged the revenue entries – it was duly proved that plaintiffs were recorded as tenants, who had become the owner on the commencement of H.P. Tenancy and Land Reforms Act- separate appeals should have been filed against the decree of the suit and dismissal of the counter-claim- appeal dismissed.(Para-17 to 35)

Cases referred:

Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant: Mr.C.N. Singh, Advocate, in both the appeals.
For the Respondents: Mr.G.D. Sharma, Advocate, in both the appeals.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

Both these appeals are being disposed of by a common judgment as they call for determination of common question of law. Moreover, the identity of the parties in both the appeals is the same.

RSA No.367 of 2007

2. Plaintiffs (respondents herein), namely; Chet Ram, Sewak Ram and Devi Chand sons of late Shri Kirpa Ram, by way of suit for permanent prohibitory injunction filed under Section 38 of Specific Relief Act, prayed for decree of permanent injunction restraining the defendant (appellant herein) from causing any sort of interference in their peaceful ownership and possession and also from cutting trees or changing nature of the land and causing any damage and waste to land comprised in Khata/Khatauni No.16/44, Khasra Nos.220 min, 223, 224, 225, 227, 229, 230, 233 and 234, kittas 9, measuring 7 bighas 3 biswas, situated at Mauja Bhaget, Pargana Chail, Tehsil Kandaghat, District Solan *(hereinafter referred to as `suit land').*

3. Plaintiffs-respondents pleaded that they are recorded as "Gair Maurusi Tenant" over the suit land as per latest Jamabandi, but they have become owners of the land in dispute by operation of law. It was further pleaded that the plaintiffs-respondents are successors-in-interest of deceased Kirpa Ram, who has been shown in possession of land in dispute as tenant on the share of deceased Shonkia. Plaintiffs-respondents claimed that they have become owners of the suit land by virtue of operation of law after H.P. Tenancy and Land Reforms Act, 1972 came into operation. Since defendant with malafide intention started advancing threats to encroach upon the land of the plaintiffs-respondents, they were compelled to file the suit as referred hereinabove.

4. Defendant-appellant also, by way of written statement, refuted the claim put forth on behalf of the plaintiffs-respondents by stating that neither plaintiffs nor their predecessor-in-interest were ever inducted as tenant over the suit land. The revenue entries existing in favour of the plaintiffs-respondents have been incorporated illegally and in unauthorized manner and as such same are void ab-initio. Defendant-appellant further averred that he is successor of the suit land and plaintiffs-respondents have no right, title or interest over the same. Defendant also filed a counter claim alongwith the written statement pleading therein that he is owner in possession of the suit land alongwith other co-owners and the revenue entries in favour of late Kirpa Ram and the plaintiffs have been incorporated wrongly and behind the back of the defendant and his predecessor-in-interest. Defendant-appellant also claimed that the plaintiffs-respondents are trying to dispossess him on the basis of the wrong revenue entries and in case they succeed in dispossessing the defendant from the suit land or the Hon'ble Court comes to the conclusion that the defendant is out of possession then in that eventuality the defendant may be held entitled for possession of the suit land on the basis of title.

5. In the aforesaid background, defendant also sought consequential relief against the plaintiffs-respondents by restraining them from interfering in ownership and possession of the defendant in any manner whatsoever.

6. On the settled issues, learned trial Court decreed the suit of the plaintiffs-respondents and restrained the defendant-appellant from causing any sort of interference in the peaceful ownership and possession of the plaintiffs and also from cutting trees or changing the nature of the suit land, described hereinabove. While decreeing the aforesaid suit of the respondents-plaintiffs, trial Court below dismissed the counter claim of the defendant.

7. Being aggrieved and dis-satisfied with the aforesaid judgment and decree, decreeing the suit of the plaintiff and dismissing the counter claims of defendant-appellant, defendant-appellant approached the learned first appellate Court by way of Civil Appeal No.65-S/13 of 2006, laying challenge therein to the decree of suit by the learned trial Court as well as

dismissal of the counter claim filed by the defendant-appellant. However, fact remains that the aforesaid appeal preferred by the appellant-defendant was dismissed and the judgment and decree of learned trial Court was affirmed.

8. In the aforesaid background, appellant-defendant approached this Court praying therein for quashing and setting aside of the judgment passed by both the Courts below. This Court vide order dated 28.8.2008 admitted the instant appeal on following substantial questions of law:

> "a. Whetherthe judgment/decree dated 26.4.2007 passed by the court below is perverse, as the findings are contrary to pleadings, evidence, admissions on record and the law, as the relevant material have been ignored and irrelevant/ inadmissible material/evidence have been taken into consideration, which has led to miscarriage of justice?
>
> b. Whether the first appellate court below misread, misconstrued, misinterpreted the provisions of the law and failed to appreciate the fact that the trial court by not framing the material issue have caused prejudice to the appellant, in law and the appellant have been deprived of just and proper opportunity to prove and contest the case, which procedure adopted by the trial court was perverse and illegal?

9. Before proceeding to decide the aforesaid substantial questions of law, it may be noticed that during arguments having been advanced by counsel representing the appellant-defendant, he was confronted with the judgment passed by the Hon'ble Apex Court in ***Rajni Rani and Another vs. Khairati Lal and Others, (2015)2 SCC 682,***which was followed by this Court **in RSA No.293 of 2006, titled as: Piar Chand & Others vs. Ranjeet Singh & Others, decided on 16.9.2016**, whereby it has been categorically held that counter claim, if any, dismissed by trial court needs to be challenged by way of affixing separate requisite court fee.

10. Mr.C.N. Singh, learned counsel representing the appellant-defendant, after perusing the judgment, referred hereinabove, fairly stated that at this stage, he would not be pressing his appeal regarding counter claim. This Court, solely with a view to ascertain the genuineness and correctness of arguments having been advanced by Mr.C.N. Singh, whereby he stated that there has been total mis-appreciation and mis-reading of evidence led on behalf of the respective parties by both the Courts below, perused the entire evidence, be it ocular or documentary, led on record by the parties.

11. After carefully perusing the material available on record, this Court finds it difficult to accept the aforesaid contention made by Mr.Singh that first appellate Court failed to appreciate the evidence in its right perspective and trial Court failed to frame material issues, as a result of which great prejudice is caused to the appellant-defendant.

12. Close scrutiny of the pleadings adduced on record by the parties nowhere suggests that learned trial Court failed to frame proper issues. Admittedly, plaintiffs-respondents filed a suit for permanent prohibitory injunction praying therein for restraining the defendant from causing any sort of interference in the peaceful possession and ownership of the plaintiffs. Plaintiffs in their plaint specifically averred that they are recorded as "Gair Maurusi Tenant" over the suit land as per latest Jamabandi and they are owners in possession of the suit land as per law, whereas, appellant-defendant by way of written statement refuted the aforesaid claim by stating that the respondents-plaintiffs were never inducted as tenant over the suit land. In view of aforesaid pleadings, learned trial Court framed the following issues:

> "1. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction as claimed? OPP.
>
> 2. In case Issue No.1 is proved in affirmative, whether the plaintiffs are entitled for a decree of possession of the suit land as alleged ? OPP.

3. Whether the entry showing the plaintiffs as tenant over the suit land is incorrect, as alleged? OPD.
4. Whether the plaintiffs have no right, title or interest over the suit land as alleged? OPD.
5. Whether the defendant is entitled for relief of declaration that he alongwith other persons is owner in possession of the suit land as alleged ? OPD.
6. Relief."

13. Perusal of aforesaid issues framed by learned trial Court clearly suggest that all the material issues, which were required to be framed in light of pleadings available on record, were duly framed by Court and as such this Court sees no force in the contention put forth on behalf of the appellant-defendant that no material issues were framed by the trial Court. Moreover, if at all defendant-appellant was aggrieved with non-framing of proper issues they had remedy under law to get the additional issues framed. Similarly, evidence led on record by respective parties, especially Ex.DX-1 and Ex.DX-2, i.e. Jamabandies for the years 1952-53 and 1956-57 suggests that predecessor-in-interest of appellant-defendant was recorded as owner, but revenue record placed on record by the plaintiffs-respondents in support of their claim is Jamabandi for the year 1960-61, perusal whereof clearly suggests that they were inducted as tenants over the suit land in the year 1960-61. Plaintiffs by way of placing on record ample evidence in shape of documentary evidence Ex.PW-1/A and Jamabandies Ex.PW-1/B to Ex.PW-1/D and copy of mutations Ex.PW-1/E and Ex.PW-1/F, have successfully proved on record that Shri Kirpa Ram, their predecessor-in-interest, was inducted as "Gair Maurusi Tenant" over the suit land by Shri Shonkia Ram, predecessor-in-interest of appellant-defendant and admittedly there is no document placed on record by the appellant-defendant to rebut the continuous entries showing the respondents-plaintiffs as "Gair Maurusi Tenant" over the suit land. Similarly, this Court finds that in all these aforesaid revenue entries, plaintiffs have been shown to be paying rent @ Rs.80/- to the landlord till 1980.

14. At this stage, Shri C.N. Singh, counsel representing the appellant-defendant, stated that change in revenue entries was effected at the back of appellant-defendant and as such same are not binding upon the appellant-defendant. He also argued that since respondents-plaintiffs were unable to place on record any order, issued by revenue authorities, ordering the change in revenue entries, change made in revenue entries has no legal sanctity and same could not be looked into by the Courts below. Mr.Singh, in support of his aforesaid contention that change in revenue entries made at the back of appellant-defendant, who has been coming in possession continuously before effecting illegal change, placed reliance on the judgments passed by our own High Court in ***Tej Ali vs. Charag Deen & Others, RSA No.6 of 2002, decided on 9.9.2015, Desh Raj alias Deshi vs. Joginder Singh and another, RSA No.500 of 2002, decided on 27.3.2014, Smt.Nirmala Devi and Others vs. The Financial Commissioner (Appeals), & Others, CWP No.1312 of 2007, decided on 3.1.2013 and Shiam Singh and Others vs. Chaman Lal and Others, RSA No.261 of 1996, decided on 5.4.2010.***

15. Mr.G.D. Sharma, learned counsel representing the respondents in both the appeals, supported the judgments passed by both the Courts below. Mr.Sharma, while inviting the attention of this Court to the judgments passed by both the Courts below, strenuously argued that same are based upon correct appreciation of evidence available on record and as such there is no scope of interference, whatsoever, of this Court in the present facts and circumstances of the case. He further stated that close scrutiny of the judgment passed by both the Courts below clearly suggests that Courts below have dealt each and every aspect of the matter meticulously and all the relevant material placed on record by the respective parties has been taken note of at the time of passing impugned judgment and as such this Court has no occasion, whatsoever, to interfere with the well reasoned concurrent findings returned on fact and law by both the Courts below. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment

passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264.**

16. I have heard learned counsel for the parties and gone through the record of the case carefully.

17. In the instant case, after perusing documentary evidence led on record by respondents-plaintiffs, it clearly emerge that Shri Shonkia Ram, predecessor-in-interest of the appellant-defendant, had inducted Shri Kirpa Ram as "Gair Maurusi Tenant" over the suit land on the rent of Rs.80/-. It is also undisputed that Shri Shonkia Ram, predecessor-in-interest of the appellant-defendant, was alive till the year 1999. It is not understood that why original owner i.e. Shonkia Ram did not lay challenge, if any, to aforesaid entries effected in favour of Kirpa Ramduring his life time. It stands duly proved on record that since 1960-61, predecessor-in-interest of the respondents-plaintiffs, has been coming in continuous possession of the suit land till filing of suit in 2001. There is no evidence led on record by appellant-defendant suggestive of the fact that at any point of time they had applied for correction of revenue entries in terms of provisions contained in H.P. Land Revenue Act. It is only after the death of original owner Shonkia Ram, appellant-defendant staked claim qua the suit land by refuting the claim put forth on behalf of respondents-plaintiffs.

18. At this stage, it needs to be taken note of the fact that prior to filing of instant suit by respondents-plaintiffs, appellant-defendant nowhere claimed himself to be owner in possession of the suit land. In the written statement filed to the plaint in the present suit, appellant-defendant denied the assertions made by respondents-plaintiffs that they were inducted as "Gair Maurusi Tenant" over the suit land. Interestingly, in the written statement appellant-defendant, while denying that the respondents-plaintiffs are owners in possession of the suit land, stated that on the basis of wrong revenue entries, respondents-plaintiffs are trying to dispossess the appellant-defendant. Defendant in thecounter claim having been filed by him claimed that by filing the suit, the plaintiffs-respondents have threatened the title of defendant qua the suit land and as such the defendant has a cause to prefer counter claim. But, interestingly in prayer clause appellant-defendant, while praying for dismissal of the suit also prayed that the entries in favour of the plaintiffs qua the suit land are wrong, illegal, null and void and plaintiffs have no right, title or interest over the same in any manner, whatsoever and consequently prayed that in case respondents-plaintiffs are found to have been in possession of the suit land, decree for possession in his favour and against the plaintiffs may be passed.Counter claims were dismissed and no independent appeal was preferred before first appellate Court and at this stage defendant has not pressed his counter claims.

19. At this stage, it may be noticed that subsequently, after one year of the filing of the instant suit by the plaintiffs-respondents, appellant-defendant filed another suit bearing Civil Suit 58-K/1 of 2002 on 23.12.2002 laying therein challenge to the revenue entries showing respondents-plaintiffs and their predecessor-in-interest to be in possession of the suit land, but, interestingly in that suit appellant-defendant, plaintiff therein, stated, *"That the cause of action for filing the suit arose to the plaintiff against the defendants on 25.5.2002 when the defendants on the basis of wrong revenue entries in their favour in the column of possession, started interfering in the suit land and threatened to change the nature of the suit land and to cause damage to the same and also threatened to raise construction thereon and prior to it the cause of action arose when the wrong entries were incorporated in the revenue record and the cause of action is still continuing."*

20. Aforesaid assertion qua the cause of action, having been accrued to the appellant-defendant, is totally contrary to stand taken by him in Civil Suit No.78-K/1 of 2001 filed by the respondents-plaintiffs in the present case. Apart from examination of aforesaid overwhelming evidence led on record by the plaintiffs suggestive of the fact that his predecessor-in-interest was inducted as "Gair Maurusi Tenant" by Shri Sonkia Ram, predecessor-in-interest of appellant-defendant, this Court also perused oral evidence led on record by appellant-defendant to prove that respondents-plaintiffs were never inducted as "Gair Maurusi Tenant". Perusal of oral evidence led on record by the appellant-defendant nowhere rebuts the entries showing

respondents-plaintiffs as "Gair Maurusi Tenant" of the suit land. None of the appellant-defendant's witnesses stated anything with regard to induction of Kirpa Ram, predecessor-in-interest of respondents-plaintiffs as "Gair Maurusi Tenant" over the suit land, rather they all stated that Kirpa Ram was a spiritual person and he never used to cultivate the land and they saw appellant-defendant Baldev Singh in possession. Apart from above, there is nothing much in their statements/depositions which could persuade this Court that appellant-defendant by way of leading cogent and convincing evidence was able to rebut the entries made in the revenue record after 1960-61 showing predecessor-in-interest of the respondents-plaintiffs as "Gair Maurusi Tenant" over the suit land. Rather, it emerged from the perusal of oral evidence led on record by the respective parties that suit land on which Kirpa Ram, predecessor-in-interest of the plaintiffs-respondents, was inducted as "Gair Maurusi Tenant", situated at village Bhaget, whereas, Shonkia Ram original owner used to reside at village Dehar, which was 35 kilometers away from the suit land. None of the defendant witnesses stated that they are residents of village in which suit land is situated, rather they admitted that they belong to other village which is at far distance from village Bhaget. Though appellant-defendant termed the entry in favour of Kirpa Ram as a stray entry, but, as has been observed above, no cogent and convincing evidence was led on record to rebut the latest entries made in favour of respondent-plaintiffs. Moreover, Jamabandies placed on record for the years 1952-53 and 1956-57, Ex.D-X1 and Ex.D-X2, pertain to period prior to 1960-61, when Kirpa Ram, predecessor-in-interest of respondents-plaintiffs, was inducted as "Gair Maurusi Tenant". Once respondents-plaintiffs themselves claimed that they were inducted as "Gair Maurusi Tenant" over the suit land after 1960-61, it was incumbent upon the appellant-defendant to place on record entries, if any, in his favour after 1960-61 suggestive of the fact that they were shown as owners in possession of the suit land and as such any Jamabandi pertaining prior to 1960-61 was rightly not considered by Courts below.

21. True, it is that it is settled law that presumption of truth is attached to the latest entries and same are rebuttable if it is proved on record that entries, if any, were not effected in accordance with law. In the present case, respondents-plaintiffs by way of placing convincing evidence successfully proved on record that since they were owners in possession of the suit land after having been inducted as "Gair Maurusi Tenant" by Shri Shonkia Ram, predecessor-in-interest of respondents-plaintiffs, they were rightly shown as "Gair Maurusi Tenant" over the suit land in the Jamabandi for the year 1960-61. While going throughthe evidence on record, this Court could lay its hand to report of Patwari given at the time of Girdawari dated 2nd December, 1959, which clearly suggests that change in the revenue entries was effected in the subsequent Jamabandi for the year 1960-61 by Patwari after noticing the change of possession and as such there is no force in the contention put forth by Shri C.N. Singh that change in entry was made without any basis and without any authority. Apart from above, it stands duly proved on record that since 1960-61 respondents-plaintiffs were recorded as "Gair Maurusi Tenant" over the suit land, they have acquired the status of owners by virtue of Section 104 of H.P. Tenancy and Land Reforms Act, 1972.

22. After carefully perusing the evidence led on record by respective parties, this Court sees no reason to differ with the judgment passed by both the Courts below that the respondents-plaintiffs were in possession of the suit land as tenants and they have become owners by operation of law. Hence, this Court really finds it difficult to conclude that Courts below misread and mis-appreciated and mis-construed the evidence led on record. Since there is proper appreciation of evidence, pleadings and law, by no stretch of imagination judgments passed by Courts below can be termed to be perverse. Substantial Questions of law are answered accordingly.

RSA No.368 of 2007

23. The suit out of which instant appeal arises was instituted by appellant-plaintiff Baldev Singh for declaration and injunction to the effect that revenue entries showing the respondents-defendants and their predecessor-in-interest in possession of suit land comprised in Khata No.20, Khatauni No.51, Khasra Nos.42 min, 101 min, 103 min and 118 min, measuring 4 bighas 6 biswas, situated at Mauza Tikkar, Pargana Chail, Tehsil Kandaghat, District Solan

(hereinafter referred to as the `suit land') are totally wrong, illegal, null and void ab-initio and are not binding on the rights of the appellant-plaintiff.

24. Since facts contained in the plaint in the present suit is virtually repetition of stand taken by appellant-plaintiff in the written statement filed by himin the Civil Suit No.78-K/1 of 2001, which was subject matter of RSA No.367 of 2007, this Court deems it not necessary to narrate the same here for sake of brevity. Similarly, respondents-defendants have taken same stand as they had taken in Civil Suit No. 78-K/1 of 2001 filed by them, whereby they claimed themselves to be the owners of the suit land being "Gair Maurusi Tenant" having been inducted by Shri Shonkia Ram, predecessor-in-interest of the plaintiff-appellant.

25. By way of instant suit i.e. Civil Suit No.58-K/1 of 2002, which was admittedly filed after one year of filing of Civil Suit No. 78-K/1 of 2001, appellant-plaintiff prayed for decree of permanent prohibitory injunction restraining the defendants (respondents herein) from interfering in the suit land and changing its nature and raising any type of construction and to declare revenue entries showing defendants-respondents and their predecessor-in-interest Kirpa Ram in the column of possession ofthe suit land as wrong, illegal, null and void ab-initio and not binding on the rights of the plaintiff-appellant.

26. Learned trial Court on the basis of pleadings of the parties framed the following issues:

> "1. Whether the plaintiff is owner-in-possession of the land and the revenue entries are incorrect as alleged? OPP.
>
> 2. In case the plaintiff proves in issue No.1, whether the plaintiff is entitled for the relief of permanent prohibitory injunction as alleged? OPP.
>
> 3. Whether the status of the defendants is that of owner qua the land by operation of law as alleged? OPD."

27. Subsequently, learned trial Court vide judgment and decree dated 31.8.2006 dismissed the suit of the appellant-plaintiff by holding that plaintiff is neither owner nor in possession of the suit land and as such he was declined relief of permanent prohibitory injunction.

28. Being aggrieved and dis-satisfied with the aforesaid judgment and decree, appellant-plaintiff filed an appeal before learned District Judge, Solan, which came to be registered as Civil Appeal No.66-S/13 of 2006. However, aforesaid appeal preferred by appellant-plaintiff was dismissed.

29. In the aforesaid background, appellant-plaintiff approached this Court praying therein for decreeing the suit after setting aside the judgment passed by both the Courts below. This Court vide order dated 28.5.2008 admitted the instant appeal on the following substantial questions of law:-

> "1. Whether the first appellate court below was right in ignoring the law well settled that the revenue entries cannot be changed behind the back of owner i.e. the father of the appellant-plaintiff, that to in favour of late Shri Kirpa Ram, who was a sanayasi & the successors in-interest i.e. the respondent-defendants, have no right under law to claim any right, if any, on the basis of illegal revenue entries and such change is against, the law and the procedure to be adopted under HP Land Revenue Act and HP Lands Record Manual, 1992?
>
> 2. Whether the revenue entries which have been changed in an unauthorized manner carries no presumption of truth in the eyes of Law and are automatically replaced by previous entries, and if that being the legal position then all revenue entries in favour of late Sh.Kirpa Ram who was a sanayasi (Admitted position on record) and further to the respondents (predecessor-in-interest) was void-ab-initio and do not

create any right, title or interest in favour of the respondents/Defendants?

3. Whether the first appellate court below acted contrary to the principles of law of evidence by giving its findings contrary to the evidence, and law which very well supported the case of the appellant/respondent/counter claimant?

30. Keeping in view the text and contents of questions No.1 and 2, this Court would be taking up these questions together for consideration. True it is that revenue entries cannot be changed behind the back of the owner and change, if any, can be effected in revenue record on the orders, if any, passed by the revenue authorities. In both the connected appeals facts are common and dispute is qua the suit land which is subject matter of both the appeals and parties had led similar evidence, as has been led in Civil Suit No.78-K/1 of 2001, which was subject matter in RSA No.367 of 2007. While deciding RSA No.367 of 2007, this Court minutely perused the evidence led on record by appellant-plaintiff to demonstrate that Shri Kirpa Ram, predecessor-in-interest of respondents-defendants, was never inducted as "Gair Maurusi Tenant" over the suit land by Shri Shonkia Ram. At the cost of repetition, it may be stated that appellant-plaintiff nowhere successfully proved by leading cogent and convincing evidence on record that entries made in favour of Shri Kirpa Ram, predecessor-in-interest of respondents-defendants, showing himas "Gair Maurusi Tenant" over the suit land are wrong, illegal and void abinitio. Appellant-plaintiff only placed on record two Jamabandies pertaining to the years 1952-53 and 1956-57, suggestive of the fact that their predecessor-in-interest Shri Shonkia Ram was entered in the column of possession qua the suit land, but, as has been discussed in earlier RSA No.367 of 2007, decided by this Court, there is no document placed on record by appellant-plaintiff suggestive of the fact that Kirpa Ram, predecessor-in-interest of respondents-defendants, was wrongly shown as "Gair Maurusi Tenant" over the suit land. Since respondents-defendants specifically claimed that they were inducted as "Gair Maurusi Tenant" by Shonkia Ram in the year 1960-61, appellant-plaintiff ought to have placed on record documentary evidence, if any,suggestive of the fact that even after 1960-61 they were shown as owners in possession of the suit land. Similarly, this Court, while perusing the record of another case, could lay its hand to the document Ex.DX-3 i.e. Rapat Roznamcha made by Patwari concerned during Girdawari, perusal whereof clearly suggests that entry made in Jambandi pertaining to the year 1960-61 was not mere a stray entry, rather same was effected on the report of Patwari who vide Rapat Roznamcha for the year 1959-60 found Kirpa Ram, predecessor-in-interest of respondents-defendants, in possession of the land and as such there is no force in the contention raised on behalf of appellant-plaintiff that change made in the revenue entry in the Jamabandi for the year 1960-61 is without any basis.

31. Similarly, in the present case also no sufficient oral evidence was led on record by appellant-plaintiff to demonstrate that Shri Kirpa Ram, predecessor-in-interest of respondents-defendants, was never inducted as a "Gair Maurusi Tenant" over the suit land because none of the plaintiff witness has stated anything with regard to induction of Kirpa Ram as "Gair Maurusi Tenant", rather they all have stated that since Kirpa Ram was a *sanyasi,* there was no occasion to induct him as a "Gair Maurusi Tenant". Moreover, as has been observed in earlier case also that original owner Shonkia Ram, who was alive till the year 1999, never laid challenge, if any, to the continuous entries in revenue record in favour of predecessor-in-interest of respondents-defendants. Apart from above, filing of present suit by appellant-plaintiff itself suggests that prior to filing of the instant suit he had not taken any steps to get the revenue entries corrected, hence it may not be open for him to file suit after 45 years for correction of revenue entries that too after filing the suit by respondents-defendants seeking permanent prohibitory injunction against the appellant-plaintiff from interfering in the suit land. Since there is evidence in shape of Ex.DX-3 suggestive of the fact that change in entries was made pursuant to Rapat Roznamcha made by Patwari, who found respondents-defendants in possession of the suit land, this Court sees no force in the contention put forth on behalf of the appellant-plaintiff that change in revenue entries was made without any basis and at his back. Moreover, at this

stage, this Court finds that counter claims, filed by the present appellant-plaintiff in the suit filed by the respondents-defendants, wherein challenge was laid to the revenue entries showing the respondents-defendants as "Gair Maurusi Tenant", were dismissed by the trial Court.

32. Appellant-plaintiff by way of common appeal laid challenge to the judgment passed by learned trial Court in favour of respondents-defendants decreeing their suit and dismissing counter claim of the appellant-plaintiff and the same was dismissed. Since there was no separate legally constituted appeal preferred by the appellant-plaintiff qua the dismissal of counter claim, no composite appeal could be entertained by the first appellate Court, as has been done in the present case. Moreover, in the present appeal since counsel representing the appellant-plaintiff has stated that he may not be pressing counter claim, finding already returned by trial Court qua counter claim has attained finality. Since there was already finding of trial Court qua the alleged wrong entries having been effected in the revenue record in favour of respondent-defendant by the trial Court in Civil Suit No.78-K/1 of 2001, while dismissing the counter claim, the Court belowought to have not entertained the instant suit preferred by present appellant-plaintiff, wherein he again laid challenge to the revenue entries showing respondent-defendant as "Gair Maurusi Tenant" over the suit land.

33. Hence, this Court, after carefully perusing/ examining the evidence led on record in both the cases, is fully convinced that respondents-defendants were able to show on record by leading cogent evidence that they were inducted as tenants by predecessor-in-interest of appellant-plaintiff and they had been paying regular rent to the original owner and thus relationship of landlord and tenant. As far as change in revenue entries is concerned, it has already been discussed in detail that those were changed on the basis of report submitted by Patwari in the shape of RoznamchaEx.D-3 to effect that he after seeing the possession of the predecessor-in-interest of the respondents-defendants over the suit land effected change in record. In view of the above, substantial questions of law are answered accordingly.

34. This Court is fully satisfied that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter, since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in***Laxmidevamma's*** case supra, wherein the Court has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained." ***(p.269)***

35. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appear to be based on correct appreciation of oral as well as documentary evidence. Hence, both

the aforementioned appeals fail and are dismissed, accordingly. There shall be no order as to costs.

36. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Ramesh Chand & Others ...Appellants-Defendants

Versus

Roop Singh (since deceased) Through his LRs.Smt.Pushpa Devi & Ors. ...Respondents-Plaintiffs

Regular Second Appeal No.446 of 2007.
Judgment Reserved on: 28.11.2016
Date of decision: 30.11.2016

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is co-owner in possession of the suit land – defendants were threatening to interfere in the ownership and possession of the plaintiff and to discharge the water of their taps and rainy water in the suit land and to create passage over the same – they had encroached upon part of the suit land- the defendants denied the claim of the plaintiff- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed- held in second appeal that the demarcation was obtained during the pendency of the suit- no objection was filed to the report of demarcation – the report was duly proved – the demarcation was conducted in accordance with law – the right of passage was not established by the defendants- the Courts had rightly appreciated the evidence.(Para-19 to 35)

Cases referred:

State of H.P. vs. Laxmi Nand and Others, 1992(2) Sim.L.C. 307
Kamal Dev and another vs. Hans Raj, 2000(1) Shim.L.C. 192
Rattan Chand son of Lachho Ram vs. Pushpa Devi widow of Shri Balwant Singh and others, 2014 ILR HP 145
Krishan Singh alias Kishan Singh vs. Balram Singh, 2010(3) Shim.L.C. 548
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264.
Raja Ram vs. Ram Sarup, 1979 P.L.J. 12
Radha Soami Satsang Beas vs. State of Himachal Pradesh and another, 1984 S.L.J. 378

For the Appellants: Mr.Neeraj Gupta, Advocate.
For the Respondents: Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-defendants *(hereinafter referred to as the `defendants')* against the judgment and decree dated 29.12.2006, passed by learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, District Kangra, H.P. affirming the judgment and decree dated 28.9.2002, passed by learned Sub Judge 1st Class, Court No.2, Dehra, District Kangra, H.P., whereby the suit filed by the respondent-plaintiff *(hereinafter referred to as the `plaintiff')* has been decreed.

2. Briefly stated facts, as emerged from the record, are that the respondent-plaintiff claimed himself to be owner in possession alongwith other co-owners of the suit land. It is averred by the plaintiff that the defendants have got no right or title over the land comprised in

Khata No.13 min, Khatauni No.24 min, Khasra No.207, area measuring 0-07-02 hects. situated in Mohal Thal, Mauza Guler, Tehsil Dehra, District Kangra as per Jamabandi for the year 1991-92, *(hereinafter referred to as the 'suit land'),* but they are threatening to interfere in the peaceful ownership and possession of the plaintiff and are also threatening to throw the water of their water taps and rainy water in the suit land. It is further averred by the plaintiff that the defendants are also threatening to carve out a path to pass through the suit land without any right, title or interest. It is further averred by the plaintiff that during the pendency of the suit, defendant Ramesh Chand encroached upon part of the suit land comprised in Khasra No.207/1, area measuring 0-00-36 hects. and defendants No.2 and 3 have also encroached upon part of suit land i.e. land comprised in Khasra No.207/2, measuring 0-00-40 hects., which was also found during demarcation taken by the plaintiff on 7.2.1995 and this plea of possession was added by way of amendment to the plaint. It is further averred by the plaintiff that the defendants having encroached upon part of suit land and threatening to throw dirty water as well as rainy water towards his plaintiff, the suit be decreed.

3. Defendants by way of filing written statement raised various preliminary objections qua cause of action, maintainability, estoppel and limitation. It is averred by the defendants that allegations of the plaintiff regarding throwing of dirty and rainy water towards the suit land are wrong. It is further averred that there is no outlet for the natural flow of rainy water and that the parties are agriculturists and have got every right to use the passage on suit land from over the *Maind (hedge)* of suit land as per their custom and by way of easement of necessity. The defendants have also averred that they have neither cut nor removed any trees nor they have any intention to change nature of suit land. It is further averred by the defendants that they have got their own water tap for the last more than 20 years and no irreparable loss had ever been caused to the plaintiff. They have also denied the alleged encroachment upon the part of suit land and it has been averred that the report of the Local Commissioner, who was Field Kanungo, is not in accordance with rules. In the aforesaid background, the defendants prayed for the dismissal of the suit.

4. By way of replication, plaintiff while denying the allegations made in the written statement, re-affirmed and reasserted the stand taken in the plaint.

5. Learned trial Court on the basis of aforesaid pleadings, framed the following issues:-

"1. Whether the plaintiff is entitled to the relief of injunction? OPP.

2. Whether the plaintiff is entitled to the relief of possession ? OPP.

3. Whether the plaintiff is estopped by his act and conduct from filing the present suit? OPD.

4. Whether the defendants are using the Meand of the suit land as per custom ? OPD.

4-a Whether the suit is not maintainable in the present form? OPD.

5. Relief."

6. The learned trial Court on the basis of the evidence adduced on record by the respective parties, decided all the issues in favour of the plaintiff and against the defendants and decreed the suit of the plaintiff for permanent prohibitory injunction.

7. Feeling aggrieved and dissatisfied with the impugned judgment and decree dated 28.9.2002, passed by learned trial Court, respondents/defendants filed an appeal in the Court of learned Additional District Judge, Fast Track Court, Kangra at Dharamshala, i.e., Civil Appeal No.41/G/05/03, however fact remains that learned Additional District Judge, Fast Track Court, Kangra at Dharamshala vide judgment and decree dated 29.12.2006 dismissed the appeal preferred by the appellants-defendants and affirmed the judgment and decree, dated 28.9.2002, passed by learned trial Court.

8. In the aforesaid background, present appellants-defendants being aggrieved and dis-satisfied with the judgment and decree passed by learned trial Court as affirmed by learned appellate Court approached this Court by way of instant Regular Second Appeal, praying therein for quashing and setting-aside the judgment and decree dated 28.9.2002 passed by learned trial Court as affirmed by learned appellate Court vide judgment dated 29.12.2006.

9. This Regular Second Appeal was admitted on the following substantial questions of law:-

> "(1) Whether both the Courts below have committed grave error of law and jurisdiction in relying upon report Ex.PW-1/B and Tatima PW-1/C which was not proved in accordance with law by producing the Field Kanungo who allegedly carried out the demarcation and Patwari who prepared the Tatima. Merely the fact that the file of demarcation was consigned for want of presence of the defendants-appellants vide Order Ex.PW-1/A, could have been sufficient to hold the said documents admissible in evidence?
>
> (2) Whether the Trial Court has wrongly dismissed the application filed by defendants-appellants for demarcation? Have not both the Courts below ignored the provisions of Chapter I-M of High Court Rules and Orders whereby it was imperative on both the Courts below to have appointed the Local Commissioner for demarcation of respective boundaries of the parties as the dispute between the parties in the suit was mainly the boundary dispute?
>
> (3) Whether both the Courts below have wrongly rejected the plea of the customary right of using the maind of the neighbour for carrying out the agricultural production which fact has duly been acknowledged in the Judicial pronouncements of this Hon'ble Court?

10. Mr.Neeraj Gupta, learned counsel representing the appellants-defendants, vehemently argued that the judgment passed by both the Courts below are not sustainable as the same are not based upon correct appreciation of evidence available on record. Rather, the same are based on mere conjecture and surmises and as such same deserves to be quashed and set aside.

11. Mr.Gupta, further contended that both the Courts below have acted with material illegality and irregularity while placing reliance upon demarcation Report Ex.PW-1/B and its Tatima Ex.PW-1/C to conclude that appellant-defendant encroached upon the suit land as alleged in the plaint. Mr.Gupta strenuously argued that the bare perusal of demarcation report itself suggest that demarcation was not conducted in accordance with law and instructions of Financial Commissioner as well as High Court Rules and Orders and as such same could not be taken into consideration by the Courts below while decreeing the suit of the plaintiff.

12. Apart from above, Mr.Gupta, further contended that both the Courts below have miserably failed to take note of the fact that demarcation report Ex.PW-1/B and Tatima Ex.PW-1/C could not be read in evidence since Field Kanungo, who allegedly carried out demarcation, was never produced as a witness before the Court and as such by no stretch of imagination demarcation report placed on record by the plaintiff could be deemed to have been proved in accordance with law. Mr.Gupta also contended that since Ex.PW-1/B and Ex.PW-1/C were inadmissible evidence and as such order of Assistant Collector consigning the file to record room was of no consequence and as such both the Courts below acted beyond their jurisdiction while placing reliance upon inadmissible evidence to pass decree of possession against defendants-appellants and as such same deserves to be quashed and set aside.

13. Mr.Gupta, while referring to the judgment passed by both the Courts below, invited the attention of this Court to the fact that on two occasions defendants-appellants had moved an application under Order 26 Rule 9 of the Code of Civil Procedure *(hereinafter referred to*

as `CPC') praying therein for appointment of Local Commissioner, keeping in view the boundary dispute involved in the matter, but on both the occasions, Courts below, without assigning plausible reason, dismissed the same and as such great prejudice has been caused to the appellants. Mr.Gupta further stated that both the Courts below ought to have appointed Local Commissioner in terms of prayer made in application under Order 26 Rule 9 CPC, keeping in view the dispute being boundary dispute as defined under Chapter-IM of the High Court Rules and Orders so that controversy at hand could be determined effectively for all times to come. Learned lower appellate Court in mechanical manner proceeded to affirm the judgment and decree of the trial Court, which was solely based upon demarcation report placed on record by the plaintiff, which at no point of time was proved in accordance with law. While concluding his arguments, Mr.Gupta also argued that both the Courts below committed material illegality and irregularity while deciding the issue of easement of necessity as raised by the plaintiff, especially in view of various pronouncements made by this Court that agriculturists in order to cultivate their fields, to take their cattle and to carry out agricultural operations during the season are entitled to use maind of neighbourers.

14. Mr.Gupta, placed reliance on the judgments of our own High Courts in ***State of H.P. vs. Laxmi Nand and Others, 1992(2) Sim.L.C. 307, Kamal Dev and another vs. Hans Raj, 2000(1) Shim.L.C. 192, Shri Rattan Chand sn of Lachho Ram vs. Pushpa Devi widow of Shri Balwant Singh and others, 2014 ILR HP 145,*** and ***Krishan Singh alias Kishan Singh vs. Balram Singh, 2010(3) Shim.L.C. 548,*** to suggest thatdemarcation, if not carried out in accordance with law/rules, same cannot be read in evidence and this Court by molding relief can order for demarcation even at this stage for settling theboundary dispute between the parties.

15. In the aforesaid background, Mr.Gupta prayed for acceptance of the appeal after setting aside the judgment and decree passed by both the Courts below.

16. Mr.Ajay Sharma, learned counsel representing the respondent-plaintiff supported the judgment passed by both the Courts below. Mr.Sharma strenuously argued that perusal of judgments passed by both the Courts below suggest that the same are based upon correct appreciation of evidence adduced on record by the plaintiff and as such there is no scope of interference, whatsoever, of this Court, especially in view of concurrent findings of fact and law recorded by both the Courts below. Mr.Sharma while referring to the judgment passed by both the Courts below, forcefully contended that there is overwhelming evidence adduced on record by the plaintiff suggestive of the fact that defendants encroached upon the suit land and caused nuisance/interference by throwing dirty water. While refuting the contention put forth on behalf of counsel representing the appellants-defendants that Courts below wrongly placed reliance on the demarcation report Ex.PW-1/B, Mr.Sharma vehemently argued that since defendants started encroaching upon certain portion of suit land during the pendency of suit, respondent-plaintiff applied for demarcation which was conducted on 7.2.1995 in the presence of the parties including appellants-defendants. While invitingattention of this Court to demarcation report Ex.PW-1/B, Mr.Sharma contended that bare perusal of the same suggests that demarcation of the site was conducted in accordance with law and instructions of Financial Commissioner as well as High Court Rules and Orders and as such there is no illegality and infirmity in the judgment passed by both the Courts below. To substantiate aforesaid arguments, he also invited the attention of this Court to the statement, especially cross-examination conducted on the defendant, who appeared as DW-1, wherein he himself admitted that demarcation was conducted in his presence by the Field Kanungo on the basis of *Mussabi* and before conducting demarcation, he ascertained/fixed three pucca points. Mr.Sharma further contended that after carrying out demarcation by Field Kanungo, same was confirmed by Tehsildar and no objection, whatsoever, at any point of time was ever filed by the appellants-defendants before Kanungo, as a result of which, same was confirmed by him.

17. Mr.Sharma, vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. He also urged that scope

of interference by this Court is very limited especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264.**

18. I have heard learned counsel for the parties and gone through the record of the case.

Question No.1

19. In the present case, respondent-plaintiff filed suit for permanent prohibitory injunction and for possession claiming himself to be the owner in possession alongwith other co-owners of the suit land. Plaintiff also claimed that healongwith his brother Kashmir Singh is in exclusive possession over the suit land and defendants, whohave no right, title and interest over the suit land, were threatening to interfere in the peaceful ownership and possession of the plaintiff and were also threatening to throw the water from their water taps and rainy water in the suit land. During the pendency of the suit, defendant Ramesh Chand encroached upon part of suit land comprised in Khasra No.207/1, area measuring 0-00-36 hects., whereas defendants No.2 and 3 encroached upon part of suit land comprised in Khasra No.207/2, measuring 0-00-40 hects., therefore, plaintiff applied for demarcation which was carried out on 7.2.1995 by the Field Kanungo. After aforesaid demarcation having been carried out by Field Kanungo, plaintiff amended his suit, whereby he raised plea of possession by alleging that defendants have encroached upon part of the suit land and threatening to throw dirty water as well as rainy water towards the land of plaintiff. Plaintiff, with a view to establish his ownership and possession qua the suit land, tendered in evidence documents Ex.P-1 and Ex.P-2, which are the copies of Jamabandi for the year 1991-92 and *Aks Sazra Kistbar*. Similarly to prove encroachment over the suit land plaintiff placed on record demarcation report given by Kanungo i.e. Ex.PW-1/B. Learned Courts below, while placing reliance upon demarcation report Ex.PW-1/B, Tatima attached with the same Ex.PW-1/C as well as statement of parties, who were present on the spot, i.e.Ex.PW-1/D, came to the conclusion that the defendants were found to be in possession of part of the suit land i.e. some portion of the suit land bearing Khasra No.207/1 was encroached by defendant No.1, whereas land shown in Khasra No.207/2 was found to beencroached upon by defendants No.2 and 3.

20. Learned counsel representing the appellants-defendants vehemently argued that no reliance, whatsoever, could be placed upon aforesaid demarcation report Ex.PW-1/B and Tatima attached with the report Ex.PW-1/C by Courts below, while decreeing the suit especially in view of the fact that same was not proved in accordance with law. As per Mr.Gupta, since Field Kanungo, who had carried out demarcation, was not produced as a witness by the plaintiff, defendants had no opportunity, whatsoever, to cross-examine this witness as a result of which great prejudice has been caused to the defendants. Had defendants got the opportunity to cross-examine the Field Kanungo, who had carried out the demarcation, the defendants would have got opportunity to prove on record that demarcation was not carried out in accordance with law as well as instructions of Financial Commissioner and High Court Rules and Orders.

21. The aforesaid argument, having been made by Mr.Gupta, needs to be rejected out rightly. It is undisputed that demarcation report dated 7.2.1995 was procured by respondent-plaintiff during the pendency of the suit. It is also undisputed that after procuring the aforesaid demarcation report, plaintiff amended his suit, whereby plea of possession was added by way of amendment to the plaint. It is not understood that if demarcation report dated 7.2.1995 was not in accordance with law what prevented the defendants from filing objection, if any, to the demarcation report allegedly not carried out in accordance with law by the Field Kanungo. Though defendants in reply to the amended written statement have stated that demarcation report dated 7.2.1995 is not in accordance with law but itnowhere suggest that in what manner demarcation report is not in accordance with law. Mere bald allegation that demarcation report is not in accordance with law may not be sufficient to conclude that demarcation was not carried out in accordance with law.

22. It is also not disputed, as emerged from the record, that at the time of demarcation wife of defendant No.1 as well as other defendants were present and their statements were also recorded by the Local Commissioner, who had carried out the demarcation. As has been noticed above, DW-1 in his cross-examination has admitted that demarcation dated 7.2.1995 was carried out by Field Kanungo on the basis of *Mussabi* after ascertaining three pucca points, which itself suggest that demarcation dated 7.2.1995 was carried out in accordance with law after summoning of the effected parties including all the defendants. It also emerge from the record that subsequent to demarcation carried out on 7.2.1995, the report was affirmed by Naib Tehsildar on 30.9.1995 Ex.PW-1/A.Perusal of Ex.PW-1/A i.e. order dated 30.9.1995, passed by Tehsildar, suggests that despite there being sufficient opportunities, nobody, including the defendants, came forward to file objection, if any, to the demarcation report dated 7.2.1995 and as such same was accepted by Tehsildar. Similarly, perusal of document Ex.PW-1/D suggests that the statement of parties, were recorded at the time of demarcation. Perusal of aforesaid document clearly suggests that defendants Mukesh Kumar and Inder Singh were present and the wife of defendant namely Vijay Guleria was also present.

23. This Court, with a view to ascertain the genuineness and correctness of submissions having been made by Mr.Gupta with regard to the correctness and validity, if any, of demarcation report Ex.PW-1/B, perused demarcation report dated 7.2.1995, which clearly suggests that same was carried in accordance with law in the presence of all the parties. Local Commissioner, who carried out demarcation, has categorically reportedthat demarcation is being carried out on the basis of *Mussabi* and there were three pucca points fixed before conducting the demarcation and hence this Court sees no force in the contention put forth on behalf of the appellants-defendants that the demarcation was not carried out in accordance with law and as such same could not be considered in evidence by the Courts below.

24. As far as non-examination of Local Commissioner, who carried out demarcation, is concerned, it is settled law that party who assail the demarcation report is to examine the Local Commissioner. In this regard reliance is placed upon the judgment of the Punjab & Haryana High Court in ***Raja Ram vs. Ram Sarup, 1979 P.L.J. 12***. Though, as has been discussed above, defendants had ample opportunity to file objection, if any, to the demarcation report after amendment of suit by the plaintiff whereby plea of possession was added while placing reliance upon the demarcation report dated 7.2.1995, but, despite that it is not understood what prevented the defendants-appellants for applying to the Court below to summon Local Commissioner who had carried out the demarcation dated 7.2.1995 Ex.PW-1/B. Defendants being effected party and dis-satisfied with the demarcation report dated 7.2.1995, were well within its rights to examine Local Commissioner by citing him as a witness by following theprocedure of law. In the instant case, plaintiff successfully proved on record demarcation report Ex.PW-1/B by placing reliance on other document Ex.PW-1/A i.e. confirmation order dated 30.9.1995, passed by the Tehsildar, which clearly suggests that despite various opportunities, defendants failed to file any objectionto the demarcation report.

25. Apart from above, PW-1 and PW-2, in no uncertain terms, proved that demarcation was conducted in accordance with law. Both the aforesaid plaintiff witnesses in their cross-examination categorically stated that demarcation was carried out on the basis of *Mussabi* by Field Kanungo after ascertaining the pucca points and there is nothing in their cross-examination, which could suggest otherwise.

26. Moreover, DW-2 himself in his cross-examination admitted that demarcation was obtained by plaintiff during the pendency of the suit and at that time he was present. He also stated that demarcation was conducted on the basis of *Mussabi* by Field Kanungo after ascertaining the pucca points and as such this Court sees no illegality and infirmity in the conclusion drawn by both the Courts below that the demarcation report Ex.PW-1/B was carried out in accordance with law.

27. It is also settled law that once land is demarcated, no further demarcation can be carried out unless previous is set aside. In this regard reliance is placed on the judgment of this

High Court in ***Radha Soami Satsang Beas vs. State of Himachal Pradesh and another, 1984 S.L.J. 378.***

28. After carefully examining the entire evidence and the reasoning given by the Courts below vis-à-vis documentary evidence adduced on record by the plaintiff, this Court sees no illegality and infirmity in the findings returned by both the Courts below. This Court has no hesitation to conclude that Courts below have rightly appreciated the documentary evidence placed on record in the shape of Ex.PW-1/B by the plaintiff to conclude that defendants have encroached upon the suit land, admittedly, owned and possessed by the plaintiff-respondent. In view of above detailed discussion, substantial question of law is answered accordingly.

Question No.2

29. It emerges from the record that appellants-defendants had applied for appointment of Local Commissioner to carry out demarcation but the same was rejected by the Court below. At the cost of repetition, it may be reiterated that plaintiff had applied for demarcation during the pendency of the suit and Local Commissioner had carried out demarcation on 7.2.1995 in the presence of all the parties, including the defendants. By way of placing demarcation report dated 7.2.1995 Ex.PW-1/B, plaintiff successfully proved on record that demarcation in question was carried out in accordance with law by associating all the defendants.

30. In view of above, this Court is of the view that once trial Court had accepted the demarcation report duly submitted by Field Kanungo, it had no occasion to call for fresh demarcation report at the instanceof defendants. Moreover, as has been discussed hereinabove in detail, demarcation report Ex.PW-1/B, placed on record by the plaintiff, was carried out strictly in accordance with law, as per own admission of the defendant, and as such, this Court sees no illegality and infirmity in the rejection of application under Order 26 Rule 9 CPChaving been preferred by defendants by the trial Court.

31. True, it is that in the event of there being boundary dispute between the parties, Courts below should appoint Local Commissioner for demarcation of respective boundaries of the parties as per provisions of Chapter I-M of High Court Rules and Orders. In the instant case, as has been observed above, trial Court had no occasion to appoint Local Commissioner when demarcation report dated 7.2.1995 Ex.PW-1/B was already on record. Therefore, the substantial question of law is answered accordingly.

Question No.3

32. Now, adverting to the plea of customary right of using *Maind* of the neighbour for carrying out agricultural production, this Court finds that no evidence worth the name was led on record by the defendants to prove such right by way of easement of necessity as well as custom. Though defendants by way of written statement claimed that they have easementary right by way of easement of necessity but there is no evidence led on record by the defendants to substantiate the aforesaid plea having been taken in the written statement. To prove the plea of easementary right by way of custom or by the easement of necessity, it was incumbent upon the defendants to prove on record that the land of defendants is situated beyond the land of plaintiff and there is no alternative passage leading to their land except from the land of the plaintiff. In the present case, there is no site plan, whatsoever, attached with the written statement, suggestive of the fact that defendants had no alternative path to their land, save and except, the one that is from the land of plaintiff. Substantial question of law is answered accordingly.

33. As far asjudgments having been relied upon by the counsel representing the appellants, there can be no quarrel that if the demarcation is not carried out in accordance with law/rules, same cannot be read in evidence and Courts while adjudicating the boundary dispute, if any, between the parties can always order for appointment of Local Commissioner in terms of Order 26 Rule 9 CPC. But in the instant case, as has been discussed in detail, demarcation report placed on record by the plaintiff is in accordance with law and instructions of the Financial Commissioner and as such this Court sees no illegality and infirmity in the judgments passed by

both the learned Courts below. In view of above, judgments cited by learned counsel representing the appellants may not have any application in the present case.

34. This Court is fully satisfied that both the courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***(p.269)***

35. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which was further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy appears to be based on correct appreciation of oral as well as documentary evidence. Hence, present appeal fails and is dismissed, accordingly.

36. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Kishori Lal & another .....Respondents.

Cr. Appeal No. 766 of 2008
Decided on : 30.11.2016

Indian Penal Code, 1860- Section 379 read with Section 34- Accused were found in possession of small pieces of aluminum wire, 6 blades, two hacksaw blades, bundle of aluminum wire and small pieces of ladder – they failed to account for the same- informant filed an application stating that one ladder was stolen – he identified the ladder as his own – the accused were tried and convicted by the Trial Court- an appeal was filed, which was allowed and the accused were acquitted – held in appeal that the copy of seizure memo was not supplied to the accused- testimony of PW-8 was contrary to the contents of the seizure memo- the theft was reported by the informant after delay for which no explanation was given - the Appellate Court had rightly acquitted the accused- appeal dismissed.(Para- 9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondents: Mr. Divay Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 25.8.2008 rendered by the learned Sessions Judge, Chamba Division Chamba (Himachal Pradesh) in Criminal Appeal No. 15/2008, whereby it while reversing the findings of conviction recorded by the learned trial Court acquitted the respondents (for short "accused") for the offences charged.

2. Brief facts of the case are that on 3.11.2001 HC Raj Kumar, Incharge Police Post Holi was on patrolling at place Tiyari Bridge alongwith HHC Dharam Chand No. 91, HHC Prithi Chand No. 144 and B.O Sh. Makholi Ram, Jagdish Kumar Guard and Gian Chand forest worker. At about 5.00 a.m. when the police party was at Tiyari Bridge three persons came from Holi side, out of which two persons had been carrying on sack each in their hands and on seeing the police party they tried to fled away. Two persons were carrying sack and on seeing the police party they tried to flee away, but accused No.1 and 2, present appellants, were apprehended while one person fled away from the spot. On checking the sack of accused No.1, it was found containing pieces of aluminum wire in small pieces, six blades and two hacksaw blades while the sack of accused No.2 was found containing one bundle of aluminum wire and small pieces of ladder. The accused persons failed to account for the above-said articles which were taken into possession through a seizure memo. The investigating Officer prepared Rukka and sent the same to the police Station Bharmour on the basis of which FIR was registered. On 8.11.2001 the complainant had given an application to the police that one ladder which was kept by him behind his residence has been stolen and the complainant identified the pieces of ladder belonging to him. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court qua theirs committing offence punishable under Section 379/34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication. However, they did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of conviction qua the accused. However in an appeal preferred by the respondents herein before the learned Sessions Judge Chamba, the latter Court returned findings of acquittal in their favour.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned Appellate Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the learned Appellate Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. Vide recovery memos comprised in Ex.PW-1/A and PW-1/B recovery of items/property allegedly stolen by the accused/respondents stood effectuated also with PW-1 a witness thereto testifying in corroboration to the contents which occur therewithin thereupon it stands canvassed by the learned Deputy Advocate General qua the aforesaid constituting formidable pieces of evidence for reversing the findings of acquittal recorded by the learned Sessions Judge, Chamba. The aforesaid submission for its standing construed to be holding immense potency it is enjoined to be read in conjunction with the testification of PW-8 besides in coagulation with the factum of the Investigating Officer concerned testifying qua his not purveying copies thereof to the accused though he stood enjoined to purvey them to the accused. A combined reading whereof purveys no conclusion than of their preparation standing engineered besides invented at the instance of the Investigating Officer hence his concert to hide them arouse-able from his not purveying them to the accused renders any reliance thereupon for nailing findings of conviction against the accused to be grossly inapt.

10. Moreover an allusion to the testification of the Investigating Officer who deposed as PW-8 is imperative for unearthing therefrom whether the relevant recovery memos aforesaid hold efficacy, conspicuously when recovery of the relevant stolen items stood effectuated thereunder from the accused on theirs standing nabbed by the investigating Officer concerned at the place and time enumerated therein. In the event of the investigating Officer hence omitting to underscore in his testification held in his examination-in-chief the trite factum of his effectuating recovery of the relevant stolen items from the possession of the accused in the manner reflected in the recovery memos, the invincible conclusion therefrom would be qua the contents reflected therein suffering erosion.

11. A close analysis of the testimony of PW-8 unveils qua in his testimony comprised in his examination-in-chief his though making a communication therein in tandem with the recitals occurring in the recovery memos yet his testification holding bespeakings therein qua his nabbing the accused at the place and time reflected therein gets blunted when analyzed in consonance with the hitherto erected inference qua the relevant memos being discardable. With the efficacy of Ex. PW-1/A and PW-1/B standing negated whereupon hence it has to be concluded of the best evidence in proof of the charge not acquiring any immense potency.

12. Be that as it may the veracity of recovery memos stands enfeebled by the factum of a disclosure occurring therewithin qua the recovery of stolen items standing effectuated from the possession of the accused on 3.11.2001 in the manner reflected therewithin even when the aforesaid factum stood detected by PW-6 on 2.11.2001 yet he omitted to promptly thereat lodge a complaint qua the case property standing stolen. The effect of recovery memos aforesaid standing prepared on 3.11.2001 whereas PW-6 despite detecting the relevant theft to occur on 2.11.2001 his belatedly on 7.11.2001 lodging a report qua the relevant theft with the police station concerned constrains a conclusion qua the preceding effectuation of recovery of the relevant items from the possession of the accused under the memos aforesaid arising not in sequel to the lodging of the apposite complaint rather hence their preparation not holding any connectivity with the alleged theft which occurred at the relevant site whereat the relevant stolen items were kept, conspicuously when their preparation occurred not subsequent to the lodging of the report rather contrarily occurred prior thereto. The inference qua Ex.PW-1/A and PW-1/B for reasons afore-stated remaining unproven by the prosecution nor thereupon hence the begetting any connectivity vis-à-vis the theft of the relevant items from the relevant site whereat they stood kept or stored stands enhanced by the factum of the prosecution witnesses acquiescing to the suggestions put to them by the learned defence counsel while he held them to cross-examination qua all the items which stood purportedly recovered thereunder being easily available in the market besides strength to the aforesaid inference stands garnered by the factum of PW-6 besides other relevant prosecution witnesses not making any vivid disclosure in their respective testifications qua any mark existing on the relevant property/items whereupon they stood rendered to be distinguishably the property of the complainant also thereupon the factum of the relevant items/property standing owned by the complainant standing emphatically established

remains unproven rendering hence the relevant charge to which the accused stood subjected to founder.

13. A wholesome analysis of evidence on record portrays that the appreciation of evidence as done by the learned Appellate Court does not suffer from any perversity and absurdity nor it can be said that the learned Appellate Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned Appellate Court merit interference.

14. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned Appellate Court is maintained and affirmed. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

State of H.P. ....Appellant.

Versus

Sant Ram & another .....Respondents.

Cr. Appeal No. 528 of 2008
Decided on : 30.11.2016

Indian Penal Code, 1860- Section 341,323 and 325 readwith Section 34- Accused B gave blow of chain on the nose of the informant due to which he suffered injuries on his eyes- accused S caught hold of the informant from his neck- the accused were tried and acquitted by the Trial Court – held in appeal that PW-1 had improved upon his previous version- the person who had rescued the informant from the accused was not examined – there are contradictions in the testimony of PW-3- the blood on the clothes was not connected to the informant – the Trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 14)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondents: Mr. Lovneeesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 8.4.2008 rendered by the learned Additional Chief Judicial Magistrate, Sarkaghat in Police Challan No. 185-II/2002, whereby the learned trial Court acquitted the respondents (for short "accused") for the offences charged.

2. Brief facts of the case are that on 30.3.2002 at about 9.30 p.m. complainant Hem Chand alongwith his brother Krishan Chand was going to his house from the house of one Sukh Ram at village Gharwasra. On the way both the accused met to the complainant. Accused Bakshi alias Inder Singh gave blow of chain on the nose of the complainant due to which complainant suffered injuries on his eyes. Accused Sant caught hold of the complainant from his neck. The complainant was rescued from the clutches of the accused by Krishan Chand and Ananat Ram. Report to this effect was made to the police on the next date by the complainant and FIR was registered. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court qua theirs committing offences punishable under Sections 341,323 and 325 readwith Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 8 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded in which they pleaded innocence and claimed false implication. However, they did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondents/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The prosecution case would succeed only when the prosecution witnesses depose a version qua the genesis of the prosecution case bereft of any taint qua theirs rendering a version qua it holding underscorings qua each of them while testifying in Court not either improving or embellishing upon their previous statements recorded in writing nor theirs while standing subjected to cross-examination theirs contradicting their respective testifications occurring in their respective examinations-in-chief besides when the testifications of the prosecution witnesses underscore qua theirs rendering a version qua the prosecution case with utmost consistency besides intra-se harmony. Contrarily when the testifications of the prosecutions witnesses unveil qua theirs therein not rendering a version qua the genesis of the prosecution case with intra-se corroboration thereupon the prosecution would not succeed in proving the relevant charges qua the accused/respondents.

10. In testing whether the prosecution witnesses testify qua the genesis of the prosecution version bereft of any taints afore-stated, an allusion to the testimony of PW-1 is imperative. In his testification PW-1 apparently has embellished besides improved upon his previous statement recorded in writing comprised in the factum of his communicating therein qua one Sukh Ram also accompanying the accused at the relevant time whereupon his testification visibly acquires a taint of his improving and embellishing upon his previous statement recorded in writing rendering hence thereupon the genesis of the prosecution case is construable to be incredible. However PW-1 has testified qua accused Bakshi Ram delivering a blow of chain upon him in sequel whereto he suffered injuries on his nose and eyes. The communication aforesaid echoed by PW-1 in his testification occurring in his examination-in-chief though is neither improved nor embellished vis-à-vis his previous statement recorded in writing given the aforesaid factum also standing embodied in the apposite FIR yet thereupon it would not be apt to conclude qua his rendering a truthful version qua the aforesaid facet significantly when in the apposite MLC comprised in Ex.PW-6/A there is no reflection therein qua the complainant begetting injuries on his eyes in sequel to his purportedly standing delivered a blow of chain thereon by accused Bakshi Ram. In sequel thereto his testification qua the aforesaid facet holds no probative sinew also the testification of the complainant qua accused Bakshi Ram delivering a blow of chain on his person though is neither an improvement nor an embellishment vis-à-vis his previous statement recorded in writing conspicuously when the factum aforesaid stands also narrated in the apposite FIR yet with the Investigating Officer not

effectuating recovery of chain renders the ascription by the complainant qua accused Bakshi Ram delivering its blow on his eyes and nose to not hold any creditworthiness.

11. Moreover PW-1 testifies qua his at the relevant site standing rescued by one Sh. Ananat Ram from the belaborings perpetrated on his person by the accused yet the said Ananat Ram neither stood cited as a witness nor stands examined whereas this witness was an un-interested witness also thereupon when he would lend an unbiased besides un-interested version qua the prosecution version. In sequel his non-examination is fatal to the success of the prosecution case. Also his non-examination by the prosecution is fatal to the emergence of truth qua the genesis of the prosecution case.

12. Be that as it may the prosecution examined PW-3 the brother of the complainant for meteing corroboration to the testification of the complainant which for the reasons afore-stated is ridden with stark taints of embellishments besides improvements also it is un-creditworthy on account of dichotomy occurring intra-se his testimony vis-à-vis the apposite MLC also for non-effectuation of recovery of chain by the investigating officer concerned , chain whereof stood allegedly used by accused Bakshi Ram for delivering blows on his nose and eyes, yet the effect of the taints afore-stated gripping the testification of PW-1 may stand belittled if PW-3 brother of PW-1 stands concluded by this court to be an eye witness qua the occurrence. For determining the aforesaid factum, it is imperative to gauge from his testimony whether he was present at the relevant site of occurrence at the stage contemporaneous to its taking place thereat. In gauging the aforesaid factum this Court stands enjoined to on an incisive reading of his testification discern therefrom qua his rendering a version in conformity with the one rendered by PW-1. However when PW-3 testifies qua accused Sant Ram belaboring PW1 with kick and fist blows factum whereof remaining un-corroborated by PW-1 in his testification renders the testification of PW-3 to be in stark contradiction vis-à-vis the testification of PW-1 whereupon it cannot be concluded of his meteing corroborative vigor to the testimony of PW-1 wherefrom it is to be concluded of his being a concocted witness to the occurrence rendering his testimony to be incredible.

13. Furthermore the factum of PW-3 omitting to testify in his examination-in-chief qua the presence of Ananat Ram at the relevant site of occurrence whereas PW-1 testifies qua the presence of Ananat Ram at the relevant site of occurrence at the relevant time also begets an inference of PW-3 deposing contradictory qua the aforesaid factum vis-à-vis PW-1 whereupon it has also to be concluded with accentuated vigor qua his being an engineered witness to the occurrence whereupon no credence is imputable to his testification.

14. The learned Deputy Advocate General has contended with vigor qua with PW-1 a witness to recovery memo Ex.PW-1/A whereunder blood stained clothes of PW-1 were taken into possession admitting the factum of occurrence of his signatures on Ex.PW-1/A purveys sound and tangible proof qua the prosecution lending cogent proof qua effectuation of blood stained clothes of the complainant occurring thereunder yet the vigor of his submission wanes, for absence on the part of the prosecution to send the blood stained clothes of the complainant recovered under memo Ex.PW-1/A to the FSL concerned for eliciting therefrom an apposite opinion qua it holding the blood of the complainant. Contrarily the aforesaid omission rears an inference qua the blood occurring on the clothes recovered under memo Ex.PW-1/A not belonging to the accused wherefrom it is to be concluded qua their recovery not connecting the accused in the commission of the alleged offence.

15. A wholesome analysis of evidence on record portrays that the appreciation of evidence as done by the learned trial Court does not suffer from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit interference.

16. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Union of India .....Appellant.
Versus
Vivek Bhardwaj & Another .....Respondents.

CMP(M) No. 284 of 2015 & RSA No. 532 of 2016.
Decided on: 30th November, 2016

Limitation Act, 1963- Section 5- An application for condonation of delay of 256 days was filed pleading that the matter remained pending before various authorities in the department – held, that the memo of appeal was returned by Assistant Solicitor General of India in the month of May, 2014 for signatures and was filed in the month of January, 2015 – no explanation for the delay was given – no sufficient cause exists for condonation of delay- application dismissed. (Para-5)

For the appellant	:	Mr. Ashok Sharma, ASGI with Mr. Angrej Kapur, Advocate.
For the respondents	:	Mr. J.L. Bhardwaj, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Heard.

2. Main appeal, which has been filed against the judgment and decree dated 20.1.2014, passed by learned Additional District Judge-II, Una, District Una, is barred by 256 days. The explanation as set out in the application is bureaucratic style of functioning in the Government Offices as the matter allegedly remained pending for consideration before various authorities in the Department of Defence, Government of India for seeking approval. The District Attorney, Una has advised the applicant-appellant vide communication dated 10.2.2014 to seek opinion of the Law Department for filing of appeal in this Court against the impugned judgment and decree. The approval was finally received in the first week of May, 2014. The matter thereafter was processed in the office of learned Assistant Solicitor General of India and the memorandum of appeal drafted in the month of May itself. The same after obtaining the signature of the competent authority was sent to the office of learned Assistant General of India on 23rd May, 2014 for filing the appeal in this Court. The appeal along with this application, however, was filed on 19.1.2015 i.e. after about seven months. It is in this backdrop while hearing this application for sometime on 13.7.2016, the applicant, Union of India, was directed to file supplementary affidavit clarifying therein as to where the matter remained held up during the period 23.5.2014 to 18.1.2015. This order reads as follows:-

> "Heard for sometime. Interestingly enough the memorandum of appeal, in view of the averments in the application, was delivered in the office of learned Assistant Solicitor General of India on 23rd May, 2014 for being filed in the Registry of this Court. The same, however, has been filed on 19.1.2015 after a period over seven months. No explanation is forth coming as to why the memorandum of appeal, which was ready for being presented in this Court on 23.5.2014, has been filed on 19.1.2015. Learned Assistant Solicitor General of India to clarify the position in this regard in the rejoinder, which shall be filed within three weeks. List on ***10th August, 2016***."

3. Irrespective of 4-5 opportunities granted for the purpose, supplementary affidavit has not been filed. On the previous date, last and final opportunity was granted to the applicant-appellant to file the same with a rider that in case the affidavit is not filed even within the extended period also, the application shall be disposed of finally.

4. Learned Assistant Solicitor General of India, on instructions, submits that despite efforts made, no one has turned up to file the supplementary affidavit as directed by this Court.

5. It is seen that the memorandum of appeal returned by learned Assistant Solicitor General of India in the month of May, 2014 for signature on this application and also attestation of affidavit etc., was returned by the applicant-appellant in the month of January 2015. The affidavit filed in support of this application was got attested on 16.1.2015 at Delhi. The memorandum of appeal and this application, no doubt, was thereafter delivered in the office of learned Assistant Solicitor General of India and thereafter, it has been filed on 19.1.2015 in the Registry of this Court i.e. within 2-3 days, however, the fact remains that there is no explanation qua the delay as occurred in filing the appeal from 23.5.2014 to 18.1.2015. The applicant-appellant could have explained the same in the supplementary affidavit, however, failed to do so, irrespective of more than sufficient time granted for the purpose. True it is that in the case where the State Government or Central Government is a party, in the matter of condonation of delay, in view of the bureaucratic style of functioning, a pragmatic approach of the matter should be taken, however, in the case in hand the applicant-appellant has miserably failed to file supplementary affidavit and to offer explanation as to where the matter remained held up during the period 23.5.2014 to 18.1.2015. Therefore, sufficient cause has not been shown, which is paramount consideration, while considering an application of this nature. I, therefore, find no merit in this application and the same is accordingly dismissed. Consequently, the appeal does not survive and the same is accordingly disposed of, so also the pending application, if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Dinesh Chander Sharma ....Appellant

Versus

Swaran Singh and others ....Respondents

Cr. Appeal No. 31 of 2010
Reserved on 02.09.2016
Decided on: 1st December, 2016

Indian Penal Code, 1860- Section 447, 323, 342, 506-II and 367 read with Section 34- Complainant had given the contract of construction of his house to the accused S- the accused had used his shuttering material as well as the material of the complainant- the accused started carrying the shuttering material of the complainant to which the complainant objected- accused M and J arrived at the spot- all the accused gave beatings to the complainant- complaint and charge-sheet were filed before the Court – the accused were tried and acquitted of the commission of offences punishable under Sections 447, 342, 506 and 367 read with Section 34 of I.P.C but were convicted and sentenced to pay Rs.1,000/- each as fine for the commission of offence punishable under Section 323 of I.P.C- held in appeal that testimonies of the witnesses only lead to the conclusion that some scuffle had taken place between the complainant and the accused S – subsequently, accused J and accused M joined the scuffle – it was not explained as to who was the aggressor – simple injuries were found on the person of the complainant, whereas, no such injuries were found on the person of accused – however, it was duly proved that the accused had administered beatings to the complainant- hence, the accused were rightly convicted by the trial Court- appeal dismissed.(Para-11 to 16)

Cases referred:
Lochan Ahir V. State of West Bengal, AIR 1963 SC 1074
State of Maharashtra V. Annappa Bandu Kavatage, AIR 1979 SC 1410
Jamatraj Kewalji Govani V. State of Maharashtra, AIR 1968 S.C. 178
Raunki Saroop V. State, AIR 1970 Punjab and Haryana, 450
Panna and others V. State of Rajasthan, 1987 Cri.L.J. 997 (Rajasthan High Court)
State of Madhya Pradesh V. Saleem @ Chamaru and another, 2005(3) Criminal Court Cases 330 (S.C.)
Adu Ram V. Mukna 2005(2) RCR (Criminal) 64

For the appellant: Appellant in person.
For the respondents: Mr. Vikrant Thakur, Advocate for respondents No. 1 to 3.
Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs for respondent No.4.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Victim of the occurrence and complainant in FIR No. 470/01 is in appeal before this Court. He is aggrieved by the impugned judgment dated 23.03.2009 passed by learned Additional Sessions Judge, Una, District Una, H.P. in Sessions Case No. 18/06 having arisen out of FIR No. 470/01 and Sessions Case No. 19/06 out of the complaint he filed, whereby the respondents (hereinafter referred to as the accused persons) have been acquitted of the charge framed against each of them for the commission of an offence punishable under Section 447, 342, 506-II and 367 read with Section 34 of the Indian Penal Code and the sentence awarded against each of them under Section 323 of the Indian Penal Code is also stated to be on lesser side.

2. The prosecution case as disclosed from the statement Ext. PW-11/A of the appellant-complainant shortly stated is that he had given the contract of construction of his house to accused Swaran Singh. The said accused in order to lay slab (lintel) of the house besides his own shuttering material used some planks and 'Ballies' belonging to the complainant also. On 8.09.2011 around 10.15 a.m. the said accused started opening the shuttering and to take the same to house. He noticed that the accused had been carrying shuttering material belonging to him also to his house. He objected to it. On this, accused Swaran Singh has called his co-accused Joginder Singh @ Dannu to identify shuttering. The said accused revealed that the shuttering being carried by accused Swaran Singh to his house was that of the said accused. On finding that accused Joginder Singh was telling lie, the complainant asked him as to why he did so. In the meanwhile, accused Mohinder Singh also arrived there though he had gone to the house and started interference in the conversation going on between complainant and accused Joginder Singh. Accused Mohinder Singh asked the complaint as to what he had to do with that 'Balli' which he was claiming to be his. On this, accused Swaran Singh made utterances that he had to take the same in his (sic.), to which obscene language according to complainant he objected to. On this, he was caught hold by both accused Joginder Singh and Swaran Singh. Accused Swaran Singh hit his left side buttocks with "Jhabbal" in his hand which he had been using to open the shuttering. Their co-accused Mohinder Singh administered beatings to the complainant. PW-3 and PW-4 were also present and not made any effort to save him from the clutches of the accused persons.

3. Not only this, all the three accused had dragged him from backside gate of their house to the adjoining 'Galli' (street). He was made to lie on the heap of grits there also. He was also beaten by them with kicks and fisty cuffs. He thereafter was taken by them to the house of accused Swaran Singh. There he was pushed and thrown on a cot. Due to the people gathered

there, the accused did not administer further beating to him there. His mother Smt. Krishna Devi (PW-16) and his sister-in-law came for his rescue and saved him from the clutches of the accused persons.

4. The police was informed by PW-16. The investigation was conducted by PW-17 ASI Prem Chand, the then I.O. Police Post, Santokgarh. It is he who had recorded the statement Ext. PW-11/A of the complainant and also made the application Ext. PW-17/A for getting the complainant medically examined in the hospital. He prepared the spot map Ext. PW-17/B and recorded the statements of prosecution witnesses. He had taken into possession the iron rod, Ext. P-1 and shirt of complainant, Ext. P-2 vide recovery memo Ext. PW-12/A. He has also taken in possession two 'Ballies' Ext. P-3 and Ext. P-4 and one garder Ext. P-5 vide recovery memo Ext. PW-10/A. He got recorded the statements of PW-3 and PW-4 under Section 164 of the Code of Criminal Procedure in the Court of learned Additional Chief Judicial Magistrate, Una vide memo Ext. PW-17/C. Statement of Angad Singh Ext. PW-17/D, statement of Sonu Ext. PW-17/E, and that of S/Shri Ram Murti, Prem Lal, Usha Rani and Ashutosh, Ext. PW-17/F, PW-17/G, PW-17/H and PW-17/I respectively were also recorded as per version of the said witnesses. He has also recorded the statement Ext. PW-17/J of PW Moti Ram. The Medico Legal Certificate Ext. PW-1/A and Ext. PW-12/B were also collected from the hospital.

5. On the completion of the investigation, challan under Section 447, 342, 323, 506-II, 367 read with Section 34 of the Indian Penal Code was filed against all the accused. In view of offence punishable under Section 367 of the Indian Penal Code is triable by the Court of Sessions, therefore, not only the challan but the complaint filed by the complainant was also sent to Sessions Court for trial.

6. As pointed out at the out set, learned trial Judge has framed the charge under Section 447, 342, 323, 506-II, 367 read with Section 34 of the Indian Penal Code against each of the accused. Since they pleaded not guilty, therefore, the prosecution was called upon to produce the evidence in support of the charge so framed against the accused persons. The prosecution in turn has examined 17 witnesses in all. The material prosecution witnesses, however, are PW-12, the complainant, his mother Smt. Krishna Devi (PW-16), Sh. Ashutosh (PW-9) nephew of complainant, Sh. Hardeep Singh (PW-4), nephew of accused Swaran Singh, Swaran Kaur (PW-5), mother of the said accused whereas, Sh. Ram Murti (PW-6), Sh. Prem Lal (PW-7) (owner of the cart hired for carrying shuttering by accused Swaran Singh), Smt. Usha Rani (PW-8) and Sh. Moti Lal (PW-10), the eye witnesses. The remaining witnesses are PW-1 Dr. N.K. Angra and PW-15 Dr. Indu Bhardwaj. The remaining witnesses including the I.O. Prem Chand PW-17 are police officials.

7. On the other hand, the accused in their statements recorded under Section 313 of the Code of Criminal Procedure have admitted that the complainant had given the contract of construction of his house to accused Swaran Singh, however, according to said accused not in a sum of Rs. 45,000/- but Rs. 60,000/-. It is also admitted that on 8.9.2001 in the morning, accused Swaran Singh started removing unfinished shuttering, however, according to them the said accused was accompanied by Mohinder Singh and not Sonu and Angad, his nephews. The rest of the prosecution case has either been denied by them being incorrect or for want of knowledge. In their defence, while answering second last question, it was stated that a false case has been registered against them at the instance of complainant who still owe a sum of Rs. 40,000/- towards the complainant.

8. As pointed out at the out set, learned trial Judge has acquitted all the accused of the charge framed under Section 447, 342, 506-II, 367 read with Section 34 of the Indian Penal Code as was framed against each of them, however, convicted and sentenced to pay Rs. 1,000/- each as fine for the commission of an offence punishable under Section 323 of the Indian Penal Code.

9. The impugned judgment has been sought to be quashed on the grounds inter-alia that the same has been passed without application of mind. There was ample evidence on record to show the involvement of the accused persons in the commission of offence punishable under Section 342, 367, 451, 504, 506-II, of the Indian Penal Code, however, they were erroneously acquitted form the charge framed against each of them. The lesser sentence awarded against accused-respondents has caused more harm to the complainant as well as the society as a whole and thereby caused miscarriage of justice to him.

10. The complainant as appellant while in person has strenuously contended that all ingredients of commission of an offence punishable under Section 342 and 367 of the Indian Penal Code stand established. The statements of PW-3 and PW-4 recorded under Section 164 of the Code of Criminal Procedure itself demonstrate that the complainant was taken by the accused persons to their place, however, for settlement of accounts. Whereas according to the complainant, he was kidnapped by the accused. The explanation that he has received injuries on his person by way of fall on shuttering material is wrong. The lesser sentence of fine under Section 323 IPC awarded against the accused is also stated to be against the public policy.

11. We have carefully analyized the oral as well as documentary evidence. As a matter of fact, as rightly pointed out by learned trial Judge, there are two sets of witnesses i.e. one set which includes the kith and kin of the accused, whereas, the other that of the complainant. PW-3 Angad Singh, PW-4 Hardeep and PW-5 Swaran Kaur, as noticed supra, are the nephews and mother of accused Swaran Singh. Their testimony amply demonstrates that the complainant and the accused quarreled at such a stage when accused Swaran Singh was in the process of removing the shuttering from the lintel of the house (under construction) of the complainant. Hot exchanges took place between the complainant and the accused on the issue of ownership of 'Ballie' (wooden plank meant for giving support to the shuttering). The statements Ext. PW-3/A and Ext. PW-4/A of PW-3 and PW-4 recorded by learned Additional Chief Judicial Magistrate under Section 164 of the Code of Criminal Procedure not at all implicate the accused persons and rather as per the same it is the complainant who assaulted accused Swaran Singh. It has also come on record by way of the testimony of PW-3 and PW-4 that the complainant though was taken by accused Swaran Singh to his house, however, for settlement of accounts. The close scrutiny of testimony of PW-3 to PW-5 lead to the only conclusion that some scuffle had taken place between the complainant and accused Swaran Singh. Subsequently, accused Joginder Singh and accused Mohinder Singh also joined that scuffle. Though it remained unexplained as to who was the aggressor, however, the fact remains that no injuries were there on the person of accused persons, whereas, the MLC Ext. PW-1/A and Ext. PW-12/B reveal that there were injuries corresponding to the time of occurrence in existence on the person of complainant. The nature thereof, of course, was simple in nature. The accsued as such were convicted under Section 323 of the Indian Penal Code. They have not assailed the findings of their conviction and sentence any further by way of filing an appeal may be because only the sentence of fine has been awarded against them.

12. Now if coming to the own testimony of complainant, who has stepped into the witness box as PW-12 and that of his mother PW-16, it is apparent that some fight between him and the accused had taken place on the spot. The prosecution case to this effect finds corroboration from the MLC Ext. PW-1/A. The accused, no doubt, have denied the prosecution story being wrong as according to them the complainant in order to avoid the payment of balance amount i.e. Rs. 40,000/- has engineered and fabricated this case against them falsely. The facts, however, remain that evidence as has come on record by way of the testimony of two sets of witnesses as aforesaid, some scuffle had taken place on the issue of ownership of one 'Ballie'. Irrespective of there being no clinching evidence as to which of the party was aggressor, it would not be improper to conclude that it is the accused who had administered beatings to the complainant and caused thereby injuries simple in nature on his person. Being so, it is only a case under Section 323 IPC is made out against the accused persons and not under Section 342 or 367 read with Section 34 IPC, as no evidence cogent and reliable has come on record to show

that the complainant was wrongfully confined by the accused persons within the meaning of Section 342 of the Code and that he was kidnapped by them within the meaning of Section 367 of the Code. He, no doubt, was taken by the accused to their home, however, to settle the accounts and not with malafide intention to harm him. It is for this reason, he himself has stated in his statement Ext. PW-11/A, which finds mention the very first version qua the manner in which the occurrence had taken place in their house, the accused had not administered beatings to him. Though, according to him, he was thrown on the cot, however, it seems that he was made to sit on the cot. Similarly, no evidence has come on record to show that he was threatened by the accused persons to do away with his life because independent witnesses PW-6 Ram Murti, PW-7 Prem Raj, PW-8 Usha Rani and PW-10 Moti Ram have not supported the prosecution case and rather turned hostile to the prosecution. The own testimony of complainant for want of corroboration from any independent source cannot be relied upon. His mother (PW-16) arrived at the place of accused and saved him from their clutches, therefore, her testimony that she witnessed the occurrence is also false. Even the complainant has also not said that the occurrence was witnessed by his mother. His testimony that she appeared on the scene of occurrence and tried to save him from the clutches of the accused rather reveals that PW-16 arrived there later on.

13. The ratio of the judgments of the Hon'ble Apex Court in ***Ram Lochan Ahir*** V. ***State of West Bengal, AIR 1963 SC 1074***, ***State of Maharashtra*** V. ***Annappa Bandu Kavatage, AIR 1979 SC 1410***, ***Jamatraj Kewalji Govani*** V. ***State of Maharashtra, AIR 1968 S.C. 178***, ***Raunki Saroop*** V. ***State, AIR 1970 Punjab and Haryana, 450*** and ***Pannaand others*** V. ***State of Rajasthan, 1987 Cri.L.J. 997 (Rajasthan High Court)*** is not attracted in the given facts and circumstances of this Case, hence need not to be referred in detail in this judgment.

14. True it is that in view of the ratio of judgments of the Hon'ble Apex Court in ***State of Madhya Pradesh*** V. ***Saleem @ Chamaru and another, 2005(3) Criminal Court Cases 330 (S.C.)*** and in ***Adu Ram*** V. ***Mukna 2005(2) RCR (Criminal) 64*** inadequate sentence would do more harm and that the sentence should be in conformity with the atrocity and brutality with which the crime has been committed. One should also not lose sight of the fact that while determining the quantum of sentence against a convict, it is the magnitude of the crime committed, gravity and heinousness thereof as well as the manner in which it is committed, weigh in the mind of the Court.

15. In the given facts and circumstances, the complainant raised the issue of ownership of one 'Ballie' and it is on this both parties enraged and scuffled with each other and it is in that process, the complainant seems to have received injuries on his person. The offence cannot be said to be grievous in nature warranting for award of severe punishment to the accused. Otherwise also, for the commission of an offence punishable under Section 323 IPC, an offender can either be imprisoned for a term which may extend to one year or fine which may extend to Rs. 1,000/- or both. Since the accused/convicts have been sentenced by learned trial Court with fine of Rs. 1,000/- each, therefore, in view of there being no past criminal history in their credit, the sentence so awarded against each of them is just and reasonable. The law laid down by the Hon'ble Apex Court in the judgments (supra) is, therefore, distinguishable in the given facts and circumstances of this case.

16. In view of re-appraisal of the oral as well as documentary evidence on record, in our considered opinion, the trial Court has not committed any illegality or irregularity while passing the judgment under challenge in this appeal. The same, as such, is affirmed and the appeal is dismissed. Personal bonds furnished by the accused persons shall stand cancelled and sureties discharged.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Budhi Singh ….Petitioner.
Versus
State of H.P. and others … Respondents.

CWP No. 4548 of 2009.
Decided on: 02.12.2016.

Constitution of India, 1950- Article 226- Revision petition has been dismissed by a non-speaking order- no findings were recorded on the grounds raised in the revision petition- recording of reasons is necessary, in case of a decision affecting anyone prejudicially – the order set aside and case remanded to the revisional Court for afresh decision. (Para-2 to 5)

For the petitioner. Mr. Ramakant Sharma, Advocate.
For the respondents Mr. Vikram Thakur and Ms. Parul Negi, Dy. AGs for respondents No. 1 to 3.
Mr. Arvind Sharma, Advocate for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this revision petition, the petitioner has prayed for the following relief.

i) "That the order dated 27.10.2009 at Annexure P-7 passed by the learned Divisional Commissioner, Mandi Division, Mandi exercising powers of Director of Consolidation under the H.P.Holdings (Consolidation and Prevention of Fragmentation) Act, 1971 in case No. 1/2009 may very kindly be quashed and set aside.

ii) That the order dated 24.5.2007 passed by the Consolidation officer at Annexure P-5 in Revenue Apeal No. 75/2006, titled Parkash Singh v. Budhi Singh may also be quashed and set aside.

iii) That the respondent may very kindly be directed to produce the entire record pertaining to the case of the petitioner for the kind perusal of this Hon'ble Court."

2. The grievance raised by way of the writ petition is that feeling aggrieved by an order which was passed by Consolidation Officer, Hamirpur dated 24th May, 2007, the petitioner had preferred a revision petition under Section 54 of the Consolidation of Holdings Act, which revision petition stands dismissed by the Revisional Authority i.e. Divisional Commissioner, Mandi Division, Mandi by way of the impugned order which is not sustainable in the eyes of law as the impugned order is an unreasoned and non-speaking order and no findings have been returned in the said order on the grounds which were taken in the revision petition by the petitioner while assailing the order of Consolidation Officer.

3. I have heard the learned counsel for the parties and also gone through the pleadings of the case. A perusal of the impugned order demonstrates that it prima facie is a non-speaking order as no findings have been returned by the learned Revisional Authority on the grounds which were raised in the revision petition filed against order dated 24.05.2007 passed by the Consolidation Officer, Hamirpur. The only reasoning which has been assigned by the Divisional Commissioner to uphold the order passed by the Consolidation Officer is that Consolidation Officer, Hamirpur had visited the spot in the presence of parties and before passing the impugned order, the Consolidation Officer had gone through the record. In my considered view, this reasoning is not sufficient to uphold the order passed by the Consolidation Officer as the Revisional Authority after due application of mind should have had returned findings also on

the grounds which were taken in the revision petition against the order passed by the Consolidation Officer.

4. It is settled law that recording of reasons is necessary if decisions affect any one prejudicially. Even a quasi-judicial authority has to record reasons in support of its conclusion and insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done but it must also appear to have been done. Besides this, recording of reasons operates as a restraint of any possible arbitrary exercise of judicial and quasi judicial power. It can only be inferred from the reasons assigned in the order as to whether discretion has been exercised by the decision maker on relevant ground and by disregarding extraneous consideration. Besides this, reasons facilitate the process of judicial review by superior Courts and insistence of reasons is a requirement for both judicial accountability and transparency. These settled principles of law have not been taken into consideration by the Revisional Authority while passing the impugned order.

5. Accordingly, order dated 27th October, 2009 passed by the Revisional Authority in case No. 1/2009, dated 27.10.2009, is set aside and the case is remanded back to the said authority to decide the same afresh after affording an opportunity of being heard to the parties. It is made clear that said authority shall dispose of the matter by passing a reasoned and speaking order. Keeping in consideration the fact that the revision petition is pertaining to the year 2007, this Court hopes and expects that the Revisional Authority shall decide the same, as expeditiously as possible, but not later than six months from today.

6. With these observations, the writ petition is disposed of. Pending miscellaneous application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO Nos.239 & 379 of 2014, 476 & 577 of 2016.
Date of decision: 02.12.2016

1. **FAO No.239 of 2014**
Divisional Manager, Oriental Insurance Co. Ltd. .....Appellant
Versus
Ram Kali & others ..... Respondents

2. **FAO No.379 of 2014**
Ram Kali & others. .....Appellants
Versus
Manohar Singh Thakur & others ..... Respondents

3. **FAO No.476 of 2016**
Manorma Thakur and others .....Appellants
Versus
Manohar Singh Thakur and others ..... Respondents

4. **FAO No.577 of 2016**
Oriental Insurance Company Ltd. .....Appellants
Versus
Manorma Thakur and others ..... Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was travelling as a labourer while deceased N was traveling as owner of goods –they died in an accident- the fact that the deceased were travelling as labourer and owner, respectively was admitted in the reply- it was also proved by PW-4, occupant of the vehicle- the delay is not sufficient to dismiss the petition- the compensation was rightly assessed- the rate of interest were wrongly granted as 9% and 7% - rate of interest modified to 7.5% per annum. (Para-11 to 19)

Cases referred:

Dhannalal vs. D.P. Vijayvargiya and others, AIR 1996 Supreme Court 2155
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

Presence for the parties:

Mr.Deepak Bhasin, Advocate, for the insurer.

Mr.Suneet Goel, Mr.Y.K. Thakur and Mr.Lakshay Thakur, Advocates, for the claimants, owner and driver, in respective appeals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

All these appeals are the outcome of one vehicular accident, therefore, the same were clubbed and are being disposed of by this common judgment.

FAO Nos.239 & 379 of 20114

2. These appeals have been filed against the common award, dated 25th March, 2014, passed by the Motor Accident Claims Tribunal (III), Shimla, H.P., (for short, the Tribunal), in MAC Petition No.117-S/2 of 12/10, titled Ram Kali and others vs. Manohar Singh Thakur and others, whereby compensation to the tune of Rs.10,58,440/-, with interest at the rate of 9% per annum from the date of filing of the petition till realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short, the impugned award).

3. Feeling aggrieved, the claimants have questioned the impugned award by the medium of FAO No.379 of 2014, while the insurer has challenged the same by way of FAO No.239 of 2014, on the grounds taken in the memos of appeals.

FAO Nos.476 & 577 of 2016

4. These appeals are directed against the common award, dated 1st July, 2016, passed by the Motor Accident Claims Tribunal (II), Shimla, H.P., (for short, the Tribunal), in MAC Petition No.26-S/2 of 2014, titled Manorma Thakur and others vs. Manohar Singh Thakur and others, whereby compensation to the tune of Rs.45,86,912/-, with interest at the rate of 7% per annum from the date of filing of the petition till realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short, the impugned award).

5. The claimants have questioned the impugned award by way of FAO No.476 of 2016 and the insurer has laid challenge to the impugned award by filing FAO No.577 of 2016, on the grounds taken in the memos of appeals.

6. In order to determine all the appeals, it is expedient to have a glance of the facts of the case. It has been averred that on 15th November, 2009, at about 6.30 p.m., deceased

Meena Ram was traveling as labourer, while deceased Narinder Thakur was traveling as owner of the goods, in Tipper bearing No.HP-63-2466, which met with an accident due to the rash and negligent driving of the driver of the offending Tipper, namely, Bhupinder Singh, as a result of which both – Meena Ram and Narinder Thakur – lost their lives. The claimants filed two separate claim petitions. Claim Petition No.117-S/2 of 12/10, titled Ram Kali and others vs. Manohar Singh Thakur and others, was filed by the dependants of deceased Meena Ram and Claim Petition No.26-S/2 of 2014, titled Manorma Thakur and others vs. Manohar Singh Thakur and others, was filed by the legal heirs of deceased Narinder Thakur, claiming compensation to the tune of Rs.15.00 lacs and Rs.50.00 lacs, respectively, as per the break-ups given in the claim petitions.

7. The Tribunal determined both the claim petitions by the medium of two different awards, as detailed above, are the subject matter of instant appeals.

8. During the course of hearing, the learned counsel for the insurer/appellant in FAO No.239 of 2014 and FAO No.577 of 2016 argued that the Tribunal has fallen into an error in holding that, at the time of accident, the offending Tipper was being driven by Bhupender Singh. In fact, the offending Tipper was being driven by Narender Thakur. In support of his submission, he relied upon the FIR recorded in regard to the accident, which was lodged against Narender Thakur. The learned counsel for the insurer further submitted that the amount awarded by the Tribunal, in both the claim petitions, is excessive. He also argued that the claimants, in Claim Petition No.26-S/2 of 2014, filed the same after a long gap, i.e. after about seven years of the accident, therefore, the same is liable to be dismissed on account of delay. It was also submitted that the Tribunal has awarded interest at higher rate, is not commensurate with the prevailing rate of interest.

9. Mr.Suneet Goel and Mr.Lakshay Thakur, learned counsel for the appellants/claimants in FAO Nos.476 of 2016 and 379 of 2014, respectively, submitted that the amount of compensation awarded by the Tribunal is inadequate and needs to be enhanced.

10. Heard learned counsel for the parties and gone through the record.

11. The claimants in claim petitions have specifically pleaded that the deceased Meena Ram and Narender Thakur were traveling in the offending vehicle as labourer and as owner of goods, respectively, which fact has been admitted by the owner in his replies filed to the claim petitions. Accordingly, there was no necessity to lead evidence to prove that the deceased were traveling as labourer and owner of goods in the offending Tipper. Still, the claimants in Claim Petition No.117-S/2 of 2012/2010, have examined PW-4 Mohan Singh, who was one of the occupants in the offending vehicle. He deposed that at the time of accident, the offending vehicle was being driven by Bhupinder Singh rashly and negligently. Further stated that in the FIR Ext.PW-1/A, it was wrongly mentioned that the offending vehicle, at the time of accident, was being driven by Narinder Thakur. This witness was cross-examined by the learned counsel for the insurer, but failed to extract anything and was not able to shatter his statement. The Tribunal has rightly made discussion in paragraphs 10 to 28 of the award impugned in FAO Nos.239 and 379 of 2014 and has rightly come to the conclusion that Bhupinder Singh was driving the offending vehicle at the time of accident.

12. The insurer has not led any evidence to prove that the driver Bhupinder Singh was not having a valid and effective driving licence at the time of accident, has failed to discharge the onus. Accordingly, the findings returned by the Tribunal, on the above issues are upheld.

13. To Deal with the next ground urged by the learned counsel for the insurer that the claim petition was filed after a long delay, it is apt to record herein that the Motor Vehicles Act, 1988, (for short, the Act), has gone through a sea change and rigours of Limitation Act have been taken away. Prior to coming into force the amended Act, limitation was prescribed for filing the claim petitions by the victims of a vehicular accident. However, after noticing that the prescribing of limitation was operating harsh and in many cases was likely to cause injustice, the Act was amended and Sub Section (3) of Section 166 of the Act came to be deleted, which

amendment came into force w.e.f. 14th November, 1994. The consequence of the above said amendment was that the Claim Petition, in a vehicular accident, could be filed by the victim at any time.

14. The Apex Court in **Dhannalal vs. D.P. Vijayvargiya and others, AIR 1996 Supreme Court 2155,** while examining the effect of omitting Sub-section(3) of Section 166 of the Act, has held that there is no limitation prescribed for filing claims before the Tribunal in respect of any accident. It was also held that where a claim petition was filed, while sub section (3) of Section 166 of the Act was operative, the same could not be dismissed on the ground that at the time of its filing it was barred by limitation under Sub-Section (3) of Section 166 of the Act:

> *"6. Before the scope of sub-section (3) of Section 166 of the Act is examined, it may be pointed out that the aforesaid sub-section (3) of Section 166 of the Act has been omitted by Section 53 of the Motor Vehicles (Amendment) Act, 1994, which came in force w.e.f. 14-11-1994. The effect of the Amendment Act is that w.e.f. 14-11-1994, there is no limitation for filing claims before the Tribunal in respect of any accident. It can be said that Parliament realised the grave injustice and injury which was being caused to the heirs and legal representatives of the victims who died in accidents by rejecting their claim petitions only on ground of limitation. It is a matter of common knowledge that majority of the claimants for such compensation are ignorant about the period during which such claims should be preferred. After the death due to the accident, of the bread earner of the family, in many cases such claimants are virtually on the streets. Even in cases where the victims escape death some of such victims are hospitalised for months if not for years. In the present case itself the applicant claims that he met with the accident on 4-12-1990, and he was being treated as an indoor patient till 27-9-1991. According to us, in its wisdom the Parliament, rightly thought that prescribing a period of limitation and restricting the power of Tribunal to entertain any claim petition beyond the period of twelve months from the date of the accident was harsh, inequitable and in many cases was likely to cause injustice to the claimants. The present case is a glaring example where the appellant has been deprived by the order of the High Court from claiming the compensation because of delay of only four days in preferring the claim petition.*
>
> *7. In this background, now it has to be examined as to what is the effect of omission of sub-section (3) of Section 166 of the Act. From the Amending Act it does not appear that the said sub-section (3) has been deleted retrospectively. But at the same time, there is nothing in the Amending Act to show that benefit of deletion of sub-section (3) of Section 166, is not be extended to pending claim petitions where a plea of limitation has been raised. The effect of deletion of sub-section (3) from Section 166 of the Act can be tested by an illustration. Suppose an accident had taken place two years before 14-11-1994, when sub-section (3) was omitted from Section 166. For one reason or the other no claim petition had been filed by the victim or the heirs of the victim till 14-11-1994. Can a claim petition be not filed after 14-11-1994, in respect of such accident ? Whether a claim petition filed after 14-11-1994, can be rejected by the Tribunal on the ground of limitation saying that the period of twelve months which had been prescribed when sub-section (3) of Section 166, was in force having expired the right to prefer the claim petition had been extinguished and shall not be revived after deletion of sub-section (3) of Section 166 w.e.f. 14-11-1994 ? According to us, the answer should be in negative. When sub-section (3) of Section 166 has been omitted, then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The claim petitions cannot be thrown out on the ground that such claim petitions were barred by time when sub-section (3) of Section 166 was in force. It need not be impressed that Parliament from time to time has introduced amendments in the old Act as well as in the new Act in order to protect the interest of the victims of the accidents and their heirs if the victims die. One such amendment has been introduced in the Act by the aforesaid Amendment Act 54 of 1994, by substituting sub-section (6) of Section 158, which provides :*

"As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner of such report, forward the some to such Claims Tribunal and Insurer".

In view of sub-section (6) of Section 158 of the Act the officer incharge of the police station is enjoined to forward a copy of information / report regarding the accident to the Tribunal having jurisdiction. A copy thereof has also to be forwarded to the concerned insurer. It also requires that where a copy is made available to the owner of the vehicle, he shall within thirty days or receipt of such copy forward the same to the Claims Tribunal and insurer. In this background, the deletion of sub-section (3) from Section 166 should be given full effect so that the object of deletion of said section by the Parliament is not defeated. If a victim of the accident or heirs of the deceased victim can prefer claim for compensation although not being preferred earlier because of the expiry of the period of limitation prescribed, how the victim or the heirs of the deceased shall be in a worse position if the question of condonation of delay in filing the claim petition is pending either before the Tribunal, High Court or the Supreme Court. The present appeal is one such case. The appellant has been pursuing from Tribunal to this Court. His right to get compensation in connection with the accident in question is being resisted by the respondents on the ground of delay in filing the same. If he had not filed any petition for claim till 14-11-1994, in respect of the accident which took place on 4-12-1990, in view of the Amending Act he became entitled to file such claim petition, the period of limitation having been deleted, the claim petition which has been filed and is being pursued up to this Court cannot be thrown out on the ground of limitation."

15. Having said so, the contention of the learned counsel for the insurer qua delay is negatived.

16. Now coming the plea whether the impugned awards are excessive or inadequate, deceased Meena Ram was a labourer. The Tribunal, after taking into account all the factors, assessed the income of the deceased at Rs.7,800/- per month and after deducting 1/3rd, the Tribunal has rightly held that the claimants lost source of dependency to the tune of Rs.6,240/- per month. The deceased, at the time of accident, was 45 years of age. In view of the law laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** read with the 2nd Schedule attached with the Act, the Tribunal has rightly applied the multiplier of 13.

17. Having said so, the amount of compensation awarded by the Tribunal vide award impugned in FAO Nos.239 of 2014 and 379 of 2014, is upheld.

18. As far as the award, impugned in FAO Nos.476 and 577 of 2016, is concerned, the Tribunal, after referring to the material on record, has rightly assessed the monthly income of the deceased Narinder Thakur, at Rs.42,902/-. After deducting 1/3rd amount towards the personal expenses of the deceased, the Tribunal has rightly assessed the loss of source of dependency to the claimants at Rs.28,602/-. The deceased, at the time of accident, was 48 years of age, thus, in view of the law laid down by the Apex Court in **Sarla Verma's case (supra)** read with the 2nd Schedule attached with the Act, the Tribunal has rightly applied the multiplier of 13.

19. Different rates of interest have been awarded by the Tribunal in both the claim petitions i.e. at the rate of 9% in one claim petition and at the rate of 7% in the other. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in *(2002) 6 Supreme Court***

Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,* reported in *2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,* reported in *(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,* reported in *2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,* reported in *2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,* reported in *(2015) 4 Supreme Court Cases 433,* and *Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another*,** reported in ***(2015) 4 Supreme Court Cases 434, and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others***, being the lead case, decided on **19.06.2015**.

20. Accordingly, it is held that the amount of compensation, in both the awards, shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petitions till realization.

21. In view of the above discussion, the impugned awards are modified, as indicated above. The Registry is directed to release the amount, alongwith interest as above, in favour of the claimants in FAO Nos.239 & 379 of 2014, forthwith, through their bank accounts, strictly in terms of the impugned award and the excess amount, if any, be released in favour of the insurer through payee's account cheque. In FAO Nos.476 & 577 of 2016, the insurer is directed to deposit the amount of compensation with interest at the rate of 7.5% per annum, within six weeks from today, and on deposit, the amount be released in favour of the claimants through their bank accounts forthwith, strictly in terms of the impugned award, after proper identification.

22. Both the appeals stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Employees Provident Fund Organization and another …..Petitioners.
Versus
Gian Chand and another …..Respondents.

CMPMO No. 83 of 2013.
Decided on: 2nd December, 2016.

Limitation Act, 1963- Section 5- There was delay of 125 days in filing the appeal – an application for condonation of delay was filed, which was dismissed – held, that the counsel for the applicant had not obtained the copy from the copying agency – there is no requirement of intimating the counsel on the preparation of the copy – the time till the collection of the copy cannot be deducted – the delay was not explained properly- appeal dismissed.(Para-3 to 6)

For the Petitioners: Mr. Rahul Mahajan, Advocate.
For Respondent No.2: Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The learned Civil Court decreed the apposite suit of the plaintiff. The defendants/petitioner herein made a endeavour before the learned First Appellate Court by belatedly instituting an appeal therefrom thereat to assail the verdict recorded by the Civil Court by appending therewith an application under Section 5 of the Limitation Act, wherewithin an espousal was made for condoning the delay of 125 days which occurred in the institution of an appeal therebefore by the defendants/petitioner herein. The application was contested by the

plaintiff/respondent herein. On the contentious pleadings of the parties, the learned First Appellate Court struck issues whereupon in discharge of the onus cast on the relevant issues upon the contesting parties, each lead their evidence thereon. On a perusal of the evidence adduced before the learned First Appellate Court, it recorded a conclusion qua the application instituted therebefore under Section 5 of the Limitation Act for begetting condonation of delay which occurred in the institution of an appeal therebfore against the impugned judgment recorded by the Civil Court, warranting dismissal arousable from the relevant delay standing not satisfactorily explained.

2. I have heard the learned counsel for either sides at length and have also traversed through the entire record.

3. The defendants/petitioners herein stood represented before the learned Civil Court. The learned Civil Court had made a pronouncement upon the suit of the plaintiff/respondent No.1 herein on 10.09.2010 whereat also the counsel for the defendants/petitioners herein recorded his presence therebefore. The counsel for the petitioners/defendants within limitation applied on 18.09.2010 for a copy of the apposite verdict recorded by the Civil Court. As apparent from a perusal of the record, the relevant copy as stood applied for by the counsel for the defendants/petitioners herein, stood attested on 22.09.2010. However, despite the Copying Agency readying the relevant copies of the relevant judgment and decree as stood applied for by the counsel for the petitioners/defendants for their onward transmission to him yet the counsel for the defendants/petitioners herein did not thereat obtain the relevant copies from the Copying Agency, rather he upto 10.11.2010 inordinately procrastinated their collection from the relevant Copying Agency. The factum of the relevant copies standing collected on 10.11.2010 by the counsel for the petitioner herein evinces an inference of his being throughout since 18.09.2010 whereat he applied for the relevant copies upto 10.11.2010, his recording his presence in the premises of the Civil Court concerned, significantly, when no evidence stands adduced qua since his applying for the relevant copies on 18.9.2010 upto his collecting the relevant copies on 10.11.2010, his being unavailable in the premises of the relevant Court, whereupon a concomitant inference stands sprouted qua his deliberately omitting to make their collection therefrom despite theirs standing readied for their delivery to him. Also the learned counsel for the petitioner has not placed on record any document showing the existence besides prevalence of any rule enjoining the ministerial staff manning the Copying Agency concerned to on the relevant copies standing readied for their onward transmission to the counsel theirs holding an obligation to purvey information qua the aforesaid facet to him. Consequently, in the absence of prevalence of the aforesaid rule casting the aforesaid injunction upon the ministerial staff manning the Copying Agency, contrarily, a conclusion spurs qua an obligation standing cast upon the counsel for the petitioner herein to visit the Copying Agency for ensuring their timely collection therefrom, especially when he for reasons aforestated was throughout since the recording of the apposite pronouncement on 10.9.2010 by the Civil Court upto 10.11.2010 remained present in the premises of the Court concerned. Consequently, his omission to make a timely collection of the copies of the relevant documents from the Coping Agency concerned is concluded to stand gripped with a vice of deliberateness.

4. The learned counsel appearing for the petitioners/defendants submits before this Court qua the time spent in obtaining the copies from 18.09.2010 whereat he applied for delivery of copies of the relevant documents, upto 10.11.2010 whereat they stood collected by the counsel for the petitioners/defendants being amenable for its standing deducted for computing the relevant period of limitation. However, the aforesaid submission also holds no vigour, conspicuously when despite the counsel for the petitioner/defendant since his applying on 18.09.2010 for delivery of the relevant copies by the relevant Copying Agency concerned till their delivery on 10.11.2010 remained present in the Court premises, whereupon it is to be reiteratedly held qua his deliberately procrastinating their collection therefrom upto 10.11.2010. Also the aforesaid submission would find force with this Court if the counsel or the litigant seeking exclusion of period spent in obtaining the copies from the copying Agency was/were

evidently evinced both diligence besides vigilance in not only making an apposite application within limitation before the quarter concerned, also his/theirs evidently making the relevant collection in prompt sequel to theirs standing readied for the relevant purpose also theirs by visiting the Copying Agency concerned ensuring the relevant fact of their readiness for transmission to him/them. However, since the aforesaid vigilance besides diligence by the counsel for the petitioners/defendants is evidently grossly wanting, hence, the petitioners/defendants are not entitled to seek exclusion of the period spent in obtaining the relevant copies from the relevant Copying Agency for thereupon the relevant computation of the period of limitation standing made.

5. The counsel for the petitioners/defendants submits that the attribution of negligence to the counsel for the petitioners/defendants cannot also stand fastened upon the petitioners herein. However, the aforesaid submission warrants it standing discountenanced arouseable from the petitioner(s) herein being a corporate entity also when the counsel representing them before the learned Court concerned was enjoined to hold constant interaction with the officials of the entity concerned besides when the officials concerned of the entity concerned stood also enjoined to hold constant interaction with the counsel representing them in the Court concerned yet contrarily, it appears qua the officials concerned besides their counsel representing the entity concerned before the relevant Courts omitting to maintain the relevant inter action intra se each other, in sequel thereto, with officials of the corporate entity, hence, holding an alike responsibility with their counsel qua the progress of the case, it appears of each derelicting on the aforesaid facet. Consequently, the sole aforesaid responsibility of the relevant counsel, if any, which stand canvassed by the counsel for the petitioner to not encumber the entity with any hardship is obviously meritless and is rejected. In aftermath, the aforesaid submission holds good only qua individual litigant(s) it does not for reasons aforesaid hold good qua a corporate entity hereat which stands manned by experienced and responsible staff.

6. For the foregoing reasons, there is no merit in the instant petition, which is accordingly dismissed. IN sequel, the order impugned hereat is affirmed and maintained.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

H.P. Housing and Urban Development Authority …..Appellant

Versus

Giani Devi & others …..Respondents

FAO No.461 of 2012

Date of decision: 02.12.2016

Employees Compensation Act, 1923- Section 12- Deceased was an employee of the contractor- H.P. Housing Board was principal employer- principal employer has to pay compensation at the first instance and it is at liberty to recover the same from the contractor – appeal allowed and order modified accordingly. (Para-2 to 4)

For the appellant:	Mr.Bhupender Gupta, Senior Advocate, with Mr.Ajit Jaswal, Advocate.
For the respondents:	Mr.Gulzar Singh Rathour, Advocate, for respondents No.1 to 5.
	Respondent No.6 stated to have expired.
	Mr.Narender Sharma, Advocate, for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award, dated 20th September, 2012, passed by the Commissioner, exercising powers under the Employees Compensation Act, 1923, (for

short, the Act), in case RBT No.8-2 of 2011/2003, titled Giani Devi and others vs. Ashok Kumar and another, whereby compensation to the tune of Rs.3,38,880/-alongwith simple interest at the rate of 12% per annum and costs of Rs.1,000/-, came to be awarded in favour of the claimants and the appellant was saddled with the liability (for short the "impugned award").

2. The learned Senior Advocate appearing for the appellant argued that the appellant i.e. H.P. Housing Board is the principal employer and has to pay the compensation, but in terms of the mandate of law, the appellant is entitled to recover the same from respondent No.7 Ashok Kumar, contractor. In support of his submission, the Senior Advocate invited my attention to Sub Sections (2) and (3) of Section 12 of the Act, which are reproduced below:

> "(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor, [2] or any other person from whom the workman could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the workman could have recovered compensation,] and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner.
>
> (3) Nothing in this section shall be construed as preventing a workman from recovering compensation from the contractor instead of the principal."

3. It is admitted case of the parties that the deceased was an employee of the contractor and the principal employer was H.P. Housing Board, thus, has to pay the compensation at the first instance and recover the same from the contractor.

4. Having said so, the appeal is allowed and the impugned award is modified by providing that the appellant has to pay the compensation, as awarded by the Commissioner, at the first instance, however, is at liberty to recover the same from the Contractor.

5. At this stage, the learned counsel for the claimants stated that claimant No.6 has died during the pendency of the appeal and prayed that the compensation in respect of her share be apportioned among other claimants. Prayer allowed.

6. The appeal is disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

H.P. State Forest Corporation through its Divisional Manager …Appellant/Plaintiff-Corporation

Versus

Kahan Singh since deceased through his LRs Partap Singh and others. Respondents/defendants.

RSA No. 86 of 2008.
Reserved on 25.11.2016.
Decided on: 02.12.2016.

Code of Civil Procedure, 1908- Order 41 Rule 1- Section 11- Plaintiff filed a civil suit for recovery- the defendant filed a counter-claim – the suit was partly decreed while the counter-claim was dismissed- an appeal was filed by the defendant against the judgement and decree – no separate appeals were filed regarding partly decreeing the suit and dismissing the counter- claim- the Appellate Court reversed the judgment and decree and allowed the counter-claim- held in second appeal that non-filing of appeal against the judgment and decree means that it has become final – the dismissal of counter-claim leads to finality of the controversy and even if the decree has not been drawn,it will not take away the effect of the dismissal – the defendant should have filed two appeals and relief could not have been granted to him in one appeal – otherwise the

decree in one suit will operate as res-judicata vis-à-vis the other – appeal allowed and the judgment of the Appellate Court set aside.(Para-16 to 24)

Cases referred:

Ramagya Prasad Gupta and others Vs. Murli Prasad and others, AIR 1974 Supreme Court 1320
Premier Tyres Limited Vs. Kerala State Road Transport Corporation, AIR 1993 Supreme Court 1202
Ram Prakash Vs. Smt. Charan Kaur and another, AIR 1997 Supreme Court 3760
Gangai Vinayagar Temple and another Vs. Meenakshi Ammal and others (2015) 3 Supreme Court Cases 624
Rajni Rani and another Vs. Khairati Lal and others, (2015) 2 Supreme Court Cases 682

For the appellant. : Mr. Bhupender Pathania, Advocate.
For the respondents. :Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this appeal, the appellant/Himachal Pradesh State Forest Corporation has challenged the judgment and decree passed by the Court of learned Addl. District Judge, Mandi in Civil Appeal No. 59 of 2005 dated 30.11.2007, vide which learned appellate court while allowing the appeal so filed before it by the present respondent, dismissed the suit filed by plaintiff-Corporation and decreed the counter claim of defendant for recovery of Rs. 60,031/- with pending and future interest @ 8% per annum from the date of institution of the suit till realization along with costs.

2. Brief facts necessary for adjudication of the present case are that appellant/plaintiff-Corporation (hereinafter referred to as 'the plaintiff-Corporation') filed a suit for recovery of Rs.68,735/- on the ground that in the year 1997 tenders were invited for extraction of resin and its carriage up to the road side Depot, for Lot No. 30/97 which work was allotted to defendant, (Kahan Singh since deceased), vide agreement dated 20.3.1997. It was further the case of the plaintiff-Corporation that for the said work the target was fixed 126 quintal pure resin from 3140 blaze and the rate fixed was Rs. 600 per quintal for extraction of resin and transportation of the same upto Roadside Depot. The total value of the work as per plaintiff-Corporation was Rs. 75,600/- and per section yield in the said lot was fixed at 40 quintal and all these aspects of the matter were made clear in the agreement itself. It was further the case of the plaintiff-Corporation that earnest money in the shape of FDR for an amount of Rs. 7,000/- was deposited and pledged in the name of plaintiff-Corporation for the said lot by the defendant. It was further the case of the plaintiff-Corporation that against the target of 126 quintals, the entire pure resin which could be extracted by the defendant was 86.980 quintals which was 39.020 quintals less than the fixed target which had caused loss to the tune of Rs. 1,28,766 to the plaintiff-Corporation on account of less extraction of resin. It was further mentioned in the plaint that defendant had raised objection that during the said period there was heavy rain as well as other unfavourable circumstances and after taking into consideration his plea, the higher authorities had granted relaxation of 12.600 quintal in favour of the defendant and after giving the said relaxation, the defendant was still liable to pay to the plaintiff-Corporation an amount of Rs. 68,735/- as per calculations given in the plaint along with interest @ 18% per annum and costs of the suit.

3. The claim of the plaintiff-Corporation was resisted by the defendant who stated that reduction of yield was not on account of his acts of omission and commission. It was mentioned in the written statement that in fact the yield which was fixed by the plaintiff-Corporation qua Lot No. 30/97 was arbitrarily fixed in proportion to the yield of previous years

and that yield had been reduced due to heavy rain which in fact was in the knowledge of the plaintiff-Corporation. As per defendant he extracted 86.980 quintals of resin and if the same was worked out on the basis of yield of previous years, the target so achieved was more than the target of the previous year.

4. Defendant simultaneously also filed counter-claim for recovery of Rs.60,031/- with costs and interest @ 18% per annum from November, 1997 onwards. As per defendant he had extracted 86.980 quintal of pure resin, value of which was Rs.52,188/- whereas he had only been paid Rs.1568/- by the plaintiff-Corporation. Defendant thus prayed for recovery of the said amount as well as the earnest money which was deposited by him with costs and interest.

5. On the basis of pleadings of the parties and material placed on record, the learned Trial Court framed the following issues:-

> "1. Whether the plaintiff-Corporation is entitled to the suit amount, if so to what extent ? OPP
>
> 2. Whether the plaintiff-Corporation has no locus standi to file the present suit ? OPD
>
> 3. Whether the plaintiff-Corporation has no enforceable cause of action? OPD
>
> 4. Whether the suit of the plaintiff-Corporation is time barred ? OPD
>
> 5. Whether the plaintiff-Corporation is estopped by his own act and conduct to file the present suit ? OPD
>
> 6. Whether the defendant is entitled to the amount of Rs. 60,031/- by way of counter claim? OPD
>
> 7. Relief."

6. Learned Trial Court returned the following findings on the said issues:-

> "Issue No.1 :No.
>
> Issue No.2 :No.
>
> Issue No.3 :No.
>
> Issue No.4 :No.
>
> Issue No.5 : No.
>
> Issue No.6 : No.
>
> Relief : Suit is partly decreed with costs and counter claim dismissed as per operative part of judgment"

7. Accordingly, learned trial court vide its judgment and decree dated 1.6.2005 partly decreed the suit of the plaintiff-Corporation by holding the plaintiff-Corporation to be entitled to recover Rs. 27,155/- alongwith interest @ 9% per annum from the date of filing of the suit till its realization from the defendant. However, the counter claim filed by the defendant was dismissed by learned trial court.

8. Feeling aggrieved by the same, defendant filed an appeal before learned appellate court challenging the partial decree of the suit in favour of the plaintiff-Corporation as well as dismissal of his counter claim by learned trial court. The partial decree granted in favour of the plaintiff-Corporation and rejection of his counter claim was challenged by the defendant by way of a single appeal. In other words, no separate appeals were filed by defendant against the judgment and decree which was partly allowed in favour of the plaintiff-Corporation by learned trial court and against the judgment and decree vide which his counter claim was dismissed.

9. In appeal, learned appellate court while allowing the same, reversed the judgment and decree which was passed by learned trial court in favour of the plaintiff-Corporation and also allowed the counter claim of the defendant to the tune of Rs. 60,031/- against the plaintiff-Corporation with interest, which counter claim earlier stood dismissed by the

learned trial court. Learned appellate court granted both these reliefs in favour of the defendant in the same appeal.

10. The said judgment and decree passed by learned appellate court has been assailed by the plaintiff-Corporation by way of this appeal which was admitted by this Court on 28.7.2008 on the following substantial question of law:-

> *"Whether the appellate court below have erred in law in concluding that the contract/agreement exhibit PW-5/A had become impossible and became void when it became impossible. Have not the appellate court below wrongly construed the provisions of section 56 of the Indian Contract Act and have thereby wrongly applied the same in favour of the respondent/defendant. Had the contract become impossible and whether there was sufficient evidence to prove that the agreement had become impossible on record because of rain."*

11. During the course of arguments this Court felt that another substantial question of law arose in the appeal i.e.:-

> "*Whether learned appellate court erred in not appreciating that a single appeal against the judgment and decree passed by learned trial court vide which learned trial court partly decreed the suit of the plaintiff-Corporation for recovery of Rs.27,155/- along with interest and costs and also dismissed the counter claim filed by the defendant for recovery of an amount of Rs. 60,031/- was not maintainable ."*

12. Both learned counsel for the parties were heard on this substantial question of law at length.

13. Mr. Bhupender Pathania, learned counsel for the appellant argued that the judgment and decree passed by learned appellate court is not sustainable because learned appellate court erred in not appreciating that because learned trial court while partly allowing the suit of the plaintiff-Corporation-Corporation for recovery of an amount of Rs.27,155/- along with interest and costs had also dismissed the counter claim so filed by the defendant for recovery of an amount of Rs.60,031/-, in these circumstances the defendant could not have had filed one appeal against the partial allowing of the suit and against the rejection of his counter claim. According to Mr. Pathania, though both these adjudications were made by way of a single judgment and rightly so, however, the partial allowing of the suit of the plaintiff-Corporation as well as dismissal of the counter claim consist two decrees and they ought to have been separately assailed by the defendant before learned first appellate court by filing two appeals. In the absence of two appeals having been filed, as per Mr Pathania, one appeal so filed by the defendant was not maintainable, as both the findings returned acted as 'res judicata' vis-à-vis each other which necessitated the filing of two appeals. According to Mr. Pathania in this view of the matter as the appeal filed before learned appellate court was not maintainable, learned appellate court erred in entertaining and adjudicating upon the appeal so filed by defendant and thereafter in allowing the same.

14. Mr. G.R. Palsra learned counsel for the respondents on the other hand argued that the defendant could not have had filed two appeals because learned trial court had allowed the suit of the plaintiff-Corporation partially and dismissed the counter claim filed by the defendant by way of same judgment and same decree. Mr. Palsra further submitted that it is not as if two judgments and decrees were passed by learned trial court. According to Mr. Palsra in these circumstances the only option available with the defendant was to prefer one appeal against one judgment and decree which was done by defendant before learned first appellate court and no illegality was committed by learned appellate court in entertaining the same and deciding the same vide judgment and decree dated 1.6.2005. Mr. Palsra further argued that even in this Court appellate-Corporation had filed only one appeal against the judgment and decree passed by learned appellate court vide which leaned appellate court while dismissing the suit filed by the

plaintiff-Corporation had allowed the counter claim. On this analogy also it was urged by Mr. Palsra that there was no merit in the contention so raised by learned counsel for the appellant.

15. I have heard learned counsel for the parties and also gone through the records of the case as well as judgments and decrees passed by both the courts below.

16. A three Judges Bench of Hon'ble Supreme Court in **Ramagya Prasad Gupta and others** Vs. **Murli Prasad and others**, AIR 1974 Supreme Court 1320 has held:-

> *"8. It is clear that where a suit has been tried and finally decided on the merits, if the defeated party wishes in another suit between the same parties relating to the same property to have the same questions re-agitated, he cannot be allowed to do so, because his cause of action has passed into a judgment, and the matter has become res judicata. Even where two appeals have been taken from the same judgment by two different parties to which all others are parties either as appellants or respondents and one of the appeals is dismissed either on merits or for any other reasons, it has been held by some of the High Courts, but we express no opinion thereon, that the other appeal has also to be dismissed, because it is barred by the principles of res judicata as otherwise there will be conflict in. the decrees. In the Lahore decision there were two cross suits about the same subject-matter filed simultaneously between the same parties and two decrees were prepared. An appeal being filed in respect of one decree and not in respect of the other, the question was whether the non-filing of the appeal against that decree creates an estoppel against the hearing of the other appeal. In Narhari's case (supra) what this Court held was, where there has been on.-. trial, one finding and one decision, there need not be two appeals even though two decrees may have been drawn up and consequently the fact that one of the appeals was time barred does not bar the other appeal on the ground of res judicata. In this case, these questions need not be considered. Nor is it relevant to consider whether there is any conflict between the decision in this case and Sheodan Singh's case (supra). In Sheodan Singh's case two suits were field in the Court of the Civil Judge, one for a declaration of the title to the suit property and the second for other reliefs and consequently two other suits were filed by the respondents in the Munsif's court against the appellant claiming joint ownership to the suit property and other reliefs. The four suits were tried together by the Civil Judge. Some of the issues were common to all the suits and one of the commons issues relating to the title of the parties was found in favour of the respondent. The Civil Judge dismissed the appellant's title suit, decreed his other suit partly, and decreed the two suits of the respondent. The appellant filed appeals against the decree in each suit. The High Court dismissed the two appeals arising out of the respondent's suits, one as time barred, and the other for failure to apply for translation and printing of the record. As the title of the respondent to the suit property had become final on account of such dismissal, the respondent prayed for the dismissal of the other two appeals also, as the main question involved therein was the same. The High Court agreed that the appeals were barred by res judicate and dismissed them. Against these order of dismissal, the appellant filed appeals to this Court and contended that-(1) title to the property was not directly and substantially it% issue in the respondent's suits (2) the Munsif's Court could not try the title suit filed by the appellant;(3) it could not be said that appeals arising out of the respondent's suits were former suits as such the bar of res judicata will be inapplicable; and (4) the two appeals which were dismissed-one on the ground of limitations and the other on the ground of not printing the records, could not be said to be heard and finally decided. This Court held that the High Court was right in dismissing the appeals as being barred by res indicate inasmuch as the issue as to the title was raised in respondent's suits and it was directly and substantially in issue in those suits also and did arise out of the pleadings of the parties, and further the High Court's decision in*

the two appeals arising from the respondent's appeals were undoubtedly earlier and, therefore, the condition that there should have been a decision in a former suit to give rise to res judicata in a subsequent suit was satisfied in that case. The decision in Narhari's case (supra) was distinguished by this Court in that case so that it could not be said that that decision was in any way in conflict with the decision in Narhari's case (supra). In appeals arising out of a subsequent suit and an earlier suit where there were common issues, common subject-matter and common trial and the appeals arising out of the subsequent suit were dismissed, a question would arise as to whether the appeals from the earlier suit which were pending arc barred by res judicata A question may also arise where the subject-matter is the same and the issues are common in the two suits but some of the parties are different in one suit, whether the bar of res judicata would operate against the parties who are common. All these aspects need not be considered in these appeals because, in our view, the subject-matter of Title Suit No.68 of 1954 and that of Title Suit No. 94 of 1956 are entirely direct. Even if the issues that are common in the two suits, and it has been admitted by the learned .Advocate for the appellants that some of the issues might be common to both the suits, issues Nos. 4, 9, 12, 13 and 14 at any rate survive, and consequently the bar of res judicata would not apply."

17. A three Judges Bench of Hon'ble Supreme Court in **Premier Tyres Limited** Vs. **Kerala State Road Transport Corporation,** AIR 1993 Supreme Court 1202 while dealing with situation where suits are decreed by common judgment and appeal is filed against one judgment and decree whereas appeal is not filed in the connected case held that finality of finding recorded in the connected suit due to non filing of appeal precludes the Court from proceeding with appeal in other suit. It was held by Hon'ble Supreme Court that effect of non filing of appeal against a judgment or decree is that it becomes final and as this finality can be taken away only in accordance with law, therefore, same consequences follows when a judgment or decree in a connected suit is not appealed from.

18. In **Ram Prakash** Vs**. Smt. Charan Kaur and another**, AIR 1997 Supreme Court 3760, Hon'ble Supreme Court has held:-

"2. It would be obvious that since the claims of the petitioner and the respondents have arisen from the same cause of action and the finding of the appellate Court that damages had accurred to the respondents due to misfeasance or malfeasance having been allowed to become final, the decree which is subject matter of the special leave petition cannot be assailed. The self same question was directly in issue and was the subject matter of both the suits. The same having been allowed to become final, it cannot be gone into since the same had attained finality, the petitioner having not filed any appeal against the appeal dismissing the suit. In view of this situation, the High Court was right in concluding that the decree of dismissal of the suit against the petitioner would operate as res judicata under Section 11 CPC in the appeal against which the petitioner has filed the second appeal."

19. In **Sri Gangai Vinayagar Temple and another** Vs. **Meenakshi Ammal and others** (2015) 3 Supreme Court Cases 624, three Judges Bench of Hon'ble Supreme Court has held:-

"27. Procedural norms, technicalities and processal law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute 30 Page 31 becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the Courts by Section 151 of the CPC, as clarified by this

Court in Chitivalasa Jute Mills vs. Jaypee Rewa Cement (2004) 3 SCC 85. In the instance of suits in which common Issues have been framed and a common Trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross-objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. The statutory law and the processal law are two sides of the judicial drachma, each being the obverse of the other. In the case in hand, had the Tenant diligently filed an appeal against the decree at least in respect of OS No. 5 of 1978, the legal conundrum that has manifested itself and exhausted so much judicial time, would not have arisen at all."

20. In **Rajni Rani and another** Vs. **Khairati Lal and others,** (2015) 2 Supreme Court Cases 682 the Hon'ble Supreme Court has held that keeping in mind the conceptual meaning given to the counter claim and the definitive character assigned to it, there can be no shadow of doubt that when the counterclaim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Hon'ble Apex Court further held that in that regard nothing survives as far as the said defendants are concerned and if the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that court is concerned and the determination should conclusively put to rest the rights of the parties in that sphere. It was further held by Hon'ble Supreme Court that a Court may draw up a formal decree or may not, but if by virtue of the order of the court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. It further held that where a counter claim which is in the nature of cross-suit has been dismissed nothing else survives for the defendants who had filed the counterclaim and the order passed by learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

21. Similar view has also been taken by a Coordinate Bench of this Court in **Piar Chand and other** Vs. **Ranjeet Sigh and others**, in RSA No. 293 of 2006 decided on 16.9.2016.

22. Reverting back to the facts of this case admittedly learned trial court while partly allowing the suit for recovery filed by plaintiff-Corporation, dismissed the counter claim filed by defendant vide which the defendant had prayed for a decree for recovery of Rs. 60,031/-. In other words, learned trial court held that in lieu of the transaction subject matter of the civil suit, whereas the plaintiff-Corporation was entitled for recovery from the defendant, however, defendant was not entitled for any recovery from the plaintiff-Corporation. Defendant rather than filing two separate appeals, one against the decree which was passed in favour of the plaintiff-Corporation by learned trial court in its civil suit and second against the dismissal of his counter claim, filed only one appeal before the learned appellate court. In my considered view, the defendant erred in doing so because as the partial decreeing of the suit of the plaintiff-Corporation and dismissal of the counter claim of the defendant were two distinct adjudications though made by way of same judgment and decree by learned trial court, both these adjudications assumed the status of a decree and they required to be challenged separately and filing only one appeal against both the said adjudications was not permissible in law. As I have already discussed above, it has been categorically held by Hon'ble Supreme Court in such like

matters that a Court may draw a formal decree or not but if by virtue of the judgment of the Court the rights have finally been adjudicated then the same would assume the status of a decree. As the adjudication on the suit filed by the plaintiff-Corporation and adjudication on the counter claim filed by the defendant assumed the status of two distinct decrees, they were required to be challenged by way of separate appeals by paying the requisite Court fee on each of them. Defendant having failed to do so he could not have been granted the relief which was granted by learned appellate court in one single appeal which was filed by defendant against the decree passed in favour of the plaintiff-Corporation by learned trial court as well as against the dismissal of his counter claim. Learned appellate court failed to appreciate that in the absence of two appeals, one appeal so filed was not maintainable, as the findings returned on plaint and counter claim acted as res judicata vis-à-vis each other which necessitated the filing of two appeals. Learned appellate court also failed to appreciate that non filing of two distinct and separate appeals amounted to having the same effect where no appeal was filed from a decree in connected case and the effect of non filing of appeal against judgment or decree that has become final. In other words because only one appeal was filed, therefore, finality of finding recorded in connected claim on account of non filing of appeal precluded the Court from proceeding with appeal in the other connected claim.

23. To give an illustration, 'A' files a suit for recovery of Rs.100/- against 'B' and 'B' also files a counter claim for recovery of Rs.50/- from plaintiff 'A'. Learned trial court partly decrees the suit of 'A" against defendant 'B' for recovery of Rs.70/- but dismisses the counter claim filed by defendant. In such like circumstance defendant cannot assail the dismissal of his counter claim as well as the partial decree of the suit of the plaintiff by one appeal. The defendant will have to file two separate appeals, one challenging the decree passed in favour of the plaintiff and other challenging the dismissal of his counter claim. However, if plaintiff wants to assail the factum of his suit not being decreed in totality, he is not to file two appeals but he can file only one appeal against the partial allowing of his suit.

24. It is settled law that counter claim has effect of a cross-suit and Court can announce a final judgment both on original claim and on the counter claim. Counter claim filed by defendant has to be treated as a plaint and the effect of counter claim is that even if suit of the plaintiff is stayed, discontinued, dismissed or withdrawn, counter claim can be decided independently on merits. In fact counter claim has to be treated as a plaint and is governed by the Rules applicable to plaint and similarly the reply filed in answer to counter claim is to be treated as written statement and is governed by Rules applicable to written statement.

In view of the findings returned above, this appeal is allowed and the judgment and decree passed by learned appellate court in Civil Appeal No. 59 of 2005 dated 30.11.2007 is set aside by holding that as defendant had not filed two separate appeals against the judgment and decree passed by learned trial court in favour of the plaintiff-Corporation and against the dismissal of his counter claim which findings acted as *res judicata vis-a-vis* each other, single appeal so filed by defendants was not maintainable before the learned appellate court. The Substantial question of law is answered accordingly. In view of findings returned in this appeal, in my considered view there is no necessity of adjudicating upon the other substantial question of law which was framed by the Court on 28.7.2008. No order as to costs. Miscellaneous application(s), if any stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

ICICI Lombard General Insurance Company Limited …Appellant.
Versus
Parul Sharma and others …Respondents.

FAO No. 366 of 2012
Reserved on: 25.11.2016
Decided on: 02.12.2016

Motor Vehicles Act, 1988- Section 163-A- Deceased was the son of owner/insured, who died in the accident - the owner had specifically stated in the reply that the vehicle was parked in the garage due to some mechanical defeat- the deceased had taken the vehicle in the absence of the owner – the deceased was not engaged as a driver but was driving the vehicle in the capacity of the son of the insured and will step into the shoes of the owner – the insured had paid extra premium insuring the owner to the extent of Rs.2 lacs - representative of the deceased are entitled to the compensation of Rs.2 lacs with interest @ 7.5% per annum.(Para-14 to 24)

Cases referred:

Ningamma and another versus United India Insurance Co. Ltd., 2009 ACJ 2020

Oriental Insurance Co. Ltd. versus Rajni Devi and others, 2008 ACJ 1441

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Neeraj Gupta, Advocate, for respondents No. 1 to 3.
Nemo for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant-insurer has called in question award, dated 21st April, 2012, made by the Motor Accident Claims Tribunal-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 26/2010, titled as Parul Sharma and others versus ICICI Lombard Insurance Co. Pvt. Ltd. and another, whereby compensation to the tune of ₹ 4,48,900/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award"), on the grounds taken in the memo of the appeal.

2. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. Deceased-Vijay Sharma, while driving the car, bearing registration No. HP-33 A-9112 on 19th January, 2010, met with an accident at about 10.00 P.M. near Tata Motors Lunapani, while going from Sundernagar to Mandi, due to which he sustained injuries, was taken to Harihar Hospital, Gutkar, from where he was referred to PGI Chandigarh, where he remained admitted and succumbed to the said injuries on 31st January, 2010.

4. The legal representatives of deceased-Vijay Sharma invoked the jurisdiction of the Tribunal under Section 163-A of the Motor Vehicles Act, 1988 (for short "MV Act") and sought compensation to the tune of ₹ 20,00,000/-, as per the break-ups given in the claim petition.

5. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

6. On the pleadings of the parties, following issues came to be framed by the Tribunal on 10th May, 2011:

> *"1. Whether the petitioners being legal representatives/dependants of deceased Sh. Vijay Sharma, are entitled for grant of compensation, if so to what amount and from which of the respondents? OPP*
>
> *2. Whether the petition is not maintainable and sustainable as alleged? OPR-1*
>
> *3. Whether there is any violation of terms and conditions of insurance policy, if so its effect? OPR-1*
>
> *4. Relief."*

7. In support of their claim, one of the claimants, namely Smt. Parul Sharma, stepped into the witness box as PW-1. The owner-insured, namely Shri Dina Nath Sharma, examined Shri Man Singh as RW-2 and himself stepped into the witness box as RW-1. The insurer has not led any evidence.

8. The Tribunal, after scanning the evidence, oral as well as documentary, decided issue No. 1 in favour of the claimants and against the respondents. Issues No. 2 and 3 also came to be decided against the insurer on the ground that it has not led any evidence and compensation to the tune of ₹ 4,48,900/- with interest @ 7.5% per annum from the date of the claim petition till its realization was granted in favour of the claimants.

9. The claimants and the owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

10. The appellant-insurer has called in question the impugned award on the ground that the Tribunal has fallen in an error in saddling it with liability.

11. Learned counsel appearing on behalf of the appellant-insurer argued that deceased-Vijay Sharma, who was the son of owner-insured of the offending vehicle, was in possession and control of the offending vehicle, was driving the same at the time of the accident and had stepped into the shoes of the owner. Further argued that deceased-Vijay Sharma was driving the offending vehicle rashly and negligently at the time of the accident, thus, the claim petition was not maintainable.

12. Learned counsel appearing on behalf of claimants-respondents No. 1 to 3 argued that the claimants are the victims of the vehicular accident, the claim petition was maintainable and the Tribunal has rightly passed the impugned award.

13. I have heard the learned counsel for the parties and gone through the record.

14. The owner-insured of the offending vehicle has specifically averred in the reply that he had parked the offending vehicle in his garage due to some mechanical defect. Further averred that he had engaged the services of a mechanic, namely Man Singh (RW-2), who could not repair the same as he had to import some part of the vehicle from outside and had specifically directed not to ply the vehicle till the defect was removed. The owner-insured had gone to his village on 18th January, 2010 and had to return on 20th January, 2010.

15. The fact that deceased-Vijay Sharma had taken the offending vehicle at the relevant point of time without permission of his father, Dina Nath Sharma and was driving the same at the time when it met with an accident, in which he lost his life, is not denied.

16. The question is - whether deceased-Vijay Sharma can be treated as a third party?

17. Admittedly, deceased-Vijay Sharma was driving the offending vehicle at the time of the accident, which belonged to his father and was registered and insured in the name of his father. He was not engaged as a driver of the offending vehicle, thus, was driving the offending vehicle in the capacity of the son of the owner-insured and the vehicle was in his possession and control at the relevant point of time. Meaning thereby, deceased-Vijay Sharma had stepped into the shoes of the owner.

18. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **Ningamma and another versus United India Insurance Co. Ltd.,** reported in **2009 ACJ 2020.** It is apt to reproduce para 18 of the judgment herein:

> *"18. In the case of Oriental Insurance Co. Ltd. v. Rajni Devi, 2008 ACJ 1441, wherein one of us, namely, Hon'ble Justice S.B. Sinha is a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would*

depend upon the terms thereof. It was held in the said decision that Section 163-A of the MVA cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under Section 163-A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163-A of the MVA. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike."

19. Now, the question is – whether the claimants, being the legal representatives of deceased-Vijay Sharma, are entitled to compensation?

20. The Apex Court in **Ningamma's case (supra)** remanded the matter for rendering the decision in accordance with law after determining certain questions of fact involved in the case including the applicability of the provisions of Section 147 of the MV Act, while holding that the MV Act is a beneficial and welfare legislation and in terms of Section 166 of the MV Act, the Court is duty bound to award just compensation irrespective of the fact whether any plea in that behalf was raised by the claimants or not. It is profitable to reproduce paras 21, 22, 25 and 26 of the judgment herein:

"21. Section 147 of the MVA provides that the policy of insurance could also cover cases against any liability which may be incurred by the insurer in respect of death or fatal injury to any person including owner of the vehicle or his authorised representative carried in the vehicle or arising out of the use of vehicle in the public place.

22. When we analyze the impugned judgment of the High Court in terms of aforesaid discussion, we find that the counsel for the insurance company himself contended before the High Court that the policy of insurance was an Act policy and the risk that is covered is only in respect of persons contemplated under Section 147 of the MVA. It is the finding of fact which we have also upheld in this Judgment that the deceased was authorised by the owner of the vehicle to drive the vehicle. When we examined the facts of the present case in view of the aforesaid submission made, we are of the opinion that such an issue was required to be considered by the High Court in the light of the facts and evidence adduced in the case. On consideration of the Judgment and Order passed by the High Court we find the same to be sketchy on the aforesaid issue as to whether the claim could be considered under the provisions of Section 166 of the MVA. In this connection, reference can be made to a judgment of this Court in the case of Oriental Insurance Company Ltd. v. Rajni Devi and Ors. (supra), wherein, it was held that where compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the insurance company would depend upon the terms thereof.

23. ....

24. ....

25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the

court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court.

26. While entertaining the appeal, no effort was made by the High Court to deal with the aforesaid issues, and therefore, we are of the considered opinion that the present case should be remanded back to the High Court to give its decision on the aforesaid issues. The High Court was required to consider the aforesaid issues even if it found that the provision of Section 163-A of MVA was not applicable to the facts and circumstances of the present case. Since all the aforesaid issues are purely questions of fact, we do not propose to deal with these issues and we send the matter back to the High Court for dealing with the said issues and to render its decision in accordance with law. The High Court will also consider the question of quantum of compensation, if any, to which the claimants might be entitled to, having regard to the earning capacity of the deceased and "Just Compensation", if any. Since the claim is a very old claim, we request the High Court to consider the matter as expeditiously as possible."

21. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Rajni Devi and others,** reported in **2008 ACJ 1441,** held that where compensation is claimed for the death of the owner or another passenger of the vehicle, the claim of the insurance company would depend upon the terms of the insurance policy. It is worthwhile to reproduce paras 6 and 11 of the judgment herein:

"6. It is now a well settled principle of law that in a case where third party is involved, the liability of the insurance company would be unlimited. Where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the insurance company would depend upon the terms thereof.

7 to 10. ....

11. According to the terms of contract of insurance, the liability of the insurance company was confined to Rs. 1,00,000 (rupees one lakh). It was liable to the said extent and not any sum exceeding the said amount."

22. Applying the test to the instant case, the insurance policy of the offending vehicle is on the record as Ext. R-1-E, the perusal of which does disclose that the owner-insured has paid extra premium covering the insurance of the owner to the extent of ₹ 2,00,000/-. As discussed hereinabove, deceased-Vijay Sharma had stepped into the shoes of the owner, thus, his risk was covered to the extent of ₹ 2,00,000/- and the claimants, being the legal representatives of the owner, are entitled to compensation only in terms of the conditions contained in the insurance policy.

23. Viewed thus, it is held that the claimants are entitled to compensation to the tune of ₹ 2,00,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization.

24. Having glance of the above discussions, the impugned award is modified and the appeal is allowed, as indicated hereinabove.

25. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts after proper identification.

26. Excess amount, if any, be refunded to the appellant-insurer through payee's account cheque.

27. Send down the record after placing copy of thejudgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No. 319 & 374 of 2012
Decided on: 02.12.2016.

FAO No. 319 of 2012

ICICI, Lombard General Insurance Co. Ltd. Appellant(s)
Versus
Gian Chand & others …Respondents

FAO No. 374 of 2012

ICICI, Lombard General Insurance Co. Ltd. Appellant(s)
Versus
Mohan Lal & others …Respondents

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a tipper, the unladenweight of which is 3680 k.g. and it falls within the definition of light motor vehicle – copy of licence shows that driver was having a valid and effective driving licence at the time of accident – it was for the insurer to plead and prove that the owner had committed willful breach of the terms and conditions of the policy- insurer is to be saddled with liability – thus, the Tribunal had rightly saddled the insurer with liability – however, rate of interest reduced from 9 % to 7.5% per annum.(Para-8 to 21)

Cases referred:

Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the Appellant(s) : Mr. Jagdish Thakur Advocate.
For the Respondents: Mr. Partap Singh Goverdhan, Advocate, for respondent No. 1.
Mr. Mukul Sood, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

A vehicular traffic accident has given birth to both these appeals, thus I deem it proper to determine these appeals by this common judgment.

2. These appeals are outcome of the two awards made by the Motor Accident Claims Tribunal-II, Solan, District Solan, (HP) (hereinafter referred to as 'the Tribunal') in two claim petitions filed by the claimants for grant of compensation, as per the break-ups given in the respective claim petitions (for short 'the impugned awards').

3. **FAO No. 319 of 2012** is directed against the award dated 24th May, 2012, passed in MAC Petition No. 62-S/2 of 2009, titled **Gian Chand versus Dalip Singh & others,** whereby compensation to the tune of Rs. 22,818/- with interest at the rate of 9% per annum was granted in favour of the claimant and the insurer was saddled with liability.

4. By the medium of **FAO No. 374 of 2012**, the appellant-insurer has questioned the award dated 28th June, 2012, passed in MAC Petition No. 38-S/2 of 2010, titled **Mohan Lal versus Dalip Singh & others,** whereby compensation to the tune of Rs. 1,75,345/-with interest at the rate of 9% per annum was granted in favour of the claimant and the insurer-appellant herein was saddled with liability.

5. The claimants, the owner-insured and the driver of the offending vehicle-Tipper have not questioned the impugned awards, on any count, thus, have attained finality so far as the same relate to them.

6. The insurer has questioned the impugned awards on the grounds that the driver was not holding a valid and effective driving licence at the time of accident.

7. Learned Counsel for the appellant-insurer argued that the vehicle involved in the accident was not a 'light motor vehicle'.

8. Admittedly, the driver was driving Tipper bearing registration No. HP-64-1289, the unladen weight of which is 3680 kilograms, as per the Registration Certificate, Ext. R-1, thus falls within the definition of "Light Motor Vehicle" as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act, for short "the Act".

9. The same issue was raised before the Supreme Court in case titled ***Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*** reported in ***AIR 1999 SC 3181***. It is apt to reproduce paras 10, 11 and 14 of the said judgment herein:

> *"10. Definition of "light motor vehicle" as given in clause (21) of Section 2 of the Act can apply only to a "light goods vehicle" or a "light transport vehicle". A "light motor vehicle" otherwise has to be covered by the definition of "motor vehicle" or "vehicle" as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be non-transport vehicle as well.*
>
> *11. To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of accident, the vehicle was not carrying any goods, and thought it could be said to have been designed to be used as a transport vehicle or goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.*
>
> *12-13 …. ….. …..*
>
> *14. Now the vehicle in the present case weighed 5,920 kilograms and the driver had the driving licence to drive a light motor vehicle. It is not that, therefore, that insurance policy covered a transport vehicle which meant a goods carriage. The whole case of the insurer has been built on a wrong premise. It is itself the case of the insurer that in the case of a light motor vehicle which is a non-transport vehicle, there was no statutory requirement to have specific authorisation on the licence of*

the driver under Form 6 under the Rules. It had, therefore, to be held that Jadhav was holding effective valid licence on the date of accident to drive light motor vehicle bearing Registration No. KA-28-567."

10. This Court in **FAO No. 54 of 2012** titled ***Mahesh Kumar and another*** vs**. *Smt. Piaro Devi and others*** decided on 25th July, 2014, held that such type of vehicle is LMV. It is apt to reproduce paras 10,11,14,16,18 and 19 of the said judgment herein:

"10.I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

"2. ....

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

11. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

12-13. ....

14. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

15.My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** -*

(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

15- ....

16. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

17. ....

18. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as ***Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,*** *reported in* ***2013 AIR SCW 2791,*** *and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:*

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. ....

21. ....

22. ....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The

definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

19. The Apex Court in another case titled as ***National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,*** *reported in* ***2008 AIR SCW 906,*** *has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:*

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. …………………

10. ………………

11. ………………

12. ……………..

13. ……………..

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. ……………………….

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

11. Applying the ratio, the vehicle in question is a "Light Motor Vehicle".

12. Same principles of law have been laid down in FAOs No. 385 of 2007 & 388 of 2007 decided on 14.11.2014, FAOs No. 33 & 55 of 2010, decided on 17.10.2014 and FAO No. 293 of 2006 decided on 4.4.2014.

13. I have gone through the copy of driving licence (Ext. R-2), which does disclose that the driver was having a valid and effective driving licence at the time of accident.

14. In view of the ratio laid down by the Apex Court in the judgments, *supra*, the Tribunal has rightly held that the driver was having a valid and effective driving licence.

15. It was for the insurer to plead and prove that the owner has committed willful breach, failed to do so. The owner has not committed any willful breach. Thus, the insurer is to be saddled with the liability.

16. The Apex Court in a case titled **National Insurance Co. Ltd.** *versus* **Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has also laid down principles, how the insurer can avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. ....*
>
> *(i) ....*
>
> *(ii) ....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).........................*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

17. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the*

situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

18. Viewed thus, it is held that the Tribunal has rightly saddled the insurer with the liability.

19. The Tribunal has rightly awarded the compensation, but has fallen in an error in awarding interest @ 9% per annum from the date of filing of the claim petitions.

20. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281;Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738;Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053;Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982;Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

21. Having said so, I deem it proper to reduce the rate of interest from 9% per annum to 7.5% per annum from the date of filing of the claim petitions till its realization.

22. Accordingly, the impugned awards are modified, as indicated above and the appeals stand disposed of.

23. Registry is directed to release the awarded amount in favour of the claimants, strictly as per the terms and conditions contained in the impugned awards, after proper identification.

24. Send down the record after placing copy of the judgment on Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Madhu Tomar …. Petitioner.

Vs.

State of H.P. and another …. Respondents.

CWP No. 1172 of 2012.
Reserved on: 10.11.2016
Date of Decision: 02.12.2016

Constitution of India, 1950- Article 226- Petitioner was appointed as anganwari worker – she was absorbed as Supervisor - she claimed the benefit of the service rendered by her asanaganwari worker for pensionary benefits - held, that appointment of the petitioner as

anganwari worker is not against any civil post and cannot be counted towards the pensionary benefits- petition dismissed. (Para- 1 to 3)

For the petitioner: Ms. Jyotsna Rewal Dua, Sr. Advocate with Mr. Shalini Thakur, Advocate.
For the respondents: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.*:*

The petitioner stood appointed as an Anganwari Worker on 21.10.1982, in capacity whereof she rendered work under the respondents upto 30.08.2005 whereat in consonance with the relevant R & P Rules she stood absorbed as a Supervisor by the respondents. She claims qua the hitherto rendition by her of service under the respondents as an Anganwari Worker standing amalgamated with her subsequent rendition of service as a Supervisor under the respondents, for facilitating computation vis.a.vis her the pensionary benefits. Her initial engagement as an Anganwari Worker under the respondents, as visible from a pronouncement made the Hon'ble Apex Court in State of Karnataka and others vs. Ameerbi and others reported in *(2007) 11 SCC 681,* relevant paragraph whereof stands extracted hereinafter:

> "Appointment made under a scheme and recruitment process being carried out through a committee, in our opinion, would not render the incumbents thereof holders of civil post. Our attention has not been drawn to any rule or regulation governing the mode of their recruitment. Some statements in this behalf have been made by the interveners but for the reasons stated hereinbefore, we cannot enter thereinto."

does not don the mantle of a civil post. Also she manifestly cannot in the aforestated capacity be construed to be holder of a civil post. The effect of the aforesaid pronouncement made by the Hon'ble Apex Court in its verdict reported supra holds a bearing upon the legitimacy of the claim of the petitioner qua the period of her rendition of service as an Anganwari worker under the respondents standing amalgamated with her subsequent rendition of service as a Supervisor under the respondents significantly when the latter capacity whereon she evidently stood absorbed by the respondents dons the mantle of a substantive post especially when she in consonance with the mandate of the relevant R & P Rules stood appointed thereon besides when her appointment thereon stood preceded by the respondents begetting compliance with the rigours of the mandate held in the apposite rules. Uncontrovertedly, the rendition of service by the petitioner against the substantive post of a Supervisor is to be construable to be rendition of service by her against a civil post since 30.08.2005 whereat she stood appointed as a Supervisor. However, reiteratedly her initial appointment since 21.10.1982 upto 30.08.2005 whereon she rendered service under the respondents as an Anganwari Worker does not, for reasons aforestated, hold any trait or characteristic qua her appointment thereon being made against a civil post nor she is to be construable to be since 21.10.1982 upto 30.08.2005 to hold a civil post. Now hereat the effect of the aforesaid inference erected by this Court qua the period from 21.10.1982 upto 30.08.2005 whereon she rendered service as an Anganwari Worker under the respondents being unamenable for it being construable to be rendition of service by her against a civil post is qua its tellingly adverselyimpinging upon her entitlement to seek amalgamation of the aforesaid duration of rendition of service by her under the respondents in the capacity of an Anganwari worker with the period of service subsequent thereto rendered by her under the respondents against the substantive post of a Supervisor, besides also her entitlement qua the facet aforesaid holding any tenacity warrants an allusion to Rule 13 of the CCS Pension Rules, 1972, wherewithin a mandate is held qua the commencement of the qualifying period of service of a Government servant for his standing entitled to therefrom seek computation of pensionary benefits by his employer qua him.

> " Commencement of qualifying service

> Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity :
>
> Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post :
>
> Provided further that –
>
> (a) in the case of a Government servant in a Group `D' service or post who held a lien or a suspended lien on a permanent pensionable post prior to the 17th April, 1950, service rendered before attaining the age of sixteen years shall not count for any purpose, and
>
> (b) in the case of a Government servant not covered by clause (a), service rendered before attaining the age of eighteen years shall not count, except for compensation gratuity.
>
> (c) the provisions of clause (b) shall not be applicable in the cases of counting of military service for civil pension under Rule 19."

A circumspect reading thereof, unravels qua the occurrence of commencement of the relevant qualifying period of service occurring besides arising from the date a Government servant takes charge of the post to which he stands first appointed either substantively or in a temporary capacity. Also it holds a proviso qua the temporary besides officiating period of rendition of service by a Government servant if remains unbroken upto his subsequent regular engagement in the relevant capacity rather stands incessantly succeeded upto his standing appointed against a substantive post in the same or in another service, the hitherto period of rendition of service by a Government servant even in an officiating or in a temporary capacity being reckonable besides it being includable for the relevant computation of pensionary benefits standing made qua him. Obviously therefrom the imminent sequel is qua also the entire period of its duration standing enjoined to be amalgamated with the subsequent period of his rendition of service in a substantive capacity against a substantive post unless his preceding rendition of service in an officiating or temporary capacity stands interrupted by a break in service, thereupon the learned counsel for the petitioner contends qua the rendition of service by the petitioner in a non substantive capacity of an Anganwari worker being amenable to a construction of it falling within the ambit of Rule 13 of the CCS Pension Rules, 1972, it acquiring the trait of hers rendering service thereagainst under the respondents in an officiating or in a temporary capacity also with hers in an unbroken succession therefrom upto hers standing appointed against a substantive post of a Supervisor rendering service under the respondents besides when her previous rendition of service in a temporary or in officiating capacity of an Anganwari Worker under the respondents held incessant continuity in time upto her appointment against the substantive post of a Supervisor rendered her to satiate the mandate of Rule 13 of the CCS Pension Rules, 1972, whereupon she canvases of hence the rendition of service as an Anganwari worker by the petitioner under her employers while hence being construable to be rendition of service in an officiating or in a temporary capacity enjoined the respondents to amalgamate the aforesaid period of rendition of service by her alongwith the rendition of service by her against the substantive post of a Supervisor, for thereupon the relevant computation of pensionary benefits being made qua her. The aforesaid submission made before this Court by the learned counsel for the petitioner is not amenable for its standing countenanced by this Court as it stands canvassed unbereft of hers remaining mindful qua therewithin the imperative ingredient(s) warranting satiation is qua the relevant period of service even in an officiating or in a temporary capacity standing performed against a civil post.

2. Now conspicuously, when this Court has pronounced qua any appointment as an Anganwari worker standing not construable to be an appointment against a Civil post nor an appointee thereon being construable to be holder of a Civil post whereupon the inevitable sequel is qua the rendition of service by the petitioner in the capacity of an Anganwari worker, even if

assumably it is construable to be qua her rendering service thereagainst in an officiating or in a temporary capacity not hence satiating the mandate of the relevant rules wherewithin the aforesaid manner of rendition of employment by her under her employer warrants rendition thereon against a civil post, civil post whereof for reasons aforestated stood unadorned by the petitioner at the stage whereat she rendered service as an Anganwari worker under the respondents. Consequently, with the petitioner while performing service as an Anganwari worker under the respondents hers not holding any civil post since 21.10.1982 to 30.08.2005, corollary whereof is qua with hers not throughout the aforesaid period neither performing service under the respondents against a civil post nor hence she being construable to be holder of a civil post whereupon the performance of service thereagainst by her even if construable to be in a temporary or in an officiating capacity does not befittingly render her to be construable to be falling within the ambit of Rule 13 of the CCS Pension Rules. In aftermath, the period of service performed by the petitioner in the capacity of an Anganwari worker since 21.10.1982 upto 30.08.2005 is to be concluded to be not constituting the relevant qualifying service for the purpose of attraction qua hers of the apposite rules nor it is enjoined to be amalgamated with the subsequent rendition of service by her under the respondent against a substantive post of a supervisor.

3. The learned counsel for the petitioner has contended with force before this Court while relying upon a judgement rendered by this Court in Civil Writ Petition No. 8953 of 2013 qua Vidya Upasaks appointed by the respondents under the 'Himachal Pradesh Vidya Upasaks Yojna, 1998' wherein this Court had pronounced qua with the rendition of service on a contractual basis by Vidya Upasaks standing succeeded by theirs standing appointed in a regular capacity thereon also when hence the aforestated ingredients encapsulated in the relevant pension rules stood satiated thereupon this Court held qua the period of rendition of service on a contractual basis by Vidya Upasaks being amenable for reckoning besides being construable to be constituting qualifying service within the ambit of the relevant mandate of the pension rules for thereupon computing the relevant pensionary benefits qua them. However, the reliance as placed by the learned counsel for the petitioner upon the aforesaid verdict of this Court is inapt given the evident gross distinctivity inter se the factual matrix prevailing thereat vis.a.vis the factual matrix visibly prevalent hereat, contradistinction whereof is garnerable from the factum qua therein the engagement on a contractual basis of Vidya Upasaks standing preceded by theirs undergoing the rigours of selection by a duly constituted Board in sequel to the post aforesaid standing advertised whereupon their initial engagement in a contractual capacity by their employer did render their apposite initial engagement being construable to partake the trait qua theirs hence initially standing appointed thereon against a civil post also theirs being construable to be holders of a civil post whereas with an Anganwari worker(s) for reasons aforestated not standing appointed against a civil post nor the appointees thereagainst being construable to be holding a civil post conspicuously also when their engagement stood unpreceded by the relevant post standing advertised visibly renders the decision relied upon by the learned counsel for the petitioner to stand unattracted hereat. There is no merit in the petition and the same is dismissed. The pending applications, if any, also stand dismissed. No costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Manoj Kumar …..Appellant

Versus

Himachal Road Transport Corporation & others …..Respondents

FAO No. 378 of 2012

Decided on : 02.12.2016.

Motor Vehicles Act, 1988- Section 166- Claimant suffered permanent disability to the extent of 55% - medical evidence proved that the injured was victim of the motor vehicle accident and had sustained 55% disability – he remained undertreatment for about 3 months – hence, by guess work, Rs.2 lacs awarded in lump sum under the heads 'pain and sufferings', 'loss of amenities' and 'medical expenses' with interest @ 7.5% per annum. (Para-10 to 16)

For the Appellant : Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. B.N. Sharma, Advocate, for respondents No. 1 & 2.
Mr. Surinder Saklani, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

By the medium of this appeal, the appellant-claimant-injured has questioned award dated 12th June, 2012, made by the Motor Accident Claims Tribunal-II, Fast Track Court, Hamirpur, H.P. (hereinafter referred to as 'the Tribunal') in MAC Petition No. 18 of 2009, titled as **Manoj Kumar** versus **Himachal Road Transport Corporation & others,**whereby the claim petition came to be dismissed (for short, "the impugned award").

2. The claimant-injured, being victim of the motor vehicular accident, had filed the claim petition before the Tribunal for grant of compensation to the tune of 10,00,000/- as per the break-ups given in the claim petition.

3. Precisely, the case of the claimant-injured was that on 11.10.2006, at about 10.00 a.m., he boarded Bus No. HP-22-0379, which was being driven by its driver-respondent No. 3, rashly and negligently. When the said bus reached near Shivpuri Chowk, Ludhiana, at about 3.45 p.m., the claimant-injured fell down from the bus while alighting, due to the rashness and negligence of driver-respondent No. 3 and conductor-respondent No. 4. He sustained injuries and suffered permanent disability to the extent of 55%. He was taken to S. Nihal Singh, Pawha Charitable Hospital, Ludhiana (Punjab) and thereafter, he was treated at various hospitals at Hamirpur (HP).

4. The respondents resisted and contested the claim petition by filing replies.

5. Following issues came to be framed by the Tribunal:

"1. Whether on 11-10-2006 the petitioner was travelling in Bus No. HP-22-0379 being driven by respondent No. 3 and respondent No. 4 was conductor in the said bus, as alleged? .....OPP

2. Whether with the rash and negligent driving of HRTC Bus No. HP-22-0379 by respondent No. 3, the petitioner had suffered grievous injuries and has become disabled as alleged? ....OPP

3. Whether the respondent No. 4 conductor in HRTC Bus No. HP-22-0379 was also negligent in the performance of his duty as also responsible for the injuries on the person of the petitioner as alleged?....OPP

4. Whether the petitioner is entitled for compensation, if so, to what extent and from whom? ....OPP

5. Whether the petition is not maintainable as alleged?.....OPR-1 & 2

6. Whether the petitioner has no cause of action as alleged? .....OPR-1 & 2

7. Whether no such accident had taken place with Bus No. HP-22-0379? ...OPRs

8. Relief."

6. The claimant examined seven witnesses including himself. Respondents examined Parkash Chand, Superintendent of the Office of Himachal Road Transport Corporation as RW-1 and driver-Kehar Singh stepped into the witness box as RW-2.

7. The Tribunal, after scanning the evidence, oral as well as documentary, held that claimant has failed to prove that driver had driven the offending vehicle, rashly and negligently, as such, dismissed the claim petition.

Issue No. 1.

8. I have gone through the entire record.

9. The claimant has specifically pleaded in the claim petition that the said accident was the outcome of the rashness and negligence of respondents No. 3 & 4, i.e. driver and conductor, respectively. There is no rebuttal to the said evidence except the statement of the driver. Copy of the daily duty register (Ext. RW-1/A), does disclose that driver-Kehar Singh was driver of the offending bus and as per copy of the accident register (Ext. RW-1/B), report of the accident was entered. All the doctors have proved that claimant-injured was victim of the motor vehicle accident. Copy of the Disability Certificate (Ext. PW-1/A) does disclose that the claimant-injured has suffered permanent disability to the extent of 55%. The copies of the Discharge Bills of Sri Krishna Hospital, Hamirpur (Ext. PW-3/A & PW-3/B) and the other documents placed on record, do *prima-facie* prove that the said accident was outcome of the rashness and negligence of respondents No. 3 & 4, i.e., driver and conductor, respectively. Thus, the Tribunal has fallen in an error in deciding this issue against the claimant-injured. Accordingly, the findings returned by the Tribunal on Issue No. 1 are set aside and is decided in favour of the claimant-injured and against the respondents.

Issues No. 2 & 3.

10. These issues are governed by the findings returned on Issue No. 1, *supra.* Accordingly, the findings returned by the Tribunal on Issues No. 2 & 3 are set aside and the said issues are decided in favour of the claimant-injured and against the respondents.

11. Before I deal with Issue No. 4, I deem it proper to deal with with issues No. 5 to 7.

Issues No. 5 & 6.

12. It was for respondents No. 1 & 2 to prove that the claim petition was not maintainable and the claimant-injured had no cause of action.

13. In terms of the provisions of sub-section (4) of Section 166 and sub section (6) of Section 158 of the Motor Vehicles Act, 1988, for short 'the MV Act', Claims Tribunal can treat the report forwarded to it as an application for compensation. Accordingly, Issues No. 5 & 6 are decided in favour of the claimant-injured and against respondents No. 1 & 2.

Issue No. 7.

14. It was for the respondents to prove this issue, have failed to do so. Accordingly, the findings returned by the Tribunal on Issue No. 7 are set aside and the said issues are decided in favour of the claimant and against the respondents.

Issue No. 4.

15. Keeping in view the fact that the claimant has suffered 55% permanent disability and remained under treatment for about three months, by guess work, it can be held that the claimant-injured is entitled to compensation to the tune of Rs. 2,00,000/- in lump sum, under the heads, 'pain and sufferings', 'loss of amenities and 'medical expenses', with interest at the rate of 7.5% per annum from the date of the claim petition till its realization.

16. Accordingly, the impugned award is set aside, the appeal is allowed and the claimant-injured is held entitled to compensation to the tune of Rs. 2,00,000/- in lump sum, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

17. The respondents No. 1 & 2 are directed to deposit the compensation amount before the Registry within six weeks from today. On deposit, the Registry is directed to release the entire amount in favour of the claimant, through payees account cheque or by depositing the same in his account.

18. Send down the records after placing a copy of the judgment on the file of the claim petition.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Master Nitish Kumar (Minor) .....Appellant(s)
Versus
Managing Director & another .....Respondents

FAOs No. 434 & 435 of 2012
Decided on : 02.12.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was a house wife – her monthly income cannot be less than Rs.6,000/- / 1/3rd is required to be deducted towards personal expenses of the deceased and claimant has lost source of dependency of Rs.4,000/- per month- multiplier of 15 is applicable and claimant is entitled to compensation of Rs.4000 x 12 x 15= Rs. 7,20,000/- under the head loss of dependency – claimants is also entitled to Rs.10,000/- each under the heads loss of love and affection and funeral expenses- thus, total compensation of Rs.7,20,000 + 20,000= Rs.7,40,000/- awarded along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-9 to 14)

Cases referred:
Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

For the Appellant(s) : Mr. Dibender Ghosh, Advocate.
For the Respondents: Mr. Adarsh Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Claimant-Master Nitish Kumar had filed two Claim Petitions i.e. M.A.C. Petitions No. 17-S/2 of 2010 & 18-S/2 of 2010, both titled as **Master Nitish Kumar versus Managing Director, HRTC and another,** before the Motor Accident Claims Tribunal, Shimla, Himachal Pradesh, (for short 'the Tribunal), for grant of compensation to the tune of Rs. 20,00,000/- each, in both the claim petitions, on account of death of his parents.

2. The aforesaid claim petitions came to be allowed by the Tribunal vide two different awards dated 21.04.2012, whereby compensation to the tune of Rs. 2,00,000/- each in both the claim petitions, was awarded in favour of the claimant, for short 'the impugned awards'.

3. Both these appeals are outcome of the one accident, thus I deem it proper to determine both these appeals by this common judgment.

4. The respondents have not questioned the impugned awards, on any count. Thus, the same have attained finality, so far these relate to them.

5. The claimant has questioned the impugned awards on the ground of adequacy of compensation.

6. Thus, the only question to be determined in these appeals is-whether the amount awarded is adequate? The answer is in the negative for the following reasons:

FAO No. 434 of 2012

7. All the facts are not admitted. As per copy of the Pariwar Register (Ext. PW-3/A), the age of deceased Nisha (mother) was 31 years at the time of accident.

8. The claimant has pleaded in the claim petition that the monthly income of the deceased was Rs.15,000/-, but has failed to prove the same. The Tribunal has awarded compensation to the tune of Rs.2,00,000/- in lump sum, which is not legally correct for the following reasons.

9. Deceased was a housewife. By guess work, it can be safely held that the monthly income of the deceased would not have been less than Rs. 6,000/-.

10. 1/3rd is required to be deducted towards the personal expenses of the deceased, while keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** Accordingly, after deducting 1/3rd amount, it is held that the claimant has lost source of dependency to the tune of Rs.4,000/- per month.

11. The multiplier of '15' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act, for short 'the Act' read with the ratio laid down by the Apex Court in view of the judgments, *supra,* read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

12. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 4,000 x 12 x 15 = Rs.7,20,000/- under the head 'loss of dependency'.

13. The claimant is also held entitled to a sum of Rs. 10,000/- each, i.e. Rs. 20,000/-, under the heads 'loss of love and affection' and 'funeral expenses'.

14. Accordingly, the claimant is held entitled to total compensation to the tune of Rs. 7,20,000/- + Rs. 20,000/- = Rs. 7,40,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

FAO No. 435 of 2016.

15. Admittedly, the deceased was 36 years of age at the time of accident, was an orchardist by profession.

16. The claimant has pleaded in the claim petition that the deceased was earning Rs. 20,000/- per month, but has failed to prove the same. The Tribunal has wrongly awarded compensation to the tune of Rs. 2,00,000/- in lump sum to the claimant for the following reasons.

17. By guess work, it can be safely held that the deceased would not have been earning less than Rs. 6,000/- per month.

18. 1/3rd is required to be deducted towards the personal expenses of the deceased, while keeping in view the ratio laid down by the Apex Court in ***Sarla Verma's*** and ***Reshma Kumari's*** cases, *supra.* Accordingly, after deducting 1/3rd amount, it is held that the claimant has lost source of dependency to the tune of Rs.4,000/- per month.

19. The multiplier of '15' is applicable in this case, in view of the 2nd Schedule appended to the Act read with the ratio laid down by the Apex Court in view of the judgments

rendered by the Apex Court in ***Sarla Verma's, Reshma Kumari's*** *cases, supra* and case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

20. Thus, the claimant-injured is held entitled to compensation to the tune of Rs. 4,000 x 12 x 15 = Rs. 7,20,000/- under the head 'loss of dependency'.

21. The claimant is also held entitled to a sum of Rs.10,000/- each, i.e. Rs.20,000/-, under the heads 'loss of love and affection' and 'funeral expenses'.

22. Accordingly, the claimant is held entitled to total compensation to the tune of Rs. 7,20,000/- + Rs. 20,000/- = Rs. 7,40,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization.

23. The amount of compensation is enhanced in both the claim petitions and the impugned awards are modified, as indicated above.

24. The respondents are directed to deposit the award amount alongwith interest, within a period of six weeks from today before the Registry. On deposit, the Registry is directed to release the entire amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in his account.

25. The appeals are accordingly disposed of.

26. Send down the record after placing a copy of the judgment on each of the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s Federal Mogul Bearing India Ltd. ...Non-Applicant/Petitioner.
Versus
Brij Lal ...Applicant/Respondent.

CMP No. 9696 of 2016 in
CWP No. 2696 of 2016
Decided on: 2nd December, 2016.

Industrial Disputes Act, 1947- Section 17-B- A writ petition was filed assailing the award passed by Industrial Tribunal-cum-Labour Court, Shimla- an application was filed by the workman- held, that Section 17-B has been enacted by the parliament to give relief to a workman who has been ordered to be reinstated under the award of Labour Court or Industrial Tribunal- the object of this provision is to relief the hardship caused to the workman due to delay in implementing the award- workman is entitled to the payment of full wages last drawn as subsistence allowance – employer directed to pay wages from the date of filing of the application.

(Para- 5 to 16)

Cases referred:

Dena Bank vs. Kiritikumar T. Patel (1999) 2 SCC 106
Dena Bank vs. Ghanshyam (2001) 5 SCC 169
Visveswaraya Iron and Steel Ltd. vs. M. Chandrappa (1994) 84 FJR 46
Carona Sahu Co. Ltd. vs.A.K. Munafkhan (1995) 70 FLR 25

For the Non-Applicant/Petitioner: Mr. Rahul Mahajan, Advocate.
For the Applicant/Respondent : Mr. V.D. Khidtta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

This order shall dispose of the application filed by the applicant/respondent (hereinafter referred to as the 'respondent') under Section 17-B of the Industrial Disputes Act, 1947(for short 'Act').

2. It is not in dispute that the non-applicant /petitioner (hereinafter referred to as the 'petitioner') has filed the writ petition No. 2696 of 2016 assailing therein the award passed in favour of the respondent by the learned Industrial Tribunal-cum-Labour Court, Shimla (for short 'Tribunal') on 18.6.2016. It is further not in dispute that even the respondent has filed a separate writ petition claiming full back wages with 9% interest throughout.

3. In terms of the award passed by the Tribunal, the respondent has been ordered to be reinstated in service along with back wages @ 25%. It is claimed by the respondent that he has been dragged into unnecessary litigation from October, 2009 and till date he is not gainfully employed in any establishment during this period and he has also filed a separate affidavit to this effect.

4. The petitioner has filed reply to this application raising therein preliminary objection regarding maintainability of the application on the ground that the order passed by the Tribunal on 18.6.2016 is not an award, but an order under Section 33-2 (b) of the Act and Rule 64(2) of the Industrial Dispute Rules, 1974 (for short 'Rules'). Whereas, Section 17-B of the Act only refers to an award. These contentions have been reiterated in the reply filed to the merits of the application.

I have heard learned counsel for the parties and have gone through the material placed on record.

5. Section 17-B of the Act, reads thus:

> *"**17B.Payment of full wages to workman pending proceedings in higher courts.**- Where in any case, a Labour Court, Tribunal or National Tribunal by its award directs reinstatement of any workman and the employer prefers any proceedings against such award in a High Court or the Supreme Court, the employer shall be liable to pay such workman, during the period of pendency of such proceedings in the High Court or the Supreme Court, full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any rule if the workman had not been employed in any establishment during such period and an affidavit by such workman had been filed to that effect in such Court:*
>
> *Provided that where it is proved to the satisfaction of the High Court or the Supreme Court that such workman had been employed and had been receiving adequate remuneration during any such period or part thereof, the Court shall order that no wages shall be payable under this section for such period or part, as the case may be."*

6. Evidently, the operative portion of the award passed by the Tribunal reads thus:

> *"As a sequel to my above discussion and findings on issues No.1 and 2, the application of the applicant for seeking approval for dismissing the respondent from his service is dismissed. Consequently, the respondent is ordered to be reinstated in service along with back wages @ 25%. File, after completion, be consigned to records."*

7. No doubt, the said award has been passed on an application filed by the petitioner under Section 33 (2) of the Act, read with Rule 64(2) of the Rules. However, the petitioner has not been able to show how the application under Section 17-B of the Act in an order for reinstating the respondent in exercise of the aforesaid provision is not maintainable.

8. Indisputably, the aforesaid provisions have been enacted by the Parliament with a view to give relief to a workman who has been ordered to be reinstated under the award of a Labour Court or the Industrial Tribunal during the pendency of the proceedings in which the said award is under challenge before the High Court or Supreme Court. The object underlying the provision is to relieve to a certain extent the hardship that is caused to the workman due to delay in the implementation of the award. (Refer:***Dena Bank vs. Kiritikumar T. Patel (1999) 2 SCC 106).***

9. Following the judgment of ***Kiritikumar's*** (supra), the Hon'ble Supreme Court in the case of ***Dena Bank vs. Ghanshyam (2001) 5 SCC 169*** has held that Section 17-B provides that where the employer prefers any proceedings against an award directing the reinstatement of any workman, the employer shall be liable to said workman during the pendency of the proceedings in the High Court or the Supreme court full wages last drawn by him. Thus, it is obvious that by enacting such provision, the Parliament intended that the workman should get the last drawn wages from the date of the award till the challenge to the award is finally decided. The provision has been enacted so as to prevent the employer from entering into a long drawn battle with the employee i.e. without paying a penny so as to exhaust him and thereby succumb to the illegal demand or enter into unconscionable bargaining with the employee.

10. In ***Kiritikumar's*** case (supra), the Hon'ble Supreme court has held that word "full wages last drawn" must be given plain and material meaning and that they cannot be given any extended meaning as given by the Karnataka High Court in ***Visveswaraya Iron and Steel Ltd. vs. M. Chandrappa (1994) 84 FJR 46*** and Bombay High Court in ***Carona Sahu Co. Ltd. vs.A.K. Munafkhan (1995) 70 FLR 25.***

11. The Karnataka High Court had taken the view that "full wages last drawn" take into their fold the wages drawn on the date of termination of the services plus the yearly increments and the DA to be worked out till the date of the award.

12. Whereas, the Bombay High Court had laid down that the expression "full wages last drawn" means the full wages which the workman was entitled to draw in pursuance of the award and the implementation of which is suspended during the pendency of the proceedings. However, it went further to observe that the proper construction of this section is that the workman is entitled not only to the full wages which the workman would have been entitled to draw but for the pendency of the proceedings in the High Court or Supreme Court. He would further be held entitled to every component of wages payable on the date of the award while determining the wages payable to the workman on the date of the award.

13. As observed earlier, the views taken by the Hon'ble Karnataka High Court and Hon'ble Bombay High Court, were not approved by the Hon'ble Supreme court and it was held that the payment which is required to be made by the employer to the workman under Section 17-B is in the nature of subsistence allowance which would not be refundable or recoverable from the workman even if the award is set-aside by the High Court or Supreme Court. It was further held that since the payment is of such a character, Parliament thought it proper to limit it to the extent of the wages which were drawn by the workman when he was in service and when his services were terminated and therefore used the expression "full wages last drawn". It shall be apt to reproduce the observations as contained in paras 20, 21 and 22 of the said judgment, which reads thus:

> "20. *The first construction give to the words "full wages last drawn" their plain and material meaning. The second as well as the third construction read something more than their plain and material meaning in this words. In substance these construction read the words "full wages last drawn" as "full wages which would have been drawn". Such an extended meaning to the words "full wages last drawn" does not find support in the language of Section 17-B. Nor can this extended meaning be based on the object underlying the enactment of Section 17-B.*

21. As indicated earlier Section 17-B has been enacted by Parliament with a view to give relief to a workman who has been ordered to be reinstated under the award of a Labour Court or the Industrial Tribunal during the pendency of proceedings in which the said award is under challenge before the High Court or the Supreme Court. The object underlying the provision is to relieve a certain extent the hardship that is caused to the workman due to delay in the implementation to the workman is in the nature of subsistence allowance which would not be refundable or recoverable from the workman even if the award is set aside by the High Court or this Court. Since the payment is of such a character Parliament thought it proper to limit it to the extent of the wages which were drawn by the workman when he was in service and when his services were terminated and therefore used the words "full wages last drawn". To read these words to mean wages which would have been drawn by the workman if he had continued in service if the order terminating his services had not passed since it has been by the award of the Labour of Industrial Tribunal, would result in so enlarging the benefit as to comprehend the relief that has been granted under the award that is under challenge. Since the amount is not refundable or recoverable in the even of the award being set aside it would result in the employer being required to give effect to the award during the pendency of the proceeding challenging the award before the High Court or the supreme Court without his being able to recover the said amount in the event of the awarded being set aside. We are unable to constitute the provisions contained in Section 17-B, to cast such a burden on the employer. In our opinion, therefore, the words "full wages last drawn" must be given their plain and material meaning and they cannot be given the extended meaning as given by the Karnataka High Court Visveswarya Iroon & Steel Ltd. [supra] or the Bombay High Court in Carona Sahu Co. Ltd. [supra].

22. Shri Jitendra Sharma has laid emphasis on the word "full" in the expression "full wages last drawn" and has submitted that the said word implies that the last drawn must be the was which the workman would have drawn under the award. We are unable to agree. In our opinion, the expression "full" only emphasis that all the emoluments which are included in "wages" as defined in clause [rr] of section 2 of the Act so as to include in "wages" as referred to in sub-clauses (i) to (iv) are required to be paid. In this context, it may also be mentioned that in Section 17-B Parliament has also used the words "inclusive of any maintenance allowance admissible to him under to him any rule". These words indicate that maintenance allowance that is admissible under any rule is required to be paid irrespective of the amount which was actually being paid as maintenance allowance to the workman. But with regard to wages Parliament has used the words "full wages last drawn" indicating that the wages that were actually paid and not the amount that would be payable are required to be paid.”

14. However, the crucial question that arises for consideration is as to whether the order of payment of wages under Section 17-B of the Act should be from the date of award or from the date of filing of the application under Section 17-B by the concerned workman or there should be any other date i.e. date of filing etc.

15. The precise question with which this Court is confronted came up for consideration before the Hon’ble Division Bench of Delhi High Court in ***Municipal Corporation of Delhi and others vs. Santosh Kumari and another,*** LPA No. 165 of 2012, decided on 24.08.2012 and after quoting Section 17-B of the Act, it was observed as under:

19. This provision has repeatedly come up for interpretation in its various hues and facets before the High Courts as well as the Supreme Court. It may not be necessary to take note of all those judgments laying down the ratio and the various aspects which have been clarified in those judgments laying down certain specific principles. Since in these appeals, we are concerned with a limited issue, viz., the

date from which the benefit under Section 17B of the ID Act is to be made available to the concerned workman, our discussion would revolve around this central issue. However, while considering an application under Section 17B of the ID Act, it is necessary to bear in mind that the spirit, intendment and object underlying the statutory provision of Section 17B is to mitigate and relieve, to a certain extent, the hardship resulting to a workman due to delay in the implementation of an award directing reinstatement of his services on account of the challenge made to it by the employer. The preliminary consideration for making available such a relief to a workman is to be found in the benevolent purpose of the enactment. It recognizes a workman''s right to a bare minimum to keep body and soul together when a challenge has been made to an Award directing his reinstatement. The statutory provisions provide no inherent right of assailing an order or an award by an industrial adjudicator by way of an appeal. The payment which is required to be made by the employer to the workman has been held to be akin to a subsistence allowance which is neither refundable nor recoverable from a workman even if the Award in favour of the workman is set aside by the High Court. In Dena Bank Vs. Kiriti Kumar T. Patel [(1999) 2 SCC 106], the Apex Court was of the view that the object under Section 17B of the ID Act is only to relieve to a certain extent, the hardship that is caused to the workman due to the delay in implementation of the Award.

20. Further, the statute requires satisfaction of the following conditions:

> *(i) An award by a Labour Court, Tribunal or National Tribunal directing reinstatement of a workman is assailed in proceedings in a High Court or the Supreme Court;*
>
> *(ii) During the pendency of such proceedings, employer is required to pay full wages to the workman;*
>
> *(iii) The wages stipulated under Section 17B are full wages last drawn by him, inclusive of any maintenance allowance admissible to him under any Rule;*
>
> *(iv) Such wages would be admissible only if the workman had not be employed in any establishment during such period and an affidavit had been filed to such effect.*

21. A Single Bench of this Court in Food Craft Instt. Vs. Remeshwar Sharma and Anr. [(2007) 2 LLJ 350 Del] culled out the following principles, from various judicial pronouncements touching upon various facets for grant of interim relief under Section 17B of the ID Act, in the following manner:

> *"(i) An application under Section 17B can be made only in proceedings wherein an industrial award directing reinstatement of the workman has been assailed.*
>
> *(ii) This Court has no jurisdiction not to direct compliance with the provisions of Section 17B of the Industrial Disputes Act if all the other conditions precedent for passing an order in terms of the Section 17B of the Act are satisfied [Re : (1999) 9 SCC 229 entitled Choudhary Sharai v. Executive Engineer, Panchayati Raj Department & Anr.].*
>
> *(iii) As the interim relief is being granted in exercise of jurisdiction under Article 226 of the Constitution of India, the High Court can grant better benefits which may be more just and equitable on the facts of the case than the relief contemplated by Section 17B. Therefore, dehors the powers of the Court under Section 17B, the Court can pass an order directing payment of an amount higher than the last drawn wages to the workman [Re : (1999) 2 SCC 106 (para 22), Dena Bank v. Kirtikumar T. Patel].*

(iv) Such higher amount has to be considered necessary W.P(C) No.11803/2005 Page 6 of 11in the interest of justice and the workman must plead and make out a case that such an order is necessary in the facts of the case.

(v) The Court can enforce the spirit, intendment and purpose of legislation that the workman who is to get the wages from the date of the award till the challenge to the award is finally decided as per the statement of the objections and reasons of the Industrial Disputes(Amendment) Act, 1982 by which Section 17B was inserted in the Act [Re : JT 2001 (Suppl.1) SC 229, Dena Bank v. Ghanshyam (para 12)].

(vi) An application under Section 17B should be disposed of expeditiously and before disposal of the writ petition [Re : 2000 (9) SCC 534 entitled Workman v. Hindustan Vegetable Oil Corporation Ltd.].

(vii) Interim relief can be granted with effect from the date of the Award [Re : JT 2001 Supplementary (1) SC entitled Regional Authority, Dena Bank v. Ghanshyam; 2004 (3) AD (DELHI) 337 entitled Indra Perfumery Company v. Sudarshab Oberoi v. Presiding Officer].

(viii) Transient employment and self-employment would not be a bar to relief under Section 17B of the Industrial Disputes Act [Re : 2000 (1) LLJ 1012 entitled Taj Services Limited v. Industrial Tribunal; 1984 (4) SCC 635 entitled Rajinder Kumar Kundra v. Delhi Administration; 109 (2004) DLT 1 entitled M/s. Birdhi Chand Naunag Ram Jain v. P.O., Labour Court No. IV & Others].

(ix) The Court while considering an application under Section 17B of the ID Act cannot go into the merits of the case, the Court can only consider whether the requirements mentioned in Section 17B have been satisfied or not and, if it is so, then the Court has no option but to direct the employer to pass an order in terms of the statute. It would be immaterial as to whether the petitioner had a very good case on merits [Re : 2000 W.P(C) No.11803/2005 Page 7 of 11(5) AD Delhi 413 entitled Anil Jain v. Jagdish Chander].

(x) A reasonable standard for arriving at the conclusion of the quantum of a fair amount towards subsistence allowance payable to a workman would be the minimum wages notified by the statutory authorities under the provisions of the Minimum Wages Act, 1948 in respect of an employee who may be performing the same or similar functions in scheduled employments. [Re: Rajinder Kumar Kundra v. Delhi Administration, (1984) 4 SCC 635; Sanjit Roy v. State of Rajasthan, AIR 1983 SC 328;decision dated 3rd January, 2003 in Writ Petition (Civil) Nos. 3654 & 3675/1999 entitled Delhi Council for Child Welfare v. Union of India; DTC v. The P.O., Labour Court No. 1, Delhi & Ors., 2002 II AD (Delhi) 112 (para 12, 13)]

(xi) Interim orders directing payment to a workman can be made even on the application of the management seeking stay of the operation and effect of the industrial Award and order. Such interim orders of stay sought by the employer can be granted unconditionally or made conditional subject to payment or deposits of the entire or portion of the awarded amount together with a direction to the petitioner employer to make payment of the wages at an appropriate rate to the workman. Such an order would be based on considerations of interests of justice when balancing equities.

(xii) For the same reason, I find that there is no prohibition in law to a direction by the Court to make an order directing payment of the wages with effect from the date of the Award. On the contrary, it has been so held

in several judgments that this would be the proper course [Re : Regional Authority, Dena Bank & Anr. v. Ghanshyam, reported at JT 2001 (Suppl. 1) SC 229 and Indra Perfumery Co. Thr. Sudershab Oberoi v. Presiding Officer & Ors., 2004 III AD (Delhi) 337].

(xiii) While passing an interlocutory direction for payment of wages, the Court may also secure the interests of the W.P(C) No.11803/2005 Page 8 of 11employer by making orders regarding refund or recovery of the amount which is in excess of the last drawn wages in the event of the industrial award being set aside so as to do justice to the employer.

(xiv) A repayment to the employer could be secured by directing a workman to given an undertaking or offer security to the satisfaction of the Registrar (General) of the Court or any other authority [Re : para 12, 2002 (61) DRJ 521 (DB), Hindustan Carbide Pvt. Ltd. v. Govt. of NCT of Delhi & Ors.(supra)]

(xv) In exercise of powers under Article 226 and Article 136 of the Constitution, if the requisites of Section 17B of the Industrial Disputes Act, 1947 are satisfied, no order can be passed denying the workman the benefit granted under the statutory provisions of Section 17B of the Industrial Disputes Act, 1947 [Re: 1999 (2) SCC 106, Dena Bank v. Kirtikumar T. Patel (para 23)].

(xvi) Gainful employment of the workman; unreasonable and unexplained delay in making the application by the workman after the filing of the petition challenging the award/order; offer by the employer to give employment to the workman would be a relevant factors and consideration for the date from which the wages are to be permitted.

(xvii) It will be in the interest of justice to ensure if the facts of the case so justify, that payment of the amount over and above the amount which could be directed to be paid under Section 17B to a workman, is ordered to be paid only on satisfaction of terms and conditions as would enable the employer to recover the same [para 13 of Regional Manager, Dena Bank v. Ghanshyam].

(xviii)The same principles would apply to any interim order in respect of a pendent lite payment in favour of the Workman." [emphasis supplied]

22. In respect of the issue, with which we are concerned, the learned Single Judge in the aforesaid judgment held that there was no prohibition in law to a direction by the Court to make an order directing payment of the wages with effect from the date of the Award. At the same time, it was also held that unreasonable and unexplained delay in making the application by the workman after the filing of the petition challenging the award/order; offer by the employer to give employment to the workman would be a relevant factors and consideration for the date from which the wages are to be permitted. Following this judgment, another Single Judge of this Court in the case of Delhi Transport Corporation Vs. Sh. Ramesh Chander [W.P.(C) No.11803/2005, decided on 09.1.2008] granted the wages from the date of application and not from the date of award.

23. Learned counsel for the appellant also referred to the judgment of the Supreme Court in the case of Uttaranchal Forest Development Corpn. and Another Vs. K.B. Singh and Others [(2005) 11 SCC 449] directing entitlement for wages under Section 17B of the ID Act from the respective dates of filing the affidavit in compliance with Section 17B of the Act.

24. However, as pointed out above by Mr. Anuj Aggarwal that this judgment was considered by a Division Bench in Delhi Transport Corporation Vs. Inderjeet

Singh (decided on 29.7.2008) holding that the aforesaid decision of the Supreme Court was a short order, which did not discuss other Supreme Court decisions. The Division Bench in this case also negated the contention that merely by filing delayed application, the workman should be given wages from the date of affidavit and not from the date of the Award. Following discussion contained in the said judgment was relied upon:

> *"5. The decisions in Uttaranchal Forest Development Corporation as well as Raptakos Brett & Co. Limited are short orders that do not discuss either of the above Supreme Court decisions. A reading of the orders would show that they were peculiar to the facts of those cases and did not alter the law as explained in Dena Bank-I and Dena Bank-II. As regards the date from which the amount under Section 17- B ID Act would become payable, the following passage in the decision in Dena Bank-II is a complete answer (SCC p.174):*
>
> > *"12. We have mentioned above that the import of Section 17-B admits of no doubt that Parliament intended that the workman should get the last drawn wages from the date of the award till the challenge to the award is finally decided which is in accord with the Statement of Objects and Reasons of the Industrial Disputes (Amendment) Act, 1982 by which Section 17-B was inserted in the Act. We have also pointed out above that Section 17-B does not preclude the High Courts or this Court from granting better benefits - more just and equitable on the facts of a case than contemplated by that provision to a workman. By an interim order the High Court did not grant relief in terms of Section 17-B, nay, there is no reference to that section in the orders of the High Court, therefore, in this case the question of payment of full wages last drawn" to the respondent does not arise. In the light of the above discussion the power of the High Court to pass the impugned order cannot but be upheld so the respondent is entitled to his salary in terms of the said order."*
>
> *6. As regards the delay by the workman in approaching the Court for relief under Section 17-B ID Act, it requires to be recalled that the workman could have filed such an application only after the DTC filed its writ petition. The object of the provision is that the wages should not be denied to the workman when he has been able to state on affidavit that he has remained unemployed and the employer is unable to show anything to the contrary. In the circumstances, the benefit under Section 17B ID Act cannot be denied to the workman on the ground that he filed the application three years after the writ petition was filed by the DTC. The entitlement of the workman to wages under Section 17B hinges on whether in fact he remained unemployed since his termination. That it is a question of fact. In light of the unrebutted claim of the workman to that effect in the instant case, his application under Section 17B ID Act had to be allowed."*

25. We would like to remark at this stage that there are many judgments cited by both the parties in support of their submissions. However, in none of those judgments, issue arises directly for consideration. In some cases, without discussion, the benefit of Section 17B of the ID Act was given from the date of application/filing of the affidavit as required under Section 17B of the ID Act in some other cases, it was given from the date of award, again routinely and without discussing as to whether in a given case, it could be given from the later date and not from the date of award. In this backdrop, we have to give answer to the issue that has arisen.

26. We may record, at the outset, that normally such a benefit of payment under Section 17B of the ID Act is to be from the date of award which is not only the plain language of the provision, but so recorded in the objects and reasons for enacting this Section. Therefore, when the application is filed by the workman with promptitude after the receipt of the notice of the filing of the petition by the Management, he would be entitled to the benefit of Section 17B of the ID Act from the date of the award. Problem arises when such an application is not filed for years together and by filing a belated application, still the claim is made from the date of the award, which is resisted by the management on the ground that it should be given, if at all, from the date of the application.

27. We are of the considered view that the Single Bench in Food Craft Instt. (supra) gave a balanced interpretation to the aforesaid provision taking into consideration the interest of both the workman as well as the employer. It is the most equitable. What follows from a conjoint reading of Para (xii) and (xvi) enumerated therein that normally, the workman would be paid wages with effect from the date of the award. It should be in those cases where application is filed with promptitude and immediately on notice of writ petition staying the operation of the order of reinstatement or proceedings against such an award. It should be within reasonable period. Thereafter, that would mean that such an application should normally be filed with the filing of the counter affidavit or reply to an application for interim relief and in the case of absence of such counter affidavit or reply, within the reasonable period from the date when workman has appeared himself or through counsel in the writ proceedings. This would be so even when the management has delayed in filing the writ petition challenging the award inasmuch as with such a delay, it cannot deprive the workman under Section 17B from the date of award. Thus, the expression "during the pendency of proceedings before the High Court" under Section 17B of the ID Act would not mean from the date of filing the writ petition. However, if there is a long or abnormal delay in filing application under Section 17B of the ID Act, we are of the opinion that in such an eventuality, it becomes an obligation of the workman to satisfactorily explain the delay. It would become relevant consideration for deciding as to whether the benefit is to be accorded from the date of application or the award. In case, it is unreasonable and unexplained delay, it would be within the discretion of the writ Court to direct payment of wages from the date of the application. There could be several reasons for adopting this course of action. One of us (Rajiv Sahai Endlaw, J.) had taken the justification by providing following reasons:

> *"12.3.......*
>
> *A. Section 17B is in the nature of a subsistence allowance. It is intended to provide to the workman whose reinstatement has been directed by the Industrial Adjudicator, at least minimum wages, during the time that the judicial review of the award of the Industrial Adjudicator is pending consideration before this Court. The payment thereunder is a month by month payment and is not a payment of any lumpsum amount. Further, the said payment is subject to the workman, on affidavit, stating that he is unemployed and/or has been unable to find employment. The employer has a right to rebut the said averment of the workman and if succeeds in rebutting the same, the workman under Section 17B would not be entitled to payment.*
>
> *B. The payment under Section 17B is not an automatic payment which starts running immediately on institution of proceedings to challenge the award. For the workman to be entitled to such payment, he is required to file an affidavit. Thus, payment is dependent upon a positive act of the*

workman. The High Court is not empowered to make the payment till such affidavit has been filed by the workman.

C. Once payment/order requires a positive act of the workman, entitled to such payment of filing in court such affidavit, the ordinary rule of litigation is (as reiterated in Beg Raj Singh Vs. State of U.P. AIR 2003 SC 833) that the right to relief should be decided by reference to the date on which the party approaches the Court. The Supreme Court in Mukund Lal Bhandari Vs. U.O.I. AIR 1993 SC 2127, in relation to the pension of Freedom Fighters also held that the "benefit should flow only from the date of application and not from any date earlier". Thus but for Section 17B providing for payment during pendency of the writ proceeding (and which has been interpreted as not from date of institution of the writ petition but from the date of the award impugned therein) under general law, an order under Section 17B would have been only from the date of the application under Section 17B.

D. However such benefit given to the workman, of direction/order for payment from a date anterior to the filing of application should not be tilted against the employer by interpreting it to mean that the workman can apply under Section 17B at his whim and fancy and at any time. The workman cannot be permitted to apply under Section 17B when the writ petition matures for hearing and be held entitled to payment for several years together. To allow so, would be inequitable to the employer.

E. In most cases, it is impossible for the employer to verify whether the workman is employed in another establishment or not. It would be more so difficult if the employer is required to verify the employment, if any, for say the last 10 years, as the petitioner herein would be required to, to rebut the affidavit filed by the workman.

F. If the application under Section 17B is made within a reasonable time, the employer can make arrangements for the payment. However, non-filing of the application by the workman can reasonably entitle the employer to believe that the employee is employed in another establishment and will not make any claim under Section 17B. The employer may arrange its financial affairs accordingly. An employer who has acted on the basis of such a representation of the workman cannot after a long period, 10 years as in the present case, be burdened with the liability under Section 17B from a back date which as a lump sum may represent an enormous amount and wreck the employer. Moreover it will provide a bounty rather than subsistence.

G. The Supreme Court in Excel Wear Vs. U.O.I. AIR 1979 SC 25 held that principles of socialism and social justice cannot be pushed to such an extreme so as to ignore completely or to a very large extent the interests of the employer."

28. We are quite in agreement with this approach. Applying this principle, we proceed to state the outcome in each of the appeal."

16. Bearing in mind the aforesaid principles, it would be noticed that the award impugned in this writ petition was passed by the Tribunal on 18.6.2016, writ petition came to be filed on 16.9.2016 and whereas the application under Section 17-B of the Act came to be filed on 11.11.2016. Therefore, in the given facts and circumstances, I am of the considered view that the ends of justice would be subserved in case the petitioner is directed to pay the wages last drawn (as clarified above) to the respondent from the date of filing of this petition i.e. 16.9.2016.

The application is accordingly disposed of in the aforesaid terms.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. .....Appellant
Versus
Smt. Daljeet Kaur and others .....Respondents.

FAO (MVA) No. 4 of 2012
Judgment reserved on: 25.11.2016
Date of decision: 02.12.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was a pillion rider of the motorcycle which met with an accident due to the rash and negligent driving of the driver of the bus- it was contended that accident was the result of the contributory negligence of the driver of the motorcycle – held, that in claim petition prima facie proof is required and not strict pleadings and proof - both the drivers had not taken due care and caution while driving their respective vehicles- when two drivers do not take due care and caution while driving their respective vehicles and contribute in causing accident, it is a case of contributory negligence – appellate directed to deposit 50% amount while the insurer of the other vehicle directed to deposit 50% of the amount.(Para-15 to 29)

Cases referred:

Dulcina Fernandes and others versus Joaquim Xavier Cruz and another, (2013) 10 SCC 646
National Insurance Company Ltd. versus Jagtamba and others, I L R 2015 (VI) HP 428
Kamlesh and others versus Attar Singh and others, 2015 AIR SCW 6158
Meera Devi and another versus H.R.T.C. and others, 2014 AIR SCW 1709
Khenyei versus New India Assurance Co. Limited & others, 2015 AIR SCW 3169

For the appellant: Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.
For the respondents: Mr. S.D. Gill, Advocate, for respondents No. 1 to 4.
Nemo for respondents No. 5 and 6.
Mr. Neeraj Gupta, Advocate, for respondents No. 7 and 8.
Mr. Aman Sood, Advocate, for respondent No.9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant has thrown challenge to the judgment and award dated 19.10.2011, passed by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P. hereinafter referred to as "the Tribunal", for short, in MAC Petition No. 18-S/2 of 2009, titled *Smt. Daljeet Kaur and others versus Hem Raj and others*, whereby compensation to the tune of Rs.12,74,000/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. The claimants, owners, drivers and insurer-respondent No.9, have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The insurer/appellant has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the insurer-appellant argued that it is a case of contributory negligence. Both the drivers were negligent and at the best, the appellant has to satisfy 50% of

the liability. He has further argued that the accident was outcome of rash and negligent driving of motorcyclist.

5. Learned counsel for respondent No. 9, i.e., the insurer of motor cyclist, vide order dated 4.11.2016 was asked to seek instructions to satisfy the award to the extent of 50%. On 11.11.2016, he sought instructions and stated that he is under instructions to contest the *lis.*

6. In order to determine the controversy, it is necessary to give a flash back of brief facts, the womb of which has given birth to the instant appeal.

7. The claimants being the victims of a vehicular accident, have filed claim petition before the Tribunal for the grant of compensation to the tune of Rs.25 lacs, as per the break-ups given in the claim petition on account of death of Vikrant, who died in a motor vehicle accident which took place on 4.10.2007, near village Anji Tehsil and District Solan due to rash and negligent driving of driver of bus bearing registration No. HP-51-3651, as a result of which, the deceased, who was pillion rider on the motorcycle, bearing Registration No. HP-14-A-3841, sustained fatal injuries and succumbed to the injuries in the hospital.

8. The claim petition was resisted by the respondents and following issues came to be framed.

> *1. Whether the deceased Vikrant had died in an accident caused due to rash and negligent driving of the respondents No. 2 and 5? OPP.*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled and from whom? OPP*
>
> *3. Whether the vehicles were plied by the respondents No. 1 and 4 in violation of terms and conditions of the insurance policy and the respondents No. 3 and 6 are not liable to pay the amount of compensation? OPR-3 and 6.*
>
> *4. Relief.*

9. Claimants have examined as many as six witnesses and one of the claimants, namely, Daljeet Kaur also stepped into the witness box as PW4. Respondents have examined four witnesses and motor cyclist, namely, Harinder Grover stepped into the witness box as RW2.

10. The Tribunal, after scanning the evidence held that the accident was outcome of rash and negligent driving of bus driver and accordingly, decided issue No.1 in favour of the claimants.

11. I have gone through the record. The claimants have examined witnesses who have deposed that the accident was outcome of rash and negligent driving of bus driver.

12. The official witnesses, namely, RW1 MHC Chander Mohan and Ramanand Sharma, Summary Clerk of the office of Civil Judge, (Senior Division) Solan have stated that FIR was lodged against motor cyclist Harinder Grover and final charge sheet was also presented against him in the court of competent jurisdiction and was facing trial.

13. While going through the statements of the witnesses, some of the witnesses have stated that bus driver has also not taken due care and caution while driving bus. In para 24 of the claim petition, it is specifically pleaded that the bus driver was rash and negligent in driving the bus. Bus driver and owner have filed the reply. It is apt to reproduce para 24 of the reply filed by respondents No. 1 and 2, i.e., bus driver and owner herein.

> *"24.That the contents of para 24 of the petition are misleading in nature. It is denied that the deceased was sitting as pillion rider on the motor cycle. The manner in which the accident has occurred has not been explained properly in this para of the petition. The deceased himself was driving the motor cycle and the respondent No. 5 was sitting as a pillion rider on the motor cycle. As stated above the motor cycle was being driven by the deceasd himself and the accident had*

occurred when the diver of the motor cycle i.e. the deceased was over taking a standing truck on a sharp curve and while taking the pass from the stranded truck, the motor cycle being driven by the deceased struck against the bus and the deceased caused the accident. Thus, the stand taken in the petition to the effect that the deceased was pillion rider on the motor cycle is wrong, rather he was driving the motor cycle. It is emphatically denied that the accident had occurred due to sole rash and negligent driving of respondent No. 2 as alleged."

[Emphasis added]

14. Some of the witnesses have stated that motor cycle struck with the bus on a sharp curve and some of the witnesses have deposed that bus struck with the motor cycle. PW3 Saravjeet Singh stated that local bus came from Kumarhatti side was being driven in rash and negligent manner and struck with the motor cycle coming from the opposite direction over which there was one pillion rider alongwith motor cyclist, who fell down and suffered fatal injuries.

15. It is beaten law of the land that in claim petitions, the standard of proof is on different footings as compared to the standard of proof required in criminal cases. In a claim petition, only *prima facie* proof is required and strict pleadings and proofs are not required.

16. My this view is fortified by the judgment rendered by the Apex Court in the case titled as **Dulcina Fernandes and others versus Joaquim Xavier Cruz and another,** reported in **(2013) 10 Supreme Court Cases 646.** It is apt to reproduce relevant portion of paras 8 and 9 of the judgment herein:

"8. In United India Insurance Co. Ltd. v. Shila Datta, (2011) 10 SCC 509, while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-Judge Bench of this Court has culled out certain propositions of which Propositions (ii), (v) and (vi) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow:

"10. (ii) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.

* * *

(v) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation.......

(vi) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the enquiry."

9. The following further observation available in para 10 of the Report would require specific note: (Shila Datta case, (2011) 10 SCC 509, SCC p. 519)

"10. ....We have referred to the aforesaid provisions to show that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute." (Emphasis added)

17. This Court in FAO No. 530 of 2008 titled ***National Insurance Company Ltd. versus Jagtamba and others***, decided on 27.11.2015 and in series of cases has laid down the similar principles of law.

18. It appears that both the drivers have not taken due care and caution while driving their respective vehicles.

19. The question is-what is contributory negligence? When two drivers have not taken due care and caution while driving their respective vehicles and have contributed in causing the accident, is contributory negligence.

20. The apex Court in case titled ***Kamlesh and others versus Attar Singh and others*** reported in **2015 AIR SCW 6158** in para 8 has held as under:

> *"8. We have heard learned counsel for the parties and perused, inter alia, the evidence on record of Ram Parshad PW2 and Devender PW.3. The method and manner in which the accident has taken place leaves no room for doubt that it was a case of composite negligence of drivers of both the vehicles, that is the driver of Maruti car and driver of tempo. Though Police has registered a case against driver of the tempo Attar Singh and has filed a chargesheet but the same cannot be said to be conclusive. Though, Attar Singh has stated that it was in order to oblige the driver of the Maruti car, a case was registered against him. Be that as it may. It appears both the drivers have tried to save their liability. In such circumstances, the version of eye-witnesses, PW.2 and PW.3 assumes significance. The fact remains that car had dashed the tempo on the middle portion near footstep. Thus the method and manner in which the accident has taken place leaves no room for doubt that both the drivers were negligent. Man may lie but the circumstances do not is the cardinal principle of evaluation of evidence. No effort has been made by the High Court to appreciate the evidence and method and manner in which the accident has taken place. Both the aforesaid witnesses have stated Maruti Car was in excessive speed. However, it appears driver of tempo also could not remove his vehicle from the way of Maruti Car. Thus, both the drivers were clearly negligent. It appears from the facts and circumstances that both the drivers were equally responsible for the accident. Thus, it was a case of composite negligence. Both the drivers were joint "tort-feasors", thus, liable to make payment of compensation."*

21. The apex Court in another judgment in case titled ***Meera Devi and another versus H.R.T.C. and others*** reported in ***2014 AIR SCW 1709*** has laid down the similar principles of law. It is apt to reproduce para 10 of the said judgment herein.

> *"10.To prove the contributory negligence, there must be cogent evidence. In the instant case, there is no specific evidence to prove that the accident has taken place due to rash and negligent driving of the deceased scooterist. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of common law cannot be applied in the present case. We are, thus, of the view that the reasoning given by the High Court has no basis and the compensation awarded by the Tribunal was just and reasonable in the facts and circumstances of the case."*

22. The Apex Court in ***Khenyei versus New India Assurance Co. Limited & others,*** reported in **2015 AIR SCW 3169** has laid down the same principles of law.

23. Applying the test, it can be safely held that both the drivers have driven the vehicles rashly and negligently and the accident was outcome of contributory negligence.

24. The factum of insurance of both the vehicles is not in dispute. The insurer of both the vehicle have failed to prove that the owners of offending vehicles have committed any willful breach in terms of the insurance policy and issue No. 3 rightly came to be decided in favour of claimants and against both respondents No. 3 and 6 in the claim petition.

25. The adequacy of compensation is not in dispute. Even the claimants have not questioned the adequacy of compensation.

26. Having said so, both the drivers have contributed in causing the accident in which deceased, a pillion rider, sustained injuries and succumbed to the same. Thus, the insurers of both the offending vehicles are saddled with the liability in equal shares.

27. The rate of interest, as awarded by the Tribunal is maintained.

28. Respondent No. 9, i.e., Bajaj Allianz Insurance Company Ltd. is directed to deposit the 50% of the awarded amount alongwith interest in the Registry of this Court within eight weeks from today. On deposit, Registry to release the same in favour of the claimants, strictly in terms of the conditions contained in the impugned award through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

29. Out of the amount already deposited by the appellant-insurer-Oriental Insurance Company, 50% be released to the claimants, strictly in terms of the conditions contained in the impugned award through payees' cheque account, or by depositing the same in their bank accounts, after proper verification and rest of the amount be refunded to the insurer/ Oriental Insurance Company Ltd. through payees cheque account.

30. Viewed thus, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

31. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs No. 441 & 442 of 2012
Decided on: 02.12.2016

FAO No. 441 of 2012

Oriental Insurance Company Ltd. …Appellant.
Versus
Smt. Sumitra Devi and others …Respondents.

FAO No. 442 of 2012

Oriental Insurance Company Ltd. …Appellant.
Versus
Smt. Sunita Devi and others …Respondents.

Motor Vehicles Act, 1988- Section 166- Claimants specifically pleaded that deceased was working as labourer in the offending vehicle and was travelling in the same as a labourer at the time of accident- this fact was admitted in the reply – sitting capacity of the vehicle was 3+1 – premium was paid for the employee - the claimants are 7 in number and 1/5th amount was rightly deducted towards personal expenses- the deceased was 31 years of age at the time of accident and multiplier of 15 is just and appropriate – the amount cannot be said to be excessive – appeal dismissed. (Para-13 to 21)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

FAO No. 441 of 2012

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate.
For the respondents: Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 to 7.
Mr. Deepak Kaushal, Advocate, for respondents No. 8 to 10.

FAO No. 442 of 2012

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate.

For the respondents: Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 to 6.
Mr. Deepak Kaushal, Advocate, for respondents No. 7 to 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Both these appeals are outcome of one vehicular accident, thus, the same are being clubbed and decided by this common judgment.

2. Challenge in FAO No. 441 of 2012 is to award, dated 30th July, 2012, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 52-N/2 of 2007, titled as Sumitra Devi and others versus Ritesh Aggarwal and others, whereby compensation to the tune of ₹5,34,400/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (hereinafter referred to as "impugned award-I").

3. Subject matter of FAO No. 442 of 2012 is award, dated 30th July, 2012, made by the Tribunal in MAC Petition No. 15-N/2 of 2008, titled as Sunita Devi and others versus Shri Ritesh Kumar Aggarwal and others, whereby compensation to the tune of ₹ 5,01,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (hereinafter referred to as "the impugned award-II").

4. The claimants, driver and owners-insured of the offending vehicle have not questioned the impugned awards on any count, thus, have attained finality so far the same relate to them.

5. Appellant-insurer has called in question both the impugned awards on the grounds taken in the respective memo of appeals.

6. In order to determine both these appeals, it is necessary to give a brief resume of the facts of the cases, the womb of which has given birth to the appeals in hand.

7. The claimants in both the claim petitions invoked the jurisdiction of the Tribunal by the medium of respective claim petitions for grant of compensation, as per the break-ups given in the respective claim petitions, on the ground that they became the victims of the vehicular accident, which was caused by the driver, namely Shri Yash Pal, while driving truck No. HP-51-3277, rashly and negligently on 5th August, 2007, at about 10.30 P.M., at Mandoli, in which deceased-Satpal and Hari Singh sustained injuries and succumbed to the said injuries.

8. The respondents in both the claim petitions resisted the same on the grounds taken in the respective memo of objections.

9. On the pleadings of the parties, a similar set of issues came to be framed by the Tribunal in both the claim petitions on 14th July, 2008. Thus, I deem it proper to reproduce the issues framed in one of the claim petitions, i.e. MAC Petition No. 52-N/2 of 2007 (subject matter of FAO No. 441 of 2012) herein:

> *"1. Whether the deceased Satpal died in an accident which was the result of rash and negligent driving of the vehicle by respondent No. 3, Yash Pal, as alleged? OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation, the petitioners are entitled to and from whom? OPP*

3. Whether the risk of the deceased was not covered under the Insurance Policy? OPR-4

4. Whether the deceased was an un-autorized passenger in the offending vehicle? OPR-4

5. Whether the driver of the vehicle was not possessed of a valid and effective driving licence at the time of accident? OPR-4

6. Whether the petition has been filed in collusion with respondents No. 1 to 3? OPR-4

7. Relief."

10. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants in the respective claim petitions and saddled the insurer with liability in terms of the impugned awards.

11. Learned Senior Counsel appearing on behalf of the appellant-insurer argued that the Tribunal has fallen in an error in saddling the appellant-insurer with liability in both the claim petitions on three counts:

(i) That the deceased were not labourer/employee or the pedestrian, but were travelling in the offending vehicle as unauthorized passengers;

(ii) That adequate opportunity was not granted to the appellant-insurer to lead evidence; and

(iii) That the amount awarded is excessive;

12. All these grounds are not tenable for the reasons to be recorded hereinafter.

FAO No. 441 of 2012:

13. The claimants have specifically pleaded in the claim petition that deceased-Satpal was working as a labourer with the offending vehicle and was travelling in the same as a labourer at the time of the accident, which stands admitted by the owner-insured and driver of the offending vehicle in their reply.

14. It is apt to reproduce para 11 of the joint reply filed by the owner-insured and driver of the offending vehicle herein:

"11. That the contents of para 23 & 24 of the claim petition are wrong hence emphatically denied except that the deceased was the labourer on the truck. It is also submitted that the accident took place due to the mechanical failure."

(Emphasis added)

15. Hence, it is admission on the part of the owner-insured and driver of the offending vehicle that deceased-Satpal was employed by them with the offending truck as a labourer.

16. I have gone through the registration certificate of the offending vehicle, which is on the record as Ext. R-4, the perusal of which does disclose that the seating capacity of the offending vehicle including the driver is '3+1'.

17. The factum of insurance is admitted. The insurance policy is on the record as Ext. R-3. While going through the details of premium paid, which is contained in the Schedule of Premium of the insurance policy, it is crystal clear that premium has been paid for liability of employee/driver also. Thus, the risk of deceased-Satpal, being the labourer with the offending vehicle, was covered.

18. The insurer has not led any evidence to dislodge the evidence led by the claimants. It is apt to record herein that the claimants' evidence was closed in terms of order, dated 4th March, 2009. Thereafter, the file remained on the dockets of the Tribunal till 25th July, 2012, for recording the respondents' evidence, on which date also no RWs were present despite

the fact that eight opportunities were already granted in their favour and the evidence was ordered to be closed. Thus, it cannot lie in the mouth of the appellant-insurer that adequate opportunities were not granted to it to lead evidence.

19. The claimants are seven in number. The Tribunal, after taking the income of deceased-Satpal to be ₹ 3600/- per month, has rightly deducted one-fifth towards his personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

20. The deceased was 31 years of age at the time of the accident. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the Motor Vehicles Act, 1988 (hereinafter referred to as "MV Act").

21. Viewed thus, the amount awarded cannot be said to be excessive in any way, rather, is meagre. But, the claimants have not questioned the adequacy of the compensation, thus, the same is maintained.

FAO No. 442 of 2012:

22. The claimants have specifically pleaded that deceased-Hari Singh was walking as a pedestrian by the side of the road when he was hit by the offending vehicle. They have also led evidence to substantiate their claim.

23. PW-1, namely Shri Shammi Kumar, has specifically stated that he was present on the spot at the time of the accident and when deceased-Hari Singh was walking alongside the road, he was hit by the offending vehicle. Thus, it can be safely held that deceased-Hari Singh was a third party and his risk was covered in terms of the insurance policy.

24. The insurer has not led any evidence in rebuttal despite various opportunities and the respondents' evidence was ordered to be closed by the Tribunal vide order, dated 25th July, 2012. Thus, it cannot be said that adequate opportunities were not granted to the insurer to lead evidence.

25. The claimants are six in number. The Tribunal, after taking the income of deceased-Hari Singh to be ₹ 3600/- per month, has rightly deducted one-fourth towards his personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

26. The deceased was 32 years of age at the time of the accident. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the MV Act.

27. Having said so, the amount awarded cannot be said to be excessive in any way, rather, is meagre. But, the claimants have not questioned the adequacy of the compensation, thus, the same is maintained.

28. All the three points raised and argued by the learned Senior Counsel appearing on behalf of the appellant-insurer are answered accordingly.

29. Having glance of the above discussions, the Tribunal has rightly made the impugned awards, are well reasoned and legal one, need no interference.

30. Accordingly, the impugned awards are upheld and both the appeals are dismissed.

31. Registry is directed to release the awarded amount in favour of the claimants in both the claim petitions strictly as per the terms and conditions contained in the respective impugned awards through payee's account cheque or by depositing the same in their respective bank accounts after proper identification.

32. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J., HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

Pawan Kumar. …Petitioner.
Versus
Union of India and another. …Respondents.

CWP No. 9093/2014, 2145, 2789, 2814, 3131, 3140, 3311, 3467, 3468, 4229 of 2015, 267, 674, 1157, 1163, 1164, 1165, 1166, 1167, 1168, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1279, 1606, 1711, 1725, 1855, 1991 and 2762 of 2016
Reserved on: 26.10.2016
Decided on: 02.12. 2016

Constitution of India, 1950- Article 226- Government of India introduced ex-servicemen contributory health scheme to provide medicare to ex-servicemen and their dependents- scheme was contributory and the appointment of the staff was contractual- petitioners were appointed on different dates on contractual basis- their services were dispensed with on cessation of the contractual service- the petitioners filed writ petitions against the orders – a division bench dismissed some of the writ petitions while another division bench allowed some of the writ petitions- full bench was constituted to resolve the conflict between the judgments of division benches – held, that the petitioners were not appointed on permanent basis but on contractual basis- once the contract came to an end, the person holding the post can have no right for renewal of contract or continuation as a matter of right- services of a contractual employee cannot be equated with the services of ad hoc employee- the scheme was meant not only to provide medical facilities to the ex-servicemen but to adjust the personnels superannuating from the army for a short period – therefore, the persons who were given appointment cannot claim any right of renewal of the employment after the expiry of contract – the respondents had never represented to the petitioners that their services will continue – writ Court can judiciallyreview the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action- judicial review cannot extend to the Court acting as an Appellate Authority sitting in judgment over the decision- the petitioners have failed to place any material on record to show that the action of the respondents is either unreasonable, unfair, perverse or irrational – petitioners had accepted the terms and conditions of the employment and they cannot claim higher rights ignoring the conditions laid down in the scheme- petitioners have no right to continue beyond the period prescribed in the contract- petitions dismissed. (Para- 4 to 36)

Cases referred:

Bir Pal Singh versus Union of India and others I L R 2016 (I) HP 81 (D.B.)
Govind Ram and others vs. Union of India and others, I L R 2015 (VI) HP 963 (D.B.)
State of Haryana and others etc. vs. Piara Singh and others etc., AIR 1992 SC 2130
Gridco Ltd. & Another vs. Sadananda Doloi & Ors, AIR 2012 SC 729
Mohd. Abdul Kadir and another vs. Director General of Police, Assam & others (2009) 6 SCC 611

Secretary, State of Karnataka and others vs. Uma Devi (3) and others, (2006) 4 SCC 1

For the Petitioner(s): Mr. Dilip Sharma, Sr. Advocate with Mr. J.L. Bhardwaj, Mr. Tara Singh Chauhan, Mr. Adarsh K. Vashista, Mr. G.R. Palsara and Mr. Manish Sharma, Advocates for the respective petitioners.

For the Respondents: Mr. Shashi Sirsoo, Central Government Counsel for respondents in CWP Nos. 3468, 4229 of 2015, 1163, 1164, 1157 and 1195 of 2016

Ms. Rita Goswami, Central Government Counsel for respondents/Union of India in CWP Nos. 3311 of 2015, 1168, 1194 and 1855 of 2016.

Mr. Neel Kamal Sharma, Central Govt. Counsel for respondents/Union of India in CWP Nos. 1193 and 1606 of 2016.

Mr. Vikas Rathour, Central Govt. Counsel for respondents/Union of India, in CWP No.1191 of 2016.

Mr. Desh Raj Thakur, Central Govt. Counsel for respondents/Union of India in CWP No. 1189 of 2016.

Mr. Nipun Sharma vice Mr. Vinod Thakur, Central Govt. Counsel for respondents/Union of India in CWP No. 1190 of 2016.

Mr. Ashok Sharma, Asstt. Solicitor General ofIndia with Mr. Angrez Kapoor, Advocate forthe respondents/Union of India in the remaining writ petitions.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

In view of the divergent views in two judgments by the learned Division Benches of this Court, the first being CWP No. 1282/2014, titled as ***Ashok Dutt Sharma***versus ***Union of India and others***, decided on 24.3.2014 and the second being CWP No. 4064/2015, titled as ***Bir Pal Singh*** versus **Union *of India and others*** decided on 1.1.2016, a learned Division Bench of this Court vide order dated 16.3.2016 in CWP No. 9093/2014, referred the matter for consideration to a larger Bench.

2. The order of reference reads thus:

> "Mr. Ashok Sharma, learned Assistant Solicitor General of India, has placed on record photocopies of the two judgments passed by the two Coordinate Benches of this Court and stated that both the judgments, involving the same issue as has been urged in the instant writ petition, are contradictory to each other. We have gone through the judgments and are of the opinion that the instant writ petition is required to be heard by a larger Bench. The matter be processed accordingly on the administrative side."

3. The seminal question that emanates in all these writ petitions is: whether an employee, who is appointed purely on contractual basis for a fixed tenure in accordance with non-statutory Scheme, can claim that his appointment be made co-terminus with the scheme or in the alternative his services be continued till the age of superannuation or would his services be liable to be terminated on the expiry of the period of contract, as is provided for in the Scheme.

4. The Ministry of Defence, Government of India, in the year 2003, introduced the Ex-Servicemen Contributory Health Scheme (hereinafter referred to as the "Scheme"). This scheme aimed to provide medicare to ex-servicemen and their dependants through a network of polyclinics and service medical facilities spread across the country. The Scheme was a contributory Scheme and was to extend the earlier referred benefits on payment of contribution. The appointment of the staff was to be on contractual basis. Para 4 of the Scheme reads as under:

"4. When requisite percentage of ex-servicemen under the reservation quota are not available, specific certificate signed by GOC Area to that effect should be placed on record and thereafter the vacancies utilized by employing a suitable civilian. The GOC Area's sanction for employment of the civilian staff on contract will be valid for a period of twelve months only. During this period efforts will be made to appoint a suitable Ex-Serviceman."

Under the terms and conditions of the contractual appointment, para 8 (d) stipulates duration of employment which reads as under :-

"TERMS AND CONDITIONS FOR CONTRACTUAL EMPLOYMENT

8. The detailed criteria are listed in Appendix-'A' and 'B'. The general terms and conditions for employment of the Medical/Para medical/Non medical staff under the ECHS are listed below:-

XXX XXX XXX

(d) Duration of employment. The employment of the staff will be entirely contractual in nature and will be normally for a period of two years at the maximum subject to review of their conduct and performance after twelve months."

Para 14 relates to contract, wherein tenure of contract appointment has been stated that it is for 2 years and review of appointment after 12 months. Extract of para 14 reads as under :-

"CONTRACT

14. Contractual agreements in the prescribed format will be signed by the Station headquarters with the individual candidates and the contracting agency as the case may be :-

(a) Contract with individual employee. The contractual agreement between the contractual employees and the Station Headquarters will include the following :-

(i) Designation of Appointment.

(ii) Place of appointment.

(iii) Contractual nature of appointment for period of two years.

(iv) Review of appointment after 12 months."

The Scheme also provides for procedure for disciplinary action. Para 15 to 17 reads as under :-

"PROCEDURE FOR DISCIPLINARY ACTION

15. In case an ECHS contractual employee is involved in any act of professional misconduct, unethical practices, medical negligence or administrative negligence, disciplinary action will be initiated against the employee and his contract may be terminated after giving a show cause notice without prejudice to any further action that may be deemed fit and initiated considering the nature of the offence committed.

16. The Station Commander will initiate the action for termination of contract on recommendations of the concerned O I/C Polyclinic. A show cause notice will be given to the employee detailing the nature of offences. An inquiry ordered by the Stn Cdr will go into details of the case including the replies to the show cause notice of the employee. The Station Commander may also take legal action under the existing laws of the land for any act listed in para 15 above.

17. The Appointing authority will be the authority for termination of contract."

5. It is not in dispute that it is in pursuance to the aforesaid Scheme that all the petitioners have been appointed on different dates on contractual basis and on cessation of their

contractual service, their services have been dispensed with and aggrieved thereby have filed these writ petitions.

6. While construing the provisions of the Scheme, a Division Bench of this Court in ***Ashok Dutt Sharma's*** case (supra) dismissed the petition by observing as under:

> "Petitioner's appointment as Lab Assistant was on contract basis. We find that the period of contract has come to an end in the month of February, 2014 and as such we find no illegality with the impugned order dated 14.2.2014 (Annexure P-2), whereby petitioner's contractual employment stands terminated. Petition stands disposed of accordingly, so also pending application(s), if any."

7. Whereas another Division Bench of this Court in ***Bir Pal Singh's***case (supra), and earlier to that in case of ***Govind Ram and others*** vs. ***Union of India and others***, CWP No.4446/2014 decided on 16.12.2015, allowed the petition by observing as under:

> 11. The Hon'ble Apex Court in a catena of decisions has deprecated the endeavours on the part of the employer to displace contractual appointees by substituting them with appointees alike to the petitioners herein. It appears that the diktat of the verdicts of the Hon'ble Apex Court frowning upon the employer resorting to displace or dislodge the services of contractual appointees by concerting to substitute or replace them by appointees whose terms of appointments bear an affinity or are alike to the appointments on a contractual basis of the petitioner herein stands openly irrevered by the respondents herein. The irreverence meted by the respondents herein to the principle aforesaid encapsulated in verdicts of the Hon'ble Apex Court reproaching the employer against its substituting contractual appointees by concerting their replacement by appointments on an alike basis, has led the respondents herein to make an indefensible endeavour to by issuing advertisements elicit applications from desirous aspirants for being considered for selection and appointment against post on a contractual basis which hitherto on an alike contractual basis was or stand manned by the petitioner herein. The said endeavour warrants its being baulked especially when its being permitted to be carried forward would overwhelm the experience gained by the petitioner herein on the post whereon he stood/stand appointed on a contractual basis defeating the salutary purpose of skilled man power manning the polyclinics established under ECHS for hence purveying optimum medical care to the stakeholders."

8. We have heard the learned counsel for the parties and have gone through the material placed on record carefully.

9. Mr. Dilip Sharma, learned Senior Advocate assisted by Mr. Tara Singh Chauhan, Advocate would vehemently contend that *ad hoc* or temporary employee cannot be replaced by other *ad hoc* or temporary employee and would place heavy reliance upon the judgment rendered by the Hon'ble Bench of three Judges of the Hon'ble Supreme Court in ***State ofHaryana and others etc.*** vs. ***Piara Singh and others etc.***, AIR 1992 SC 2130, more particularly, the following observations:

> "[25]. Before parting with this case, we think it appropriate to say a few words concerning the issue of regularisation of ad hoc/temporary employees in government service.
>
> Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee should not be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

10. The aforesaid ratio is not clearly applicable to the facts obtaining in the instant cases as it cannot be disputed that the petitioners herein were selected and thereafter appointed

pursuant to an advertisement, which never envisaged appointment on permanent basis and were to be appointed only on contractual basis.

11. Once the appointments were purely contractual then by efflux of time as envisaged in the contract itself the same came to an end and the persons holding such posts can have no right to continue or renewal of contract of service as a matter of right, and therefore, such cases are clearly distinguishable from repeated and *ad hoc* appointments, which was adopted as a matter of practice by the State Government in case of *Piara Singh's* case (supra).

12. The difference in the fact situation obtaining in the instant cases vis-à-vis *Piara Singh's* case (supra) is stark and clear. In the instant cases, the petitioners were appointed on fixed term contract and after lapse of period of service are claiming continuity of the same, and therefore, their services cannot be equated with the *ad hoc* employment as was in the case of *Piara Singh* (supra). The *ad hoc* appointment against a vacancy by the State repeated with number of vacancies, one after another, was construed to be an unfair practice by the Hon'ble Supreme Court and it accordingly directed the State to frame a scheme for regularization of such employees consistent with the reservation policy, if not already framed. Therefore, the judgment in *Piara Sin*gh's case cannot be blindly applied to the facts of the present cases where the petitioners have been appointed on a fixed term contractual appointment and after lapse of the period of contract, are claiming the continuation of the term by excluding other persons from seeking similar term of appointment.

13. The fixed term contractual appointment, as envisaged under the Scheme, is not only to provide medical facilities to the ex-servicemen but at the same time is a mode of adjusting the personnel superannuating from the Army for a short period so as to enable them to adjust suitably even after the tenure with the ECHS Clinics. Thus, the avowed object is to engage such employment to a large number of persons, therefore, the persons, who are given fixed term service contract, cannot claim any right of renewal of such employment after the period of contract is over. The same can neither be equated with repeated ad hoc employment nor can it be termed as unfair practice. It lies best in the wisdom of the employer to grant such appointments on contract to various terms and unless the decision making process is established to be arbitrary on the face of it, the Court will be loath to exercise its extra-ordinary jurisdiction to quash such appointment of fixed term basis.

14. A careful reading of the letter of appointment as also the Scheme leaves no manner of doubt that the appointment offered to the petitioners was limited one. The respondents at any given time had never offered to the petitioners that they would continue in service till the existence of the Scheme or till the time they did not attain the age of superannuation. It is not even the case of the petitioners that there was any uncertainty or ambiguity in the appointments made by the respondents in so far as the tenure on the post to which they were appointed.

15. There is a clear distinction between public employment governed by the statutory rules and private employment governed purely by contract. No doubt with the development of law, there has been a paradigm shift with regard to judicial review of administrative action whereby the writ court can examine the validity of termination order passed by the public authority and it is no longer open to the authority passing the order to argue that the action in the realm of contract is not open to judicial review. However, the scope of interference of judicial review is confined and limited in its scope. The writ court is entitled to judicially review the action and determine whether there was any illegality, perversity, unreasonableness, unfairness or irrationality that would vitiate the action, no matter the action is in the realm of contract.

16. However, judicial review cannot extend to the Court acting as an appellate authority sitting in judgment over the decision. The Court cannot sit in the arm chair of the administrator to decide whether more reasonable decision or course of action could have been taken in the circumstances. (Refer ***Gridco Ltd. & Another*** vs. ***Sadananda Doloi & Ors***, AIR 2012 SC 729).

17. The petitioners have failed to place before this Court any material to show that the action of the respondents is either unreasonable or unfair or perverse or irrational. As observed earlier, the scheme placed on record governing the service conditions of the petitioners makes it abundantly clear that petitioners in all these petitions had been appointed on contractual basis, that too, on a non-statutory scheme.

18. Faced with this situation, learned counsel for the petitioners would then contend that the action of the respondents in terminating and re-appointing the petitioners was required to be avoided as the petitioners were entitled to be continued as long as the scheme continued or till the time they did not attain the age of superannuation and as such the action of the respondents being contrary to the principles of service jurisprudence was liable to be quashed.

19. In order to buttress their submission reliance is placed on the judgment of the Hon'ble Supreme Court in ***Mohd. Abdul Kadir and another*** vs. ***Director General of Police, Assam and others*** (2009) 6 SCC 611 wherein it was held as under:

> 18. We are therefore of the view that the learned Single Judge was justified in observing that the process of termination and re-appointment every year should be avoided and the appellants should be continued as long as the Scheme continues, but purely on ad hoc and temporary basis, co-terminus with the scheme. The circular dated 17.3.1995 directing artificial breaks by annual terminations followed by fresh appointment, being contrary to the PIF Additional Scheme and contrary to the principles of service jurisprudence, is liable to be is quashed.
>
> [19] Before parting we may however refer to two aspects. One is with reference to the term of the scheme itself. Second is with reference to the pay.
>
> 20. The PIF Scheme has been in force for nearly five decades. PIF Additional Scheme has been in force for more than two decades. The object of the Scheme is detection and deportation of illegal immigrants/fresh infiltrators/re-infiltrators, establishment of second line of defence on Assam Bangladesh Border to man the areas not covered by Border Security Force and monitoring the occurrences on international border. The staff entrusted with such sensitive functions and duties can work wholeheartedly and with commitment in adverse and hostile conditions only if they have security of tenure, without having to constantly worry about their future. If the task under the scheme is perennial, there is no point in executing it as a "temporary" Scheme, though to start with it might have been thought that the task was a short term task.
>
> 21. Another aspect to be noticed is that duties discharged by the Border staff belonging to Assam Police Border Organization under the PIF Scheme is said to be somewhat similar or parallel to the duties discharged by regular forces like Border Security Force and Assam Special Peace keeping Force. Further, part of the very same Border Organization under PIF Scheme is manned by regular police personnel. Therefore, if those working as ad hoc or temporary staff for decades on, are converted to regular permanent staff, that would boost their morale and efficiency.
>
> 22. We are conscious of the fact that the issue is a matter of policy having financial and other implications. But where an issue involving public interest has not engaged the attention of those concerned with policy, or where the failure to take prompt decision on a pending issue is likely to be detrimental to public interest, courts will be failing in their duty if they do not draw attention of the concerned authorities to the issue involved in appropriate cases. While courts cannot be and should not be makers of policy, they can certainly be catalysts, when there is a need for a policy or a change in policy.

> 23. Another issue requiring consideration by the respondents is the question of pay. The order of appointment in the case of first appellant shows that he was appointed in a time scale of pay. First appellant and similarly placed will therefore be entitled to increments in terms of the pay scale. Second appellant was appointed on a fixed pay. But even in the case of second appellant and others appointed on fixed pay, it is alleged that the State Government had treated their appointments as being in a time scale of pay and claiming reimbursement from the Central Government on that basis.
>
> 24. If the State Government has treated the appointments on fixed salary as appointments on a time scale, and claimed reimbursement from the Government of India on that basis, the State Government should, in all fairness, pass on the benefit of such time-scale of pay to the employees concerned. When persons are engaged under the same Scheme, discriminatory treatment, that is extending benefit of increments to some and denying the said benefit to others, should be avoided.

20. We are unable to agree with the aforesaid contention for the reason already set out hereinabove. Apart from that, it is beyond cavil that the petitioners are contractual employees, and therefore, would have a right to remain in employment only for the period mentioned in the contract, that too, subject to other conditions contained in the Scheme, but in no manner would have a right to claim that their appointments now be treated as co-terminus with the project.

21. It may be noticed that the petitioners had voluntarily accepted the appointment granted to them subject to the conditions clearly stipulated in the scheme. These appointments subject to the conditions have been accepted with their eyes wide open, therefore, now the petitioners cannot turn around claiming higher rights ignoring the conditions subject to which the appointments had been accepted.

22. Indubitably, there is an age of superannuation provided in the Scheme; however, the same is only in the nature of providing outer limit to which the employment or contract could have been extended. It does not suggest that there was any specific or implied condition of employment that the petitioners would continue to serve till they attain the age of superannuation. The extensions given to the petitioners were subject to and in accordance with the terms and conditions stipulated in the scheme. The appointment letters, in favour of the petitioners, specifically stated that their services would be governed under the Scheme. The Scheme itself makes manifest that the appointments under the Scheme were only on contractual basis. That being so, it is difficult to see how the appointments could be continued beyond what was envisaged and provided for therein.

23. Learned counsel for the petitioners would then contend that having undergone a selection process, the petitioners had every right to continue in service as their appointments cannot be said to be backdoor appointments.

24. Indisputably, the Scheme under which the petitioners have been appointed does prescribe a mode of selection but looking to the nature of appointment, more especially, the tenure thereof, it cannot be said that the best talent would apply, and therefore, even though such appointments may not amount to backdoor appointments yet nevertheless they would be side door appointments and depend upon the contract service.

25. Moreover, advertising the posts, as fixed term contractual appointment initially and thereafter permitting the incumbents so appointed to continue and making their appointments co-terminus with the Scheme or permitting them to continue in service till the age of superannuation, would amount to playing fraud with those multitude of people, who would otherwise be eligible to apply and may have skipped the employment process thinking that it is only for a temporary period or a contractual period.

26. In addition to the aforesaid, in case the contention of the petitioners is accepted that their services be made co-terminus with the Scheme or they be continued till the age of retirement, then this would amount to rewriting the contract by way of interpretation, contrary to the terms and conditions, that are agreed by the parties to the contract, besides substituting the very Scheme under which they have been appointed. Obviously, such a course is legally impermissible.

27. Learned counsel for the petitioners would then argue that some of the petitioners have put in 8-10 years of service, and therefore, their services cannot be dispensed with. Even this contention cannot be accepted as the Hon'ble Constitution Bench of the Hon'ble Supreme Court in ***Secretary, State of Karnataka and others*** vs. ***Uma Devi (3) and others***, (2006) 4 SCC 1 had clearly held that the courts are not to be swayed by the consideration that the concerned person has worked for some time or for a considerable length of time as the person, who is engaged on such appointment is temporary or casual or contractual, is fully aware of the nature of his employment and having accepted such appointments with eyes open cannot turn around and claim permanency or continuation as this would create another mode of employment, which is not permissible. It is relevant to reproduce relevant observations as under:

> [45] While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain not at arms length since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other, words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the constitution of India.

28. It needs no reiteration that framing of Scheme by the respondents is a policy matter and it is more than settled that it is neither within the domain of the Courts nor the scope

of judicial review to embark upon an inquiry as to whether a particular public Scheme is wise or better public policy can be evolved. Nor are the Courts inclined to strike down a policy at the behest of the petitioner merely because it has been urged that a different policy would have been formulated or more scientific or logical.

29. As a last ditch effort, learned counsel for the petitioners would then contend that they have legitimate expectation to continue in service.

30. As already observed earlier, appointment offered to the petitioners was limited one and the respondents had not at any given time offered to the petitioners that they would continue in service till the existence of Scheme or till the date they attain the age of superannuation. It is not even the case of the petitioners that there was any uncertainty or ambiguity in the appointments made by the respondents insofar as the tenure to which they were appointed. Therefore, the question of legitimate expectation to continue in service does not arise. The petitioners at the time of entering into contractual appointment were fully aware of the consequences of appointments being contractual in nature, therefore, such a person(s) cannot invoke the theory of legitimate expectation for being continued in the post.

31. Identical issue has already been considered by the Constitution Bench in ***Uma Devi's*** case (supra) and it was negated by observing as under:

> [46] Learned senior counsel for some of the respondents argued that on the basis of the doctrine of legitimate expectation, the employees, especially of the Commercial taxes Department, should be directed to be regularized since the decisions in dharwad (supra) , Piara Singh (supra) , jacob, and Gujarat Agricultural University and the like, have given rise to an expectation in them that their services would also be regularized. The doctrine can be invoked if the decisions of the Administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision- maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn {see Lord diplock in Council of Civil Service unions v. Minister for the Civil Service, national Buildings Construction Corpn. v. S. Raghunathan, and Dr. Chanchal goyal v. State of Rajasthan. There is no case that any assurance was given by the government or the concerned department while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the commissioner of the Commercial taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after the dharwad decision. Though, there is a case that the State had made regularizations in the past of similarly situated employees, the fact remains that such regularizations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some case by this court. Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they. must be regularized in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the Court had directed regularization of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation. The argument if accepted

would also run counter to the constitutional mandate. The argument in that behalf has therefore to be rejected.

[47] When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the state has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

32. In view of aforesaid discussion, the question raised in these petitions is answered by holding that the petitioners who have been appointed purely on contractual basis for a fixed term, in accordance with the non-statutory scheme, have no right to claim higher right than what is envisaged in their contract of the appointment and the same would automatically come to an end by efflux of time in terms of the contract. The petitioners holding such posts have no right to continue or claim renewal of the contract, save and except, if so provided in the scheme itself. Therefore, they cannot lay claim that the appointments be made co-terminus with the scheme or in the alternative the services be continued till they attain the age of superannuation.

33. Moreover, the petitioners having accepted the offer of appointment with eyes open cannot turn around by claiming higher rights ignoring the conditions subject to which the appointments had been accepted. There was no uncertainty or ambiguity in the appointments made by the respondents insofar as the tenure to which they were appointed.

34. Evidently, the petitioners at the time of entering into contractual appointments were fully aware of the appointments being contractual in nature. Therefore, they cannot also invoke the theory of legitimate expectation for being continued in the posts.

35. Having said so, we are of the considered opinion that the view taken by the learned Division Bench in ***Bir Pal Singh's*** and ***Govind Ram's*** cases does not lay down the correct law and are accordingly over ruled and the view taken by Coordinate Division Bench in ***Ashok Dutt Sharma's*** case is affirmed.

36. Now that we have held that the petitioners have no right to continue beyond the period as stipulated in the contract, there is no need to refer these matters back to the learned Division Bench for deciding individual cases as none of these petitions are maintainable and accordingly are dismissed. Pending application(s), if any, also stands disposed of leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Piar Chand …Petitioner

Versus

Deepika & others …Respondents

CMPMO No. 378 of 2012

Date of Decision : December 2, 2016

Code of Civil Procedure, 1908- Order 7 Rule 14- Plaintiff filed a civil suit for declaration challenging the revenue entries and the entry of date of birth of defendant No.3 – plaintiff filed an application seeking permission to place on record the date of birth certificate, which was dismissed – plaintiff filed a similar application in the suit after it was remanded by the appellate court, which was dismissed- plaintiff was fully aware of the date of birth of defendant No.3 – birth certificate is a public document and could have been obtained or proved without any difficulty- obtaining a certified copy is not the discovery of a new fact- plaintiff failed to prove as to why he had not placed the document on record with the plaint –no error was committed by the Court in dismissing the application- petition dismissed. (Para-8 to 14)

Cases referred:

Shalini Shyam Shetty & another vs. Rajendra Shankar Patil, (2010) 8 SCC 329
Jai Singh & others vs. Municipal Corporation of Delhi & another, (2010) 9 SCC 385
Braham Dass vs. Onkar Chand & another, 2009 (1) Shim. L.C. 339
Kapil Kumar Sharma vs. Lalit Kumar Sharma & another, (2013) 14 SCC 612

For the petitioner : Mr. Anand Sharma, Advocate, for the petitioner.
For the respondent : Mr. Ramakant Sharma, Senior Advocate, with Mr. Basant Thakur, Advocate, for respondent No. 3.
Mr. Neeraj Gupta, Advocate, for respondents No. 6(a) and 6(b).

The following judgment of the Court was delivered:

Sanjay Karol, J. (Oral)

The plaintiff (petitioner herein), claiming himself to be owner, filed a suit for declaration, challenging revenue entries recorded to the contrary, in favour of defendants No. 1 to 3 (respondents No. 1 to 3 herein) to be null and void as also entry of date of birth of defendant No. 3, in the record maintained by the school, to be illegal.

2. The contesting defendants resisted the suit inter aliaclaiming themselves to have perfected the title by way of statutory provisions.

3. Based on the pleadings of the parties, trial court framed several issues, including the one relating to the said entry of date of birth.

4. It is a matter of record that for establishing the factum of incorrect entry pertaining to the date of birth of defendant No. 3, plaintiff did not place any material, worthy of credence, alongwith the plaint. It is also a matter of record that for establishing such fact, plaintiff filed an application seeking permission to place on record birth certificate, which came to be dismissed by the trial Court vide order dated 9.8.2011, passed in CMA No. 138/11 (Civil Suit No. 78/98/96), titled as *Piar Chand vs. Deepika & others,* operative portion whereof, reads as under:

> "4. Perusal of the case file reveals that the photocopy of certificate of Sh. Vivek Mahajan (matriculation certificate) placed on record. Mere placing on record the photocopy of document cannot be held as perse admissible unless it is upon the applicant to show under which provision of law, it is perse admissible. Perusal of the case file reveals that the suit has been filed in the year 1996, more than fifteen years already stand lapsed. Perusal of the plaint reveals that it is within the knowledge of applicant to prove the said document being photocopy placed on record and the fate of the case is depend upon it. Applicant fails to show any "due diligence" upon his part. As per law laid down in a case titled as *Madan Mohan Singh & Ors. vs. Rajni Kant & Anr.* reported in 2010 (3) APEX COURT JUDGMENTS 196 (S.C.) *"If a person wants to rely on a particular date of birth and wants to press document in service, he has to prove its authenticity in*

> *terms of S. 32(5) of Evidence Act, by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein".*
>
> 5. Applying the ratio of this citation, by no stretch of imagination it be held that the photocopy of document is perse admissible and this court to exhibit in the statement of counsel.
>
> 6. In view of discussion above, application is not sustainable as applicant fails to show any due diligence on his part as well as photocopy of matriculation certificate cannot be tendered in the deposition being perse admissible. There is no force in the application accordingly, it is rejected. Application, after registration and its due completion be tagged with main case file."

Significantly this order has attained finality.

5. It is a matter of record that though the suit came to be disposed of in terms of judgment dated 31.12.2007, but it stood remanded back to the trial Court and at that stage, plaintiff again filed a similar application, seeking permission to place on record certified copy of the birth certificate so obtained under the provisions of the Right to Information Act, 2005.

6. It is this application which stands dismissed in terms of impugned order dated 17.11.2012, passed by Civil Judge, (Jr. Divn.), Chamba, in Civil Suit No. 78/98/1996, titled as *Piar Chand vs. Deepika & others* (Annexure P-9).

7. Bare reading of the impugned order is reflective of the fact that not only has the trial Court appreciated the statutory provisions but correctly applied the same to the attending fact situation.

8. Perusal of the application in question only reveals that plaintiff was fully aware of the date of birth of defendant No. 3. Birth certificate is a public document and could have been obtained or proved, without any difficulty, at the first opportune time. In any event, between the dismissal of the first application and passing of the impugned order, no new fact has emerged. Obtaining a certified copy is not a discovery of a new fact. The earlier application came to be dismissed not only for the reason that plaintiff had placed photocopy of the document but also for the reason that he had failed to exhibit exercise of due diligence, explaining the delay, in placing the document on record.

9. Even in the instant application, plaintiff has, prima facie, failed to establish as to why such document never came to be filed in the Court alongwith the plaint. Also no steps for summoning the record at the time of trial were ever taken by him.

10. It cannot be said that in the passing of impugned order, trial Court has either exceeded or failed to correctly and appropriately exercise jurisdiction so vested in it, warranting interference by this Court in a petition of the nature so filed by him, scope of interference with which, elaborately stands discussed in *Shalini Shyam Shetty & another vs. Rajendra Shankar Patil,* (2010) 8 SCC 329 and *Jai Singh & others vs. Municipal Corporation of Delhi & another,* (2010) 9 SCC 385, so referred to and relied upon by Sh. Ramakant Sharma, learned Senior Counsel.

11. In fact, parties have been litigating since the year 1996 and the first attempt to place on record the said document was made only in the year 2011. It is not that plaintiff is an illiterate rustic person, having no access to justice delivery system. It is also not that he was misguided or was under some misconception of law or fact. It is also not that he belongs to the lowest strata of the society, which prevented him from taking steps at the earliest. Also issues can be decided on the basis of evidence already led by the parties.

12. It is not the law that under no circumstance document can be taken on record, but then it has to be with the leave of the Court, exercise of which, in any case has to be within the settled parameters of law and unexplained delay, lack of due diligence and furnishing inadequate explanation, inter alia being certain factors not warranting favourable exercise

thereof. Prejudice, if at all, is to be shown by the plaintiff and not the defendant for the statutory provisions under Order VII Rule 14 CPC, mandates plaintiff to prepare a list and produce all documents with the plaint. Now in the instant case, what prevented the plaintiff to do so and wake up from deep slumber after more than 15 years remains unexplained.

13. There is yet another reason for dismissing the plaintiff's application and that being, finality attached to the earlier order.

14. In support of the petition, reliance is sought on the decision rendered by this Court in *Braham Dass vs. Onkar Chand & another,* 2009 (1) Shim. L.C. 339. The said decision stands rendered in the given facts and circumstances, where the case was still at the stage of trial. To the similar effect, is the decision rendered by Hon'ble the apex Court in *Kapil Kumar Sharma vs. Lalit Kumar Sharma & another,* (2013) 14 SCC 612.

In view of the aforesaid discussions, present petition, devoid of any merit is dismissed. Pending application(s), if any, also stands disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No. 449 of 2012
a/w FAO No. 33 of 2013
Decided on: 02.12.2016

FAO No. 449 of 2012

Prit Pal Singh	…Appellant.
Versus	
Smt. Radha Devi and others	…Respondents.

FAO No. 33 of 2013

Smt. Radha Devi and others	…Appellants.
Versus	
Shri Amar Singh and others	…Respondents.

Motor Vehicles Act, 1988- Section 166- Claimant specifically pleaded that accident was outcome of contributory negligence – challan was filed against the driver of the truck as well as motorcyclist – drivers of both vehicles had driven the vehicles rashly and negligently and it was a case of contributory negligence – the deceased was bachelor and 50% amount was to be deducted towards personal expenses- the deceased was 21 years of age and multiplier of 15 was applicable – however, multiplier of 16 was applied by the Tribunal, which is maintained – appeal dismissed.
(Para-11 to 26)

Cases referred:

Kamlesh and others versus Attar Singh and others, 2015 AIR SCW 6158
Meera Devi and another versus H.R.T.C. and others, 2014 AIR SCW 1709
Khenyei versus New India Assurance Co. Limited & others,2015 AIR SCW 3169
Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

FAO No. 449 of 2012

For the appellant:	Mr. O.C. Sharma, Advocate.
For the respondents:	Mr. J.L. Bhardwaj, Advocate, for respondents No. 1 to 5.
	Mr. J.S. Bagga, Advocate, for respondent No. 6.
	Mr. Praneet Gupta, Advocate, for respondent No. 7.
	Name of respondent No. 8 stands deleted.
	Nemo for respondent No. 9.

FAO No. 33 of 2013

For the appellants: Mr. J.L. Bhardwaj, Advocate.
For the respondents: Mr. J.S. Bagga, Advocate, for respondent No. 1.
Mr. Praneet Gupta, Advocate, for respondent No. 2.
Mr. O.C. Sharma, Advocate, for respondent No. 3.
Nemo for respondents No. 4, 6 and 7.
Name of respondent No. 5 stands deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Both these appeals are outcome of one vehicular accident and award, thus, I deem it proper to club both these appeals and determine the same by this common judgment.

2. Challenge in both these appeals is to award, dated 28th July, 2012, made by the Motor Accident Claims Tribunal, Fast Track Court, Solan, Himachal Pradesh (hereinafter referred to as "the Tribunal") in MACT Petition No. 1FTC/2 of 2007, titled as Smt. Radha Devi and others versus Shri Lala Ram alias Lal and others, whereby compensation to the tune of ₹ 5,10,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the insurer of offending truck and motorcyclist and the owner of the offending motorcycle were saddled with liability in equal shares (hereinafter referred to as "the impugned award").

3. The motorcyclist, owner-insured, driver and insurer of the offending truck have not questioned the impugned award on any count, thus, the same has attained finality so far it relates to them.

4. Owner of the motorcycle, namely Shri Prit Pal Singh, has questioned the impugned award by the medium of FAO No. 449 of 2012 on the grounds taken in the memo of the appeal.

5. By the medium of FAO No. 33 of 2013, the claimants have called in question the impugned award on the ground of adequacy of compensation.

6. In order to determine both these appeals, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeals in hand.

7. The claimants filed claim petition before the Tribunal for grant of compensation to the tune of ₹ 20,00,000/-, as per the break-ups given in the claim petition, on the grounds taken in the memo of the claim petition, was resisted by the respondents and following issues came to be framed by the Tribunal on 1st March, 2008:

"1. Whether Shiv Kumar @ Robin died in a motor vehicle accident which took place on 22-5-2006 due to negligence of respondents No. 1 and 5? OPP

2. If issue No. 1 is proved in affirmative, whether petitioners are entitled to compensation, if so, to what amount and from whom? OPP

3. Whether driver of truck No. HP-11-4331 was not holding a valid driving licence on the date of accident, if so its effect? OPR-3

4. Whether vehicle i.e. truck No. HP-11-4331 was not having valid registration certificate, route permit and other documents on the date of accident and was being driven in breach of terms and conditions of policy, as alleged, if so its effect? OPR-3

5. Whether respondent No. 4 had sold motor cycle in question bearing No. HR-49-2397 to respondent No. 6 Sanjeev Kumar on 12-5-2006, if so its effect? OPR-4

6. Whether the petition is not maintainable? OPR-6

7. Whether the petitioners have no cause of action against respondent No. 6? OPR-6

8. Whether the petition is bad for non-joinder of necessary parties? OPR-6

9. Relief."

8. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation in favour of the claimants in terms of the impugned award. Hence, the instant appeals.

FAO No. 449 of 2012:

9. Learned counsel appearing on behalf of the appellant in FAO No. 449 of 2012 argued that the accident was not outcome of the contributory negligence, but was the result of the rash and negligent driving of the offending truck by its driver, namely Shri Lala Ram alias Lal.

10. The argument of the learned counsel for the appellant is not tenable for the following reasons:

11. The claimants have specifically pleaded in the claim petition that the accident was outcome of contributory negligence, which fact has not specifically been denied by the respondents in the claim petition, thus, is held to be an admission on their part.

12. The final report under Section 173 of the Code of Criminal Procedure (hereinafter referred to as "CrPC") is on the record as Ext. RW-1/C, the perusal of which does disclose that the challan has been presented before the Court of competent jurisdiction against the diver of the offending truck as well as the motorcyclist, thus, is a case of contributory negligence.

13. The question is - what is contributory negligence? When the drivers of two vehicles involved in the accident have not taken due care and caution while driving their respective vehicles and have contributed in causing the accident, is contributory negligence.

14. The Apex Court in case titled as **Kamlesh and others versus Attar Singh and others** reported in **2015 AIR SCW 6158,** in para 8 has held as under:

> *"8. We have heard learned counsel for the parties and perused, inter alia, the evidence on record of Ram Parshad PW2 and Devender PW.3. The method and manner in which the accident has taken place leaves no room for doubt that it was a case of composite negligence of drivers of both the vehicles, that is the driver of Maruti car and driver of tempo. Though Police has registered a case against driver of the tempo Attar Singh and has filed a chargesheet but the same cannot be said to be conclusive. Though, Attar Singh has stated that it was in order to oblige the driver of the Maruti car, a case was registered against him. Be that as it may. It appears both the drivers have tried to save their liability. In such circumstances, the version of eye-witnesses, PW.2 and PW.3 assumes significance. The fact remains that car had dashed the tempo on the middle portion near footstep. Thus the method and manner in which the accident has taken place leaves no room for doubt that both the drivers were negligent. Man may lie but the circumstances do not is the cardinal principle of evaluation of evidence. No effort has been made by the High Court to appreciate the evidence and method and manner in which the accident has taken place. Both the aforesaid witnesses have stated Maruti Car was in excessive speed. However, it appears driver of tempo also could not remove his vehicle from the way of Maruti Car. Thus, both the drivers were clearly negligent. It appears from the facts and circumstances that both the drivers were equally responsible for the accident. Thus, it was a case of composite negligence. Both the drivers were joint "tort-feasors", thus, liable to make payment of compensation."*

15. The Apex Court in another case titled as **Meera Devi and another versus H.R.T.C. and others,** reported in **2014 AIR SCW 1709,** has laid down the similar principles of law. It is profitable to reproduce para 10 of the said judgment herein.

> *"10. To prove the contributory negligence, there must be cogent evidence. In the instant case, there is no specific evidence to prove that the accident has taken place due to rash and negligent driving of the deceased scooterist. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of common law cannot be applied in the present case. We are, thus, of the view that the reasoning given by the High Court has no basis and the compensation awarded by the Tribunal was just and reasonable in the facts and circumstances of the case."*

16. The Apex Court in the case titled as **Khenyei versus New India Assurance Co. Limited & others,**reported in **2015 AIR SCW 3169,** has laid down the same principles of law.

17. Applying the test and while going through the facts of the case and the record, it can be safely held that both the drivers have driven the offending vehicles rashly and negligently and the accident was outcome of contributory negligence.

18. The Tribunal, while making discussions in para 14 of the impugned award, has rightly decided issue No. 1, needs no interference.

19. Viewed thus, the appeal filed by the owner of the motorcycle, i.e. FAO No. 449 of 2012, merits to be dismissed.

FAO No. 33 of 2013:

20. The question to be determined in this appeal is – whether the amount awarded is inadequate? The answer is in the negative for the following reasons:

21. I have gone through the impugned award as well as the record and am of the considered view that the Tribunal has rightly assessed income of the deceased at ₹ 5,000/- per month, i.e. ₹ 60,000/- per annum, from all sources.

22. The deceased was a bachelor. Thus, the Tribunal has rightly made deductions to the extent of 50% towards his personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

23. Admittedly, the deceased was 21 years of age at the time of the accident. The multiplier of '15' was applicable in view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the Motor Vehicles Act, 1988 (hereinafter referred to as "MV Act"). However, the multiplier of '16' applied by the Tribunal is maintained.

24. Viewed thus, the Tribunal has rightly made the discussions in paras 15 to 18 of the impugned award. The amount awarded cannot be said to be inadequate in any way, is upheld accordingly.

25. Having said so, the appeal filed by the claimants, i.e. FAO No. 33 of 2013, deserves to be dismissed.

26. Having glance of the above discussions, the impugned award is upheld and both the appeals are dismissed.

27. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts after proper identification.

28. Send down the record after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Pushpa Devi & others .....Appellants-Plaintiffs.
Versus
Amro Devi and others .....Respondents-defendants.

RSA No.4323 of 2013.
Reserved on: 25th November, 2016.
Date of Decision : 2nd December, 2016.

Specific Relief Act, 1963- Section 5- Plaintiffs filed civil suit pleading that they are owners in possession of the shop – predecessor-in-interest of the defendants had asked the plaintiffs for one room – plaintiffs had permitted him to keep the material – he had not vacated the room – hence, the suit was filed seeking possession – the defendants pleaded that shop was joint family property and was allotted to the predecessor of the defendants – the suit was dismissed by the Trial Court – an appeal was filed, which was also dismissed- held in second appeal that the suit land is recorded to be in the joint ownership of the parties in the revenue record - the land was not partitioned by metes and bounds – Hindi translation of the document in Urdu was not proved and reliance could not have been placed upon the same – however, in absence of partition, plaintiffs were not entitled for any relief – appeal dismissed.(Para-8 to 12)

For the Appellants: Mr. Ajay Sharma, Advocate.
For Respondent No.1: Mr.Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Under the concurrently recorded renditions of both the learned Courts below, the suit of the plaintiffs stood dismissed, whereupon, theirs standing aggrieved, they through the instant appeal constituted herebefore concert to seek their reversal.

2. Briefly stated the facts of the case are that the land comprised in Khata No. 366min, Khatauni NO. 584 min, Khasra No.1724, measuring 0-02-56 hectares situated at Mohal and Mauza Haripur, Tehsil Dehra, District Kangra, H.P, is abadi deh and the plaintiff is also co-sharer of this land. The plaintiff Mangat Ram, predecessor-in-interest of the present appellants had his shop consisting of four rooms on the ground floor and two rooms on the first floor on the above said khasra No. 1724. Previously, it was only one shop single storied slate roofed which was owned and constructed by the father of the plaintiff, Shri Nathu Ram and after his death in family settlement, the shop was given to Mangat Ram, plaintiff. The total value of this shop was fixed as Rs.2400/- and the plaintiff paid Rs.800/- each to Hamir Chand and Minjroo, who were brothers of Mangat Ram. The plaintiff Mangat Ram became absolute owner of the shop in dispute. After getting the shop in the year 1980-81 the plaintiff converted the single storied shop in four rooms by giving partition walls and it was converted into four rooms and similarly second story was also raised where to rooms were constructed. Shri Hamir Chand was serving away and was residing with his family outside the State of H.P., who came back in the village in the year 1990 after his retirement alongwith his family and household articles. Since old joint house was small and was not having sufficient accommodation to keep the articles brought by Hamir Chand, predecessor-in-interest of the defendants, Hamir Chand requested the plaintiff to give the room in dispute to keep the material/articles brought by him after his retirement. The plaintiff agreed and

allowed Hamir Chand to keep the material in disputed room i.e. in one room of the first floor as shown by letters 'CDEF' in the map. The said Hamir Chand had agreed to vacate the accommodation after constructing his own house. The said Hamir Chand constructed his house in the year 1994-95, but even then he did not vacate the accommodation provided to him by Mangat Ram. The decree for possession of the room in question that is mentioned as 'CDEF' in the map in the first floor of the house has been sought.

3. The suit was contested by the defendants by filing written statement wherein preliminary objections of maintainability, cause of action and estoppel have been taken. On merits, it has been submitted that the shop in question was joint family property of Mangat Ram, Hamir Chand and Minjroo Ram, which on 7.6.1982 along with other joint houses has been partitioned in family settlement by owners i.e. Mangat Ram, Hamir Chand, Minjroo Ram and Bishni Devi wife of Minjroo Ram with the help and intervention of respectables of village. The settlement was reduced into writing signed by co-sharers. This family settlement was made to keep peace and harmony among brothers and to enjoy the joint family property. The shop was valued and share of Minjroo Ram amounting to Rs.800/- was given to him which was received by him. Since, 7.6.1982 the plaintiff and defendants are owners of the shop. This shop was earlier having one room below and one room on the 1st floor which after settlement was converted into four rooms so it could be shared by the parties. The plaintiff and Hamir Chand are owners of the shop in equal shares. No amount of Rs.800/- was paid to Hamir Chand. It is the plaintiff who had taken the ground floor of the shop from Hamir Chand on request. Therefore, dismissal of the suit is sought.

4. The plaintiffs/appellants herein filed replication to the written statement of the defendants/respondents herein, wherein, they denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiffs are entitled to the relief of possession, as prayed for? OPP
2. Whether the suit is not maintainable? OPD.
3. Whether the plaintiffs are estopped by their act, conduct and acquiescence from filing the suit? OPD
4. Whether the joint family property including suit property has been partitioned on 7.6.1982, in family settlement by predecessor of parties, as alleged? OPD.
5. Whether the plaintiffs are absolute owners of suit property? OPD.
6. Whether the defendants are co-sharers in the suit property? OPD.
7. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiffs/appellants herein. In an appeal, preferred therefrom by the appellants herein/plaintiffs before the learned first Appellate Court, the latter Court dismissed their appeal.

7. Now the plaintiffs/appellants herein have instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgement and decree by the learned first Appellate Court. When the appeal came up for admission on 21.07.2014, this Court, admitted the appeal instituted herebefore by the plaintiffs/appellants against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial question of law:-

1. Whether impugned judgments and decrees passed by Courts below in law stand vitiated on account of misreading and mis appreciating of oral and

documentary evidence with special reference of the statements of PW-1 to PW-5 and DW1 to DW4 and further Exts. PW/1 to Ex.PW5/A and DW2/A to DW1/A, thereby vitiating the impugned judgments and decrees?

Substantial question of Law No.1:

8. One Nathu had three sons,namely, Mangat Ram, predecessor-in-interest of the plaintiffs, Hamir Chand, predecessor-in-interest of the defendants and One Minjroo. The suit property stands located upon khasra No.1724. In the relevant revenue records, the suit property stands reflected to be in the joint ownership of the parties at contest, sequel, whereof is qua thereupon standing aroused the principle of joint tenancy wherewithin the trite legal nuance is held qua until its dismemberment occurs by metes and bounds, the recorded co-owners holding unity of title besides community of possession therein, whereupon any exclusive holding of possession by any of the co-owners of the jointly recorded suit property, renders his holding possession thereof to be construable to be possession also on behalf of the other recorded co-owners, thereupon he stands disabled to despite the factum of exclusivity of his possession, oust the legitimate claim qua joint possession thereof of other co-sharers besides any co-owner holding exclusive possession of joint property not holding any leverage to forestall other co-owners to beget its partition by metes and bounds.

9. Even if, assumingly, the defendants hold exclusive possession of the undivided suit property yet on anvil aforesaid with their possession thereupon in the capacity as co-owners along with the plaintiffs, would also frustrate the relief canvassed by them in their suit qua theirs holding entitlement to seek delivery of its possession vis-a-vis them unless of course on its standing partitioned by metes and bounds, it falls to their share whereupon on any resistance by the defendants to handover its possession to the plaintiffs, the latter would hold the facilitation to through the enjoined legal mechanism seek delivery of its possession from the defendants. The aforesaid inference visibly ousts the concert of the plaintiffs to through the instant appeal upset the concurrently recorded renditions of both the learned Courts below. Nonetheless, the learned Courts below under their concurrently recorded renditions had declined relief to the plaintiffs on the anvil of the defendants successfully proving the factum of Ex.Dx comprising a family settlement holding recitals qua a partition occurring inter se the litigating parties hereat qua the hitherto undivided suit property , whereupon, they concomitantly pronounced qua with the defendants holding exclusive title qua the suit property, it thereupon, hence non suiting the plaintiffs.

10. The original of Ex. Dx stands scribed in Urdu. For Ex. Dx, scribed in Urdu whereupon its contents were unreadable, except by a person who is well conversant in Urdu, enjoined the defendants to obtain an authentic translation thereof from a person well conversant in Urdu also they stood enjoined to lead into the witness box, the translator of Ex. Dx, who carried its translation from Urdu to Hindi whereupon, the translated version of Ex. Dx wasboth readable besides admissible in evidence. The aforesaid injunction cast upon the defendants for theirs thereupon efficaciously proving Ex. Dx stands uncomplied by them. Contrarily only a photo copy of its Hindi translation stood adduced in evidence. The photostated copy of the Hindi translation of Ex. Dx neither discloses therein the name of the translator who carried its apposite translation nor obviously the person who carried the translation of Ex. Dx besides made its translation from Urdu to Hindi stood led into the witness box by the defendants, for facilitating him to during his testification on oath unravel qua his carrying out an authentic Hindi translation of Ex. Dx. The effect of the aforesaid omission of the defendants, in theirs thereupon efficaciously proving Ex. Dx besides its photostated Hindi translation rendered Ex. Dx besides its photostated Hindi translation to be both unreadable and inadmissible in evidence whereas both the learned Courts below visibly misdirected themselves in theirs concurrently imputing sanctity to Ex. Dx also to its photostated Hindi translation, whereupon they inaptly concluded qua with the suit property on its standing subjected to partition by metes and bounds inter se the parties at contest, its falling to the exclusive ownership of the defendants thereupon the suit the plaintiffs warranting dismissal.

11. Be that as it may, with efficacious proof not standing adduced by the defendants in the manner aforesaid qua the recitals embodied in Ex. Dx yet thereupon the suit property is to be construed to be joint besides undivided inter se the litigating parties whereupon exclusivity of possession thereon of the defendant would not till its dismemberment by metes and bounds, facilitate the plaintiffs to reclaim its possession from the defendants.

12. The upshot of the above discussion is though with this Court concluding qua both the learned Courts below not properly appraising the import of Ex. Dx also in theirs imputing sanctity to it, theirs committing a gross error, nonetheless, for reasons aforesaid the suit of the plaintiff would not succeed. Consequently, the substantial question of law is answered in favour of the plaintiffs/appellants herein and against the defendants/respondents herein.

13. Though, In view of above discussion, the present Regular Second Appeal is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are maintained and affirmed. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, JUDGE.

Rattan Chand (since dead) through LRs & Anr. ...Appellants.

Versus

Julfi Ram ...Respondents.

RSA No.110 of 2005.
Reserved on: 23.11.2016.
Decided on: December 2, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendants threatened to take forcible possession of the same – the suit was opposed by the defendants by pleading that a portion of the suit land was purchased by defendant No.1 vide agreement dated 14.11.1984- defendant No.1 is in possession of the portion of the suit land and has become owner by adverse possession- the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed – held in second appeal that the agreement shows that the father of the minor plaintiff had agreed to sell the suit land to the defendant No.1 for a sale consideration of Rs.2,000/- - the father of the plaintiff was not competent to alienate the property of the plaintiff and the agreement will not bind the plaintiff- Besides, it was established by the Revenue Record that plaintiff is in possession – defendants had not led sufficient evidence to rebut the presumption of the correctness attached to the revenue record- the suit was rightly decreed by the Appellate Court- appeal dismissed.(Para-7 and 8)

For the Appellants: Mr.Anand Sharma, Advocate.
For the Respondent: Mr.Ashwani K.Sharma, Sr.Advocate with Mr. Nishant Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal stands directed against the impugned rendition recorded by the learned first appellate Court whereby the latter Court reversed the pronouncement made by the learned trial Court dismissing the suit for injunction preferred there-before by the plaintiff.

2. The facts necessary for rendering a decision on the instant appeal are that the plaintiff is owner in possession of the land comprised in Khata No.13 min, Khatauni No.13 min, Khasra No.279, measuring 0-10-57 hectares as per missal hakiat for the year 2000-2001, situated in Tika Grond, Mauza Kanger, Tehsil Barsar, District Hamirpur, H.P. (herein-after referred to as 'the suit land'). The defendants have no right, title or interest in the suit land. They are strangers. On 17.5.2002 when the plaintiff was ploughing the suit land, the defendants

appeared there and objected to it. They threatened that they will take forcible possession of the suit land and not allow him to plough the same. They also threatened to cut valuable trees from it due to which the plaintiff has filed the instant suit for permanent prohibitory injunction restraining the defendants from interfering in the possession of the plaintiff over the suit land.

3. The suit of the plaintiff was resisted and contested by the defendants. In their written-statement they have taken preliminary objection inter alia of cause of action, maintainability, estoppel and the plaintiff having no locus standi to file the present suit. On merits it is alleged by the defendants that the total area of the suit land is 0-10-57 hectare and out of this land the defendant No.1 has purchased the land measuring 0-0768 hectares vide agreement of 14.11.1984 and since 14.11.1984 he is in continuous possession of the land purchased by him i.e. 2 kenals out of the suit land and now he has become owner of this 2 kanal of land by way of adverse possession. It is further alleged that after the agreement in question the father of the plaintiff had fixed a boundary on the spot with the help of a Patwari. On this ground it is alleged that the suit of the plaintiff is not maintainable in the present form.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties in contest:-

(i) Whether the plaintiff is the owner in possession of the suit land as alleged? OPP

(ii) Whether the plaintiff is entitled to the injunction prayed for? OPP

(iii) Whether the plaintiff is entitled to a decree for possession as claimed? OPP

(iv) Whether the suit is not maintainable in the present form? OPD

(v) Whether the plaintiff is estopped from filing the suit by his act and conduct? OPD

(vi) Whether the plaintiff has the locus-standi to sue? OPP

(vii) Whether the plaintiff has a cause of action? OPP

(viii) Whether the defendants are entitled to special costs u/s 35A CPC as claimed, if so, their quantum? OPD

(ix) Whether the defendant No.1 has become owner of the suit land by way of adverse possession as alleged. If so, its effect? OPD.

(x) Whether the suit has not been properly valued for the purpose of the court fee and jurisdiction ? OPD

(xi) Whether the defendant No.1 purchased the land vide agreement dated 14.11.84 as alleged. If so, its effect? OPD

(xii) Relief.

5. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court dismissed the suit of the plaintiff whereas the learned First Appellate Court proceeded to allow the appeal preferred before it by the plaintiff.

6. Now the appellants/defendants have instituted the instant Regular Second Appeal before this Court, assailing the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 21.3.2005, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

1. Whether the findings recorded by the learned lower Appellate Court are absolutely perverse and based on complete misreading of the judgment and decree passed by the learned trial Court?

2. Whether the suit filed by the plaintiff was time barred?

3. Whether defendant/appellant was entitled to protect his possession under Section 53-A of the Transfer of Property Act more especially when the agreement dated 14/11/1984 had been duly proved on record an don the

basis of this agreement the defendant/appellant had been put in possession over the suit land.

4. Whether the findings recorded by the learned Appellate Court are otherwise perverse being based on complete misreading and misappreciation of the pleadings and exhibited documents on record?

Substantial questions of law:

7. Ex.DW-2/A stood executed on 14.11.1984 qua the suit land inter-se father of the then minor plaintiff with the defendants. Thereunder the suit land stood agreed to be alienated to defendant No.1. Ex.DW-2/A also therewithin holds a recital qua the suit property standing agreed to be sold for a sale consideration of Rs.2,000/-by the father of the then minor plaintiff vis-à-vis the defendant No.1 also it holds recitals qua the sale consideration standing received thereat on behalf of the then minor thereat by the latter's father. A recital stands also encapsulated therein qua the father of the plaintiff undertaking therein qua on the plaintiff attaining majority the latter executing a sale deed qua the suit land besides it holds a recital qua his holding responsibility qua Julfi Ram on attaining majority his executing a sale deed with the defendant No.1 qua the suit land. In addition recitals stand embodied therein qua on the plaintiff refusing to execute the sale deed with defendant No.1 qua the suit land thereupon the father of the plaintiff undertaking to alienate vis-à-vis defendant No.1 3 kenals of land held in his ownership. The factum of formidable proof emanating qua occurrence of signatures of the father of the plaintiff and of the defendants on the relevant agreement to sell the suit land embodied in Ex.DW-2/A stands unflinchingly evinced besides unearthed from the relevant apposite material. However proof of occurrence thereon of signatures respectively of the father of the plaintiff and of the defendants would not ipso-facto beget an inference of devolution of interest of the minor in the suit property standing validly bestowed upon the defendant conspicuously when at the time contemporaneous to its execution the plaintiff thereat was a minor whereupon emanation stood enjoined to sprout of the relevant evidence holding vivid portrayals therein qua the father of the plaintiff while executing qua the suit property Ex.DW-2/A with the defendants his not thereby harming or jeopardizing the interest of the minor in the suit property rather in his executing DW-2/A with the defendants his ensuring qua thereupon the welfare besides the benefit of the minor standing facilitated. However the aforesaid evidence is amiss. In aftermath lack of the aforesaid evidence constrains a conclusion qua dehors proof standing adduced qua occurrence of signatures thereon of the father of the plaintiff and of the defendants not ipso facto proving the imperative factum of the father of the then minor plaintiff in his executing DW-2/A with the defendants his ensuring qua thereupon the benefit besides interest of the then minor plaintiff in the suit property standing facilitated. Significantly this Court while standing seized of DW-2/A which stood executed at a stage when the plaintiff was a minor stands enjoined to in the capacity of parens patriae vis-à-vis the then minor plaintiff ensure the paramount factum qua its execution not standing gripped with any vice of the minor's interest in the suit property at the relevant stage of its execution standing neither compromised nor adversely affected whereas for reasons aforesaid unflinching evidence for sustaining the aforesaid factum being amiss, prods this Court to reinforcingly with accentuated vigor conclude qua Ex.DW-2/A standing stained with a colour of invalidity whereupon no bestowment of title occurred thereunder vis-à-vis the defendant.

8. Be that as it may even if assumingly dehors the aforesaid inference as stands erected by this Court the defendants for repulsing the apposite endeavor of the plaintiff was enjoined to prove the factum of his holding possession upon the suit property. Even though the defendant No.1 canvasses that in pursuance to Ex.DW-2/A his holding possession of the suit property whereupon he concerts to canvass qua his holding entitlement to receive the benefit of section 53(A) of the transfer of the property Act, espousal whereof for the reasons afore-stated stands blunted yet dehors the vigor of his espousal qua the aforesaid facet getting smothered, nonetheless he stood enjoined to prove by emphatic evidence qua his holding possession of the suit property. However the relevant documentary evidence comprised in copy of missal hakiat bandobast borne on Ex.P-1, Exhibit whereof pertains to the suit land rather holds visible

reflections qua the plaintiff holding possession of the suit property, reflections whereof when hold a presumption of truth hence enjoined the defendants to by adducing cogent evidence dislodge the aforesaid presumption. The defendants in making the aforesaid concert have merely relied upon oral evidence besides relying upon an acquiescence made by the plaintiff in his cross-examination qua his sighting the defendants ploughing the suit land. However therefrom it is unbefitting to conclude qua the presumption of truth carried by the apposite reflections occurring in the apposite revenue record standing dislodged especially when the plaintiff while making the aforesaid acquiescence has omitted to make therein a precise communication qua the defendants ploughing the suit land whereas for the aforesaid acquiescence to give capitalization to the espousal of the defendants qua thereupon theirs standing concluded to hold possession of the suit land an acquiescence holding a precise embodiment therein qua the defendants ploughing the suit land stood enjoined to emanate from the plaintiff whereas his deposing nebulously qua the aforesaid facet constrains an inference qua the nebulously worded acquiescence made by the plaintiff qua his sighting the defendants to plough land being un-relatable to the suit land rather it being relatable to some other land whereupon with hence the presumption of truth enjoyed by the apposite revenue records remained un-eroded rendering reliance thereupon for making a conclusion qua the plaintiff holding possession of the suit land being a tenable ensuing sequel therefrom.

9. Accordingly, there is no merit in the instant appeal and the same is dismissed. Substantial questions of law answered in favour of the plaintiff accordingly. Impugned judgment is maintained and affirmed. All pending application(s) shall also stand disposed of. No costs. The records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Reliance General Insurance Company Ltd. .....Appellant
Versus
Smt. Shiv Rajia & others .....Respondents

FAO No. 429 of 2012
Decided on : 02.12.2016.

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs.4,500/- 1/3rd was to be deducted towards personal expenses and loss of source of dependency would be Rs.3,000/- per month- multiplier of 12 is applicable – thus, claimants are entitled to Rs.3000 x 12 x 12= Rs.4,32,000/- under the head loss of dependency- claimants are also entitled to Rs.25,000/- under the head 'loss of consortium and Rs.25,000/- under the head 'loss of love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs.4,82,000/- along with interest @ 7.5% per annum. (Para-6 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

For the Appellant : Mr. Jagdish Thakur, Advocate.
For the Respondents: Mr. Rakesh Thakur, Advocate, for respondents No. 1 & 2.
Ms. Neelam Kaplas, Advocate vice Mr. J.R. Poswal, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Mr. Rakesh Thakur, Advocate, stated at the Bar that claimant-respondent No. 2 has attained the age of majority. His statement is taken on record. Accordingly, guardian is discharged. Registry to make necessary entries in the cause title.

2. Subject matter of this appeal is the award dated 21st April, 2012, made by the Motor Accident Claims Tribunal-1 Solan, Camp at Nalagarh, H.P. (hereinafter referred to as 'the Tribunal') in Claim Petition No. 12NL/2 of 2009, titled as **Smt. Shiv Rajia & others** versus **Shri Munish Kumar & another,**whereby compensation to the tune of 6,38,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition, came to be granted in favour of the claimants and the appellant-insurer was saddled with liability (for short, "the impugned award").

3. The claimants and insured-owner-cum-driver have not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to them.

4. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

5. Learned Counsel for the appellant-insurer argued that the factum of insurance is admitted and insurer is liable to pay the compensation, but the Tribunal has fallen in an error in assessing the compensation and applying the multiplier.

6. The claimants have specifically pleaded in para-6 of the claim petition that deceased was earning Rs. 4,500/- per month and as per the copy of Pariwar Register (Ext. P-A), his age was 47 years at the time of accident.

7. Accordingly, I deem it proper to hold that the monthly income of the deceased was Rs. 4,500/-.

8. 1/3rd is required to be deducted towards the personal expenses of the deceased, while keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.** Accordingly, after deducting 1/3rd amount, it is held that the claimants have lost source of dependency to the tune of Rs. 3,000/- per month.

9. The Tribunal has fallen in an error in applying the multiplier of '14'. The multiplier of '12' was applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in view of the judgments, *supra* andthe judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

10. Thus, the claimants are held entitled to compensation to the tune of Rs. 3,000 x 12 x 12 = Rs. 4,32,000/- under the head 'loss of dependency'.

11. The compensation amount awarded by the Tribunal under the other heads is not challenged. Accordingly, the amount awarded under the other heads is maintained.

12. Accordingly, the claimants are held entitled to total compensation under the following heads:

1.	Loss of dependency	Rs. 4,32,000/-
2.	Loss of consortium	Rs. 25,000/-
3.	Loss of love and affection and funeral expenses	Rs. 25,000/-
	Total:	Rs. 4,82,000/-

13. The aforesaid amount of compensation shall carry interest @ 7.5% per annum from the date of filing of the claim petition.

14. The Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts.

15. The excess amount, if any, be refunded in favour of the appellant-insurer through payees' account cheque.

16. Accordingly, the impugned award is modified and the appeal is disposed of.

17. Send down the records after placing a copy of the judgment on the file of the claim petition.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. & another .....Appellants-respondents.
Versus
Shanti Devi & others .....Respondents/Petitioners.

RFA No. 379 of 2008.
Reserved on: 21.11.2016.
Date of Decision: 2nd December, 2016.

Land Acquisition Act, 1894- Section 18- Land of the petitioner was acquired for the construction of Karara-Chandi Road – land Acquisition Collector assessed the value of cultivable land as Rs.4,000/- per biswa and value of ghasni land as Rs. 500/- per biswa- a reference was made and the compensation was enhanced to Rs.10,000/- per biswa- held in appeal that the exemplar sale deed showed that one biswa of land was alienated for Rs.6,000/- large piece of land was acquired, whereas, exemplar sale deed was regarding one biswa of land, therefore, 20% deduction has to be made from the sale consideration shown in the exemplar sale deed – appeal partly allowed and the value assessed as Rs.6,000/- per biswairrespective of the category of the land-20% amount ordered to be deducted from this amount. (Para-2 to 5)

For the Appellants: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondents: Mr. R. G. Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge .

The instant appeal stands directed by the State of Himachal Pradesh against the rendition recorded by the learned Reference Court on 23.08.2008 in Land Reference Petition No. 12-S/4 of 2006, whereby, it enhanced compensation amount at a uniform rate of Rs.10,000/- per biswa qua the lands of the respondents herein/landowners as stood brought to acquisition.

2. The land of the landowners stood brought to acquisition for construction of Karara Chandi road. The apposite notification for the aforesaid purpose stood issued on 1.09.2003. The land Acquisition Collector had in his relevant award assessed compensation qua the lands of the landowners/respondents herein as stood brought to acquisition in an amount computed at Rs. 4000/- per biswa qua cultivable land whereas he assessed qua ghasni land compensation amount @ of Rs. 500/- per biswa. However, the learned Reference Court under its impugned rendition assessed compensation amount at a uniform rate of Rs.10,000/- per biswa for all categories of land as stood brought to acquisition. In making the aforesaid assessment, the learned reference Court had relied upon a sale exemplar executed on 26.08.2002 whereupon land

holding an area of one biswa stood alienated for a sale consideration of Rs.6000/-, significantly with the land embodied therein standing located in a Mohal/village akin to the location of the lands of the respondents herein as stood brought to acquisition. Also given the factum qua the issuance of the apposite notification for bringing to acquisition the lands of the landowners for the notified purpose occurring in the year 2003 whereas the sale deed aforesaid as stood relied upon by the learned Reference Court standing executed prior thereto, renders it to beget satiation of the relevant parameter of its execution occurring in proximity in time vis-a-vis the issuance of the apposite notification whereupon the reliance as stood placed thereupon is tenable. Also, with no evidence standing adduced by the respondents herein in portrayal qua the location of the land comprised in the sale exemplar of 26.08.2002 holding no proximity in location vis-a-vis the lands of the landowners as stood brought to acquisition begets the sequel qua hence the principle of proximity in location angle inter se the lands occurring in the apposite sale exemplar vis-a-vis the lands of the respondents herein standing satiated whereupon the reliance as stood placed thereupon was tenable. However, in the learned Reference Court contrarily computing the market value borne by the relevant lands at Rs.10,000/- per biswa merely for their relevant acquisition occurring a year subsequent to the execution of the relevant sale exemplar, is grossly unwarranted, significantly since the relevant sale exemplar satiated all the relevant parameters for reliance standing placed thereupon hence only the amount embodied therein constituted the figure wherefrom the relevant assessment of compensation qua the lands of the respondents stood enjoined to occur besides an exorbitant hike standing meted thereto bereft of any sound, firm and credible evidence warrants disapprobation from this Court.

3. Be that as it may, the learned Reference Court had assessed a uniform rate of compensation for all categories of land, assessment whereof does not hold any palpable display of it suffering any vitiation, imperatively when all the distinct categorizations besides classifications borne by all the lands as stood brought to acquisition evidently on theirs standing acquired are all put to common use also when on their acquisition all lands holding distinct classifications evidently stand utilized for a purpose common to each other whereupon their distinct categorization(s) looses its apposite significance.

4. However, the area of land comprised in the relevant sale exemplar as stood relied upon by the learned reference Court is minimal or holds an area of one biswa, whereas, the lands of the landowners holds vis-a-vis it immense tract(s) of land thereupon, it was incumbent upon the learned Reference Court to mete therefrom some percentum of deduction for its thereupon assessing compensation qua the lands of the landowners/respondents herein, yet with its making the relevant omission aforesaid has begotten the sequel of its committing an illegality, whereupon, this Court proceeds to mete a deduction of 20% from the sale consideration borne in the relevant sale exemplar of 26.08.2002.

5. For the foregoing reasons, the instant appeal is partly allowed and the impugned award is modified to the extent that after meteing 20% deduction from Rs.6000/- per biswa, assessed as compensation amount qua all categories of land, thereupon qua all categories of lands as stood brought to acquisition, the sum arrived therefrom shall constitute the compensation amount qua all the categories of lands of the landowners/respondent herein as stood brought to acquisition. It is clarified that qua thereupon all the statutory benefits shall be levied in accordance with law. All pending applications stands disposed of.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

Subhash Chand ..Appellant/defendant.

Versus

Bhim Sen and another. ..Respondents/plaintiffs.

RSA No. 310 of 2015.
Reserved on : 22/11/2016
Date of decision: 02/12/2016

Specific Relief Act, 1963- Section 34- Plaintiffs sought declaration that they are owners in possession of the suit land and the entry showing the defendant to be the owner is wrong, illegal, null and void as the defendant was never inducted as a tenant – the defendant pleaded that he was inducted as a tenant on the payment of gallabatai and has become the owner on the commencement of H.P. Tenancy and Land Reforms Act- the suit was decreed by the Trial Court- an appeal was filed, which was allowed – held in second appeal that the plaintiffs had purchased the land in the year 1966 from predecessor-in-interest of the defendant- defendant was a co-owner and therefore cannot be a tenant – the version the defendant was paying gallabatai was not proved – the order was passed in the absence of the plaintiffs and would not bind them – the suit was rightly decreed- appeal dismissed.(Para-7 to 10)

For the appellant: Mr. Anil God, Advocate.
For the respondent: Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J:

The instant appeal stands directed against the impugned judgement and decree of the learned Additional District Judge (III), Kangra at Dharamshala, Circuit Court at Baijnath, District Kangra, H.P., whereby she affirmed the rendition of the learned Civil Judge (Jr. Division), Baijnath, District Kangra, Himachal Pradesh. The defendant standing aggrieved by the concurrently recorded renditions of both the learned Courts below, concert through the instant appeal constituted before this Court, to beget reversal of the judgements and decrees of both the Courts below.

2. The facts necessary for rendering a decision in the instant appeal are that plaintiffs sought declaration to the effect that they are owners of land comprising Khata No. 204, Khatauni No. 275, Khasra No. 223, measuring 0-11-77 hectares, situated at Mohal Chogan, Mouza Bir, Tehsil Baijnath, District Kangra, as per Jamabandi for the year 2007-08 (hereinafter referred to as the suit land) and the entry showing the defendant as owner is wrong, illegal, null and void and not binding upon them as the same were recorded on the basis of mutation No. 486 of 18.08.1999 whereby he was declared to be owner under the H.P.Tenancy and Land Reforms Act. It is contended that defendant was never inducted as tenant over the suit land by the plaintiffs nor their predecessors. Hence, the defendant be restrained by way of permanent prohibitory injunction. Further it is contended that the suit land was purchased by the plaintiffs from father of the defendant to the extent of 333310/63906760 share from suit land out of total land measuring 05-54-59 hectares. It is contended that plaintiffs were living in Punjab due to his service and during settlement joint land was partitioned though they were never summoned and partition was conducted behind their back in which Khasra No. 467 was given to the plaintiffs and they were put in possession which is also evident from the jamabandi. Lateron in 1994-95 when Iatemaal was done and said Khasra No. 467 was given new Khasra No. 223 and the defendant was wrongly shown as tenant and on the basis of this wrong entry defendant got mutation No. 486 attested conferring proprietary rights under H.P.Tenancy and Land Reforms Act. It is contended that this fact came to their knowledge in the month of November, 2009. Thereafter, they asked the defendant to get the wrong entries corrected in the revenue record. He paid no heed to their request. Hence, the present suit.

3. The suit was contested by defendant. He filed written statement, wherein he raised preliminary objections about maintainability of the suit and cause of action, limitation, estoppel and locus standi. On merits, it is averred that he is coming in possession of the suit land even prior to 1971. However, his name was got deleted by the plaintiffs in the revenue record but he continued with possession over the suit land without any interruption. Thereafter, consolidation took place in the village in the year 1994-95 and on his application of 25.11.1995 he was recorded as gair marusi and he has been paying lagan in the shape of galla batai to the

plaintiff and thereafter he was conferred with proprietary rights under H.P.Tenancy and Land Reforms Act and mutation No. 486 dated 8.8.1999 was also attested in this behalf and as such he has now become absolute owner of the suit land. However, the factum of purchasing the land from his father is admitted. It is also averred that the plaintiff No.1 and father of plaintiff No.2 themselves inducted him as tenant over the suit land since 1971 and as such he has rightly been recorded as tenant in the revenue record, as such, the question of taking forcible possession of the suit land does not arise at all. All other contents of the plaint are denied and a prayer is made for dismissal of the suit.

4. On the pleadings of the parties, the trial Court struck following issues inter-se the parties at contest:-

> 1. Whether the plaintiffs are owners of the suit land comprised in Khata No. 204 min, Khatauni No. 275, Khasra No.223 leand measuring 0-11-77 hects situated at Mohal Chogan, Mauza Bir, Tehsil Baijnath, District Kangra, H.P., as prayed for? OPP.
>
> 2. Whether the revenue entry showing the defendant as owner in possession of suit land are illegal, null and void and is not binding upon to the plaintiffs, as alleged for? OPP.
>
> 2A. Whether the entry showing the defendant tenant over the suit land is made at the back of the plaintiffs and as such is wrong, null and void ? OPP.
>
> 3. Whether mutation No. 486 dated 18.08.1999 showing the defendant as tenant over the suit land is wrong, null and void, as alleged? OPP.
>
> 4. Whether the plaintiff is entitled to the relief of permanent and prohibitory injunction, as prayed for?
>
> 5. Whether the plaintiff is entitled for the possession of the suit land, as prayed for? OPP.
>
> 6. Whether the defendant was conferred with proprietary rights under Section 104(3) as per H.P.Tenancy and Land Reforms Act, as alleged? OPD.
>
> 7. Whether the suit of the plaintiff is not maintainable in the present form? OPD.
>
> 8. Whether the plaintiff has no cause of action against the defendant? OPD.
>
> 9. Whether the plaintiff is estopped by his act and conduct to file the present suit? OPD.
>
> 10. Whether the plaintiff has no locus standi to sue? OPD.
>
> 11. Whether the suit is barred by limitation? OPD.
>
> 12. Relief.

5. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the plaintiffs besides the learned Additional District Judge, affirmed the findings of the learned trial Court.

6. Now the defendant/appellant herein has instituted before this Court the instant Regular Second Appeal wherein he assails the findings recorded in its impugned judgment and decree by the learned first Appellate Court. When the appeal came up for admission on 8.7.2015, this Court admitted the appeal on the hereinafter extracted substantial questions of law:-

> "1. Whether both the learned Courts below failed to appreciate that the suit filed by the respondent/plaintiff is barred by limitation?
>
> 2. Whether the learned trial Court erred in allowing application under Order 14 Rule 5 CPC and issue No. 3 was amended and issue 2(A) was framed additionally without amending the original suit?

3. Whether the Court below has misinterpreted the oral as well as documentary evidence placed on record?

4. Whether the learned courts below has erred in disbelieving the defence as set up by the present appellant that by virtue of Section 104(3) of the H.P.Tenancy and Land Reforms Act, he has become owner of said land?

5. Whether the adverse inference was received to be inferred against the defendant, if the respondents/plaintiffs have failed to appear at the time of correction of revenue record and the Ld. Courts below have wrongly presumed that same is without jurisdiction and appellant/defendant was recorded as "Gair Marusi"?

6. Whether the learned trial Court had jurisdiction to entertain the suit filed by the present respondents/plaintiffs?

Substantial questions of law.

7. Evidently, the plaintiffs purchased the suit land in the year 1966 from the predecessor in interest of the defendant whereupon they acquired co-ownership alongwith them qua the suit land. However, though with the plaintiffs' acquiring title qua the suit land as co-owners thereon alongwith the defendant, yet the latter on the anvil of revenue entries purportedly depicting him to be holding tenancie(s) upon the suit land hence canvassed qua his by statutory operation of the mandate of Section 104(3) of H.P.Tenancy and Land Reforms Act acquiring absolute title thereto. With the factum of the plaintiffs' holding co-ownership qua the suit land alongwith the defendant thereupon they alongwith the defendant held unity of title besides community of possession with him qua every inch of land borne thereon. The espousal of the defendant qua his holding possession of the suit land as a tenant under the plaintiffs' would be erosive of the salient cannon embodying the principle of joint tenancy wherewithin a fiat aforesaid stands encapsulated. Even if assumingly the aforesaid salient nuance embodying the principle of joint tenancy may stand eroded by categorical depictions emanating from the apposite revenue records personificatory qua one of the co owners qua his rights as a co-owner in the undivided suit land inducting the other co-owner(s) as tenant(s) thereon personifications whereof would erupt from the apposite revenue records reflecting qua one of the co-owners vis-à-vis the other co-owner(s)' share holding it as a tenant on payment of rent in cash or in kind whereupon a construction would stand erected qua the apposite relationship of landlord and tenant standing established inter se co-owners'.

8. In the endeavour aforesaid the defendant has canvassed qua his tendering 'galla batai' to the plaintiff through Shesh Ram, tendering whereof stands espoused to hence connote qua its sustaining the factum of an apposite relationship of a landlord and tenant coming into existence inter se the parties at contest hereat yet with the defendant not adducing any receipt qua his tendering 'galla batai' to the plaintiffs through Shesh Ram does belittle his espousal qua his thereupon holding the share of the plaintiffs in the suit land as a tenant under them.

9. Be that as it may, the defendant had contended qua with an apposite affirmative order standing recorded vis-à-vis him on his application comprised in Ext.DX whereupon mutation No. 486 of 18.08.1999 stood attested in sequel whereto the apposite substitution(s) in the relevant records stood effected qua him rendering him hence to be construable to be holding the share of the plaintiffs' in the joint suit land as a tenant under them whereupon he espouses qua statutory vestment of title standing automatically bestowed upon him qua the suit land. However, the aforesaid submission would hold vigour only when the revenue officer concerned, preceding his recording the apposite order on the application of the defendant comprised in Ext.DX, his eliciting the participation of the plaintiffs'. However, evidently with the order pronounced upon Ext.DX remaining unpreceded by the revenue officer concerned eliciting the participation of the plaintiffs' in the relevant proceedings hence it is construable to stand pronounced behind the back of the plaintiffs also thereupon the plaintiffs are to be construed to stand condemned unheard whereupon an inference is erectable qua in the making of the apposite order recorded by the revenue officer concerned on the application of the defendant comprised in

Ext.DX, it standing stained with a vice of its infracting the rule of audi alteram partem whereupon no sanctity is imputable thereto.

10. For reasons aforesaid this Court concludes with aplomb of the judgements and decrees of both the Courts below standing sequelled by theirs appraising the entire evidence on record in a wholesome and harmonious manner apart therefrom it is obvious that the analysis of material on record by the learned Courts below not suffering from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather they have aptly appreciated the material available on record. I find no merit in this appeal, which is accordingly dismissed and the concurrently recorded judgments and decrees of both the Courts below are maintained and affirmed. Substantial questions of law stand answered against the defendant. Decree sheet be prepared accordingly. All pending applications stand disposed of accordingly. No costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sunil Kanotra. …Petitioner.

Versus

Indian Oil Corpn and others. …Respondents.

Arbitration Case No. 44/2008
Decided on: 2.12. 2016

Arbitration and Cancellation Act, 1996- Section 34- The Objector had received the entire amount awarded by the Arbitrator, therefore, objections to the arbitration award are not maintainable- objections dismissed. (Para-1 to 3)

Case referred:
Pooran Chand Nangia vs. National Fertilizers Ltd; (2003) 8 SCC 245

For the Petitioner: Mr. Suneet Goel, Advocate.
For the Respondents: Mr. K.D. Sood, Sr. Advocate with Ms. Ranjana Chauhan, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge(oral)**:**

When the case was taken up for hearing today, learned counsel for the respondents, questioned the very maintainability of the objections against the award of the Arbitrator. He drew my attention to decision of the Hon'ble Supreme Court in ***Pooran Chand Nangia*** vs. ***National Fertilizers Ltd***; (2003) 8 SCC 245, wherein it has been held that once the person concerned/contractor has received the amount, which was due to him under the award and thereby submitted to the award unequivocally and accepted the same without reservation, it is not open to him to challenge the same. If he desired to challenge the award, he should have reserved the right to do so. The relevant observation reads thus:

> "[3] So far as the first question is concerned, it is not disputed that the appellant had received the money which was due to him under the award and once the appellant had submitted to the award unequivocally and without reservation, it is not open to him to challenge the award. We have looked into the record and find that the appellant had submitted unequivocally to the jurisdiction of the Arbitrator. He also accepted the awarded amount without any reservation. Had the appellant desired to challenge the award, he could have reserved his right to do so, but no such reservation was made in the letters sent by him. In this view of the matter, there remains no manner of doubt

about the fact that the appellant had submitted to the award and it does not lie in the mouth of the appellant to challenge the award. For these reasons, we reject the first argument of the learned counsel for the appellant."

2. In the instant case also, the parties are *ad idem* that the petitioner had received the entire amount before filing the instant petition/objections and has not reserved his right to challenge the award. Therefore, in such circumstances, he cannot be permitted to agitate that he is entitled to the claims, which have been disallowed by the Arbitrator after having accepted the money due under the award without demur or protest at the relevant time.

3. In the given circumstances and following the ratio laid down by the Hon'ble Supreme Court in ***Pooran Chand Nangia's*** case (supra), the instant application under section 34 of the Arbitration and Conciliation Act, 1996 is clearly not maintainable and the same is accordingly dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR.JUSTICE SURESHWAR THAKUR, J.

The Secretary (PWD) to the Government of Himachal Pradesh and another …Appellants

Versus

Chaman Lal …Respondent.

RFA No. 371 of 2011
Reserved on : 17.11.2016
Date of decision: 02/12/2016

Land Acquisition Act, 1894- Section 18- The award pronounced by Reference Court was assailed before the High Court – appeal was disposed of in RFA no.44 of 2009- the award in the present case has arisen from the common notification- the award was common in the present appeal and in RFA no.44 of 2009- therefore, the present appeal disposed of in terms of RFA No.44 of 2009. (Para- 1 to 4)

For the appellants: Mr. Vivek Singh Attri, Dy. A.G.
For the respondent: Mr. Ranvir Chauhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (Oral)

The instant appeal stands directed against the impugned award recorded by the Reference Court in Land Reference No. 11-S/4 of 2007 whereby the learned Reference Court assessed compensation qua the lands of the land owner in the manner as stands reflected therein. The learned counsel appearing for the respondent has placed on record a judgement recorded by this Court in RFA No. 44 of 2009, verdict whereof stands submitted by him to arise from an award recorded by the learned Reference Court qua a notification analogous inter se the land owners therein vis.a.vis the respondent land owner herein besides he submits qua thereupon an award common to the land(s) of the land owners in RFA No. 44 of 2009 vis.a.vis. the respondent land owner herein standing pronounced by the Land Acquisition Collector concerned, lastly he contends qua the learned Reference Court pronouncing a common award inter se the land owners therein vis.a.vis respondent land owner(s) herein whereupon he contends qua the verdict recorded in RFA No. 44 of 2009 while holding attraction with aplomb hereat warrants its standing revered by this Court. The aforesaid submission warrants its standing countenanced by this Court conspicuouslywith this Court, while standing seized of RFA No. 44 of 2009 which stood preferred herebefore by the land owners against the award pronounced by the learned Reference Court qua the lands of the appellants therein whose lands alike the land of the respondent herein stood acquired under a common notification also when thereupon a common

award stood pronounced by the Land Acquisition Collector concerned besides when the learned Reference Court pronounced a common verdict on the apposite reference petition(s) constituted therebefore by the aggrieved land owners wherefrom amongst RFA No 44 of 2009 arose. As a corollary, with this Court while adjudicating RFA No. 44 of 2009 it enhancing compensation amount vis.a.vis. land owners therein in a sum higher than the sum which stood assessed as compensation by the learned Reference Court thereupon with conclusivity standing fastened qua the verdict recorded by this Court in RFA No. 44 of 2009 also thereupon the respondent herein, hence stands entitled to assessment of compensation qua his acquired lands at par therewith. Even if the respondent herein has not preferred cross-objection herebefore against the impugned award of the learned Reference Court nonetheless with the provisions of Order XLI, Rule 33 of the CPC clothing this Court with a plenary jurisdiction to pass or make such further and other decree or order as the case may require. In sequel thereof with the provisions engrafted in Order XLI, Rule 33 of the CPC vesting jurisdiction in this Court to, even in the absence of any of the respondents in the memo of parties herebefore omitting to file any cross appeal or cross-objections ventilating therein their grievance against the award impugned herebefore at the instance of the State, make an equitable befitting just pronouncement, inconsonance therewith this Court for bringing parity inter-se the pronouncement recorded by this Court in RFA No. 44 of 2009 qua the compensation amount assessed thereunder qua the land owners therein vis.a.vis the land of the respondent herein, lands whereof stood subjected to acquisition under a notification common to the appellants therein vis.a.vis the respondent herein, hence proceeds to alike the compensation amount assessed thereunder compute the aforesaid sum of money as compensation amount qua the lands of the respondent herein especially when hence parity inter-se the lands brought to acquisition under a notification analogous qua each stands begotten also when thereupon would stand assessed a just, reasonable and fair compensation amount vis.a.vis the land of the respondent herein whereupon the salutary purpose behind the engrafting of the aforestated provision in Order XLI, Rule 33 of the CPC would stand satiated.

2. Be that as it may when the apposite evidence forcefully portrays the factum qua the lands of the respondent herein and the lands of the appellants in RFA No.44 of 2009 existing in close proximity to each other whereupon this Court stands prodded to form a conclusion qua the rates as stand assessed as compensation qua the lands of the appellants in RFA No. 44 of 2009 being also the computable rates of compensation assessable by this Court qua the lands of the respondent herein, whereupon parity in computation of compensation amount would occur inter-se the verdict recorded in RFA No,. 44 of 2009 vis.a.vis the verdict which stands recorded hereat. Consequently, the award passed by the learned Reference Court, which stands impugned herebefore, stands modified in consonance with the verdict pronounced by this Court in RFA No. 44 of 2009.

3. With RFA No. 181 of 2009 which stood preferred herebefore by the State of Himachal Pradesh assailing therewithin the award of the learned Reference Court holding omnibus analogity on all relevant facets inter se the respondents therein vis.a.vis the respondent herein also when it stood adjudicated alongwith RFA No. 44 of 2009 besides when a perusal of the adjudication recorded therein unveils qua RFA No. 181 of 2009 standing dismissed by this Court, in sequel thereto with the rendition of the learned Reference Court as stood assailed therein holding omnibus analogity on all relevant facets vis.a.vis. the impugned rendition hereat the latter ought to suffer an alike fate of its also warranting dismissal. In sequel, the impugned award stands modified to the extent above.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Vikky Devi and others …Appellants

Versus

Shri Kuldeep Bhatia and others …Respondents.

FAO (MVA) No. 103 of 2012.
Date of decision: 2.12.2016.

Motor Vehicles Act, 1988- Section 166- Tribunal dismissed the claim petition on the ground that the driver was acquitted by the criminal Court- held, that mere acquittal in the criminal case is not sufficient to dismiss the claim petition- a claim petition has to be prima facie proved while criminal case has to be proved beyond reasonable doubt - the deceased was a green grocer and was also selling milk – hence, his income cannot be less than Rs.6,000/- per month- the claimants are three in number and 1/3rd was to be deducted towards personal expenses- multiplier of 15 is applicable and claimants are entitled to Rs.4,000 x 12 x 15= Rs.7,20,000/- under the head loss of dependency- claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of estate, funeral expenses and loss of consortium- thus, claimants are entitled to total compensation of Rs.7,60,000/- along with interest @ 7.5% per annum. (Para- 6 to 26)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. versus Mst. Zarifa and others, re AIR 1995 Jammu and Kashmir 81
Cholamandlan MS General Insurance Co. Ltd. Vs Smt. Jamna Devi and others, ILR 2015 (V) HP 207
Anil Kumar versus Nitim Kumar and others, I L R 2015 (IV) HP 445 (D.B.)
Kusum Kumari versus M.D. U.P Roadways and others, I L R 2014 (V) HP 1205
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. Manohar Lal Sharma, Advocate.
For the respondents: Mr. Rajesh Sharma, proxy counsel for respondents No. 1 and 2.
Ms. Sunita Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

<u>Mansoor Ahmad Mir, Chief Justice, *(Oral).*</u>

This appeal is directed against the judgment and award dated 16.11.2011, passed by the Motor Accident Claims Tribunal-II Kangra at Dharamshala, H.P. hereinafter referred to as “the Tribunal”, for short, in MACP No.20-P/2006, titled *Vikky Devi and others versus Kuldeep Bhatia and others*, whereby the claim petition filed by the claimants came to be dismissed, for short “the impugned award”, on the grounds taken in the memo of appeal.

2. Insurer, owner and driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The claimants have questioned the impugned award on the grounds taken in the memo of appeal.

4. Claimants being the victims of a vehicular accident filed claim petition before the Tribunal for the grant of compensation to the tune of Rs. 12 lacs, as per the break-ups given in the claim petition which was resisted by all the respondents and following issues came to be framed by the Tribunal.

1. *Whether the respondent No. 2 was driving the tractor No. HP-37-7665 owned by respondent No.1 in a rash and negligent manner on 19.12.2005 and had hit the said tractor against the deceased Kamaljeet Singh Bhatia, and caused his death? OPP.*
2. *If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled and from whom? OPP.*
3. *Whether the petition is not maintainable in the present form? OPR-1&2.*

4. *Whether the petition is bad for non-joinder and mis-joinder of necessary parties? OPR-1&2.*

5. *Whether the deceased was travelling in the offending vehicle as gratuitous passenger as alleged? If so its effect? OPR-3.*

6. *Whether the respondent No. 2 was not holding a valid and effective driving licence on the day of accident as alleged? OPR-3.*

7. *Whether the offending vehicle was being plied by respondent No. 1 in violation of the terms and conditions of insurance policy, as alleged? If so its effect? OPR-3.*

8. *Relief.*

5. Claimants examined five witnesses and claimant No. 1 Smt. Vikky Devi herself stepped into the witness-box as PW1. Respondents, on the other hand examined three witnesses and respondent No. 2 Manjit Singh Bhatia driver of offending vehicle stepped into the witness-box as RW1.

6. The Tribunal, after scanning the evidence determined issue No. 1 against the claimants and dismissed the claim petition. The Tribunal has held that the final report under Section 173 of the Code of Criminal Procedure, for short "the Code" was filed against Manjit Singh driver in which accused Manjit Singh was acquitted vide judgment Ext. RW1/C and accordingly held that the claimants have failed to prove that the driver has driven the offending vehicle rashly and negligently.

7. In civil cases, the parties have to prove their cases by preponderance of probabilities. In summary cases like granting of compensation, in terms of the mandate of Section 166, Chapter XII of the Motor Vehicles Act, for short "the Act", summary procedure has to be adopted, without succumbing to the niceties and technicalities of procedure. It is beaten law of the land that technicalities or procedural wrangles and tangles have no role to play.

8. My this view is fortified by the judgment delivered by the apex court in ***Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another***,reported in ***(2013) 10 Supreme Court Cases 646, N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.***, reported in ***AIR 1980 Supreme Court 1354*** **and** ***Oriental Insurance Co. versus Mst. Zarifa and others***, reported in ***AIR 1995 Jammu and Kashmir 81.***

9. This Court has also laid down the similar principles of law in *FAO No. 692 of 2008* decided on 4.9.2015 titled *Cholamandlan MS General Insurance Co. Ltd. Versus Smt. Jamna Devi and others*, *FAO No. 287 of 2014* along with connected matter, decided on 18.9.2015 titled *Tulsi Ram versus Smt. Beena Devi and others*, *FAO No. 72 of 2008* along with connected matter decided on 10.7.2015 titled *Anil Kumar versus Nitim Kumar and others* and *FAO No. 174 of 2013* decided on 5.9.2014 titled *Kusum Kumari versus M.D. U.P Roadways and others.*

10. Having said so, the Tribunal has wrongly returned the findings in para 18 of the impugned award.

11. It is apt to record herein that the learned Trial Court while dismissing the criminal case held that the prosecution has failed to prove the case beyond reasonable doubt, is not a clear-cut acquittal. It is apt to reproduce para 14 of the said judgment herein.

> *"14. In view of the forgoing discussion, the prosecution has not been able to prove beyond reasonable doubt that on the evening of 19.12.2005 around 9 p.m. at Rajpur Tanda, P.S. Palampur accused was driving Tractor No. HP-37-7665 on the public way rashly and negligently which resulted in causing death of Kamaljeet Singh when the aforesaid tractor rolled down into fields and the aforesaid tractor overturned on deceased Kamaljit Singh, rather the case of prosecution is shrouded under the shadow of doubt, the benefit of which deserves to be given to the*

accused. Thus, while giving benefit of doubt to the accused, point No. 1 is decided in negative."

12. I have gone through the record. *Prima facie*, it is established and proved that the driver had driven the offending tractor rashly and negligent and caused the accident, in which deceased lost his life. Accordingly, the claimants have proved issue No.1 and the findings returned by the Tribunal on issue No. 1 are set aside and this issue is decided in favour of the claimants/appellants herein and against the respondents.

13. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 to 7.

Issue No.3.

14. It was for the respondents to prove how the claim petition was not maintainable. Respondents have taken the pleas in the written statement. Parties had knowledge of their respective pleadings, understood their case, joined the trial and contested the case. It was for the insurer to prove that the claim petition was not maintainable or there was collusion, has not led any evidence to that effect. However, I

have gone through the claim petition. The claimants are victims of a vehicular accident and the claim petition was maintainable.

15. In terms of mandate of Section 166 of the Act, an application has to be made by a person who has sustained injuries or by legal representatives where the accident has resulted into death of a person or by owner of property.

16. Section 166 of the Act mandates that the Tribunal has to treat report made by the police agency under Section 158 (6) of the Act as a claim petition. It is apt to reproduce Sections 158 (6) and 166 (4) of the Act herein.

"158 (1 to 5)..... ......

"(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer.

166 (1) to (3).... ....

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act."

17. The mandate of the aforesaid provisions of the Act is that a police report can be treated as claim petition.

18. Having said so, the Tribunal has rightly decided issue No. 3. Respondents have not questioned these findings, are accordingly upheld.

Issue No. 4.

19. It was for respondents No. 1 and 2 to show how the claim petition suffers from non-joinder and mis-joinder of necessary parties. Driver, owner and insured have been arrayed as parties. It is not the case of non-joinder and mis-joinder of necessary parties. Thus, the Tribunal has rightly decided this issue. Accordingly, the findings returned on this issue are upheld.

Issue No.5.

20. It was for the insurer to prove that the deceased was a gratuitous passenger and onus was on it, has failed to discharge the same. Even the insurer has not questioned the findings returned by the Tribunal, on this issue in para 19 of the impugned award. The

argument advanced by the learned counsel for the insurer that the deceased was a gratuitous passenger, is not tenable for the reasons that the Trial Court has held that the tractor has rolled down and deceased was crushed. There is not an iota of evidence on the record to show or prove that the deceased was gratuitous passenger. Having said so, findings returned on issue No. 5 are upheld.

Issue No.6.

21. It was for the insurer to prove that the driver was not having a valid and effective driving licence at the time of accident, has not led any evidence. However, I have gone through the driving licence Ext. RW1/A, which is valid and effective. Thus, the findings recorded on this issue merits to be upheld and are accordingly upheld.

Issue No.7.

22. It was for the insurer to plead and prove that the insured has committed willful breach, has not led any evidence. Even the findings recorded on issue No. 7 have not been questioned by the insurer. Accordingly, the same merits to be upheld and are accordingly upheld.

Issue No.2.

23. The Tribunal has not determined issue No. 2. Claimants have pleaded that the deceased was earning Rs.15,000-20,000/- per month, was a green grocer and also selling milk. It can be safely held that the deceased was earning not less than Rs.6000/- per month. In view of the 2nd Schedule attached to the Act, read with ***Sarla Verma and others versus Delhi Transport Corporationand another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***., the multiplier applicable is “15” and is accordingly applied. The claimants are three in numbers and 1/3rd has to be deducted towards personal expenses of the deceased.

24. Thus, the claimants are held entitled to compensation to the tune of Rs.4000x12x15= Rs.7,20,000/- under the head loss of source of dependency.

25. In addition, the claimants are also held entitled to compensation under the following four heads:

(i)	Loss of love and affection:		Rs.10,000/-
(ii)	Loss of estate	:	Rs.10,000/-
(iii)	Funeral expenses	:	Rs.10,000/-
(iv)	Loss of consortium	:	Rs.10,000/-
		Total Rs.40,000/-	

26. Accordingly, the claimants are held entitled to compensation to the tune of Rs.7,20,000+ Rs.40,000= Rs.7,60,000/- with interest @7.5% per annum, from the date of claim petition till its realization.

27. The factum of insurance is not in dispute. Thus, the insurer is saddled with the liability and has to satisfy the award.

28. The insurer is directed to deposit the amount alongwith interest @ 7.5% per annum, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, through payees’ cheque account, or by depositing the same in their bank accounts, after proper verification.

29. Viewed thus, the appeal is allowed and the impugned award is set aside, as indicated hereinabove.

30. Send down the record forthwith, after placing a copy of this judgment.

****

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Devi Dass & others .....Appellants/Petitioners.

Versus

Prem Chand & another .....Respondents.

FAO No.283 of 2014.
Reserved on: 23.11.2016.
Decided on : 5th December, 2016.

Employees Compensation Act, 1923- Section 4- Deceased was employed as a driver and died in a motor vehicle accident during the course of his employment – a claim petition was filed which was dismissed by the Commissioner for want of proof that the deceased was discharging his duties at the time of accident – held in appeal that the owner had specifically stated that the deceased was employed by him as a driver - it was also proved that he was discharging his duties at the time of accident -a claim petition was filed before MACT which was dismissed- hence, penalty of Rs.1 lac imposed upon the employer. (Para-5 to 11)

For the Appellants:	Ms. Rita Goswami, Advocate.
For Respondent No.1:	Mr. B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.
For Respondent No.2:	Mr. Lalit K. Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioners/appellants herein are the dependents and successors-in-interest of one Diwan Chand, who purportedly during the course of performance of his employment as a driver under respondent No.1 in motor vehicle bearing No. HP-07-3474 suffered his end in a motor vehicle accident involving the aforesaid vehicle.

2. The apposite claim petition constituted by the appellants herein before the learned Commissioner under the Employee's Compensation Act suffered dismissal. The learned Commissioner recorded disaffirmative findings on the issue qua the deceased at the relevant time performing employment as a driver under respondent No.1 in the vehicle aforesaid also it recorded disaffirmative findings qua the appellants herein qua his suffering his demise during the course of his performing employment under respondent No.1 in the ill-fated vehicle.

3. The appellants herein standing aggrieved by the rendition of the learned Commissioner hence concert to assail it by preferring an appeal therefrom before this Court.

4. When the appeal came up for admission on 18.11.2014, this Court, admitted the appeal instituted herebefore by the appellant against the order of the learned Commissioner, on the hereinafter extracted substantial questions of law:-

a) Whether the findings of the learned Court below is perverse on the ground that the deceased does not fall within the definition of the workman who despite the admitted fact of respondent No.1 is admittedly recruited as driver in connection with a motor vehicle?

b) Whether the courts below have misconstrued the pleadings as well as the evidences/documents produced by the appellants, in which it was proved that the deceased was died on 10.08.2005 during the course of his employment?

c) Whether the learned Commissioner has acted in violation of the provisions of the law contained under Section 108 of the Indian Evidence Act, 1872?

Substantial questions of law No.1 to 3.

5. The disaffirmative finding recorded by the learned Commissioner on the issue qua the predecessor-in-interest of the appellants herein standing engaged by respondent No.1 as a driver in the relevant vehicle, apparently stands not founded on a wholesome appreciation of the relevant evidence on record, significantly, of the recitals embodied in Ex.RW1/A, comprising an affidavit tendered by the owner of the ill-fated vehicle during the course of his examination-in-chief wherewithin a loud communication stands echoed qua his engaging deceased Diwan Chand as a driver in the ill-fated vehicle. The aforesaid pronouncement occurring in Ex.RW1/A does clinch the factum of deceased Diwan Chand standing engaged by the owner of the ill-fated vehicle as its driver thereon whereupon the relevant issue No.1 warrants its standing answered affirmatively vis-a-vis the appellants. Moreover, with a candid pronouncement occurring in Ex. RW1/A qua also at the relevant time deceased Diwan Chand standing borne on the ill-fated vehicle as its driver does nurse a firm conclusion from this Court qua his demise occurring during the course of his performing employment as a driver under respondent No.1 in the ill-fated vehicle.

6. Be that as it may, the occurrence on record of the the apposite FIR comprised in Ex.PW1/B lodged with the police station concerned besides with the learned counsel appearing for respondent No.2 while holding respondent No.1 to cross-examination purveying suggestions to him qua in FAO's arising herebefore against the apposite renditions recorded by the MACT concerned upon the claim petitions preferred therebefore, stirring a verdict herefrom qua the liability qua compensation amount assessed qua the dependents of the deceased/occupants of the ill-fated vehicle standing fastened upon the owner whereto an affirmative elicitation stood purveyed by RW-1, does constrain a conclusion of the ill-fated vehicle whereon thereat the deceased evidently was performing employment as its driver under respondent No.1 rolling into the gushing waters of river Satluj whereupon the demise of its occupants also of its driver occurred. The erection of the aforesaid inference by this Court does oust the formidability of the findings recorded by the learned Commissioner qua in the absence of production of the death certificate of deceased Diwan Chand by the appellants herein thereupon a conclusion standing warranted qua there being abysmal lack of evidence in portrayal of his suffering his demise in an accident involving the ill-fated vehicle.

7. Be that as it may, the relevant accident occurred in the year 2005, whereas, the apposite petition stood preferred before the learned Commissioner as evident from a disclosure made in the impugned rendition belatedly on 21.01.2012 wherefrom the learned counsel appearing for the respondents contend qua their occurring a manifest inordinate unexplained delay in the institution of the apposite petition before the learned Commissioner. Conspicuously, with the apposite delay occurring beyond the appposite statutorily mandated period of two years, prescribed in Section 10(1) of the Employee's Compensation Act (hereafter referred to as the Act) also with the appellants not within the ambit of the relevant proviso purveying a tenable sound explanation in explication of the apposite delay renders the claim petition to suffer the illfate of its standing dismissed given its standing filed beyond the period of limitation. However, the submission addressed herebefore by the learned counsel for the respondents holds no tenacity as they proceed to make the aforesaid submission qua the facet aforesaid only on anvil of a reflection occurring in the impugned award qua the apposite petition standing instituted therebefore by the appellants herein on 21.01.2012, whereas, a perusal of the original claim petition preferred by the appellants before the learned Commissioner unravels qua its presentation occurring only within 50 days elapsing from the date of accident, whereupon its standing preferred therebefore within the statutorily mandated period of two years, rendered it to stand preferred thereat within limitation.

8. Be that as it may, before proceeding to adjudicate qua the appellants a just and fair compensation amount, it is imperative to determine from the relevant record qua the claimants not simultaneously along with the apposite petition laid hereat instituting before the MACT concerned a petition claiming compensation arising out of the demise of their predecessor-

in-interest Diwan Chand in a motor vehicle accident involving the ill-fated vehicle whereon he stood engaged as a driver under respondent No.1, especially when the appellants herein enjoy the statutory leverage to claim compensation either under the Employee's Compensation Act or under the provisions of the Motor Vehicles Act, obviously not under both.

9. The relevant evidence for resting the aforesaid factum stand embodied in the testification occurring in the cross-examination of Devi Dass, the father of deceased Diwan Chand, wherein, he acquiesces to a suggestion put to him by the learned counsel appearing for the respondents while holding him to cross-examination qua his preferring a claim petition before the MACT concerned along with the co-appellants on occurrence of demise of their predecessor-in-interest Diwan Chand in the ill-fated accident involving the relevant vehicle, petition whereof he echoes therein to suffer the ill-fate of its dismissal. The aforesaid proclamation occurring in the cross-examination of co-appellant No.1 does beget an inference of his simultaneously alongwith the preferment of the apposite petition laid hereat, filing a petition under the Motor Vehicles Act before the MACT concerned wherefrom with his simultaneously prosecuting remedies under two compatible statutes whereas he stood enjoined to either avail his remedy under the Employee's Compensation Act or under the Motor Vehicles Act, renders the claim petition laid hereat to warrant it standing dismissed. Also it appears qua despite theirs preferring a claim petition before the MACT concerned in sequel to occurrence of demise of their predecessor-in-interest Diwan Chand theirs yet proceeding to canvass a relief similar to the one which stood canvassed in the aforesaid claim petition thereupon their extant endeavour warrants its standing negated conspicuously to obviate any belittling of conclusivity acquired by the previous rendition pronounced upon their apposite petition laid before the MACT concerned for a purpose akin to the one which stands embodied in the apposite petition laid hereat. Reiteratedly, for blunting the aforesaid eventuality also when the instant claim petition attracts the principle of res judicata besides with the operation of a statutory bar against conjoint relief under compatible statutes being unavailable, conspicuously, when an earlier pronouncement upon the apposite claim petition of the appellants herein has acquired conclusivity also when it was inter se akin litigants thereat vis-a-vis the litigants hereat, verdict pronounced thereon obviously holds an aura of reverence, whereupon, other Courts stand barred to adjudicate any compensation qua the appellants arising out of the demise of their predecessor-in-interest in the ill-fated accident.

10. The effect of the aforesaid diktat formed by this Court for declining vis-a-vis the appellants herein quantification of compensation under the Act would not oust the operation of the statutory mandatory provisions of Section 4A(3) of the Employee's Workman Compensation Act, which stand extracted hereinafter:-

> **"4A. Compensation to be paid when due and penalty for default**:-
>
> (1). Compensation under Section 4 shall be paid as soon as it falls due.
>
> (2). In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and, such payment shall be deposited with the Commissioner or made to the employee, as the case may be without prejudice to the right of the employee to make any further claim.
>
> (3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall-
>
> (a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and
>
> (b) if, in his opinion, there is no justification for the delay, direct that the employer shall in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per recent of such amount by way of penalty;

The imminent reason for this Court erecting the aforesaid inference is dehors the factum of conclusivity acquired by the rendition recorded by the MACT concerned upon the claim petition preferred therebefore by the co-appellants also dehors qua thereupon the instant petition while obviously attracting the principle of res judicata it forestalling the appellants herein to canvass herebefore the relief which stood previously unsuccessfully canvassed by them. Nonetheless, with none of the statutory provisions engrafted in the Motor Vehicles Act holding any postulation therein akin to the one postulated in Section 10(a) of the Act, renders the relevant statutory expostulation embodied in Section 4A(3)(b) of the Act to warrant deference standing meted thereon, visibly, with this Court recording affirmative findings vis-a-vis the appellants herein on the relevant issues Nos.1 and 2 also visibly with respondent No.1 not revering the statutory mandate of sub Section (1) of Section 4 thereupon this Court is enjoined to impose upon the employer of deceased Diwan Chand statutory penalty quantified in a sum of Rs.1,00,000/- (Rs. One lac only) arising from of his demise occurring during the course of his performing employment under him in the relevant vehicle, dehors no compensation amount being assessable qua the appellants herein especially when the rigor of the relevant mandate occurring therein is inflexible besides when the instant petition has suffered dismissal merely on the ground of estoppel besides on anvil of res judicata whereupon this Court does not deem it unbefitting to compute in the aforesaid amount penalty payable vis-a-vis the appellants herein besides deems it also just to fasten the liability qua its defrayment to the appellants herein upon the employer, who merely on the principle of res judicata has escaped his relevant liability qua defrayment of compensation amount vis-a-vis the appellants herein.

11. For the reasons recorded hereinabove, the instant appeal is partly allowed. In sequel, the award rendered by the learned Commissioner is modified to the extent that the owner of the vehicle, respondent No.1 is held liable to pay penalty of Rs.1,00,000/- (Rs. One lac only), to the appellants herein. All pending applications also stand disposed of. No order as to costs.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Girdhari Lal son of Shri Sher Singh ….Petitioner

Versus

Shashi Kumari wife of Shri Girdhari Lal ….Non-petitioner

Cr.MMO No. 255 of 2014
Order Reserved on 18th November 2016
Date of Order 5th December 2016

Code of Criminal Procedure, 1973- Section 127- S was married to G – G started maltreating S and ousted her from her matrimonial home – she filed a petition for maintenance and maintenance of Rs.500/- per month was granted to him on 19.6.2207- S filed a petition for enhancement of maintenance from Rs.500/- to Rs.5,000/-- Session Judge, Mandi enhanced the maintenance allowance toRs.2,000/- per month from the date of the order- held, that keeping in view the price index and the fact that one daughter is residing with S, it is not expedient to interfere with the order of Session Judge, Mandi – the husband is duty bound to maintain his wife – rise in prices is a changed circumstance and the petition for enhancement can be filed on this ground – petition dismissed. (Para- 8 to 12)

Cases referred:

Dwarika Prasad Satpathy vs. Bidyut Prava Dixit and another, AIR 1999 SC 3348
Dhan Raj vs. Kishni and another, 1998 Cr.L.J. 1312

For Petitioner: Mr. H.S. Chandel, Advocate.
For Non-petitioner: Ms. Leena Advocate

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. against order dated 2.6.2014 passed by learned Sessions Judge Mandi District Mandi H.P. whereby learned Sessions Judge Mandi accepted revision petition filed under Section 397 of Code of Criminal Procedure 1973 by Smt. Shashi Kumari and enhanced maintenance allowance to the tune of Rs.2000/-(Rupees two thousand) per month from the date of order.

Brief facts of the case

2. Smt. Shashi Kumari filed petition under Section 127 of Code of Criminal Procedure 1973 for enhancement of maintenance allowance. It is pleaded that Smt. Shashi Kumari is legally wedded wife of Girdhari Lal and their marriage was solemnised about 22 years ago according to Hindu rites and customs. It is pleaded that after solemnisation of marriage Girdhari Lal maltreated Smt. Shashi Kumari and also ousted Smt. Shashi Kumar from her matrimonial house. It is pleaded that maintenance allowance to the tune of Rs.500/- (Rupees five hundred) was granted to Smt. Shashi Kumari on dated 19.6.2007. It is pleaded that Girdhari Lal has constructed six shops and is earning Rs.10000/- (Rupees ten thousand) as rent from shops. It is pleaded that respondent is also employed in HPSEB and is earning Rs.5000/- (Rupees five thousand) per month. It is pleaded that total income of Girdhari Lal is Rs.32000/- (Rupees thirty two thousand) per month from all sources. It is pleaded that due to increase in price index it is not possible to Smt. Shashi Kumari to maintain herself. It is pleaded that daughter of Smt. Shashi Kumari is college going student. It is also pleaded that Smt. Shashi Kumari is at the verge of starvation. It is pleaded that Smt. Shashi Kumari is serving as Angan Wari worker and is earning Rs.1800/- (Rupees one thousand eight hundred) per month. Prayer for enhancement of maintenance allowance from Rs.500/- (Rupees five hundred) to Rs.5000/- (Rupees five thousand) per month sought.

3. Per contra response filed on behalf of Girdhari Lal pleaded therein that Girdhari Lal is daily waged employee and is earning Rs.110/- (Rupees one hundred ten) per day. It is pleaded that Smt. Shashi Kumari is working as Angan Wari worker and is earning Rs.3000/- (Rupees three thousand) per month. Prayer for dismissal of petition sought.

4. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and also perused the entire record carefully.

5. Following points arises for determination in this petition:-

1. Whether petition filed under Section 482 Cr.P.C. is liable to be accepted as per grounds mentioned in petition?
2. Final Order.

Findings upon Point No.1 with reasons

6. PW1 Smt. Shashi Kumari has stated that Girdhari Lal is her husband. She has stated that her husband had beaten her. She has stated that her husband has turned her out from her matrimonial house. She has stated that she is residing in rented house and is paying Rs.1500/-(Rupees one thousand five hundred) per month as rent. She has stated that her husband is employed in Electricity board and further stated that her husband owned six shops at Bassi and is earning Rs.10000/- (Rupees ten thousand) per month as rent. She has stated that Girdhari Lal has also rented rooms and further stated that income of her husband is Rs.35000/- (Rupees thirty five thousand) per month from all sources. She has stated that Girdhari is also owner of five bighas of agricutural land. She has also stated that Girdhari also used to sell cow milk. She has stated that her daughter is residing with her. She has stated that Rs.500/- (Rupees five hundred) was granted to her as maintenance allowance on 9.6.2007. She has stated that due to increase in price index of necessary commodities she could not maintain herself. She has stated that she is employed as Angan Wari worker and is earning Rs.1500/- (Rupees one

thousand five hundred) per month. She has admitted that her son Pankaj is residing with Girdhari Lal. She has stated that Pankaj is student of B.Tech. She has denied suggestion that Girdhari Lal is drawing Rs.3500/- (Rupees three thousand five hundred only) per month as salary. She has denied suggestion that she has filed present petition just to harass her husband.

7. RW1 Girdhari Lal has stated that Smt. Shashi Kumari is his wife. He has stated that he is regularly paying the maintenance allowance granted to his wife. He has stated that he is employed in Electricity board on daily wages and is earning Rs.3600/- (Rupees thirty three hundred) per month. He has stated that his wife is employed in Angan Wari and is earning Rs.3300/- (Rupees thirty three hundred) per month. He has stated that his son is student of engineering and his expediture is Rs.48000/- (Rupees forty eight thousand) per semester. He has stated that he has no other source of income. He has admitted that his daughter is residing with his wife. He has denied suggestion that his income is Rs.36000/- (Rupees thirty six thousand) per month.

8. Submission of learned Advocate appearing on behalf of petitioner that as per Annexure P-3 placed on record Smt. Shashi Kumari is posted as Angan Wari worker and is drawing honorarium to the tune of Rs.3513/- (Rupees three thousand five hundred thirteen) per month as Angan Wari worker and on this ground petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Court is of the opinion that in view of price index as of today and in view of the fact that one daughter is residing with Smt. Shashi Kumari it is not expedient in the ends of justice to interfere in order of learned Sessions Judge Mandi.

9. Submission of learned Advocate appearing on behalf of petitioner that age of mother of Girdhari Lal is about 81 years and she is suffering from various ailments and requires continuous medical treatment and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that Smt. Shashi Kumari is legally wedded wife of Girdhari Lal and Girdhari Lal is under legal obligation to provide reasonable maintenance allowance to her legally wedded wife. It is well settled law that wife has legal right to live in society with honour and dignity.

10. Submission of learned Advocate appearing on behalf of petitioner that petitioner is posted as helper in HPSEB and his salary is Rs.10707/- (Rupees ten thousand seven hundred seven) per month and petitioner has also domestic and social obligations and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner has himself admitted his income to the tune of Rs.10707/- (Rupees ten thousand seven hundred seven) per month in Cr.MMO No. 255 of 2014 in para 7 (c) of petition. It is well settled law that facts admitted need not be proved as per Section 58 of Indian Evidence Act 1872. It is well settled law that wife is entitled for reasonable maintenance allowance to the extent of 1/3rd income of husband. Hence it is held that order of learned Sessions Judge is not illegal and it is held that no interference is warranted.

11. It is well settled law that maintenance allowance can be enhanced under Section 127 Cr.P.C. as per changed circumstances. It is well settled law that rise in prices is changed circumstance as defined under Section 127 Cr.P.C. It is well settled law that object to grant maintenance allowance to married woman is to prevent vagrancy and destitution. ***See AIR 1999 SC 3348 Dwarika Prasad Satpathy vs. Bidyut Prava Dixit and another.*** It is well settled law that Court can take judicial notice of inflation and rising cost of commodities for enhancing maintenance allowance. ***See 1998 Cr.L.J. 1312 Dhan Raj vs. Kishni and another.*** In view of admission of petitioner in petition that monthly income of petitioner is Rs.10707/- (Rupees ten thousand seven hundred seven) per month it is held that maintenance allowance granted to Smt. Shashi Kumari is not excessive in nature. It is held that maintenance allowance granted by learned Sessions Judge Mandi to Smt. Shashi Kumari is reasonable maintenance allowance. It is held that order of learned Sesisons Judge Mandi H.P. is in accordance with law and based upon positive, cogent reasons. In view of above stated facts and case law cited supra point No. 1 is answered in negative.

Point No. 2 (Final Order)

12. In view of findings upon point No. 1 above petition is dismissed. File of learned Sessions Judge Mandi and file of learned Judicial Magistrate Joginder Nagar District Mandi H.P. along with certify copy of order be sent back forthwith. Cr.MMO No. 255 of 2014 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Himachal Pradesh State Electricity Board, through its Secretary, Vidyut Bhawan, Shimla, H.P. ....Petitioner.

Versus

M/s Virendra Hotels and Allied Hotels Pvt. Ltd. & anr. ....Respondents.

CWP No.1672 of 2010.
Reserved on : 21.11.2016.
Date of Judgment: 05.12.2016.

Constitution of India, 1950- Article 226- Tampering was noticed by Flaying Squad of H.P.S.E.B. – criminal proceedings were initiated and electricity connection was disconnected - ombudsman decided the dispute – aggrieved from the order, present writ petition has been filed – held, that ombudsman had decided the dispute only on the basis of acquittal recorded by Criminal Court, which is not correct- no other reason was given by the ombudsman – writ petition allowed and the case remanded to ombudsman for a fresh decision. (Para-9 and 10)

For the petitioner : Mr. Satyen Vaidya, Sr. Advocate with Ms. Priyanka Khenal, Advocate.
For the respondents : Mr. K.D. Sood, Sr. Advocate with Mr. Ankit Aggarwal, Advocate, for respondent No.1.
Nemo for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present writ petition is maintained by the petitioner against the respondents praying therein for the following substantive reliefs :

> "a) That writ of certiorari may kindly be issued and the impugned order dated 15.3.2010 (Annexure P-4) may kindly be quashed and set aside.
>
> b) That the respondent may kindly be restrained from releasing the amount which is lying in deposit with the present petitioner."

2. As per the petitioner, respondent No.1-company has electric commercial connections bearing Account No.CGC-43-C and CGC-36-C having connected load of 16.4 KW and 58.24 KW. It is averred in the petition that on 4.2.1998, Flying Squid of HPSEB, headed by Assistant Executive Engineer (E), Sub Division, Idgah, Shimla and Executive Engineer, Flying Squid, inspected the premises of respondent No.1, allegedly found the tempering with the electric meter aforementioned. The Flying Squid found that the electricity was used directly from mains by bye passing the recording of consumption meters installed there. Thereafter, the Flying Squid started the proceedings against respondent No.1 for theft of energy and immediately disconnected the electricity of both the meters aforementioned. As per instruction No.206 of H.P Sales Manual Provisional assessment was made on 4.2.1998. Thereafter, the Flying Squid also registered the criminal case against respondent No.1 in Police Station, Shimla, after investigation filed a challan, under Section 39 of the Electricity Act, 1910 against respondent No.1. The final assessment was made on 24.2.1998 and after calculating the same a demand for a sum of Rs.

9,91,776.75 was raised from respondent No.1, for the alleged theft of energy. Respondent No.1 filed a Civil Suit before the learned Court below and later on before learned District & Sessions Judge, Shimla, to restore the electricity connection. The learned District & Sessions Judge, Shimla, vide its order dated 8.5.1998, directed the petitioner to restore the electricity connection of respondent No.1 after taking 50% of the assessed demand amount. Respondent No.1 deposited the half of the assessed amount with the petitioner on 8.5.1998. The electricity meters of respondent No.1 remained disconnected w.e.f. 4.2.1998 to 8.5.1998. Thereafter, respondent No.1 approached before this Court against the disconnection of the electrical meter bearing No.CGC-43-C and CGC-36-C, vide which the HPSEB will not disconnect the electric connection and respondent No.1 was ordered to deposit the remaining amount in four equal installments of rupees one lac. Respondent No.1 deposited the entire amount i.e. Rs. 9,99,775.76. Thereafter, criminal case was filed before Addl. Chief Judicial Magistrate, Court No.1, Shimla, under Section 39 of the Electricity Act, 1910 against respondent No.1, the same was decided on 1.7.2002 and respondent No.1 was acquitted from the charges of theft after giving him benefit of doubt. Respondent No.1 filed an appeal before the Zonal Level Disputes Settlement Committee, Shimla. The Committee after taking into consideration all the facts and circumstances of the case decided the same on 4.1.2003 in favour of the petitioner and appeal of respondent No.1 was dismissed. Thereafter, respondent No.1 again approached this Court regarding his grievances, but in the meantime, the Government have created one Institution, namely, Himachal Pradesh Electricity Ombudsman (hereinafter referred to as 'Ombudsman'), to settle the electricity disputes. Respondent No.2 was directed to decide the dispute within a stipulated period and the parties were also directed to approach respondent No.2 within a time bound manner. Respondent No.2 after hearing both the parties, decided the case, vide order dated 15.3.2010, in which the appeal of respondent No.1 was allowed. Respondent No.1 involved in the theft of electricity from the aforementioned electric meters w.e.f. 6/1996 to 1/1998 and during this period even in few months his consumption of unit was Nil. This fact has not been taken into consideration by respondent No.2 while passing the impugned order dated 15.3.2010.

3. In reply to the petition, respondent No.1 has taken preliminary objections that the present petition is neither competent nor maintainable on account of the act and conduct of the petitioner. The order passed by the learned Ombudsman, suffers from no illegality and irregularity. On merits, it is submitted that the Executive Engineer, City Electrical Division, Shimla, is neither competent nor authorized to file the present writ petition. It has been further submitted that the commercial electricity meter bearing Account Nos. CGC-43-C and CGC-36-C, having connected load of 16.4 KW and 58.2 KW, HPSEB was billing respondent No.1 on the basis of actual consumption/minimum monthly charges whichever was higher. The actual consumption was less with the minimum monthly charges so invariably respondent No.1 was billed on minimum monthly charges. After September 2001, have done away with monthly minimum charges and started billing on the actual consumption basis. Respondent No.1 has further submitted that bill raised for an amount of Rs. 9,99,775.76, is without any basis and illegal. It is further submitted that the challan regarding the theft was put before the learned Addl. Chief Judicial Magistrate, Court No.1, Shimla, under Section 39 of the Electricity Act, vide which respondent No.1 was acquitted of the charges of theft, vide judgment dated 1.7.2002.

4. Heard.

5. Mr. Satyen Vaidya, learned Senior Counsel appearing on behalf of the petitioner has argued that the impugned order dated 15.3.2010 passed by the learned Ombudsman, is without any reason and is based upon the judgment of learned Court below. He has further argued that the judgment is not binding upon the proceedings before the learned Ombudsman and the standard of proof in both is different. He has further argued that the order passed by the learned Ombudsman, is without any basis and unreasoned and so, the writ petition may be allowed and the case may be remanded back after taking afresh decision.

6. On the other hand, Mr. K.D. Sood, learned Senior Counsel appearing on behalf of respondent No.1 has argued that no appeal was filed by the petitioner against the order of

acquittal of respondent No.1 in the alleged electricity theft case and that order has attained finality. The order of learned Ombudsman, also suffers from no illegality and infirmity, as the same was passed after taking into consideration all the facts, which have come on record, to its true perspective. He has further argued that the writ petition may be dismissed.

7. In rebuttal, Mr. Satyen Vaidya, learned Senior Counsel appearing on behalf of the petitioner has argued that consumption of the Hotel of respondent No.1, is much lesser than the bills, which were being paid by respondent No.1 on the basis of minimum charges. He has further argued that hotel was vacant during those days and due to the mischief of the neighbourers, false case has been made out against respondent No.1, when he was out of station because of winter season and hotel was totally unoccupied.

8. To appreciate the arguments of learned Senior Counsel appearing on behalf of the parties, I have gone through the record in detail.

9. As far as the case, under Section 39 of the Indian Electricity Act is concerned, there is no dispute that Satish Chand Sood/respondent No.1 has been acquitted by the learned Addl. Chief Judicial Magistrate, Court No.1, Shimla, on 1.7.2002 and the judgment has attained finality. However, the Zonal Level Dispute Settlement Committee, has held respondent No.1 defaulter and raised demand of Rs. 9,91,776.75 paise against Account No.CGC-43-C and CGC-36-C. Thereafter, in appeal learned Ombudsman/respondent No.2, will gave its findings and has held as under :

> "As per record of the licensee, the petitioner has paid all the bills for supply of power to the licensee (including for the period when the meter in dispute remained disconnected from 4.2.1998 to 8.5.1998) and this amount of Rs. 9,91,776/- as raised by the licensee is a penal amount on account of theft as worked out on the basis of Instruction No.203 to 206 of the Sales Manual. As per demand notice dated 4.2.1998 & 24.2.1998, this amount has been raised by the licensee as additional penal amount on account of alleged theft which has not been proved as per decision of the Hon'ble Addl. Chief Judicial Magistrate, Court No.1, Shimla, as referred above.
>
> Order of the Ombudsman :
>
> Keeping in view the foregoing deliberations, the amount of Rs. 9,91,776/- raised by the respondent Board through demand notice dated 4.2.1998/24.2.1998 is set aside and quashed and HPSEB is directed to refund this amount to the petitioner alongwith annual interest @ 9% as per orders of the Hon'ble High Court immediately but not later than one month from the date of this order. The compliance of the order may be reported to this office by both the parties i.e. petitioner and respondent Board after one month of the issuance of this order."

10. From the above, it is clear that the learned Ombudsman/respondent No.2 has decided the case against the petitioner simply on the ground that the learned Addl. Chief Judicial Magistrate, Court No.1, Shimla, has held that the petitioner has failed to prove the theft, hence the demand notice, raised by the petitioner was set aside and petitioner was directed to refund the amount. This Court finds that the learned Ombudsman/respondent No.2 has erred taking the findings of acquittal in favour of respondent No.1, a sole ground to set aside the demand notice, as respondent No.2 has not given his reasoning for setting aside the demand notice. So, the findings of the learned Ombudsman/respondent No.2, vide its impugned order dated 15.3.2010, is quashed and set aside and respondent No.2 is directed to decide ***Case No.3 of 2009***, afresh, within a period of two months from the date of first hearing. Parties are directed to appear before the Ombudsman/respondent No. 2 on ***22nd December, 2016***. Needless to say that the party against whom learned Ombudsman/respondent No.2 gives the findings shall be at liberty to approach the competent Court, as per law.

11. The writ petition is disposed of accordingly alongwith all pending application (s), if any.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Oriental Insurance Company .. Appellant.

Versus

Kushla Devi & ors. .. Respondents.

FAO No. 118 of 2008.
Decided on: 5.12.2016.

Employees Compensation Act, 1923- Section 4- Deceased was employed as a driver in a tractor – he died in an accident involving tractor – a claim petition was filed – Commissioner awarded compensation of Rs.2,03,850/- with interest @ 12% per annum- held in appeal that tractor falls within the definition of light motor vehicle (LMV) –however, it will become commercial vehicle when trolley is attached to it and goods are being carried in the same – the tractor was carrying sand and grit and was being used as a transport vehicle – the accident occurred on 2.6.2000- the licence was valid till 23.10.1997 and no application for renewal was received – there was no valid licence with the driver – the insurer was wrongly saddled with liability – appeal allowed and liability fastened upon the insurer.(Para-7 to 12)

Case referred:

M/S United India Insurance Co. Ltd. Chandigrh vs. Sh. Pritpal Singh, (1996-2) 113 P.L.R. 49

For the appellant: Mr. Lalit K. Sharma, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1 to 4.
Mr. Adarsh K. Vashisht, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

<u>Dharam Chand Chaudhary, J (Oral).</u>

Respondent No. 2, Oriental Insurance Company before learned Commissioner below, being aggrieved by the award dated 20.3.2006, passed in case No. 5/2000, is in appeal before this Court. The perusal of the impugned award reveals that the learned Commissioner below while holding that Sh. Bikram Chand, the predecessor-in-interest of respondents No. 1 to 4 (hereinafter referred to as the claimants) was a workman and taking his monthly salary as Rs. 2500/- per month as well as applying 203.85 as relevant factor keeping in view the age of the deceased as 32 years, has awarded a sum of Rs. 2,03,850/- as compensation whereas Rs. 1,40,249/- towards pendente lite interest @ 12% as on 24.4.2006.

2. The deceased Bikram Chand, was admittedly deployed by respondent No. 5 (hereinafter referred to as the insured) as driver with ill fated tractor bearing registration No. HP-53-0905. Although the petitioners have claimed his monthly salary at Rs. 3,000/- per month, yet as per the admission made by the insured respondent No. 5, he was paying Rs. 2,500/- as wages per month to the deceased. The tractor met with an accident on 2.6.2000 due to sagging of danga. The deceased received multiple injuries on his person and later on succumbed to the injuries so received by him on his person.

3. The claimants, being his widow, minor children and widowed mother, hence dependent upon him had preferred the application under Section 22 of the Workmens' Compensation Act and claimed compensation to the tune of Rs. 5,00,000/- on account of loss they suffered in this accident.

4. The insured-respondent No. 1 before learned Commissioner below by way of preliminary objection has raised the objection qua maintainability of the petition, locus standi of the claimants to file the same as well as for non-joinder of necessary parties. On merits, he, however, has admitted that deceased Bikram Chand was driver of his tractor bearing registration No. HP-53-0905. When he was employed as driver, the deceased had valid driving licence and it is on the basis thereof, he was employed as driver. The accident, however, did not occur due to rash and negligent driving on his part and rather due to sagging of kutcha danga (retaining wall). The monthly wages of the deceased according to the insured was Rs. 2500/- per month.

5. The insurer-respondent No. 1, in addition to the preliminary objections raised by the insured, has also claimed in preliminary that the deceased driver was not holding valid and effective driving licence at the time of accident. Rejoinder was also filed. On the pleadings of the parties, the following issues were framed:

> "1. Whether the deceased Bikram Chand was a workman as defined in the Workmen's Compensation Act, 1923? OPP.
>
> 2. Whether the deceased died during course of his employment with respondent No. 1? OPP.
>
> 3. Whether the deceased was earning wages @ Rs. 3000/- per month? OPP.
>
> 4. Whether the applicants are entitled for compensation under the Workmen's Compensation Act, 1923? OPP.
>
> 5. Whether the application is not maintainable in the present form? OPR.
>
> 6. Whether the deceased was not holding a valid and effective driving licence in the time of accident? OPR.
>
> 7. Relief."

6. Learned Commissioner below, while answering issues No. 1 to 3 has concluded that the deceased was working as driver with ill fated tractor and that his wages were Rs. 2500/- per month. He died during the course of his employment. Being so, while answering issue No. 4, the claimants were held entitled to the award of just and reasonable compensation. The question of maintainability of the petition as raised was rejected while answering issue No. 5 against the appellant. On issue No. 6, though it has been held that the driving licence was not renewed beyond 23.10.1997, however, interpreting Section 15(4) of the M.V. Act, 1988, which provides for renewal of a driving licence up to a period of 5 years, it was held that the same has not become ineffective during the period i.e. 23.10.1997 when its validity had expired till the accident of the tractor i.e. 2.6.2000. The insured-respondent No. 1 has not assailed the impugned award. The same, however, has been assailed on behalf of insurer-respondent No. 1 on several grounds, however, mainly that since deceased was not holding a valid and effective driving licence at the time of accident of the tractor, therefore, the liability, if any, to pay the compensation is that of the insured who allowed the ill fated tractor to be driven by an unauthorised person.

7. The appeal, though has been admitted, however, not on any substantial question of law. Anyhow, as per the settled legal proposition, substantial question of law can be framed at any stage, including at the time of final hearing. Otherwise also, the substantial questions of law arises according to the appellant-insurer for determination are at page 4 of the memorandum of appeal. Anyhow, it is only the substantial question of law at Sr. No. 3 which arises for determination in this appeal, which reads as follows:

> "3. Whether, the Ld. Commissioner below is justified to pass the amount of compensation along with interest against the appellant who has proved on the record that the insured has committed the material breach of Insurance Policy w.r.t. driving clause as well as the use of tractor for non-agriculture purpose although the tractor was insured under Kisan Package Policy and no passenger could be carried on the tractor?

8. In order to decide the legal question as has arisen for determination in this appeal, it is desirable to take note of as to what constitutes a legal and valid driving licence in legal parlance. Reference can be made in this behalf to Section 3(1) of the M.V. Act, which reads as follows:

> "3. Necessity for driving licence.—
>
> (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than 1[a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.—(1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than 1[a motor cab or motor cycle] hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do."

9. It is thus safe to hold that no person can drive a vehicle in any public place unless he holds an effective driving licence issued by the competent authority. Similarly, no person can drive a transport vehicle unless and until the driving licence he holds entitles him to do so. Be it stated that here the vehicle is tractor. When it is a tractor alone, it can reasonably be believed that the same falls in the category of light motor vehicle (LMV). Reference in this behalf can be made to Section 2(21) of the Act. However, when trolley is attached and goods carried therein, the same becomes a transport vehicle and in that event only a person whose driving licence authorizes him to drive the same can do so. In this regard, support can be drawn from the judgment of Punjab and Haryana High Court in ***M/S United India Insurance Co. Ltd. Chandigrh vs. Sh. Pritpal Singh, (1996-2) 113 P.L.R. 49.*** The relevant text of the judgment reads as follows:

> "6. Definition of "Motor Vehicle" or "vehicle" is comprehensive so as to include any mechanically propelled vehicle adapted for use upon roads irrespective of the source of power and includes a trailer. "Trailer" has been defined separately but is also included in the definition of the "Motor Vehicle"/"Vehicle". Therefore, even though a trailer may be drawn by a motor vehicle, it by itself is a motor vehicle and both the tractor and the trailer taken together would constitute a transport vehicle. If the trailer/trolley is not driven by a tractor, it does not become a vehicle and does not have any independent identity. The very fact that the trailer has been included within the definition of "motor vehicle" clearly shows that the legislature did not intend to exclude a tractor together with a trailer/trolley from the definition of the "motor vehicle" and in our opinion, the findings recorded by the Tribunal about the liability of the appellant do not suffer from any illegality."

10. Although the insured respondent No. 1 has not said anything about the use of the tractor at the relevant time yet the suggestion given to PW-2 Kushla Devi on behalf of insurer-respondent No. 2 that at the time of accident, sand and grit was being carried in the trolley of the tractor, has been admitted by the said witness, therefore, it can reasonably be believed that the tractor was being used as a transport vehicle at the relevant time. Admittedly, the validity of the driving licence which was issued by Licensing Authority, Mandi was between 24.10.1994 to 23.10.1997. The accident has occurred on 2.6.2000. As per the testimony of DW-3 Anuj Kumar, no application for renewal of the driving licence was received after 23.10.1997, meaning thereby that at the time of accident, the deceased driver was not holding a valid and effective driving licence. Learned Commissioner below has erroneously pressed into service the provision contained under Section 15(4) of the Act because the driving licence which ceases to be effective, no doubt, can be renewed, however, only subject to undergoing and passing out the test of competence to drive in terms of Section 9 of the M.V. Act, i.e. like at initial stage when an

application for issuance of driving licence is made and the driving licence issued subject to qualifying the test of competence. In the case in hand, deceased driver has never approached the Licensing Authority for renewal of the driving licence till his death.

11. The licence could have been renewed within 30 days as provided under Section 15(3) of the M.V.Act. No application, however, was made by the deceased driver within the prescribed period for renewal of the licence in question. Otherwise also, the licence admittedly issued for driving light motor vehicle, the deceased driver could not have driven the tractor loaded with sand and grit in its trolley. Therefore, there being breach of the contract of insurance, no liability could have been fastened upon the insurer-respondent No. 2. Since it is the insured who has allowed the tractor along with its trolley loaded with grit and sand to be driven by an unauthorized person, being responsible for breach of the contract of insurance, is liable to indemnify the claimants in the matter of payment of the compensation as awarded. The substantial question of law is answered accordingly.

12. Being so, the present appeal is allowed and the impugned award is though upheld, however, modified to the extent that the liability to pay the amount of compensation together with interest shall be that of the insured and not the insurer-appellant. The appeal is accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Shri Pawan Kumar Sharma ....Petitioner/JD.

Versus

Sarla Sood and others ....Respondents/DH.

C.R. No. 184 of 2011.
Reserved on:24.11.2016.
Decided on: 5th December, 2016.

Code of Civil Procedure, 1908- Section 47- Rent Controller ordered the eviction of the tenant on the ground of arrears of rent - the order was put to execution – objections were filed, which were dismissed – held, that an application for extension of time was filed, which was dismissed, this shows the liability to pay the amount – however, the general power of attorney admitted in subsequent rent petition that the tenant had paid the rent – the objections were wrongly dismissed by the Executing Court- revision allowed – order of the Rent Controller set aside.

(Para-2 to 4)

For the Petitioner: Mr. Deepak Bhasin, Advocate.
For Respondents: Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The Judgment debtor/petitioner herein, tenant in the demised premises stands aggrieved by the pronouncement made by the learned Executing Court upon his objections constituted therebefore vis-a-vis the execution petition constituted thereat by the Decree holder/landlord, wherewithin the apposite unfoldments qua his resistance to the execution of the decree stood discountenanced by the learned Executing Court.

2. The learned counsel appearing for the judgment debtor/petitioner herein submits qua the impugned pronouncement made by the learned Executing Court upon the apposite objections preferred therebefore by the JD/tenant manifesting therein qua the decree put to execution therebefore not warranting recording of affirmative orders thereon, its standing fully satisfied, standing stained with a vice arising from the factum of its palpably slighting the factum

of unfoldments occurring in the relevant record existing therebefore comprised in the testification recorded on 29.10.2004 in Rent Petition No. 10/2 of 2003 by the General Power of Attorney of the landlord wherein he made articulations qua all the outstanding arrears of rent qua the demised premises standing liquidated by the judgment debtor excepting conspicuously the one's pertaining to the period commencing from 1.9.2000 uptill 31.03.2003 whereupon he hence canvassed qua the executable pronouncement recorded in rent petition No. 1-2 of 1996 put to execution before the learned Executing Court embodying therein qua the Judgment debtor, falling into arrears of rent commencing from 1.9.1995 upto the date of payment standing fully satisfied, satisfaction whereof emanating from the factum of liability of rent fastened upon the tenant in a verdict recorded in Rent Petition No. 1-2 of 1996, standing acquiesced to stand liquidated more so when the aforesaid verdict stood put to execution. However, the learned counsel appearing for the tenant/JD/petitioner herein cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from an imminent display occurring in the impugned pronouncement hereat wherewithin unravelments are held qua the rendition recorded by the learned Rent Controller in Rent Petition No.1-2/1996 standing assailed before the learned Appellate Authority by the tenant/JD by the latter preferring an appeal therebefore whereat he under an application constituted under Section 5 of the Limitation Act sought extension of time for depositing his statutory liability qua the arrears of rent determined by the learned Rent Controller in a pronouncement made by the latter on 6.11.1999, wherefrom an inference spurs of the JD acquiescing qua his not making the relevant deposit qua his liability towards arrears of rent within the statutorily prescribed period, application whereof suffered the ill fate of its dismissal by the learned Appellate Authority under the latter's order recorded on 16.12.2000. Of course, the inevitable ensuing sequel therefrom is qua the tenant/JD acquiescing to the factum of his not depositing the relevant computations of arrears of rent made by the learned Rent Controller concerned in Rent Petition No.1-2 of 1996 within the statutorily prescribed period for its deposit therebefore whereupon the apposite decree for his suffering eviction from the demised premises on account of his falling into arrears of rent became executable qua him, whereupon, he stands estopped besides forestalled to derive the fullest strength from any acquiescence made by the GPA of the decree holder/landlords, rather stands entailed with the misfortune of the learned Executing Court ensuring his eviction from the demised premises by ordering for issuance of warrants of possession qua him.

3. Even though, this Court has partially blunted the effect of the aforesaid communication occurring in the testification of the GPA of the decree holder qua the tenant/JD not holding any liability qua the landlord vis-a-vis liquidation qua him of rent for the period commencing from 1.9.1995 upto the date of payment, whereupon, this Court concludes qua its entailing the effect of the Executing Court ordering for issuance of warrants of possession upon the judgment debtor yet before ordering, the learned Executing Court to make the aforesaid pronouncement, this Court is enjoined to also not remain oblivious to the factum of the executable decree standing rendered in the year 1999 by the learned Rent Controller concerned in Rent Petition No. 1-2 of 1996, also this Court stands enjoined to not remain unmindful to the factum of the landlord subsequent to his obtaining a verdict in Rent Petition No. 1-2 of 1996 his also qua the demised premises instituting Rent Petition No.10/2 of 2003 before the learned Rent Controller concerned, during proceedings whereof the GPA of the landlord made a communication displaying his acquiescence qua the tenant liquidating his liability of rent qua the demised premises in sequel to the pronouncement made in Rent Petition No. 1-2 of 1996. Though, the acquiescence of the GPA of the landlord would not erode the play of the dicktat of the relevant statutory mandatory provisions enjoining the tenant to within the time prescribed therewithin deposit his apposite judicially determined liability of arrears of rent before the Court concerned, whereas, evidently with the tenant not liquidating his apposite liability within the statutorily ordained period for its liquidation whereupon the statutory consequence qua the Executing Court ordering for issuance of warrants of possession qua him is an inevitable ensuing sequel therefrom. However, the acquiescence qua the relevant facet made by the GPA of the landlord in rent petition No.10/2 of 2003 which stood instituted subsequent to the pronouncement made in

rent petition No.1-2 of 1996 holding bespeakings therein of the tenant making the relevant liquidation holds the sequel of the landlord accepting the attornment of rent to him by the tenant/JD other than the statutory mode for its deposit. The effect of the landlord personally/directly accepting attorning of rent qua the demised premises from the tenant in detraction of the statutory mode does hold the consequence of the landlord waiving his rights to seek eviction of the tenant, right whereof stood bestowed upon him under an executable decree pronounced in Rent Petition No.1-2 of 1996, inference whereof when stands construed in coagulation with the landlord subsequent to the pronouncement recorded by the Rent Controller in Rent Petition No. 1-2 of 1996, his in the year 2003 instituting another petition seeking eviction of the JD from the demised premises, ultimately also when both the factum aforesaid stand construed in entwinement with the apposite execution petition constituted before the learned Executing Court by the landlord whereupon he sought execution of the executable decree rendered in Rent Petition No.1-2 of 1996 standing constituted therebefore belatedly on 30.08.2010 does foster an inference of with the landlord receiving rent directly from the tenant, he is to stand construed to not only create a fresh tenancy qua the demised premises upon the tenant besides is to stand construed to concomitantly hence, waive his rights to seek eviction of the JD under an executable decree recorded in Rent Petition No.1-2 of 1996. Contrarily, it has to be concluded of the landlord by procrastinating the execution of the executable decree rendered on 6.11.1999 in Rent Petition No. 1-2 of 1996 upto 29.09.2005 whereat a pronouncement in rent petition No. 10/2 of 2003 also occurred his also thereupon renewing the tenancy qua the relevant premises vis-a-vis the JD.

4. The summom bonum of the aforesaid discussion is that all the aforesaid material which existed before the learned Executing Court standing slighted besides their impact standing untenably undermined by him whereupon the ensuing sequel therefrom is of the learned Executing Court while pronouncing its impugned rendition overlooking the relevant and germane evidence besides its not appreciating its worth. Consequently, the order impugned suffers from a gross absurdity and perversity of mis-appreciation of material on record. Accordingly, the instant petition is allowed and the order impugned is quashed and set aside. In sequel, the apposite execution petition seeking execution of the verdict pronounced in Rent Petition No.1-2 of 1996 is dismissed, whereas, the objections instituted thereat by the JD/petitioner herein/tenant are allowed. All the pending applications also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rattan Chand Sharma …Appellant.

Versus

State of Himachal Pradesh through Collector, Kangra at Dharamshala, H.P …Respondent.

RSA No.393 of 2006.
Reserved on : 16.11.2016.
Decided on : 05.12.2016.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit seeking declaration that shamlat land was allotted to him – the allotment was cancelled but the order of cancellation was set aside in the civil suit- an appeal was filed, which was dismissed-representation was made subsequently by the residents of the area on which the allotment was cancelled – the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held in second appeal that cancellation was set aside in the previous suit on the ground that Sub Divisional Magistrate had no jurisdiction to cancel the allotment and only Commissioner was empowered to do so – subsequent cancellation was made by the Commissioner – the land was never possessed by the plaintiff and the allotment was rightly set aside- appeal dismissed.(Para-10 and 11)

For the appellant Mr. N.K. Sood, Sr. Advocate with Mr. Aman Sood, Advocate.
For the respondent : Mr. Virender Kumar Verma, Addl. AG with Mr. Pushpinder Jaswal, Dy. AG.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal under Section 100 of the Code of Civil Procedure is maintained by the appellant against the judgment and decree dated 1.6.2006, passed by the learned District Judge, Kangra at Dharamshala, in Civil Appeal No.144-P/XIII-2005, whereby the learned lower Appellate Court has affirmed the judgment and decree passed by learned Civil Judge (Junior Division), Court No.2, Palampur, District Kangra, H.P, in Civil Suit No.103 of 2000, dated 17.8.2005, with the prayer to set aside the same and decree the suit of the plaintiff.

2. Briefly stating facts giving rise to the present appeal are that appellant/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for declaration and possession of the suit land against the respondent/defendant (hereinafter referred to as 'the defendant') alleging that he was allotted 'Shamlat land' in the year 1976-77, comprised in Khata No.70 min. Khatauni No.241 & 245 Khasra No.218, 670 & 671/1 measuring 0-30-47 hectares, situated in Mohal Nawalkar, Mauza Naura, Tehsil Palampur, District Kangra, H.P. The allotment was cancelled by the SDO (C), Palampur, vide order dated 25.7.1981, without any rhyme or reason, the order was challenged in the Civil Court and the order of S.D.O (C) was quashed by the Civil Court while decreeing the suit of the plaintiff. Thereafter, the State of Himachal Pradesh, maintained an appeal before the learned District Judge, Dharamshala, the same was also dismissed and the judgment and decree passed by the learned Court below was affirmed. On 18.9.1996, Addl. District Magistrate, Kangra, entertained an application of some of the residents of Village Naura, Tehsil Palampur, for cancellation of the allotment cancelled the allotment made in favour of the plaintiff. The said order of Addl. District Magistrate, who was earlier impleaded as defendant No.2 (and whose name was deleted) is in clear disobedience of the decree of Civil Court and without jurisdiction. An application under Order 21 Rule 32 CPC, was also filed against the Addl. District Magistrate, but it was dismissed by the Civil Court.

3. The suit was resisted and contested by the defendant by raising preliminary objections that the Civil Court has no jurisdiction to try and decide the case, suit is not maintainable, plaintiff has no locus standi and cause of action to file the suit and the suit is bad for want of notice under Section 80 CPC. On merits, it has been contended that the suit land was allotted to the plaintiff during the year 1976-77, but its possession was not delivered to him. Thereafter, the said allotment was cancelled by Addl. District Magistrate, exercising the powers of Commissioner, as there was representation of Gram Panchayat, Naura, with a prayer for the cancellation of allotment. There was no bar for the competent Revenue Officer, for cancellation of the suit land. Moreover, the plaintiff was an employee at the time of allotment of land and no possession was ever delivered to him.

4. The learned trial Court framed following issues on 4.1.2003 :

"1. Whether the order dated 28.4.1997 passed by Addl. Dy. Commissioner, Kangra at Dharamshala, is wrong and without jurisdiction, as alleged ? OPP.

2. Whether the plaintiff is entitled to the relief of possession, as alleged ? OPP.

3. Whether this Court has no jurisdiction ? OPD.

4. Whether suit is not maintainable ? OPD.

5. Whether plaintiff has no locus standi ? OPD.

6. Whether plaintiff has no cause of action ? OPD.
7. Whether no notice under Section 80 CPC has been served on the State of H.P ? OPD.
8. Whether plaintiff has no cause of action ? OPD.
9. Relief."

5. The learned trial Court after deciding Issue Nos.1 and 2 against the plaintiff, Issue No.3 against the defendant, Issue No.4 in favour of the defendant, Issue Nos.5 to 8 against the defendant and dismissed the suit of the plaintiff. Thereafter, the appeal was maintained by the plaintiff before learned District Judge, Kangra at Dharamshala and the same was dismissed. Hence, the present regular second appeal, which was admitted on the following substantial question of law:

> "Whether in the face of the decree passed in the earlier suit declaring the appellant-plaintiff as owner in possession of the suit land and restraining the respondent-defendant from causing any interference in possession of the appellant-plaintiff, could the Additional Deputy Commissioner have passed an order for the cancellation of allotment of the suit land in favour of the appellant-plaintiff, under the scheme formulated in accordance with the provisions of H.P. Village Common Lands (Vesting and Utilization) Act ?"

6. Learned Senior Counsel appearing on behalf of the plaintiff has argued that the learned Courts below has not taken into consideration the fact that the judgment and decree passed in favour of the plaintiff in earlier suit has attained finality with respect to the same land and the Additional District Magistrate, was having no power to cancel the allotment after the decree has attained finality.

7. On the other hand, learned Additional Advocate General appearing on behalf of the respondent has argued that the decree in the earlier suit was only to the extent that the Sub Divisional Magistrate, was having no jurisdiction to pass the cancellation order cancelling the Nautor land, but thereafter the order of cancellation was passed by the competent authority, as per law. There is no ground to interfere with the well reasoned judgment passed by the learned Courts below. He has argued that the appeal deserves dismissal.

8. In rebuttal, learned Senior Counsel appearing on behalf of the plaintiff has argued that the land is still lying vacant, as the plaintiff was entitled for Nautor land, he should be given Nautor land, as per Rules by the defendant and so the appeal may be allowed.

9. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

10. At the very outset, it is pertinent to discuss the evidence, which has been led by the plaintiff. The plaintiff Rattan Chand, appeared as PW-1, has stated that the suit land is about 8 ½ Kanals, which was allotted to him by way of 'Patta' in the year 1978, against payment of Rs. 184/- and thereafter Sub Divisional Magistrate, cancelled the same. The plaintiff has challenged the said order before learned Court below and the suit was decreed in his favour. The appeal was preferred by the defendant before the learned lower Appellate Court, Dharamshala, and the same was also decided in favour of the plaintiff. He has further deposed that the Panchayat people approached the Addl. District Magistrate and decided the matter against the plaintiff without any jurisdiction. In his cross-examination, he has stated that the suit land was allotted to him, being a land less person and that he joined services in the year 1990, on daily wages. He has denied that he was in service during the year 1976-77. He has denied that at the time of allotment, his annual income was Rs. 3000/- or that possession was not delivered to him by the Revenue Department stated that the possession was delivered and then Revenue Department again took possession of the suit land. He has denied that all the villagers use the suit land and the land is lying vacant and is possessed by the Government. He has admitted that after the allotment of suit land, the villagers complained against the witness and the allotment

was cancelled. He has admitted that on the complaint of Panchayat before the Addl. District Magistrate, the allotment was cancelled, even after the decision of Civil Court. He has admitted that sufficient opportunity was given to the witness and Panchayat during the proceedings before Addl. District Magistrate. He has also admitted that decisions made by learned Court below and learned District Judge, pertained to the order of Sub Divisional Magistrate. He has also unaware if Addl. District Magistrate (Commissioner) was competent to cancel the 'Pata'. No appeal was preferred by the plaintiff against the order of cancellation of allotment made by the Addl. District Magistrate. He has also stated that Revenue Department had not handed over the possession to him. DW-1 Ranu Ram, Patwari Halqua Naura, has stated that the suit land belongs to the State Government and is in possession of Forest Department through 'Tabe'-Bartandaran'. The said land was allotted to the plaintiff in the year 1976-77, but the possession was not handed over to the plaintiff, because it was in possession of Forest Department through 'Bartandarans'. There is one water pond in the suit land, the water of which is used for irrigation by the 'Bartandarans'. In his cross-examination, he has denied that change in entry of the suit land was made in the year 2000 and such change was effected in the year 1995-96. DW-2 Baldev Singh, Clerk, has produced copy of the order dated 28th April, 1997, Ex.P-7, whereby the allotment of the suit land was cancelled on an application moved by the Gram Panchayat, Naura. He has also proved on record that the plaintiff was working as Mate in the Irrigation and Public Health Department. DW-3 Kashmir Singh, Pradhan, Gram Panchayat, Naura, has stated that the suit land is owned by State of Himachal Pradesh and is possessed by Forest Department through 'Bartandarans'. The suit land falls in village Naura and there is a water pond, the water is being used by the Villagers, that is, the 'Bartandarans'. He has also stated that earlier the suit land had been allotted to the plaintiff, but on the objections and keeping in view the utility of the 'Bartandarans', such allotment was cancelled, on the application of Gram Panchayat, Naura, moved before Deputy Commissioner and the same was duly signed by the Villagers. The plaintiff has no concern with the suit land nor there is any entry in favour of the plaintiff in Revenue record. In his cross-examination, he has admitted that suit land was allotted to the plaintiff in the year 1977, but he does not know, if earlier Sub Divisional Magistrate, had cancelled the same or that such order was challenged by the plaintiff and civil suit was decided in favour of the plaintiff. DW-4 Smt. Kanta Mehta, has deposed that the earlier to the allotment of suit land is being used by the 'Bartandarans', as there is also one water tank, which is hundred years old. The plaintiff has no concern whatsoever with the suit land. In her cross-examination, she has denied that the plaintiff has got the suit land by the order of the Court. She has denied that after decision of the Court, they have built a water tank on the suit land. She has also denied that being Pradhan, she connived with Villagers and got quashed the court orders from the Addl. District Magistrate. She has denied that Addl. District Magistrate, had no powers to quash such order. She has denied that plaintiff is owner-in-possession of the suit land.

11. From the perusal of record, it is revealed that the judgment as passed by the Civil Courts in the earlier litigation shows that the Civil Courts judgment and decree, which has attained finality has specifically held that Sub Divisional Magistrate, was having no jurisdiction to cancel the allotment made in favour of the plaintiff. It was held that in cases under the H.P. Village Common (Vesting and Utilization) Scheme, 1975 only the "Commissioner" is empowered to cancel the allotment made in favour of a particular person. Vide notification No.2-A (4)-3/78, dated January 6, 1979, issued by the State Government, all the Deputy Commissioners in the State of Himachal Pradesh, have been vested with the powers of the "Commissioner" within the meaning of clause 13 (4) of the Scheme of 1975 and vide subsequent notification No.2-A (3)-11/77 dated March 26, 1983, in addition to the Deputy Commissioners, Addl. District Magistrates of Kangra and Mandi, have also been vested with the powers of the "Commissioner" within the meaning of clause 13 (4) of the Scheme of 1975. So, the order of cancellation made by the Sub Divisional Magistrate, Palampur, against the plaintiff was quashed. It was the sole ground on which the cancellation order was set aside by the Civil Courts. However, the Addl. District Magistrate, Kangra, thereafter exercising the powers of "Commissioner" has cancelled the allotment of the suit land in favour of the plaintiff, vide order Ex.D-7, its copy Ex.P-3, also on record. It is specifically admitted by the plaintiff in his cross-examination that he was given full

opportunity to contest the cancellation case by the Addl. District Magistrate. It is also admitted by the plaintiff that the land is in the nature of water body and is still lying vacant. However, the defendant's case is that the land is being used by 'Bartandarans', is in occupation of the Forest Department, which also shows that the land being vacant throughout and it was never possessed by the plaintiff. So, substantial question of law is decided accordingly holding that the judgment and decree passed by the learned Courts below is not in derogation to the decree for Permanent Prohibitory Injunction in respect of the suit land. The learned Courts below has not misconstrued and misinterpreted the provisions of H.P. Village Common Land (Vesting and Utilization) Act, 1974. The order of competent authority is just, reasoned and properly appreciated by the learned Courts below.

12. From the above, it is clear that the findings arrived at by the learned Courts below are just, reasoned and after appreciating the evidence, which has come on record to its true perspective. Hence, needs no interference.

13. With these observations, the appeal of the appellant/plaintiff being without any merit deserves dismissal, hence the same is dismissed. Needless to say that if the plaintiff has a right in view of the order passed by the Additional District Magistrate, Kangra at Dharamshala, H.P, Ex.P-3 dated 28.4.1997, he shall be at liberty to approach the authorities, as per law. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Balvinder Kumar .....Respondent.

Cr. Appeal No. 286 of 2008
Decided on: 05/12/2016.

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving a van in a rash and negligent manner- Van hit the informant and caused him injuries – the accused was tried and acquitted by the Trial Court- held in appeal that the informant had suddenly appeared before the vehicle - the contents of the FIR were not readover and explained to the informant – one prosecution witness had not supported the prosecution version- the accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-9 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Digvijay Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 2.1.2008 by the learned Judicial Magistrate 1st Class, Court No.4, Mandi, Himachal Pradesh, in Police Challan No.255/I/04/255/II/04, whereby she acquitted the respondent (for short 'accused') for the offences charged.

2. The brief facts of the case are that on 21.3.2004 at about 9.00 a.m. at Nerchowk accused Balvinder Kumar was driving a Maruti van bearing No.HP-02-6573 in a rash and negligent manner and at the same time complainant Parma Ram, alongwith Chavi Ram, was walking by the side of the road with his bullocks and the accused while driving the car rashly and negligently hit the complainant causing injuries to him. The injured/complainant was taken to

hospital for medical treatment. A case was got registered against the accused, police visited the spot, prepared the site plan and took into possession the Maruti van bearing No. HP-02-6573 for its mechanical examination. After recording the statements of the witnesses and completion of the investigation, the accused was challaned under Sections 279, 337 and 338 of the Indian Penal Code. After completing all codal formalities and on conclusion of the investigations into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for his committing offences punishable under Sections 279, 337 and 338 of the Indian Penal Code to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 10 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent has with considerable force and vigour contended qua the findings of acquittal recorded by the learned trial Court standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. Victim complainant PW-3 lodged F.I.R. qua the relevant occurrence which stands borne on Ext.PW-3/A. PW-6 in his testification while proving the apposite MLC prepared qua the victim embedded in Ext.PW-6/A has made an emphatic pronouncement therein qua the occurrence of injuries on the person of the victim being sequelable in a road side accident. The learned trial Court had pronounced a verdict of acquittal qua the accused respondent who stands alleged to commit the relevant charged offence comprised in his while negligently driving his vehicle his striking it with PW-3 who at the relevant time was occupying the road along with his bullocks whom he was thereat tending to. In sequel thereto the accused respondent carried the victim to hospital whereat he received treatment for the injuries suffered by him in a collision which occurred inter se the vehicle driven by him with PW-3. The ascription of penally inculpable negligence by the prosecution qua the accused respondent stands canvassed by the learned Deputy Advocate General to stand emphatically proven by the consistent testimonies of PW-1, PW-2 and PW-3. He canvasses qua the veracity of the testimonies of PW-1, PW-2 and PW-3 not warranting theirs standing concluded as inaptly done by the learned trial Court to stand countervailed by the deposition of PW-4 also an eye witness to the occurrence merely for PW-4 omitting to lend support to the prosecution version comprised in his reneging from his previous statement recorded in writing. The espousal made herebefore by the learned Deputy Advocate General for seeking reversal of the verdict pronounced upon the accused/respondent enjoins this Court to incisively peruse the defence projected by the accused before the learned trial Court embedded in the factum of PW-3 occupying the road at the relevant time, road whereof also thereat evidently held a heavy congestion of vehicles besides thereat PW-3 was tending to his bullocks whereupon the defence has put apposite suggestions to the prosecution witnesses qua the bullocks on hearing the blaring sounds of sirens emanating from the vehicle occupying the road at the relevant time, theirs moving astray from their maneuvered direction by PW-3

whereupon they struck PW-3 whereafter on the latter abruptly appearing before the vehicle driven by the accused/respondent he suffered a collision with it, besides obviously on anvil thereof the defence espoused qua the striking of PW-3 by the vehicle driven by the accused respondent not being a sequel to any penally negligent act on the part of the accused respondent rather the collision which occurred inter se the vehicle driven by the accused respondent with PW-3 arising from PW-3 standing abruptly struck by the bullocks which he was tending to at the relevant time, who had for reasons afore-stated moved astray from their negotiated direction whereafter the abrupt appearance of PW-3 before the relevant vehicle not begetting the sequel of the vehicle driven by him directly striking PW-3 rather the reason for the relevant collision occurring with PW-3 being ascribable to after PW-3 suffering a jolt from the bullocks to whom he was tending to at the relevant time his thereafter begetting an abrupt collision with the vehicle driven by the accused. Consequently, the defence espouses qua theirs evidently not in the aforestated factual scenario surfacing any proven element of the accused respondent intentionally deviating from the standards of due care and caution nor any penal liability being fastenable upon him for the injuries suffered by PW-3.

10. Be that as it may, PW-1 and PW-2 who are the eye witnesses to the occurrence did lend corroborative succor to the testifications of PW-3 the victim/complainant. The vigour of the prosecution case qua PW-3 sustaining injuries in the manner manifested in F.I.R. embodied in Ext.PW-8/A primarily warranted emanation of taint free evidence of PW-3 qua the recitals borne thereon being free from any stain of compulsion or duress besides the contents embedded in Ext.PW-3/A arising from their volition making by PW-3 whereupon alone the genesis of the prosecution case embedded in Ext.PW-3/A would acquire probative sinew also thereupon the testifications of PW-1 and PW-2 in purported corroboration qua the testification of PW-3 would hold a concomitant vigour of tenacity. Contrarily if the testification of PW-3 holds therewithin the aforestated taints it besides evidence in purported corroboration thereto would fall apart rather reiteratedly the testifications of PW-1 and PW-2 in purported corroboration to the taint ridden testification of PW-3 would be construable to stagger besides the testifications of PW-1 and PW-2 would be construable to be a sequel of the Investigating Officer for meteing corroboration to Ext.PW-3/A his concerting to engineer the statements of PW-1 and PW-3. A close scrutiny of the deposition of PW-3 embodied in his cross-examination unveils qua the Investigating Officer *suo motu* recording the contents of Ext.PW-3/A also therein he communicates qua the contents of Ext.PW-3/A neither standing readover to him nor his reading its contents whereupon it is to be concluded qua without his dictating the recitals of Ext.PW-3/A to the Investigating Officer nor thereafter his comprehending its contents, his proceeding to append his signatures thereon whereupon it is to be concluded qua the recitals embedded in Ext.PW-3/A being not a voluntary making of PW-3 rather the recitals embedded therein standing engineered by the Investigating Officer. In aftermath, the genesis of the prosecution case which stands testified in purported corroboration thereto by PW-3 in his examination in chief stands eroded of its truth. The apt sequel thereof is qua the purported corroboration lent thereto by PW-1 and PW-2 standing obviously concluded to be a sequel to the Investigating Officer tutoring besides inventing their previous statement recorded in writing whereupon their testifications in corroboration thereto do not acquire any tenacity or vigour. Corollary of the aforesaid discussion is qua the genesis of the prosecution case embodied in Ext.PW-3/A standing benumbed.

11. Be that as it may hereat with PW-4 supporting the propagation of the defence, though he obviously reneged from his previous statement recorded in writing rather contrarily being construable for imputation of reliance thereon besides credence being placed thereupon significantly when on his reneging from his previous statement recorded in writing the learned APP on obtaining an affirmative permission of the learned trial Court to hold him to cross-examination though in course whereof he made a concerted bid therein to rip the tenacity of the disclosures made by him in his examination in chief yet the aforestated concert of the APP to rip the tenacity of his deposition embodied in his examination in chief wherein he had lent succor to the propagation of the defence did not yield any fruitful outcome to the prosecution. Consequently, even though PW-4 reneged from his previous statement in writing yet when he

stood subjected thereafter to a rigorous examination by the learned APP whereat his testimony comprised in his examination in chief remained unscuttled constrains this Court to conclude qua thereupon his testimony in support of the defence acquiring credit besides tenacity being imputable thereupon. Even the testifications occurring in the examinations-in-chief of prosecution witnesses who therein renege from their previous statements recorded in writing are not *per se* thereupon rendered unreadable vis-à-vis the propagations articulated therein holding leanings qua the defence especially when the relevant echoings supportive of the defence occurring in the relevant examination-in-chief acquire succor from the factum of the testification of the victim besides of purported eye witnesses to the relevant occurrence standing ingrained with a taint besides blemish also when the testification of a hostile prosecution witnesses despite withstanding the rigors of an exacting cross-examination whereupon his espousal in his examination-in-chief supportive of the defence hence remain unshattered, contrarily thereupon his untaint ridden relevant testification warranting imputation of credence thereto.

12. The *summum bonum* of the above discussion is qua the depositions of PW-3 besides PW-1 and PW-2 in purported corroboration thereto not being amenable to imputation of reliance thereupon contrarily the deposition of PW-4 being amenable to imputation of credence besides reliance thereupon whereupon this Court concludes qua the defence succeeding in proving qua the injuries begotten on the person of PW-3 being a sequel to the latter while standing struck by the bullocks occupying the road at the relevant time his thereafter *suo motu* abruptly striking the vehicle driven by the accused respondent, in sequel whereof no penally inculpable negligence is ascribable to the accused/respondent. Also with the conduct of the accused respondent comprised in his carrying the victim to hospital when is conduct magnificatory of his innocence, hence it negates the charge.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ...Appellant.

Versus

Nanha ...Respondent.

Criminal Appeal No.478 of 2008

Date of Decision : 05.12.2016

Indian Penal Code, 1860- Section 376- Accused had subjected the prosecutrix to sexual assault – the accused was tried and acquitted by the Trial Court- held in appeal that testimony of the prosecutrix if found credible does not require any corroboration - the Court may look for corroboration in case of child witness to satisfy its conscience – Court should have no hesitation in accepting the testimony of the prosecutrix – minor discrepancy or variation in the statement of witness will not be fatal, whereas, contradiction will be – the prosecutrix was minor on the date of incident- the accused was on visiting terms with the family of the prosecutrix and is a close relative – the father of the prosecutrix was not at home and the accused had visited the house of the prosecutrix to spend the night – the prosecutrix supported the prosecution version – her credit was not impeached in cross-examination- absence of blood, rashes, sperms or bruises on

the vital part of the prosecutrix is not sufficient to disbelieve her testimony – her version was corroborated by her mother – the matter was reported to police immediately- the prosecution version was proved beyond reasonable doubt and the Trial Court had wrongly acquitted the accused- appeal allowed- accused convicted of the commission of offence punishable under Section 376 of I.P.C. (Para-7 to 40)

Cases referred:
State of Rajasthan versus Om Prakash, (2002) 5 SCC 745
State of Maharashtra versus Chandraprakash Kewalchand Jain, (1990) 1 SCC 550
Golla Yelugu Govindu vs. State of AndhraPradesh (2008) 16 SCC 769
Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)
State of Himachal Pradesh vs. Suresh Kumar (2009)16 SCC 697
Gentela Vijayavardhan Rao v.State of A. P. [(1996) 6 SCC 241]
Rattan Singh v. State of H. P., (1997) 4 SCC 161
Rameshwar v. The State of Rajasthan, AIR 1952 SC 54
State of Punjab versus Gurmit Singh and others, (1996) 2 SCC 384
State of H.P. versus Lekh Raj and another (2000) 1 SCC 247
State of Punjab versus Jagir Singh (1974) 3 SCC 277
State of Rajasthan versus N. K. THE ACCUSED (2000) 5 SCC 30
State of M.P. v. Dharkole alias Govind Singh and others, (2004) 13 SCC 308

For the Appellant : M/s M.A. Khan and Varun Chandel, Additional Advocate Generals.
For the Respondent : Mr. N.S. Chandel with Mr.Dinesh Thakur, Advocate.
Accused in the custody of HHC Sant Ram No.1106 and HHC Ghanshyam No. 891, Police Line, Kaithu, Shimla.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State has appealed against the judgment dated 26.4.2008, passed by learned Sessions Judge, Hamirpur, Himachal Pradesh, in Sessions Trial No.16 of 2007, titled as *State v. Nanha,* challenging the acquittal of respondent Nanha (hereinafter referred to as the accused), who stands charged for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code.

2. It is the case of prosecution that on 8.6.2007, Patto Devi (PW.2) lodged a complaint to the effect that accused Nanha had subjected her daughter, i.e. the prosecutrix (PW.3) to sexual assault. In relation to the said crime, on 8.6.2007 at 2.30 AM, FIR No. 238/2007 (Ex.PW.2/A) under the provision of Section 376 of IPC came to be registered at Police Station, Hamirpur. The alleged incident took place at about 1.30 AM, in the night intervening 7th& 8th June, 2007. Inspector Anjni Jaswal (PW.12), SHO of the concerned Police Station, who conducted the investigation, got the prosecutrix medically examined from Dr. Rajneesh Thakur (PW.1), who issued MLC (Ex.PW.1/B). Accused was also got medically examined from Dr. Rajesh Sharma (PW.4), who issued MLC (Ex.PW.4/B). For corroboration, certain incriminating articles so recovered, were sent for chemical analysis and report of the Chemical Analyst (Ex.PX) taken on record. Police also took on record proof with regard to age of the prosecutrix (Certificates Ex.PW.8/B and PW.9/B).

3. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

4. Accused was charged for having committed an offence punishable under the provisions of Section 376 of the Indian Penal Code to which he did not plead guilty and claimed trial.

5. In order to establish its case, prosecution examined as many as 12 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took up the following defence:

> "I am innocent. A false case has been foisted against me at the instance of the prosecutrix and her mother. On the day of occurrence, Pato Devi had invited me to her residence in the absence of her husband. I treat Nitu as my cousin."

6. Trial Court has acquitted the accused on the following grounds: (a) testimony of the prosecutrix was highly improbable; (b) element of her tutoring was not ruled out; and (c) possibility of the accused having been falsely implicated on account of his having illicit relationship with the mother of the prosecutrix could not be ruled out.

7. Having heard learned counsel for the parties as also perused the record, we are of the considered view that the trial Court has seriously erred in coming to such conclusions and returning findings of acquittal of the accused. Reasoning adopted is bordering perversity, for it is not based on correct and complete appreciation of testimony of the prosecutrix as also other relevant/material witnesses. In fact, we are of the considered view that the trial Court adopted an extremely insensitive approach, in presupposing certain facts, while arriving at its conclusion. It presupposed that the prosecutrix had caught her mother and the accused in a compromising position, which resulted into concoction of false story and implication.

8. At this juncture, one may only observe the suggestion put by the accused, of his having alleged illicit relationship with the mother of the prosecutrix at least 3-4 years prior to the incident. It is not that the accused and the mother of the prosecutrix had allegedly developed physical intimacy/relationship on the night of the incident itself and as such, out of fear, or alleged threats, mother used her daughter to save herself.

9. It is a settled principle of law that if testimony of the prosecutrix itself is found to be inspiring in confidence, one need not look for corroborative evidence, medical or otherwise. However, it is also a settled principle of law, that in a case of child witness, only as a matter of abundant caution, Court may look for evidence, corroborative in nature and that too, only to satisfy its conscience and lend assurance to the otherwise inspiring version of the prosecutrix.

10. The law on this point is now well settled.

11. In *State of Rajasthan versus Om Prakash*, (2002) 5 SCC 745, the Apex Court has held that:-

> "Cases involving sexual molestation and assault require a different approach – a sensitive approach and not an approach which a court may adopt in dealing with a normal offence under penal laws."
>
> "Child rape cases are cases of perverse lust for sex where even innocent children are not spared in pursuit of sexual pleasure. It is a crime against humanity. In such cases, responsibility on the shoulders of the courts is more onerous so as to provide proper legal protection to these children. Their physical and mental immobility calls for such protection. Children are the natural resource of our country. They are the country's future. Hope of tomorrow rests on them. In our country, a girl child is in a very vulnerable position and one of the modes of her exploitation is rape besides other modes of sexual abuse. These factors point towards a different approach required to be adopted. It is necessary for the courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in the Constitution of India in Article 39."

12. Prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. If for some reason Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. If the totality of the circumstances appearing on the record of the case disclose that prosecutrix does not have a strong motive to falsely involve the person charged, Court should ordinarily have no hesitation in accepting her evidence. [*State of Maharashtra versus Chandraprakash Kewalchand Jain,* (1990) 1 SCC 550].

13. In *Golla Yelugu Govindu* vs. *State of AndhraPradesh* (2008) 16 SCC 769, the Apex Court has reiterated its earlier view and has held as under:-

> "11. 6.Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, diseasewhether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J in Wheeler v. United States (159 U.S. 523). The evidence of a child witness is not required to be rejected per se; but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. (See Surya Narayana v. State of Karnataka (2001 (1) Supreme 1).

14. In *Dattu Ramrao Sakhare v. State of Maharashtra* (1997 (5) SCC 341) it was held as follows:

> '5. .....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored'. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

15. In *State of Himachal Pradesh vs. Suresh Kumar* (2009)16 SCC 697, the Apex Court was dealing with a case where the prosecutrix was ravished by the accused on 15.3.2000 which incident was narrated by the prosecutrix to her sister later during the day. She also

narrated the incident to her parents the following day and to the Doctors after the incident. Court accepted the statement of the sister, the parents and the doctors while holding the accused guilty. Importantly, the Apex Court reversed the finding recorded by the High Court wherein it was held that the statement of the prosecutrix being minor was not worthy of credence.

16. Sarkar on Evidence (Fifteenth Edition) summarises the law relating to applicability of Section 6 of the Evidence Act thus :

> "1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.
>
> 2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.
>
> 3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and by-standers. In conspiracy, riot &c. the declarations of all concerned in the common object are admissible.
>
> 4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

17. This Court in *Gentela Vijayavardhan Rao v.State of A. P.* [(1996) 6 SCC 241] considering the law embodied in Section 6 of the Evidence Act held thus:

(SCC pp.246-47, para 15)

> “15.The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, in exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae."

18. In another judgment in *Rattan Singh v. State of H. P.,* (1997) 4 SCC 161 this Court examined the applicability of Section 6 of the Evidence Act to the statement of the deceased and held thus (SCC p.167, para 16)

> ".....................The aforesaid statement of Kanta Devi can be admitted under Section 6 of the Evidence Act on account of its proximity of time to the act of murder. Illustration 'A' to Section 6 makes it clear. It reads thus:
>
> ‘(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so *shortly before* or after it as to form part of the transaction, is a relevant fact.’(Emphasis supplied)
>
> Here the act of the assailant intruding into the courtyard during dead of the night, victim's identification of the assailant, her pronouncement that appellant was standing with a gun and his firing the gun at her, are all circumstances so intertwined with each other by proximity of time and space that the statement of the deceased became part of the same transaction. Hence it is admissible under Section 6 of the Evidence Act."

19. In *Rameshwar v. The State of Rajasthan,* AIR 1952 SC 54, the Supreme Court has held that the previous statement of the raped girl to her mother, immediately after the occurrence, is not only admissible and relevant as to her conduct, but also constitutes corroboration of her statement under the provisions of section 157 of the Evidence Act. In order to come to the aforesaid conclusions, illustration (j) to section 8 of the Evidence Act was relied upon. In that case, the victim, named Purni, was 7/8 years old. She was not administered oath, but was held to be competent witness and, therefore, duly examined and believed.

20. The Apex Court in *State of Punjab versus Gurmit Singh and others,* (1996) 2 SCC 384 has held that:-

> "... ...The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, <u>unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.</u> The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The <u>testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.</u> Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ?
>
> ---- --- ---
>
> "21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. <u>Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case</u>." ... ...
>
> (Emphasis supplied)

21. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. In order to ascertain as to whether discrepancy pointed out is minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witnesses and environment in which such witness is making the statement.[*State of H.P. versus Lekh Raj and another* (2000) 1 SCC 247].

22. In the aforesaid decision itself the Court reiterated its earlier view taken in *State of Punjab versus Jagir Singh* (1974) 3 SCC 277 wherein it was held that:-

> "A criminal trial is not like a fairy tale wherein one is free to give fight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."
>
> (Emphasis supplied)

23. The Apex Court in *State of Rajasthan versus N. K.* THE ACCUSED (2000) 5 SCC 30 has held that:-

> "… …It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal Courts which gives rise to the demand for death sentence to the rapists. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women."
>
> (Emphasis supplied)

24. In *State of M.P. v. Dharkole alias Govind Singh and others,* (2004) 13 SCC 308 the Apex Court has held that:-

> "9. … Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."
>
> "10. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case?
>
>> "The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to

occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

"11. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case." [Emphasis supplied]

25. We shall now discuss the evidence in view of the aforesaid settled proposition of law.

26. Certain facts are not in dispute:

(a) That on 07.06.2007, the date of alleged incident, prosecutrix was minor. She was born on 03.01.1998, which fact, in any event, stands established through the testimony of PW.8 and PW.9, who have proved on record birth certificate (Ex.PW.9/B);

(b) Accused was not only known to, but was on visiting terms with the family of the prosecutrix. In fact, he is a close relative which fact also stands established through the unrebutted testimonies of PW.2, PW.3 and PW.6. He is the cousin of the prosecutrix.

(c) On the fateful day, father (PW.6) of the prosecutrix was not at home, for he had gone for some work to a nearby place.

(d) Same day, accused had come to spend the night in the house of the prosecutrix. Her younger brother and mother were also at home.

(e) After having meals at night, prosecutrix, her brother and mother slept on the cot and in the same room, accused also slept on the floor.

27. With these admitted and undisputed facts, we now proceed to examine the testimony of the prosecution witnesses.

28. Prosecutrix who was competent to understand the sanctity of oath, in Court, has deposed that on 07.06.2007, after having meals, she alongwith her brother and mother went off to sleep on the double bed (cot) whereas accused slept on the ground. Her brother was sleeping towards the side of the wall and she was sleeping towards the side of the accused, and in between was her mother. Sometime in the middle of night, when all were asleep, accused who afterapplying saliva on his fingers, inserted them in her private parts. This was so done twice. Also accused inserted his private part on her private parts, as a result of which she felt pain and cried. Hearing the same, her mother got up and switched on the lights. When enquired, accused ran away, stating that nothing had happened. Soon her mother went to the house of neighbour Manoj Gupta and telephonically informed her father. Thereafter, prosecutrix was taken to the Police Station, where the matter came to be reported.

29. From the cross-examination part of her testimony, we do not find credit of this witness to have been impeached in any manner. We also do not find her to have been tutored in making such a statement in Court. In fact, she has bravely withstood the test of cross-

examination, which by all standards is extremely bold, if not shocking. She is categorical that her father was away for work and the accused, of his own came to their residence. After consuming meals he slept with them. Her mother had asked the accused to leave but he stayed over. When questioned, on her knowledge of the accused having applied saliva, she explained it to be on the basis of her observation, finding the body part to have salivary sensation. She is categorical that it was only on the second occasion that she woke up her mother. On first brush there appears to be little contradiction, but then, on a careful reading of testimony of both the witnesses, it is evidently clear that mother got up only when the child cried, which was at the time of the second attempt by the accused. She is also clear that prior to her mother having switched on the lights, accused had tried to insert his male organ into her vagina. Categorically she has denied, having noticed her mother and accused to be in a compromising position, on the fateful night. We do find that in cross-examination, she does state that "accused was trying to insert his male organ meant for urinating" but then in the examination in chief, she is categorical that accused had started "inserting" the same. Hence in our considered view offence under the provisions of Section 376 of IPC is clearly made out. It is not a case of attempt, but an act of rape. It is a case where the male organ came in contact with the vagina. On this count, our attention is invited to the medical record (Ex.PW.1/B). The version, so narrated by the prosecutrix stands recorded therein. No doubt, doctor did not find any injury on the vaginal part of the prosecutrix, but then he is categorical that there is no evidence to suggest that "rape has not been committed" and that "I finally opined that sexual intercourse has not taken place, but rape cannot be ruled out".

30. Absence of blood, rashes, sperms or bruises on the vital part of the prosecutrix, in itself, cannot be a ground for disbelieving her. We also find that the investigating agencies had been extremely cautious in coming to the conclusion, of involvement of the accused in the crime. They took opinion of the doctor thrice. On the last occasion, the doctor opined (Ex.DA) that even mere penetration itself would amount to sexual assault. Significantly, the doctor has not ruled its possibility.

31. We further find version of the prosecutrix to have been absolutely corroborated by her mother Patto Devi (PW.2). Even she is categorical that at about 1.30 AM, after hearing cries of her daughter, she got up and switched on the lights. The accused ran away from the spot and on her asking, the entire incident came to be narrated by the prosecutrix to her. Pants of the accused were down and the underwear of the prosecutrix was lying on the floor. Even she has withstood the test of cross-examination and we also do not find her to have either deposed falsely or falsely implicated the accused in the alleged crime.

32. It is not that the accused was not known to the family. He was cousin of the prosecutrix. Hence his presence in the house is totally explainable. It has also come on record, as also stands established through the testimony of Dr. Rajesh Sharma (PW.4) who has proved MLC (Ex.PW.4/B), that the accused was under the influence of alcohol.

33. It is contended that the story propounded by the prosecutrix "sounds to be unreasonable and improbable". Such contention only merits rejection. We find the room, where the parties were sleeping to be big enough. Even the cot was big enough to accommodate two adults and two children. Assuming hypothetically that the mother was caught in a compromising position by the child, even then, we see no reason for the mother to have falsely involved her children and that too her daughter, in the alleged crime, for it only tarnishes her image and mars her future prospects. One cannot isolate the socio-economic status of the parties.

34. The defence of the accused of false implication also stands falsified from the fact that the incident came to be reported to the police immediately after the occurrence of crime.

35. To impeach the credit of the prosecution witnesses, more particularly that of the prosecutrix and her mother, our attention is invited to medical record in MLC (Ex.PW-1/B). No doubt, it records that prosecutrix was got medically examined on 8.6.2007 at 11.45 a.m., however the fact of the matter, as is evident from the testimony of the prosecutrix as also police officials, is that prosecutrix was taken to the hospital immediately after lodging of the report. In fact, we also

find the accused to have been arrested and medically examined, same day and that too in the morning hours. Hence, possibility of error in recording the exact timing in the MLC cannot be ruled out, attention of which, in any event, was never brought to the notice of the doctor.

36. Court below, seriously erred in correctly and completely appreciating the testimonies of the prosecution witnesses as also the law as aforesaid.

37. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

38. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable.

39. Thus, in our considered view, findings returned by the trial Court cannot be said to be based on correct and complete appreciation of material on record, which are reversed. The appeal is allowed and we hold the accused guilty of having committed offence, punishable under the provisions of Section 376 of the Indian Penal Code, for having committed rape on prosecutrix.

40. For the purpose of hearing the accused-convict on the quantum of sentence, the appeal be listed on 06.12.2015, as jointly prayed for. He be produced in the Court on the said date. Copy of the judgment be supplied to the accused, free of cost.

41. No other point urged.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Suresh Kumar & others. ....Petitioners.

Versus

M/s Sunnox International & anr. ...Respondents.

CMPMO No.247 of 2015.
Reserved on : 21.11.2016.
Decided on : 05.12.2016.

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed, which was allowed by the trial Court- held, that the interest of the applicant is involved in the present suit and applicant is a necessary party – therefore, the application was rightly allowed by the Trial Court – revision dismissed.(Para-8 to 11)

For the petitioners: Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate.
For the respondents: Mr. Dushyant Dadwal, Advocate, for respondent No.1.
Mr. Satyen Vaidya, Sr. Advocate with Ms. Priyanka Khenal, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Article 227 of the Constitution of India, for quashing and setting the impugned order dated 30.5.2015, passed by

learned Civil Judge (Junior Division) Court No.II, Nalagarh, District Solan, H.P, in CMA No.6 of 2015 (Civil Suit No.195 of 2012).

2. Brief facts giving rise to the present petition are that the petitioners/plaintiffs (hereinafter referred to as the 'plaintiffs') filed a suit for Permanent Prohibitory Injunction against the respondents/defendants (hereinafter referred to as the 'defendants') alleging that the plaintiffs are co-owners in joint possession of the suit land measuring 24 bighas, 1 biswa, Khasra No.71 (11-01) and 72 (13-00) comprised in Khata/Khatauni No.8/22, situated in village Ambwala, HB No.63, Pargana Plassi, Tehsil Nalagarh, District Solan, H.P (hereinafter refereed to as the 'suit land'). The defendants are stranger to the suit land having no right, title or interest in the suit land. The defendants are threatening to install electricity tower and to lay down/stretch overhead electrical wires in, over and through the suit land forcibly and illegally without any right, title or interest. It is averred that during the pendency of present suit, defendant No.1 filed application under Order 1 Rule 10 of the Code of Civil Procedure, for impleading them as defendant No.2. The application was contested by the plaintiffs on the ground that the application is not maintainable. Subsequently, the learned Civil Judge (Junior Division) Court No.II, Nalagarh, District Solan, vide impugned order dated 30.5.2015, has allowed the application of defendant No.1 and impleaded him as defendant No.2 in the suit. Hence, the present petition.

3. Heard.

4. Learned Senior Counsel appearing on behalf of the plaintiffs has argued that the impugned order passed by the learned Court below is without appreciating the fact, which has come on record, as it is for the plaintiff to choose against whom he wants to maintain his suit.

5. Learned counsel appearing on behalf of respondent No.1-defendant company has argued that the stay order was operating against newly added defendant, now defendant No.1 and so, the interest of defendant No.1 was involved, as he was rightly impleaded as a party.

6. Learned Senior counsel appearing on behalf of defendant No.2-HPSEB has argued that the impugned order passed by the learned Court below is just, reasoned and as per law.

7. In rebuttal, learned Senior counsel appearing on behalf of plaintiffs has argued that the newly added defendant has neither agent nor attorney of HPSEB and so, not required to be impleaded as defendant.

8. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

9. The suit was filed by the plaintiffs for Permanent Prohibitory Injunction. The Government of Himachal Pradesh has sanctioned the transmission of electricity transmission line of 66 KV from Sub-Station Nangal Upperala (Nalagarh) to Panjehra, the premises of M/s Sunnox International Limited, defendant No.1, vide its notification No.MPP-A (3)-3/2003-1, dated 18.9.2008, the said transmission line is being installed under the supervision of HPSEB Limited and its officials/Engineers under the provisions of The Electricity (Supply) Act, 2003. Defendant No.2-HPSEB under the aforesaid notification of the Government of Himachal Pradesh have almost completed the work of electricity transmission line of 66 KV from Nangal Upperla Sub-Station to Panjehra barring two small spans including one in the present suit. Defendant No.1-company and Defendant No.2/HPSEB have strictly carried out the work under the provisions of Electricity Act, 2003, as HPSEB being licensee has been conferred the powers of Telegraph notification under Section 164 of the Government has given vast powers to officials of HPSEB for laying of cables and plants for electrical transmission as per the Indian Telegraph Act, 1885. There is no mention of present notification. The mere fact that notification was published, keeping in mind the interest of the public and not as a prerequisite of laying the cables. The supply of power on 66 KV voltage level from 220/66 KV Sub-Station Uperla Nangal (Nalagarh) to premises of defendant No.1-company at village Panjehra, transmission line was to be set up by erecting the towers. Transmission line is to be set up on self execution basis under the supervision of

defendant No.2/HPSEB. Defendant No.1-company with the help and supervision of defendant No.2/HPSEB has to set up the transmission line. Defendant No.1-company has invested huge amount in the project and due to the present suit, defendant No.1/company is not able to complete the project in the scheduled time resulting in huge financial losses to it. The disturbance at this site, if being created by persons with vested interest who are trying to exploit and arm-twist the company to extract money by creating obstacles in smooth laying of cables. There is no dwelling unit of any farmer/individual or anyone else is being transgressed or damaged in the process. Defendant No.1/company and defendant No.2/HPSEB has already compensated the villagers at rates much higher than those as per the norms of the revenue department whose lands are taken for laying the transmission line and defendant No.1-company even ready to compensate the villagers for the damage, if any, caused during the laying of transmission line.

10. The interest of defendant No.1-company is involved in the present suit and in these circumstances, defendant No.1 was impleaded as necessary party. So, this court finds that there is no illegality and infirmity with the impugned order dated 30.5.2015 passed by the learned Court below.

11. Accordingly, the petition is devoid of any merit and deserves dismissal, hence the same is dismissed. Parties are directed to appear before the learned Court below on ***22nd December, 2016.*** However, the parties are left to bear their own costs. Pending applications, if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Ajay Kumar Sud and others …….Petitioners.
Versus
St. Bede's College and others ……Respondents.

CWP No.1803 of 2014.
Judgment reserved on: 18.11.2016.
Date of decision: 6th December, 2016.

Constitution of India, 1950- Article 226- Petitioners are employees of respondent No.1- petitioners claimed that EPF contribution is payable to them in accordance with H.P. University Act, 1970, various statutes, ordinances and regulations as the college is affiliated to H.P. University – held, that as per the ordinance, every college or institute seeking affiliation with the University is required to satisfy the condition laid down in the statute – respondents No.1 and 2 had restricted the contribution to the one prescribed under EPF and MP, 1952, which is not permissible as ordinance has a force of law- no college can take a decision contrary to the provisions of H.P. University Act and Ordinances, Regulations and Statutes – the scheme framed by the Central Government does not prohibit the applicability of any other regulation or the scheme – petition allowed and respondents No.1 and 2 directed to contribute the provident fund in accordance with the Non-Government Affiliated College Teachers Contributory Provident Fund Rules.(Para-14 to 35)

Cases referred:

Marathwada Gramin Bank Karamchari Sanghatana and another versus Management of Marathwada Gramin Bank and others (2011) 9 SCC 620
State of Maharashtra versus Shashikant S.Pujari and others (2006) 13 SCC 175
Prabhakar Ramkrishna Jodh versus A.L. Pande and another 1965 (2) SCR 713

For the Petitioners Mr.Dilip Sharma, Senior Advocate with Mr.Manish Sharma, Advocate.

For the Respondents Mr.K.D.Sood, Senior Advocate with Ms.Ranjana Chauhan, Advocate, for respondents No.1 and 2.
Mr.J.L.Bhardwaj, Advocate, for respondent No.3.
Mr.Prince Chauhan, Advocate vice Mr.Rahul Mahajan, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

The excellence of the education provided by an institution would depend directly on the excellence of the teaching staff and in turn that would depend on the quality and the contentment of the teachers. Conditions of service pertaining to minimum qualifications of teachers, salaries, allowances and other conditions of service which ensure security, contentment and decent living standards to the teachers will consequently enable them to render better services to the institution and the pupils.

2. The St. Bede's College is one of the oldest and elite colleges of India having been established initially as an orphanage for the children of the British soldiers in 1864, however, thereafter in 1904 it started teachers training college. Though, till 1947 the College was meant primarily for Christian girls, however, thereafter its doors were open to students of all the faiths.

3. The St. Bede's College was affiliated to the H.P. University (respondent No.3) on 22.07.1970, whereas, respondent No.2 St. Bede's Educational Society is a society registered under the Societies Registration Act, 1860, which is administering respondent No.1-College.

4. The petitioners are the employees of respondent No.1-College. The moot question in this petition concerns the EPF contribution which according to the petitioners is payable to them in accordance with the H.P. University Act, 1970 and the various statutes, ordinances and regulations made under the said Act on account of respondent No.1 being affiliated with respondent No.3.

5. Respondents No.1 and 2 have opposed the claim raised by the petitioners on the ground that they cannot be compelled to contribute in excess of the statutory limit as contemplated and provided for in the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (for short 'Act').

6. It is not in dispute that respondent No.1 is affiliated to the H.P. University and as a consequence thereof has necessarily to abide by the provisions of the H.P. University Act, 1970 and all the statutes, ordinances and regulations made under the said Act.

7. It is also not in dispute that as per the Non-Government Affiliated College Teachers' Contributory Provision Fund Rules, the contribution of the respondent-College as per rules 60 was initially 10% and thereafter 12% and the matching contribution was being paid by the Management.

8. However, it appears that respondents No.1 and 2 lateron took a decision whereby they decided to contribute only that amount towards its share as was prescribed under the EPF & MP Act.

9. This action of the respondents constrained the petitioners to approach this Court by filing CWP No. No.7655/2012 titled 'Mr.Ajay Kumar Sud and another versus Regional Provident Fund Commissioner and others' which was disposed of by this Court on 22.11.2012 by directing the parties to present themselves before the Regional Provident Fund Commissioner (respondent No.4), who after placing reliance upon the judgment of the Hon'ble Supreme Court in ***Marathwada Gramin Bank Karamchari Sanghatana and another*** *versus* ***Management of Marathwada Gramin Bank and others*** (***2011) 9 SCC 620***held that the Employer could not be

compelled for contributing in excess of the statutory limit and accordingly dismissed the claim of the petitioners.

10. Aggrieved by the decision taken by respondents No.1 and 2 and thereafter aggrieved by the order passed by respondent No.4, the petitioners have filed the instant petition claiming therein the following reliefs:-

"(i) That the impugned action of respondents No.1 and 2 whereby contribution to Provident Fund of the petitioners has been reduced to 12% of the pay of petitioners by taking their salary @ Rs.6500/- per month from June, 2012 may be declared to be illegal and ultra-vires the provisions of HP University Act, 1970, Statues and Ordinances of the HP University and the provisions of EPF&MP, 1952;

(ii) That rejection of the claim of petitioners by respondent No.4 vide order dated 23.5.2013, Annexure P-9 may also be quashed and set aside;

(iii) That the respondent No.3 may be directed to seek compliance of provisions of Non-Government Affiliated College Teachers' Contributory Provident Fund Rules from respondents No.1 and 2;

(iv) That the respondents No.1 and 2 may be directed to contribute to the Provident Fund of petitioners @12% of their salary with effect from June, 2012, in accordance with the provisions of Non-Government Affiliated College Teachers' Contributory Provident Fund Rules, in the same manner in which it was being done prior to June, 2012, with all consequential benefits;

(v) That respondents No.1 and 2 may be directed to deposit with respondent No.4 interest and also discharge other statutory liabilities which would arise on account of difference in payment of Provident Fund as a result of restoration of the same since June, 2012 as per the provisions of the Non-Government Affiliated College Teachers' Contributory Provident Fund Rules."

11. Respondents No.1 and 2 have filed their common reply wherein it is averred that they had rightly taken the decision for being governed under the EPF and MP Scheme and their action is perfectly in tune with the judgment rendered by the Hon'ble Supreme Court in ***Marathwada Gramin Bank Karamchari Sanghatana and another*** *versus* ***Management of Marathwada Gramin Bank and others*** (***2011) 9 SCC 620***. On merits, the same plea has been reiterated while fling parawise reply to the petition.

12. The Himachal Pradesh University (respondent No.3) has in its reply clearly stated that the affiliated colleges are required to work in accordance with the Act, Statutes, Ordinances, Rules and Regulations of the H.P. University, though it can manage its college in a manner it so chooses without impinging upon the Rules etc.

13. The Regional Provident Fund Commissioner (respondent No.4) has filed its reply wherein it has obviously supported the order passed by it.

I have heard the learned counsel for the parties and gone through the records of the case.

14. Chapter 38 of the First Ordinance deals with the affiliation and recognition of the Colleges and Institutions and as per Ordinance 38.5, every College and Institution seeking affiliation with the University is required to satisfy the conditions laid down in Statute 16 of the University alongwith conditions contained in Ordinance 38.5, relevant portion where of reads thus:-

"38.5. In addition to the conditions laid down in Statute 16 of the First Statues of the University, every college or institution for which affiliation is sought, shall also satisfy the following conditions:-

B. In the case of a non-Government college or institution:

(b) that there shall be an endowment fund in cash, so long as the college or institution exists:

(iv) The endowment fund shall remain intact and shall not be used by the Management for current expenses or as a security for obtaining a loan or for any other purpose. A declaration to this effect by the President/Secretary of the Management shall accompany the endowment fund fixed deposit receipts or Government securities.

(d) that the Principal/teachers of the college or institution shall be appointed in the manner and on the terms and conditions of service as laid down in the rules in Appendix A to this Chapter."

15. Appendix-A appended with paragraph 38.5. B (b) (iv) (d) (supra) deals with the Provident Fund Rules which has been nomenclatured as "The Non-Government Affiliated College Teachers' Contributory Provident Fund Rules" (for short Provident Fund Rules) and is applicable to all teachers holding non-pensionable posts in Non-Government Affiliated College. The conditions of rates of subscriptions are contained in Rule 58(iii)(b) which reads thus:-

"58. *(iii) The amount of subscription shall be fixed by the subscriber himself subject to the following conditions:-*

(b) It may be any sum so expressed, not less than 10% of his pay and not more than his pay."

The contribution by the Management has been provided for in Rule 60, the relevant part thereof reads thus:-

"60. Contribution by Management:- The Management shall make contribution every month to the account of each subscriber of an amount equal to 10% of his pay expressed in whole rupees;"

16. It is not in dispute that respondent No.1 is a Non-Government Affiliated College receiving 95% grant-in-aid from the Government.

17. It is further not in dispute that in the year 1990 the contributions standing to the credit of the petitioners and other employees alongwith shares of the management/employer were transferred to the respective accounts in the Employees Provident Fund Organization. However, thereafter, the respondent-College took a decision to contribute only that amount towards their shares that was contemplated in the EPF & MP Act whereby the contribution of the petitioners to the Provident Fund has been reduced to 12% of the pay of the petitioners by taking their salary at the rate of Rs. 6500/- per month from June, 2012.

18. In light of the what has been set out hereinabove, the seminal question that arises for consideration is whether respondents No.1 and 2 of their own and that too without the consent and concurrence of its affiliating authority (respondent No.3) could have taken the impugned decision to grant their contributions only to the extent of statutory limit as provided for under the EPF & MP Act and in addition thereto whether the order passed by respondent No.4 on 23.05.2013 upholding the action of respondents No.1 and 2 is legal in the eyes of law.

19. Adverting to the first question, the parties are ad idem with respect to the respondent No.1 being affiliated with respondent No.3-University and, therefore, there is no gainsaying that once it is so, then it is bound by the regulations framed by the University as the same have force of law.

20. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***State of Maharashtra*** *versus* ***Shashikant S.Pujari and others (2006) 13 SCC 175*** wherein the Hon'ble Supreme Court observed as under:-

"26. The colleges affiliated to the University are bound by the Regulations. The Regulations have force of law. Terms and conditions of services of a university

employee as also the employees of colleges affiliated to it are governed by statutory regulations….."

21. It has to be borne in mind that the Act, Regulations, Ordinances and Statutes control and regulate the service conditions of the teachers of the affiliated colleges independently of any terms that may have been agreed to between the teachers and the Management of an affiliated college.

22. In ***Prabhakar Ramkrishna Jodh*** *versus* ***A.L. Pande and another 1965 (2) SCR 713***, the Hon'ble Supreme Court held that such provisions are made by the University in exercise of its powers of affiliation granted by law and to protect the teachers of the affiliated college against any arbitrariness of the Management in terms of the efficiency in the field of education. When a college is admitted to the privilege of affiliation or association with the University, its Management is bound by the conditions of affiliation imposed by the University under the Act incorporating such University.

23. Therefore, the affiliating college cannot of its own take a decision which would be contrary to any provisions of the H.P. University Act and Ordinances, Regulations and Statutes framed thereunder and any such course adopted by the affiliated college would be fraught with danger of the affiliation itself being lost.

24. Therefore, this Court has no hesitation to conclude that unilateral decision taken by respondents No.1 and 2 without seeking approval and concurrence of the H.P. University to reduce its contribution to the provident fund cannot withstand judicial scrutiny and is consequently struck down and set aside.

25. Now, adverting to the order passed by the respondent-College, it would be noticed that the same is based upon the judgment rendered by the Hon'ble Supreme Court in ***Marathwada's case*** (supra), however, the moot question is whether the ratio laid down therein is applicable to the fact situation obtaining in the present case.

26. It is not in dispute that it was in the year 1990 that the provisions of EPF & MP Act were extended to the employees of respondent-College. By virtue of Section 15 of the Act, all the conditions standing to the credit of petitioners alongwith the share of the Management stood transferred to the respective accounts in the Employees Provident fund Organization.

27. It is also not in dispute that in exercise of powers conferred by Section 5 of the Act, 1952, the Central Government framed Employees' Provident Fund Scheme, 1952. It is only paragraphs 26 and 29 that are relevant for the purpose of adjudication of this case and are reproduced hereinbelow:-

> "[***26. Classes of employees entitled and required to join the fund.***- *(1)(a) Every employee employed in or in connection with the work of a factory or other establishment to which this scheme applies, other than an excluded employee, shall be entitled and required to become a member of the fund from the day this paragraph comes into force in such factory or other establishment.*
>
> *(b) Every employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies, other than an excluded employee, shall also be entitled and required to become a member of the fund from the day this paragraph comes into force in such factory or other establishment if on the date of such coming into force, such employee is a subscriber to a provident fund maintained in respect of the factory or other establishment or in respect of any other factory or establishment (to which the Act applies) under the same employer:*
>
> *Provided that where the Scheme applies to a factory or other establishment on the expiry or cancellation of an order of exemption under section 17 of the Act, every employee who but for the exemption would have become and continued as a member of the fund, shall become a member of the fund forthwith.*

(2) After this paragraph comes into force in a factory or other establishment, every employee employed in or in connection with the work of that factory or establishment, other than an excluded employee, who has not become a member already shall also be entitled and required to become a member of the fund from the date of joining the factory or establishment.

(3) An excluded employee employed in or in connection with the work of a factory or other establishment to which this Scheme applies shall, on ceasing to be such an employee, be entitled and required to become a member of the fund from the date he ceased to be such employee.

(4) On re-election of an employee or a class of employees exempted under paragraph 27 or paragraph 27-A to join the fund or on the expiry or cancellation of an order under that paragraph, every employee shall forthwith become a member thereof.

(5) Every employee who is a member of a private provident fund maintained in respect of an exempted factory or other establishment and who but for exemption would have become and continued as a member of the fund shall, on joining a factory or other establishment to which this Scheme applies, become a member of the fund forthwith.

(6) Notwithstanding anything contained in this paragraph, an officer not below the rank of an Assistant Provident Fund Commissioner may, on the joint request in writing, of any employee of a factory or other establishment to which this Scheme applies and his employer, enroll such employee as a member or allow him to contribute more than [six thousand five hundred rupees] of his pay per month if he is already a member of the fund and thereupon such employee shall be entitled to the benefits and shall be subject to the conditions of the fund, provided that the employer gives an undertaking in writing that he shall pay the administrative charges payable and shall comply with all statutory provisions in respect of such employee.]

[29. Contributions. *(1) The contributions payable by the employer under the Scheme shall be at the rate of [ten per cent] of the [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] payable to each employee to whom the Scheme applies:*

[Provided that the above rate of contribution shall be [twelve per cent] in respect of any establishment or class of establishments which the Central Government may specify in the Official Gazette from time to time under the first proviso to sub-section (1) of section 6 of the Act.]

(2) The contribution payable by the employee under the Scheme, shall be equal to the contribution payable by the employer in respect of such employee:

[Provided that in respect of any employee to whom the Scheme applies, the contribution payable by him may, if he so desires, be an amount exceeding [ten per cent] or [twelve per cent], as the case may be, of his basic wages, dearness allowance and retaining allowance (if any) subject to the condition that the employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act.]

(3) The contributions shall be calculated on the basis of [basic wages, dearness allowance (including the cash value of any food concession) and retaining allowance (if any)] actually drawn during the whole month whether paid on daily, weekly, fortnightly or monthly basis.]

(4) Each contribution shall be calculated to [the nearest rupee, 50 paise or more to be counted as the next higher rupee and fraction of a rupee less than 50 paise to be ignored].]"

28. Paragraph 26(6) starts with a non-obstante clause and states that an Officer not below a rank of Assistant Provident Fund Commissioner may on the joint request in writing of any employee of a factory or other establishment to which scheme applies and his Employer, enroll such employee as a member and allow him to contribute more than Rs. 6500/- of his pay per month.

29. Adverting to paragraph 29, it would be noticed that proviso to sub-para 2 of this paragraph clearly provides that the Employer shall not be under an obligation to pay any contribution over and above his contribution payable under the Act.

30. However, the said provisions in my humble opinion are not at all applicable to the case of the petitioners as the provident fund being paid to them is under the "Non-Government Affiliated College Teachers Contribution Provident Fund Rules and not strictly under the Employees Provident Fund Rules or Regulations.

31. Moreover, there is nothing in the EPF & MP Act or the Rules or even the Scheme framed thereunder to even remotely indicate that irrespective of there being any other beneficial scheme framed by the State Government, scheme framed under the Act shall have an over-riding effect. That apart, once respondents No.1 and 2 have themselves implemented the scheme, they cannot now turn around and question the scheme or deny the benefits available thereunder to the petitioners.

32. Even otherwise, the reliance being placed by the respondents on the Central Scheme is totally misplaced as the compulsion envisaged therein and thereunder upon the Employer is to pay atleast minimum wages fixed statutorily which is absolute and no Employer can say that he will not pay such minimum wages and if he does so, then he is liable to be prosecuted as in that event he would be committing an offence. As observed earlier, the scheme nowhere bars or prohibits the applicability of any other scheme which obliges the Employer to contribute a larger amount than the one envisaged and prescribed under the Act, Rules and Scheme framed under the Central Act.

33. Apart from the above, the Act itself provides for exemption from the operation of provisions of the Scheme to an establishment as a whole or its class of employees where the employee is in enjoyment of Provident Fund and the benefits of which are more favourable than the one available under the statutory scheme. The intention of the Legislature was not to reduce those benefits and bring them at par with the Central Legislature. On the contrary, the intention of the Act is, where better benefits are available they should be maintained and continued to be made available to the employees. The grant of exemption under the scheme is only a technical measure but the voluntarily scheme has got to be enforced under the control of the respective Provident Fund Commissioners. Not only the accounts must be maintained, but contributions must be according to credit under the appropriate account. Therefore, in the given facts and circumstances of the case, the ratio as laid down by the Hon'ble Supreme Court in ***Marathwada's case*** (supra) is clearly not applicable to the facts of the instant case.

34. Lastly, it is settled that the scheme of contributory provident fund is a beneficial piece of legislation and confers retiral benefit and is in the nature of a substitute for old age pension for the employees because it was felt that in the prevailing conditions in India, the institution of a pension scheme could not be visualized in the near future and thus the same has to be interpreted in a manner so as to confer maximum advantage on the employees.

35. As a sequel to the aforesaid discussion, there is merit in this petition and the same is accordingly allowed and order passed by respondent No.4 on 23.05.2013 is quashed and set aside. The impugned action of respondents No.1 and 2 whereby the contribution to provident fund of the petitioners has been reduced to 12% of the pay of the petitioners by taking their salary @ Rs. 6500/- per month from June, 2012 is declared illegal and ultra vires to the provisions of the H.P. University Act, 1970, Statutes, Ordinances and Regulations etc. framed thereunder. Respondents No. 1 and 2 are directed to contribute the provident fund of the petitioners @ 12% of the salary with effect from June, 2012 in accordance with the provisions of

the Non-Government Affiliated College Teachers' Contributory Provident Fund Rules in the same manner as it was being done prior to June, 2012 with all consequential benefits. The needful be done within three months from today, failing which respondents No.1 and 2 shall be liable to pay interest @ 9% on such amount from the time it fell due i.e. June, 2012 till the date of its actual payment.

36. The petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Amar Nath and another …Appellants.
Versus
State of H.P. and others …Respondents.

LPA No. 162 of 2015
Reserved on: 22.11.2016
Decided on: 06.12.2016

Constitution of India, 1950- Article 226- Writ petitioner No.2 was appointed as anganwari worker – respondent No.5 questioned her appointment and sought cancellation of income certificate – it was found on inquiry that the income shown in the certificate was incorrect and the income certificate was cancelled – appeal was filed, which was dismissed- a writ petition was filed, which was also dismissed- held in appeal that the question of facts determined by the authority cannot be questioned in the writ petition unless it is shown that the findings recorded are perverse or are based on no evidence or the evidence, which is inadmissible – the authorities had thrashed all the facts – the orders are well reasoned and legal, which cannot be said to be erroneous, perverse or suffering from non-application of mind – writ petition was rightly dismissed- appeal dismissed.(Para-9 to 15)

Cases referred:

Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd., 2014 AIR SCW 3157
Iswarlal Mohanlal Thakkar vs Paschim Gujarat Vij Company Ltd. & Anr., 2014 AIR SCW 3298

For the appellants: Ms. Tim Saran, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 4.
Mr. Rajiv Jiwan, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to judgment and order, dated 4th September, 2015, made by the learned Single Judge/Writ Court in CWP No. 5535 of 2012, titled as Amar Nath and another versus State of Himachal Pradesh & others, whereby the writ petition filed by the appellants-writ petitioners, i.e. Amar Nath, father-in-law of Susheela Devi, and Susheela Devi, came to be dismissed (for short "the impugned judgment").

2. In order to determine this appeal, it is necessary to give brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. Susheela Devi, i.e. appellant-writ petitioner No. 2, daughter-in-law of appellant-writ petitioner No. 1, came to be appointed as Anganwari Worker in Ward No. 2, Kharotta, P.O. Berthin, Tehsil Jhandutta, District Bilaspur in the year 2008. Respondent No. 5-Maya Devi questioned the appointment of appellant-writ petitioner No. 2 and also sought cancellation of the income certificate in terms of which the family income of appellant-writ petitioner No. 2 was stated to be ₹ 10,000/-.

4. The Additional District Magistrate, Bilaspur, directed for conducting the inquiry relating to the income certificate issued in favour of appellant-writ petitioner No. 1, i.e. Amar Nath, which was made basis for appointment of appellant-writ petitioner No. 2 as Anganwari Worker. The inquiry was conducted by the Naib Tehsildar, Jhandutta, (Annexure P-2 to the writ petition) who after examining the witnesses and the report submitted by the Patwari Halqa concerned, made the assessment and held that the income of appellant-writ petitioner No. 1 was ₹ 14,000/- per annum and the income recorded in the income certificate issued on 13th June, 2007, was factually incorrect. Further held that the income certificate was to be cancelled, which, resultantly came to be cancelled in terms of order made by the Executive Magistrate, Jhandutta (Annexure P-4 to the writ petition), constraining the appellants-writ petitioners to file appeal before the appellate authority, i.e. Sub Divisional Magistrate, Ghumarwin, District Bilaspur.

5. The appellate authority framed three points for consideration and while holding that the inquiry was rightly conducted in terms of the mandate of H.P. Land Record Manual, upheld the order made by the Executive Magistrate, thereby cancelling the income certificate issued in favour of appellant-writ petitioner No. 1 and dismissed the appeal vide order, dated 2nd July, 2012 (Annexure P-6 to the writ petition).

6. Being dissatisfied, the appellants-writ petitioners invoked the jurisdiction of the Writ Court by the medium of writ petition seeking quashment of the inquiry report (Annexure P-2 to the writ petition), order made by the Executive Magistrate, Jhandutta (Annexure P-4 to the writ petition) and order, dated 2nd July, 2012, made by the appellate authority (Annexure P-6 to the writ petition) with a further prayer that the income certificate issued in favour of the appellant-writ petitioner No. 1 on 13th June, 2007, be declared as legal and valid, on the grounds taken in the memo of the writ petition.

7. The Writ Court, after examining the pleadings and the law applicable, dismissed the writ petition vide impugned judgment. Hence, the appeal.

8. The moot question is – whether the Writ Court can examine and determine the question of facts? The answer is in the negative for the following reasons:

9. The question of facts determined by the authorities cannot be questioned by the medium of writ petitions unless it is shown that the findings recorded are perverse or are based on no evidence or on the evidence, which is inadmissible. The Writ Court can interfere only where it is shown that the authorities have wrongly appreciated the facts and the evidence and the findings are illegal.

10. While going through the orders made by the authorities, it appears that the authorities have thrashed out all the facts, the orders are well reasoned and legal one, cannot be said to be erroneous, perverse or suffering from non-application of mind, in any way.

11. The Apex Court in the case titled as **Bhuvnesh Kumar Dwivedi versus M/s Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** has held that question of fact cannot be interfered with by the Writ Court unless the findings are perverse, erroneous and without application of mind. However, such findings can be questioned if it is shown that the Tribunal/Court has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which has influenced the impugned findings. It is apt to reproduce paras 16, 17 and 18 of the judgment herein:

"16. .... The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. <u>This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the</u> tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. <u>In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in</u> proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. <u>The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of</u> certiorari can be legitimately exercised....................

17. The judgments mentioned above can be read with the judgment of this court in Harjinder Singh's case (AIR 2010 SC 1116) (supra), the relevant paragraph of which reads as under:

> *"21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty-bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the Preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43-A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to subserve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J. opined that:*
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> > *"10. … The concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State."(State of Mysore v. Workers of Gold Mines, AIR 1958 SC 923 p.928, para 10.)*

18. A careful reading of the judgments reveals that the High Court can interfere with an Order of the Tribunal only on the procedural level and in cases, where the decision of the lower courts has been arrived at in gross violation of the legal principles. The High Court shall interfere with factual aspect placed before the Labour Courts only when it is convinced that the Labour Court has made patent mistakes in admitting evidence illegally or have made grave errors in law in coming to the conclusion on facts. The High Court granting contrary relief under Articles 226 and 227 of the Constitution amounts to exceeding its jurisdiction conferred upon it. Therefore, we accordingly answer the point No. 1 in favour of the appellant." [Emphasis added]

12. Our this view is also fortified by the judgment rendered by the Apex Court in **Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr.,** reported in **2014 AIR SCW 3298.** It is apt to reproduce para 9 of the judgment herein:

"9. We find the judgment and award of the labour court well-reasoned and based on facts and evidence on record. The High Court has erred in its exercise of power under Article 227 of the Constitution of India to annul the findings of the labour court in its Award as it is well settled law that the High Court cannot exercise its power under Article 227 of the Constitution as an appellate court or re-appreciate evidence and record its findings on the contentious points. Only if there is a serious error of law or the findings recorded suffer from error apparent on record, can the High Court quash the order of a lower court. The Labour Court in the present case has satisfactorily exercised its original jurisdiction and properly appreciated the facts and legal evidence on record and given a well reasoned order and answered the points of dispute in favour of the appellant. The High Court had no reason to interfere with the same as the Award of the labour court was based on sound and cogent reasoning, which has served the ends of justice.

It is relevant to mention that in the case of Shalini Shyam Shetty & Anr. v. Rajendra Shankar Patil, (2010) 8 SCC 329, with regard to the limitations of the High Court to exercise its jurisdiction under Article 227, it was held in para 49 that-

> *"The power of interference under Art.227 is to be kept to a minimum to ensure that the wheel of justice does not come to a halt and the fountain of justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and courts subordinate to the High Court."*

It was also held that-

> *"High Courts cannot, at the drop of a hat, in exercise of its power of superintendence under Art. 227 of the Constitution, interfere with the orders of tribunals or courts inferior to it. Nor can it, in exercise of this power, act as a court of appeal over the orders of the court or tribunal subordinate to it."*

Thus it is clear, that the High Court has to exercise its power under Article 227 of the Constitution judiciously and to further the ends of justice.

In the case of Harjinder Singh v. Punjab StateWarehousing Corporation, (2010) 3 SCC 192, this Court held that,

> *"20. ..... In view of the above discussion, we hold that the learned Single Judge of the High Court committed serious jurisdictional error and unjustifiably interfered with the award of reinstatement passed by the Labour Court with compensation of Rs.87,582 by entertaining a wholly unfounded plea that the appellant was appointed in violation of Articles 14 and 16 of the Constitution and the Regulation."*

13. The same principle has been laid down by this Court in a series of cases.

14. We have gone through the record and are of the view that the appellants-writ petitioners have not been able to made out a case that the findings recorded by the authorities are perverse or based on no evidence or on inadmissible evidence or suffers from non-application of mind or the authority, which had conducted the inquiry, was not competent to do so.

15. Having said so, the Writ Court has rightly held that the findings of fact recorded by the authorities cannot be interfered by the Writ Court.

16. Viewed thus, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Bhawan Avam Sannirman Kamgar Sangh (Regd.) .....Petitioner

Versus

State of HP and others .....Respondents.

CWP No. 1962 of 2015.
Reserved on 22nd November, 2016.
Date of decision: 6th December, 2016.

Constitution of India, 1950- Article 226- Respondent No. 3 permitted to hire accommodation for hostel purposes instead of creating own permanent built up structure – Chief Secretary directed to file a consolidated status report and to take appropriate action from time to time. (Para-6 & 7)

For the petitioner:	Mr. K.B. Khajuria, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General with M/s Anup Rattan and Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, and Kush Sharma, Deputy Advocate Generals for respondents No. 1,2,4 and 6 to 18. Mr. Shrawan Dogra, Sr. Advocate with Ms. Shreya Chauhan, Advocate, for respondent No.3-Board. Mr. Ashok Sharma, Assistant Solicitor General of India with Ms. Sukarma, Advocate for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this writ petition, the petitioner mainly has sought the following reliefs, on the grounds taken therein.

> "A. That the records of the case may kindly be called for the kind perusal of this Hon'ble Court.
>
> B. That the respondent Board may kindly be directed to place on record the decision dated 4.6.2014 with regard to the registration of the Building and other Constructions workers and the same may kindly be ordered to be quashed and set aside being in contravention of law.
>
> C. That the respondent No.4 may kindly be directed to register the Building and other Constructions workers as beneficiary from the date of the submission of the application with all benefits.
>
> D. That the impugned orders dated 31.1.2015 and 16.7.2014, may kindly be quashed and set aside."

2. Directions came to be passed by this Court from time to time and in compliance to the said directions, respondents have filed the status reports.

3. Respondent No.10- Chief Secretary to the Government of Himachal Pradesh has filed the status report on 21st November, 2016, which does disclose that what steps the respondents have taken and what follow-up action they have to draw, in order to comply with the Court directions, passed from time to time.

4. In para 17 of the said status report, it is prayed that the order dated 15.5.2015, may be modified and respondent No. 3 be permitted to hire the accommodation for hostel purpose instead of creating own permanent built up structures, for the reasons given in the said report.

5. We have heard the learned counsel for the parties and have examined the entire record.

6. Respondent No.3- Board is at liberty to hire accommodation for hostel purpose, as prayed in paragraph 17 of the status report and accordingly, the order dated 15.5.2015, passed by this Court is modified.

7. Chief Secretary to the Government of Himachal Pradesh is directed to file a consolidated status report in compliance to the directions passed by this Court from time to time and follow up action drawn in terms of the status report filed on 21st November, 2016, **quarterly** before the Registrar (Judicial).

8. The writ petition is accordingly disposed of alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

R.S.A. No. 7 of 2016 a/w RSA No. 8 of 2016.
Judgment reserved on : 30.11.2016
Date of decision: 06.12. 2016.

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1. RSA No. 7 of 2016
   Chander Lekha ...Appellant
   Versus
   Purshotam Dutt and others ...Respondents
2. RSA No. 8 of 2016
   Rajesh Kumar ...Appellant
   Versus
   Purshotam Dutt and others ...Respondents

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit seeking the specific performance of the agreement to sell the suit land – the defendant denied the claim of the plaintiff- the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that plaintiff has to prove his continuous readiness and willingness to perform the contract from the date of agreement till hearing – plaintiff had pleaded that he was ready and willing to perform his part of the contract, to pay remaining consideration and to bear the expenditure of execution and registration of the sale deed, which is not in accordance with Form 47 and Order 6 Rule 3 of C.P.C – plaintiff had only paid Rs.50,000/- out of Rs.4 lacs agreed to be paid – it was not proved that plaintiff was possessed of balance consideration and was ready to pay the same to the defendant- it was mentioned in the agreement that entire consideration was paid, which is not correct - plaintiff cannot be faulted for not executing the sale deed, in these circumstances – appeal allowed and the suit dismissed with the cost of Rs.20,000/- each.

(Para-10 to 26)

Cases referred:
Jugraj Singh and another vs. Labh Singh and others AIR 1995 SC 945
N.P. Thirugnanam (D) by L.Rs vs. Dr. R. Jagan Mohan Rao and others AIR 1996, SC 116

For the Appellant(s): Mr. G.R. Palsra, Advocate.
For the respondents: Mr. Dilip Sharma, Senior Advocate, with Mr. Umesh Kanwar, Advocate, for respondent No.1, in both the appeals.
Mr. G.D.Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, for respondent No.2, in both the appeals.
Ms. Leena Guleria, Advocate, for respondent No.3, in both the appeals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since common question of law and fact arise in both these appeals, therefore, they were taken up together for consideration and are being disposed of by a common judgment.

2. Both these regular second appeals have been filed against the judgment and decree dated 01.10.2015 passed by learned Additional District Judge (I), Mandi in Civil Appeal No. 73 of 2015 and Civil Appeal No. 75 of 2015, whereby he affirmed the judgment and decree passed by learned trial Court on 16.6.2015 in Civil Suit Nos. 78 of 2008 and 79 of 2008 thereby decreed the suit of the plaintiff/respondent No.1 herein in both the appeals.

3. Briefly stated, the facts are that the plaintiff/respondent No.1 (hereinafter referred to as the 'plaintiff'), filed a suit for specific performance of the contract with the allegation that defendant No.1/respondent No.2 herein, was owner in possession of the land comprised in Khewat No. 51 min, Khatauni No. 116, Khasra No. 3467/1, measuring 517 sq.mtrs. situated in Muhal Sundernagar/26/8, Tehsil Sundernagar, District Mandi, H.P. He entered into an agreement of sale with the plaintiff on 15.12.2007 for sale of 244 sq.mtrs. of land out of Khasra No. 3467/1 for consideration of Rs. 3,00,000/- and had received Rs. 50,000/- as earnest money. It was averred that subsequently respondent No.2 again demanded more money and sale consideration was raised to Rs. 4,00,000/-, it was in pursuance to the agreement that sale deed was prepared on 7.1.2008 and was duly attested by the witnesses. However, before the same could be registered, respondent No.2 slipped from the office of Sub Registrar and resultantly the sale deed could not be registered. It was also averred that respondent No.2 out of evil intention thereafter executed a sale deed of entire khasra No. 3467/1 in favour of appellant and proforma respondent No.3 on 1.2.2008 out of Khasra No. 3467/1, 273/517 shares measuring 273 sq.mtrs in favour of proforma respondent No.3 (appellant in RSA No. 8 of 2016) and 2444/517 shares measuring 244 sq. mtrs in favour of appellant (proforma respondent No.3 in RSA No. 8 of 2016) for a total consideration of Rs. 9,38,000/- and in this way the agreement to sell was frustrated. It was averred that the plaintiff was always ready and willing to perform his part of contract and still ready and willing and therefore, the suit be decreed.

4. The appellant filed written statement denying the allegations in the plaint and it was maintained that the appellant was bonafide purchaser for consideration of the suit land under the law. Similar contention was raised by proforma respondent No.3.

5. The learned trial Court on 14.5.2012 framed the following issues:

1. Whether the plaintiff and defendant No.1 entered into an agreement for sale of the suit land on 15.12.2007, as alleged? OPP
2. Whether the sale deed dated 7.1.2008 was executed by the defendant No.1 in favour of plaintiff regarding the suit land, as claimed? OPP

3. Whether the plaintiff is entitled to the relief of the defendant No.1 being directed to register the sale deed regarding the suit land in favour of the plaintiff, as claimed? OPP
4. Whether alternatively, the plaintiff is entitled to recovery of Rs.4,00,000/- alongwith costs and interest against defendant No.1, as claimed? OPP
5. Whether the suit is not maintainable? OPD
6. Whether the plaintiff has no cause of action and locus-standi? OPD
7. Whether the plaintiff is guilty of suppression of material fact? If so, its effect? OPD
8. Whether the defendant No.2 is a bonafide purchaser of part of the suit land? OPD2.
9. Whether the defendant No.3 is bonafide purchaser of part of the suit land? OPD3.
10. Relief.

6. After recording the evidence and evaluating the same, the learned trial Court vide its judgment and decree dated 16.6.2015 decreed both the aforesaid suits and the defendant No.1/respondent No.2 was directed to execute the sale deed in favour of respondent No.1/plaintiff, who in turn was directed to pay the balance sale consideration of Rs. 3,45,000/- within a period of 30 days in each of the cases.

7. Aggrieved by the judgment and decree passed by the learned trial Court, the appellant filed first appeal in the Court of learned District Judge, Mandi, which ultimately came to be tried by learned Additional District Judge (I), Mandi and was dismissed vide judgment and decree dated 1.10.2015.

8. Aggrieved by the judgment and decree passed by learned Courts below, the appellant filed the instant second appeal before this Court which was admitted on 10.8.2016 on the following substantial question of law:

> *"Whether the appellant is a bonafide purchaser for consideration without any notice and finding to issue No.9 is totally wrong?"*

9. During the course of hearing, the record revealed that though the plaintiff/respondent No.1 had pleaded that he was ready and willing to perform his part of the contract, however, the evidence in this regard appeared to be deficient and accordingly with the consent of the parties, the following additional substantial question of law was framed:

> *"Whether the plaintiff/respondent No.1 has proved his continuous readiness and willingness to perform his part of the contact at all stages i.e. from the date of agreement till the date of hearing of the suit?"*

I have heard learned counsel for the parties and also gone through the records of the case carefully.

10. At the outset, it may be observed that it is more than settled that the plaintiff has to prove his continuous readiness and willingness to perform his contract at all stages i.e. from the date of the agreement till the date of the hearing of the suit.

11. In ***Jugraj Singh and another vs. Labh Singh and others AIR 1995 SC 945*** the Hon'ble Supreme Court in para 3 held that in a suit for specific performance of the contract, the plaintiff must prove continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit. It is apt to reproduce para 3 of the judgment as under:

> *"3. Section 16(c) of the Specific Relief Act, 1963 provides that the plaintiff must plead and prove that he has always been ready and willing to perform his part of the essential terms of the contract. The continuous readiness and willingness at all*

stages from the date of the agreement till the date of the hearing of the suit need to be proved. The substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract."

12. In ***N.P. Thirugnanam (D) by L.Rs vs. Dr. R. Jagan Mohan Rao and others AIR 1996, SC 116***, the Hon'ble Supreme court in para 5 of the judgment observed that the plaintiff must from the date of the execution till date of decree prove that he is ready and has always been willing to perform his part of the contract. It is apt to reproduce para-5 of the judgment as under:

"*It is settled law that remedy for specific performance is an equitable remedy and is in the discretion of the court, which discretion requires to be exercised according to settled principles of law and not arbitrarily as adumbrated under s.20 of the Specific Relief Act 1963 (for short, 'the Act'). Under s.20, the court is not bound to grant the relief just because there was valid agreement of sale. Section 16(c) of the Act envisages that plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract."*

13. Now, adverting to the pleadings with regard to the specific performance, there can be no denial that these have to be in conformity with the form as prescribed by Order 6 Rule 3 CPC in this regard i.e. as given in Clause 3 of Form 47 contained in Appendix 'A'.

14. A careful reading of para 10 of the plaint makes it clear that the averments as contained under Clause 3 is not in *stricto sensu* complied with by the plaintiff. The same is evident from the averments made in para 10 of the plaint, which reads "*that the plaintiff is ready and willing to perform his part of the contract and to pay remaining consideration and to borne the expenditure of execution and registration of the sale deed."*

15. The Form No. 47 of Appendix 'A' reads thus:

"No. 47

SPECIFIC PERFORMANCE (No.1)

(Title)

A.B., the above-named plaintiff, states as follows:-

1. By an agreement dated the ….day of…..and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to, for the sum of…..rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras 4 and 5 of Form No.1.]

6. The plaintiff claims that the court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit."

16. Upon a careful reading of para-10 of the plaint, I have no hesitation to hold that the plaintiff/respondent No.1 have not complied with the legal requirement which is mandatory as provided under Order 6 Rule 3 CPC of the Specific Relief Act.

17. Adverting to the oral evidence led by the plaintiff, while appearing as PW-1 the plaintiff has not even cared to make a whisper regarding his being still ready and willing to perform his part of the contract and it is really not understood as to on what basis have the learned courts below decreed the suit of the plaintiff without the mandatory requirement of law having been proved.

18. Apart from the above, is it really so simple for the plaintiff to allege that defendant No.1/respondent No.2 had fled from the spot in order to avoid performance of his part of contract?

19. Having gone through the records of the case, more particularly pleadings and oral evidence, I entertain no doubt in my mind that both the learned Courts below have failed to appreciate the real controversy in issue. The plaintiff while appearing as PW-1 has categorically admitted as against the sale consideration of Rs. 4,00,000/-, he had paid only a sum of Rs. 50,000/- each in both the cases.

20. There is no evidence led by the plaintiff, rather there is no whisper made by him while appearing as PW-1 that he on the date of registration of the sale deed was possessed of the balance sale consideration of Rs. 3,45,000/- and Rs. 3,45,000/- in each case total Rs. 6,90,000/- and was ready to pay this amount to defendant No.1/respondent No.2. Yet, when he got drafted the sale deed, he incorporated therein a clause to the effect that he i.e. respondent No.1/plaintiff had paid the entire sale consideration to defendant No.1/respondent No.2 and he in lieu of his having received the entire sale consideration had delivered the possession to the plaintiff. Obviously in such circumstances, the defendant No.1/ respondent No.2 had no option but to flee from the office of Sub Registrar or else executed the sale deed which itself was based on the fraud committed by respondent No.1/plaintiff.

21. At this stage, it would necessary to refer to the judgments rendered by both the learned Courts below whereby they came to the conclusion that the plaintiff was ready and willing to perform his part of the contract and the relevant portion of the judgment of the learned trial Court reads thus:

"24. The counsel for the defendants avers that the plea of specific performance is a discretionary relief. The counsel avers that the plea of readiness and willingness is not established by the plaintiff. The counsel further avers that without the plea of readiness and willingness as provided under Section 16 (C) of the Specific Relief Act, 1963 no relief of specific performance can be granted in favour of the plaintiff. This plea set up by the counsel for the defendant is without merits. In para No.10 of the plaint, the plaintiff has clearly stated that he is ready and willing to perform his part of the contract. Further, the readiness and willingness is more than established when the plaintiff executed the sale deed with defendant No.1, which is Ext.PW-1/B. The agreement to sell Ext.PW-1/A provided for sale consideration of Rs.3,00,000/-, whereas the plaintiff agreed to purchase the suit land for a consideration of Rs.4,00,000/- as per Ext.PW-1/B. Thus, the readiness and willingness of the plaintiff cannot be doubted in the present case. Rather, the

plaintiff is more than willing to purchase the suit land as he agreed to higher price as compared to agreement to sell, which is evident from the sale deed Ext.PW-1/B."

Whereas, the relevant portion of the judgment of the learned first Appellate Court reads thus:

"18.......The plaintiff has stated that he is ready to perform his part of contract and he is ready to pay the amount of Rs. 3,50,000/- to the defendant No.1. The sale deed Ext.PW-1/B also shows that the land was sold for Rs. 4,00,000/-. There are signature of Shashi Kumar on sale deed Ext.PW-1/B and agreement Ext.PW-1/A. This Ext.PW-1/A shows that amount of Rs. 50,000/- was paid to the defendant No.1 by plaintiff as PW-1 has stated that he has paid Rs. 5,000/- (Five Thousand) on 1st day of the sale deed. He has also admitted that remaining amount of Rs. 3,50,000/- was to be paid to defendant No.1. The plaintiff is ready to pay the remaining amount to the defendant No.1. The plaintiff is ready to perform his part of the contract and defendant No.1 has not come in the witness box to rebut the evidence of the plaintiff. The plaintiff, therefore, has proved this fact that the defendant had executed the agreement to sell Ext.PW-1/A and sale deed Ext.PW-1/B in favour of the plaintiff. Though in Ext.PW-1/B it has been mentioned that whole amount has been received by the defendant No.1, but it is sincere admission of the plaintiff while coming in witness box and he is ready to pay remaining amount to the defendant No.1. Plaintiff is therefore entitled to the relief of Specific Performance of Contract and Ld. Lower Court has rightly held him entitled for this decree. The Ld. Lower Court has therefore rightly decreed the suit of the plaintiff. Therefore, I do not find any reason to interfere with the judgment passed by the Ld. Lower Court. Hence, this point is decided in affirmative."

22. I am really surprised how the learned Courts below extended time for the payment towards the balance sale consideration when it was not even proved on record that he had been ready and willing and was still ready and willing to perform his part of the contract. The learned Courts below appear to have been unnecessarily influenced and prejudiced because the defendant No.1/respondent No.2 had fled away from the office of the Sub Registrar, little realizing his compulsion and complications that would arisen in case he would have executed the sale deed without receiving the balance sale consideration.

23. Conversely, it was incumbent upon the plaintiff to have led sufficient evidence to indicate that on the day when the sale deed was to be registered and the defendant No.1/respondent No.2 had fled from the office of Sub Registrar, he was possessed of the balance sale consideration or that he had actually handed over the balance sale consideration and it was after receipt thereof that defendant No.1/ respondent No.2 had fled from the office of the Sub Registrar. Rather, it is admitted by the plaintiff that he had not paid the balance sale consideration of Rs. 3,45,000/- in each of the cases i.e. total Rs. 6,90,000/- to the defendant No.1/respondent No.2.

24. On the basis of the aforesaid discussion, it can conveniently be held that there was no subsisting contract between the plaintiff and defendant No.1/respondent No.2 which could be enforced in a court of law and obviously therefore, the appellants in both the cases are purchasers for valid consideration and question of their being bonafide in fact does not arise as there is neither any subsisting agreement or contract between the plaintiff and defendant No.1/respondent No.2, rather, it was the plaintiff/respondent No.1, who by dubious means wanted to get the sale deed executed, that too, without paying a single paisa of balance sale consideration of Rs. 3,45,000/- in each case i.e. total Rs. 6,90,000/-.

25. As a sequel to my aforesaid discussion, I have no hesitation to hold that the suits filed by the plaintiff were nothing but an abuse of the process of law and unfortunately both the learned Courts below did not apply their judicial mind to the real issue in controversy and decreed the suit and even the appeal filed against the same was ordered to be decreed. Even the

bare provisions of the Specific Relief Act and the essential pre-requisites as are required to be proved in a case of specific performance of contract, were conveniently ignored. Even otherwise, the plaintiff has not approached the Court with clean hands which is pre-requisite for maintaining a suit for specific relief of agreement to sell.

26. Having said so, I find merit in both the appeals and the same are allowed with special costs quantified at Rs. 20,000/- each in each case to be paid by the plaintiff/respondent No.1 to the appellant(s).

****

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J

Hemant Kumar ....Petitioner
Versus
State of Himachal Pradesh ....Respondent

Cr. Revision No. 219 of 2011
Decided on : December 6, 2016

Indian Penal Code, 1860- Section 279, 337 and 338- Accused was driving the bus in a rash and negligent manner- bus rolled down in a gorge and the passengers sustained injuries – accused was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held in revision that accident was not disputed – it was also not disputed that the accused was driving the bus – only one witness had supported the prosecution version – he admitted in cross-examination that it took about 50-55 minutes for the bus to cover the distance of 12 kilometers, which shows that bus was being driven in a normal speed- rash and negligence was not proved, in these circumstances- the accused was wrongly convicted by the Courts- appeal allowed- judgments of the trial Court and Appellate Court set aside and accused acquitted.(Para-6 to 22)

Cases referred:

State of Kerala vs. Puttumana Illath Jathavedan Namboodiri (1999)2 Supreme Court Cases 452
Krishnan and another Versus Krishnaveni and another, (1997) 4 Supreme Court Case 241
Akshay Kumar v. State of HP, Latest HP LJ 2009 HP 72
Gurcharan Singh versus State of Himachal Pradesh 1990 (2) ACJ 598

For the petitioner : Mr. Rohit Chauhan, Advocate.
For the respondent : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

Present criminal revision petition filed under Sections 397 CrPC is directed against judgment dated 30.8.2011 rendered by the learned Additional Sessions Judge, Mandi, HP in Criminal Appeal No. 45 of 2010, upholding the judgment of conviction recorded by the learned Judicial Magistrate 1st Class, Court No.2, Mandi, HP in Police Challan No. 190-I/2003, 119-II/2003, holding petitioner-accused (herein after, 'accused') guilty of having committed offence under Sections 279, 337 and 338 IPC and convicting and sentencing the accused as per the description given herein below:

"1. To undergo simple imprisonment for six months and to pay a fine of Rs.500/- (five hundred only) and in case of non payment of fine to undergo simple imprisonment for one month for commission of offence under Section 279 of Indian Penal Code.

2. To undergo simple imprisonment for six months and to pay a fine of Rs.500/- (five hundred only) and in case of non-payment of fine to undergo simple imprisonment for one month for commission of offence under Section 337 of Indian Penal Code.
3. To undergo rigorous imprisonment for nine months and to pay a fine of Rs.1,000/-(one thousand only) and in case of non payment of fine to undergo simple imprisonment for two month for commission of offence under section 338 of Indian Penal Code.
4. It is however ordered and directed that sentences of substantive imprisonment shall run concurrently. The sentence in case of non payment of fine shall run independently."

2. Briefly stated the facts as emerge from the record are that the complainant namely Netar Singh made a statement that on 25.3.2003 at 5.45 pm, he boarded a private bus (Bharat Service) bearing No. HP-32-4140 in order to go to his house. There were 25-30 passengers. When at around 6.15, the bus reached near Bajeer Bain, it rolled down in a gorge, as a result of which, he as well as other passengers suffered injuries. Complainant, further complained that at the relevant time, vehicle in question was being driven by the accused in rash and negligent manner and in high speed. On the basis of aforesaid statement, police sent a *Rukka*, on the basis of which, FIR No. 96/2003 dated 25.3.2003 came to be registered at Police Station Balh, District Mandi. Police after completion of codal formalities, submitted challan in the Court against the accused under Sections 279, 337 and 338 IPC. Learned trial Court, on being satisfied that prima facie case exists against the accused, put notice of accusation to him, to which he pleaded no guilty and claimed trial. Subsequently, learned trial Court, on the basis of material adduced by the prosecution, convicted and sentenced the accused under sections 279, 337 and 338 IPC, as per description given above. Being aggrieved by the aforesaid judgment of learned trial Court, accused filed an appeal before the Additional Sessions Judge, Mandi, under Section 374 CrPC, which was also dismissed. In the aforesaid background, accused has approached this Court by way of instant petition, praying therein for acquittal after setting aside the judgments of the Courts below.

3. Mr. Rohit Chauhan, Advocate, vehemently argued that the judgments passed by the Courts below are not sustainable as the same are not based on correct appreciation of evidence adduced on record and as such same deserve to be set aside. Mr. Chauhan, while referring to the judgments passed by the Courts below, strenuously argued that the Courts below have not appreciated the evidence in its right perspective, rather judgments are based on conjectures and surmises and as such same can not be allowed to sustain. Mr. Chauhan, during arguments having been made by him, made this Court to travel through the depositions have been made by the prosecution witnesses, to demonstrate that no conviction could be imposed by the Court below on the set of evidence having been adduced by the prosecution, because there were material contradictions and majority of prosecution witnesses had turned hostile. While referring to the statement of PW-1, Netar Singh, Mr. Chauhan, stated that even the complainant, nowhere stated with regard to specific speed of the vehicle at the relevant time, as such, Courts below erred in concluding that at the relevant time, vehicle in question was being driven in rash and negligent manner by the accused, that too at a high speed. While concluding his arguments, Mr. Chauhan, forcefully contended that the learned Courts below miserably failed to take note of the fact that at the relevant time, one cow had come before the bus, as a result of which, accused had to take sudden turn. In the aforesaid background, Mr. Chauhan prayed that accused may be acquitted of the charges framed against him by setting aside the judgments of the Courts below.

4. Mr. Ramesh Thakur, learned Deputy Advocate General, supported the judgments passed by the learned Courts below. Mr. Thakur, while referring to the judgments passed by the Courts below, vehemently argued that there is no scope of interference, whatsoever by this Court, especially in view of the concurrent findings of facts and law recorded by both the learned Courts below. Mr. Thakur, while inviting attention of the Court to the judgments forcefully argued that

each and every aspect of the matter has been dealt with meticulously by the Courts below while recording conviction of accused and as such there is no merit in the present petition and the same deserves to be dismissed. With a view to refute the contentions having been put forth on behalf of the petitioner, Mr. Thakur, stated that bare perusal of statement of PW-1 Netar Singh (Complainant) suggests that at the relevant time, vehicle in question was being driven rashly and negligently at a high speed by the accused, as such, there is no illegality or infirmity in the judgments passed by the Courts below, and as such, same deserve to be upheld. Mr. Thakur, while concluding his arguments reminded this Court of its limited jurisdiction under Section 397 as far as re-appreciation of evidence is concerned. Learned Additional Advocate General, has placed reliance upon the judgment passed by Hon'ble Apex Court in case **State of Kerala versus Puttumana Illath Jathavedan Namboodiri** (1999)2 Supreme Court Cases 452, wherein it has been held as under:-

> " In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."

5. I have heard learned counsel representing the parties and have carefully gone through the record made available.

6. True, it is that while exercising the power under Section 397 of Criminal Procedure Code, this Court has very limited power to re-appreciate the evidence available on record. But in the present case, where accused has been convicted and sentenced under Sections 279, 337,338 of the Indian Penal Code, this Court solely with a view to ascertain that the judgments passed by both the Courts below are not perverse and the same are based upon correct appreciation of evidence available on record, undertook an exercise to critically examine the evidence available on record to reach fair and just decision in the case.

7. As far as scope of power of this Court while exercising revisionary jurisdiction under Section 397 is concerned, the Hon'ble Apex Court in ***Krishnan and another Versus Krishnaveni and another*****, (1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/incorrectness committed by inferior criminal court in its judicial process or illegality or sentence or order. The relevant para of the judgment is reproduced as under:-

> "8. The object of Section 483 and the purpose behind conferring the revisional power under Section 397 read with Section 401, upon the High Court is to invest continuous supervisory jurisdiction so as to prevent miscarriage of justice or to correct irregularity of the procedure or to mete out justice. In addition, the inherent power of the High Court is preserved by Section 482. The power of the High Court, therefore, is very wide. However, the High Court must exercise such power sparingly and cautiously when the Sessions Judge has simultaneously exercised revisional power under Section 397(1). However, when the High Court notices that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct

> irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order."

8. During the proceedings of this case, this court had an occasion to peruse the entire evidence on record, perusal whereof suggests that the Courts below have erred in recording conviction against the accused that too on the basis of contradictory and inconsistent pleas having been taken by the prosecution witnesses. However, this court solely with a view to ascertain the genuineness and correctness of the submission having been made by the learned counsel for the respective parties, undertook an exercise to critically examine the evidence available on record to ensure that the judgments passed by the learned Courts below are not perverse and same are based on correct appreciation of the evidence available on record.

9. It is undisputed that on 25.3.2003, vehicle bearing registration No. HP-32-4140, in which 25-30 passengers were traveling, met with an accident, as a result of which, PW-1 Netar Singh (Complainant) and other persons suffered injuries. It is also undisputed that the vehicle at that time was being driven by the accused, who, while recording his statement under Section 313 CrPC, claimed himself to be innocent, though he did not lead any evidence in his defence. But careful perusal of the evidence available on record suggests that during the proceedings of the case, defence of the accused was that since one cow had suddenly emerged before the bus, he had to take a right turn, as a result of which, bus fell in a gorge. In the present case, prosecution has examined as many as 12 witnesses to prove its case. But careful perusal of judgments passed by learned Courts below as well as evidence available on record clearly suggests that except for PW-1 Netar Singh (complainant), none of the material prosecution witnesses supported the prosecution case. Apart from PW-1, Netar Singh, there are two material witnesses i.e. PW-2 Dhaneshwari Devi and PW-3 Durga Dass, who at the relevant time, were also traveling in the same bus alongwith complainant, Netar Singh, whereas PW-5 Pawan Kumar is a witness of recovery, PW-6 is Parvati, PW-7 Om Parkash has prepared challan, and PW-8 Dr. P.K. Soni, has examined the injured and rendered his opinion in the shape of MLC (Ext. PB). PW-9 Deepak Kumar is also a witness of recovery and PW-10 Dina Nath has conducted investigation. PW-12 Breastu Ram has conducted mechanical examination of the vehicle in question.

10. Close scrutiny of the judgments passed by learned Courts below suggests that the Courts below, while recording conviction against accused have placed heavy reliance on the statement of PW-1 Netar Singh as well as documentary evidence available in the shape of photographs and spot map adduced on record by the prosecution. PW-1 Netar Singh in his deposition before the Court stated that he was traveling in the bus. When it came near Bajir Bain, it fell down. It is stated that at the relevant time, accused was driving the vehicle at a high speed, which caused the accident. In his cross-examination, he stated that the bus started from Ner Chowk at 5 pm. He also stated that it took about 4-5 minutes to board the passengers. He also stated that the vehicle stopped for 3-4 minutes near Galma Pull, Kotlu and Lakhwan. It has come in his statement that the distance between Ner Chowk and Bajeer Bowri was about 12 Kms and bus took about 50-55 minutes to cover the distance. PW-1 Netar Singh has admitted in his cross-examination that it took about 50-55 minutes for the bus to cover a distance of 12 kms, meaning thereby that by no stretch of imagination, it can be concluded that at the relevant time, bus was being driven in a rash and negligent manner and at a high speed, rather this Court, after carefully examining the aforesaid aspect of distance as well as speed, as projected by PW-1 Netar Singh, in his statement, is of the view that vehicle in question was being driven at a normal speed at the relevant time. Similarly, PW-6 Parvati Devi, in her statement, stated that on hearing noise, she reached the spot. In her cross-examination, she denied the suggestion put to her that accused was driving vehicle at a high speed and vehicle fell down due to rash and negligent driving of accused. She, in her cross-examination, further stated that there is a *Bowri* near the place of accident, which certainly does not prove the case of the prosecution.

11. PW-2 Dhaneshwari Devi, has also not supported the case of the prosecution. She was declared hostile. In her cross-examination by the learned APP, she categorically denied that at the relevant time, accused was driving the vehicle at higher speed and vehicle fell down due to

negligence of the accused. She stated that the vehicle had fallen towards its side. She also admitted that the accident had occurred due to colpase of *Danga*.

12. PW-3 Durga Dass has also not supported the case of the prosecution. Accordingly, he was declared hostile. In his cross-examination, he denied that accused was driving vehicle in rash and negligent manner and he was unable to control the vehicle due to high speed. He further stated in his cross-examination, that accident had taken place while saving some stray animal, which had come on road. As per record available, aforesaid prosecution witnesses were the only eye-witnesses, who witnessed the accident but interestingly, except PW-1 Netar Singh, none of the prosecution witnesses has stated that accident occurred due to rash and negligent driving of accused.

13. Similarly, none of the aforesaid prosecution witnesses has stated that at the relevant time, they saw accused driving bus at a high speed, rather, their cross-examination, if read in its entirety, suggests that vehicle was being driven at a normal speed.

14. PW-1 Netar Singh, complainant, on whose statement, Courts below have placed strong reliance, has also not supported the prosecution case because, in his own statement, as discussed above, he has categorically stated that the bus took almost 50-55 minutes to cover distance of 12 kms. If, for the sake of arguments, it is presumed that during these 50-55 minutes, bus had deboarded passengers at the stations as narrated by PW-1, at Galma Pull, Kotlu and Lakhwan, 10 minutes can be deducted from 55 minutes, meaning thereby that bus took 45 minutes to cover distance of 12 kms, which can be easily covered in 45 minutes. If bus took 45 minutes to cover distance of 12 kms, no man of ordinary prudence can say that vehicle was being driven in a rash and negligent manner.

15. Moreover, there is another aspect of the matter, which suggests that there was no specific evidence led on record by the prosecution suggestive of the fact that vehicle in question was being driven in a rash and negligent manner at a high speed. None of the prosecution witnesses has stated anything specifically with regard to the speed of the vehicle at the relevant time, which is essential for determining rashness and negligence on the part of accused. Though, PW-1 Netar Singh, who only supported the case of the prosecution, in his statement, stated that the vehicle was being driven rashly and negligently at a high speed but he himself stated/admitted that it took 50-55 minutes for the bus to cover a distance of 12 kms, which falsifies the stand of the prosecution that bus was being driven in a rash and negligent manner at that time.

16. True it is that the prosecution by way of leading convincing evidence on record was able to prove the injuries suffered by PW-1 Netar Singh as well as other passengers, who were traveling in the bus at that time, but same may not be sufficient to record conviction against accused, who at the relevant time was driving bus in question.

17. Since the prosecution has miserably failed to prove that the bus in question was being driven rashly and negligently and at high speed, this Court is unable to accept the findings of the learned Courts below, which are totally based upon the statement of PW-1 Netar Singh as well as documents i.e. photographs and spot map because once rashness and negligence on the part of accused has not been duly proved, no conviction could be recorded on the basis of material available on record.

18. Apart from above, none of the prosecution witnesses has specifically stated with regard to speed of the vehicle and as such, no finding could be returned by the court below on mere statement of complainant that at that relevant time vehicle was being driven rashly and negligently. Had any prosecution witness stated something with regard to specific speed, it could be the best piece of evidence for the Court to ascertain the genuineness and correctness of the claim of the complainant with regard to rash and negligent driving of the petitioner-accused.

19. At this stage, reliance is placed on judgment rendered our own High Court in case titled **Akshay Kumar v. State of HP**, Latest HP LJ 2009 HP 72, relevant para of which reads as under:-

> "8. In fact, an injury shall be deemed to be negligently caused whomsoever it is willfully caused, but results from want of reasonable caution, in the undertaking and doing of any act either without such skill, knowledge or ability as is suitable to consequences of such act, or when it results from the not exercising reasonable manner of using them or from the doing of any act without using reasonable caution for the prevention of mischief, of from the omitting to do any act which is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without an intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Rash and negligent act may be described as criminal rashness negligence. It must be more than mere carelessness or error of judgment."
>
> The courts below did not appreciate the above facts that there was debris on the side of the road on the curve due to the slip, while negotiating the curve, as stated above, some witnesses have admitted that the danga gave way to the bus which caused the accident and the rash and negligent driving by the petitioner is also denied, therefore, it find that the findings of quilt arrived at against the petitioner by both the courts below were not based upon legal and proper appreciation of evidence. In the circumstances aforesaid, the petitioner cannot be said to have criminal rashness or negligence, thus he is entitled for the benefit of doubt as two views were deducible from the evidence on record."

20. Reliance is placed upon judgment of this Court reported in **Gurcharan Singh versus State of Himachal Pradesh** 1990 (2) ACJ 598, the relevant paragraphs of which are reproduced here-in-below:-

> "14. Adverting to the facts of this case, it is in evidence that the truck in question was loaded with fertilizer weighing 90 quintals. Obviously, it cannot be said that the speed of the vehicle was very fast. Secondly, it is a State Highway and not a National Highway. Therefore, the speed on this account as well cannot be considered to be high.
>
> "15. Coming to the statements of witnesses on this aspect, it has been stated that the truck was moving in high speed but it has not been said as to what that speed actually was. To say that a vehicle was moving in a high speed is neither a proper and legal evidence on high speed nor in any way indicates thereby the rashness on the part of the driver. The prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved in a case under Section 304-A of the Indian Penal Code. Further, there are no skid marks which eliminate the evidence of high speed of the vehicle. In addition to this, it has been stated by the witnesses that the vehicle stopped at a distance of 50 feet from the place of accident. This appears to be exaggerated. However, it is not a long distance looking to the two points; viz, the first impact of the accident and the last tyres of the vehicle and the total length of the body of the truck in question. If seen from these angles, the distance stated by the witnesses cannot be considered to be very long and thus an indication of high speed. The version of the petitioner that he blew the horn near about the place of curve which frightened the child, cannot be considered to be without substance. This can otherwise be reasonably inferred that the petitioner would have blown the horn on seeing the child on the road as it is in evidence that the child had come on the pucca portion of the road while there is no evidence as to whether the witnesses, more particularly, Ghanshyam, PW7, Chander Kanta, PW8, mother, and a few other witnesses were there at that particular time. Rather the depositions of

> these witnesses indicate that they were coming from some village lane which was joining the main road in question. Children of this age, usually crafty by temperament, move faster than the parents and are in advance of them while walking. This appears to have happened in the present case. Minute examination of the circumstances of this case and the evidence brought on the record, discloses that the deceased had reached the pucca portion of the road much before the arrival of his parents and the witnesses. That is why in their deposition they have said that the child had been run over by the truck. On the other hand, the petitioner has stated that horn by him and started crossing the road which could not be seen by him and the result was the accident and the death of the child. In case some pedestrians suddenly cross a road, the driver of the vehicle cannot save the pedestrian, however slow he may be driving the vehicle. In such a situation he cannot be held negligent; rather it appears that the parents of the child were negligent in not taking proper care of the child and allowed him to come alone to the road while they were somewhere behind and they could have rushed to pull back the child before the approaching vehicle came in contact with him as it is in their depositions that the truck driver was at a distance coming at a high speed and in case the child wanted to cross the road, it could do so within the time it reached at the place of the accident. How the accident has actually taken place, has not been clearly and comprehensively stated by any of the witnesses. They appear to have been prejudiced by the act of the driver. Their versions are, therefore, coloured by the ultimate act of the petitioner and the fact that the child had been finished."

21. In the aforesaid case, Hon'ble Court while passing aforesaid judgment has observed that "prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved under Section 304-A of the Indian Penal Code". Definitely, there cannot be any quarrel with regard to the aforesaid observations made by the Court. But now question arises as to what can be the method/mode for measuring the exact speed of the offending vehicle at the time of accident, undisputedly, in the present case, engine of offending vehicle after falling in gorge must have stopped, no help at all could be taken from speedometer to ascertain the exact speed of the vehicle at the relevant time. To my mind, in the aforesaid situation, the eye witnesses of the accident could be the best persons to depose whether offending vehicle was in high speed or not. Apart from above, aspect of high speed can be gauged from the side/direction of the offending vehicle and certainly an inference of its being driven rashly and negligently on high speed can be drawn by perusing spot map, photographs and mechanical reports, which may point towards the force/impact, as supporting evidence. But obviously, in the absence of some specific mode to gauge the speed, only eye witnesses to the accident can be the best persons to depose the high speed/actual speed of the vehicle. In the instant case, as has been discussed in detail, none of the prosecution witness has stated anything with regard to specific speed of the offending vehicle, rather all the prosecution witnesses in one way or the other, have admitted that vehicle in question was being driven in normal speed by the petitioner accused and as such, no finding could be returned by the court below that vehicle in question was being driven at high speed by the petitioner accused at that relevant time.

22. Consequently in view of the detailed discussion as well as law referred to herein above, this Court sees substantial force in the contentions put forth on behalf of the petitioner and as such, present petition is allowed. Accordingly, judgments passed by the Courts below are set-aside. Accused is acquitted of the charges so framed against him. Bail bonds of the accused are discharged. Interim orders, if any, are vacated. All applications, if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Smt. Khuri ....Petitioner

Versus

State of Himachal Pradesh and another ....Respondents

CWP No. 4742 of 2011
Decided on : December 6, 2016

Constitution of India, 1950- Article 226- Land of the petitioner was used for the construction of the road without acquisition - assurance was made to acquire the land but no steps were taken for acquisition – the respondent stated that the road was constructed on the persistent demand of the Villagers- it was denied that any objection was raised by the petitioner – held, that the road was constructed in the year 1991 - no document was placed on record to show that the land was donated by the petitioner or that there was implied consent of the petitioner – the petition allowed – respondent directed to pay admissible compensation to the petitioner. (Para-8 to 13)

Case referred:

State of Maharastra Vs Digamber (AIR 1995) SC 1991 and 1995 4 SCC 683
K.B. Ramachandra Raje v. State of Karnataka, (2016) 3 SCC 422

For the petitioner : Mr. B.S. Chauhan, Senior Advocate with Mr. Rakesh Thakur, Advocate.
For the respondents : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (Oral):

By way of instant writ petition under Article 226 of the Constitution of India, the petitioner has prayed for following main relief(s):

> "It is therefore prayed that the writ petition may kindly be allowed and appropriate writ, order or direction be issued to the respondents for initiating acquisition proceedings in respect to land measuring about 3 bighas used for the construction of road bearing Kh no 411 and 413 kita 2, measuring 00-13-61 hecters, situated at Mohal / Mauza Madhole , Tehsil Jubbal, Distt. Shimla, H.P. used in the year 1995 and made functional in 2007 in the interest of justice and fair play."

2. Briefly stated the facts as emerge from record are that land belonging to the petitioner, description whereof is available in para-4 of the petition, has been used by the respondents for the construction of road namely Mandhol-Khara Pathar-Patsai road in the year 1993 and it was completed in 2007. Petitioner has specifically averred in the petition that for the construction of aforesaid road, land of the petitioner has been used by the respondents without there being any acquisition of land. Pleadings further suggest that the petitioner, at the time of construction of road, raised objection and prayed that before starting construction of road, steps may be initiated for acquiring the land in accordance with Land Acquisition Act (in short, 'Act'). It also emerges from the record that on the assurance having been given by the respondent Department, petitioner allowed department concerned to construct the road through the land without there being acquisition of the land in terms of the Act. Pleadings further suggest that petitioner was assured by the representatives of the Department that acquisition proceedings would be started and amount of compensation would be paid in accordance with law. In the aforesaid background, petitioner allowed road to be constructed through the land as described in the petition but after the construction of the road, where now vehicles ply, no steps, whatsoever,

were taken by the respondents for acquiring the land, admittedly, having been used by them for the construction of aforesaid road. It also emerges from the record that the petitioner made several requests to the authorities for initiating process for acquisition of land and payment of compensation thereafter, but despite that, no action was taken and as such petitioner was compelled to file present petition, for the redressal of her grievances praying therein for reliefs as reproduced herein above.

3. Respondents, pursuant to issuance of notice by this Court, filed a detailed reply refuting therein the claim of petitioner. Respondents, in their reply, submitted that the rural link road namely Mandhol-Khara Pathar-Patsai from KM 0/0 to 10/0 was proposed to be constructed under State Head during 1985 to facilitate the public of the area upon their popular demand to take their horticulture produce to the market by providing road connectivity. Work of the construction of road was started in 1985 from Magawta side and completed upto KM 4/810 upto village Madot in the year 1990-91. Land of the petitioner falls between RD 4/500 to 4/810 and cutting work through this portion of land as per MB (Measurement Book) entries (JD No. 1318 Page 4 to 7) has been completed during 1990-91. Respondents also placed on record copies of MB's suggestive of the fact that land in question was actually used by the respondent Department for the construction of road. It also emerges from annexure R-1 that at the relevant time, entries were made by the concerned officer in the MB. However, respondents categorically denied the contentions having been put forth on behalf of the petitioner that he had objected to the construction of road through his land, rather, respondents have stated that the road in question was constructed on the 'persistent demand' of people of area. It would be apt to reproduced herein following para of the reply filed by the respondents:

> "2. That in this behalf it is respectfully submitted that rural link road namely Mandhol-Khara Pathar-Patsai road from km 0/0 to 10/0 was proposed to be constructed under state head during the year 1985 to facilitate the public of the area upon their popular demand to take their Horticultural produce to the market by providing road connectively. The work of construction of road was started in the year 1985 from Magawta side and completed up to K.M. 4/810 up to village Madot in the year 1990-91. The suit land of petitioner falls between RD 4/500 to 4/810 km and cutting work through this portion of suit land of petitioner as per MB entries (No. JD-1318 page 4 to 7) has been completed during 1990-91. The copy of MB entries is annexed as **Annexure R-1**. Needless to point out that none of the land owners including petitioner ever objected at the time of construction of road by the contractor through suit land. Thereafter, upon the persistent demand of the people of area, the remaining road i.e. from km 4/810 to 10/0 was started in the year 2002 and completed in the year, 2007. However, the work of construction of this road upto km 4/810 was completed during the year, 1990-91 and since then the villagers including petitioner has been utilizing the "usufruct" of this connectively upto 4/810 km by plying their vehicles. In fact, to provide connectivity to rural areas, the govt. of HP had formed a policy vide which land is to be donated by the land owners free of cost. Therefore, now the petitioner has raised dispute after an inordinate delay of about 30 years from the date of construction of road through her suit land i.e. in the year, 1990-91 when cutting work was done. Hence, the present writ petition is not maintainable as the petitioner has raised this highly disputed question of law and facts with respect to the land compensation on account of the use of suit land which otherwise cannot be adjudicated in a Civil Writ Petition having lost his remedy of filing a civil suit on the ground of limitation. As such at this belated stage the same being barred on the ground delay and latches as per the law laid down by the Apex Court in the case State of Maharastra Vs Digamber (AIR 1995) SC 1991 and 1995 4 SCC 683 and recently followed up by the majority verdict of full bench of our Hon'ble High court on 2.3.2013 in CWP No.

1966/2010 titled as Shankar Dass vs State of HP & ors connected matters. Hence, the present petition deserves its dismissal on this ground alone.”

4. Perusal of aforesaid para of reply clearly suggests that the land of the petitioner was used for construction of road and entries were recorded in the MB. Aforesaid averments contained in the reply support the contention put forth on behalf of the petitioner that at the time of construction of road, concerned officer while recording measurements in MB, repeatedly assured the petitioner that the land in question would be acquired in accordance with law and she would be paid compensation in terms of measurement recorded in the MB. While praying for rejection of the claim of the petitioner, respondents in their reply have categorically stated that the claim at such a belated stage can not be accepted and as such present petition may be dismissed on the grounds of delay and laches.

5. Mr. B.S. Chauhan, learned Senior Advocate duly assisted by Mr. Rakesh Thakur, Advocate, vehemently argued that perusal of reply of the respondents, clearly suggests that land of the petitioner was used by the respondents for the construction of the road in question that too without there being any payment of compensation. He, while placing reliance on annexure R-1, placed on record by the respondents, strenuously argued that it clearly suggests that at the time of construction of road, measurements were recorded in the MB and repeated assurances were given to the petitioner that let the road be completed and then steps would be taken for acquisition of land and due and admissible compensation would be paid. While refuting the contentions raised by the respondents, with regard to delay in filing the petition, Mr. Chauhan, placed reliance upon judgment passed by the Apex Court in **Raj Kumar vs. State of H.P. and ors** in SLP(C) No. 2373 of 2014 decided on 29.10.2015, wherein Hon'ble Apex Court has held that once user of land owned by the petitioner is not denied by the State in the counter affidavit filed before the High Court, plea of delay, may not be available to the respondents simply for denying legitimate claim of the person, who gave his land for the construction of road. Mr. Chauhan, further placed reliance on the judgment passed by this Court in a bunch of cases i.e. CWP No. 2067 of 2008 **Birbal versus State of H.P. and others** and connected matters, wherein, in the similar facts and circumstances, this Court directed the respondents to complete the proceedings under Land Acquisition Act for acquisition of the land of the petitioner, therein, within six months from the date of passing of the judgment and thereafter to pay due and admissible compensation.

6. Mr. Ramesh Thakur, learned Deputy Advocate General, vehemently opposed aforesaid prayer having been made on behalf of the petitioner. Mr. Thakur strenuously argued that that no compensation as claimed in the present petition can be awarded to the petitioner at this belated stage because there is no document suggestive of the fact that after the construction of road, petitioner, at any point of time, made request to the authorities for the acquisition of land and payment of compensation. Mr. Thakur, while admitting that road in question was constructed through the land of the petitioner, stated that same was constructed on the popular demand of the people of area, who repeatedly requested the Government to construct road for their convenience and they themselves offered their land for the construction of road and as such, at this belated stage, petitioner can not be allowed to claim compensation qua same land. Mr. Thakur also placed reliance upon judgment passed by the Hon'ble Apex Court in case State of Maharastra Vs Digamber (AIR 1995) SC 1991 and 1995 4 SCC 683, which was followed by a Full Bench of this Court on 2.3.2013 in CWP No. 1966 of 2010 **Shankar Dass versus State of H.P. and another.** In the aforesaid background, Mr. Thakur, prayed that the instant petition deserves to be dismissed on the ground of delay and laches.

7. I have heard learned counsel representing the parties and have carefully gone through the record made available.

8. True, it is that in the judgment passed by the Full Bench of this Court in Shankar Dass versus State of H.P. and others, it was held that in cases where State has not taken steps under Land Acquisition Act for the purpose of construction of road on the ground that required land had been willingly surrendered, either orally or otherwise or with the implied

or express consent of the owners at the relevant time, they can invoke jurisdiction refuting such express or implied consent or the stand of the State on voluntary surrender, only within the time within which such a relief can be claimed in a Civil Suit. Once such a question is thus raised in a Writ Petition, the same can be considered in the Writ Petition itself.

9. Careful perusal of pleadings as well as documents clearly suggests that land of the petitioner was used by the respondents for the construction of road in question in the year 1991 and it is also not disputed that no steps were taken by the respondents for the acquisition of land and thereafter for paying compensation in lieu of the land used by them for the construction of road. Interestingly, respondents in the present case neither in their reply nor in the oral submissions having been made at the time of hearing, disputed that the land of the petitioner was not used for the construction of road, rather, respondents took a very strange plea that since no objections were raised by the petitioner during construction of road, she can not be allowed to put forth claim for payment of compensation at this belated stage. Respondents, though have taken plea of delay and laches but no document worth the name has been placed on record to refute plea of petitioner that she had been repeatedly requesting the respondents to acquire land in question in accordance with law. As per the own case of the respondents, work of construction of road was started in 1985 from Magawta and completed upto KM 4/810 upto village Madot in the year 1990-91. Though respondents, in their reply, have taken stand that road in question was constructed upon the persistent demand of people of the area, but there is no document available on record suggestive of the fact that prayer for construction of road was ever made by the petitioner as well as other villagers, as is claimed by the respondents in their reply. Further, perusal of reply suggests that the construction of road in question though was started in the year 1985 but same was completed in 2007. Respondents have categorically stated in their reply that the work of construction of road upto KM 4/810 was completed in 1990-91 but since villagers including petitioner, had been utilizing 'usufruct' of the connectivity upto 4/810 by plying their vehicles, which was completed in the year 2007. Reply also suggests that there is a policy of the Government to construct road on land which may be donated by the owners. But it may be again stated that neither there is any pleading nor document available on record suggestive of the fact that land in question was donated by the petitioner for the purpose of construction of road. Averments contained in the writ petition suggest that the land of the petitioner as well as co-owners was used for the construction of road, which was completed in 2007. There is no rebuttal to aforesaid assertion having been made by the petitioner in the writ petition.

10. In the instant case, this Court, after carefully perusing the reply having been filed by the respondents, is of the view that respondents have not been able to make out a case that petitioner willingly surrendered her land either orally or otherwise, with implied or express consent, at the time of construction of road, as such with due respect, this Court is of the view that the judgments passed by the Full Bench of this Court in the case of **Shankar Dass** (Supra), may not be applicable in the present case. In the present case, respondents have not stated anything in their reply, from where it can be inferred that land in question was either donated by the petitioner for the construction of the road or there was any kind of implied consent on her part for using her land for the construction of road in question. The Hon'ble Coordinate Bench of this Court while dealing with the similar issue in CWP No. 128 of 2003 decided on 25.7.2007, titled "Mathu Ram v. State of HP and Ors.", wherein land was used for construction of road and compensation was paid to the similar situate persons, directed the respondents to initiate acquisition proceedings for acquisition of land of the persons and to pay compensation in accordance with law. As far as contention put forth by the respondents with regard to the inordinate delay in maintaining the petition as well as compensation is concerned, the Hon'ble Apex Court in case title Raj Kumar v. State of HP and Ors. in SLP(C) No 2373 of 2014 decided on 29.10.2015, held as under:-

> "There is in our opinion considerable merit in the submission made by Mr. Nag. It is true that the appellant had approached the High Court rather belatedly inasmuch the land had been utilized sometime in the year

1985-86 while the writ petition was filed by the appellant in the year 2009. At the same time it is clear from the pleadings in the case at hand that the user of the land owned by the appellant is not denied by the State in the counter affidavit filed before the High Court of that filed before us. It is also evident from the averments made in the counter affidavit that the state has not sought any donation in its favour either by the appellant or his predecessor in interest during whose life time the road in question was constructed. All that is stated in the counter affidavit is that the erstwhile owner of the land "might have donated" the land to the State Government. In the absence of any specific assertion regarding any such donation or documentary evidence to support the same, we are not inclined to accept the ipsit dixit suggesting any such donation. If that be so as it indeed it, we fail to appreciate why the State should have given up the land acquisition proceedings initiated by it in relation to the land of the appellant herein. The fact that the State Government had initiated such proceedings is not in dispute nor is it disputed that the same were allowed to lapse just because the road had in the meantime been taken under the Pradhan Mantri Gram Sadak Yojna. It is also not in dispute that for the very same road the land owned by Kanwar Singh another owner had not only been notified for acquisition but duly paid for in terms of Award No. 10 of 2008. In the totality of the above circumstances, the offer made by Mr. Nag to the effect that the appellant would be satisfied if he is paid compensation at the rate determined and paid to Kanwar Singh under Award No. 10 of 2008 appears to be reasonable. That is so especially when the compensation in terms of Award No. 10 of 2008 was determined by reference to a Notification issued nearly 10 years ago The fact that the appellant is giving up his claim for any compensation for wrongful utilization of land and to the payment of interest which is otherwise statutorily prescribed makes the offer still more attractive for the State."

11. Further, Mr. Chauhan, has relied upon judgment rendered by Apex Court in **K.B. Ramachandra Raje v. State of Karnataka** reported in (2016) 3 SCC 422, wherein it has been held as under:

"15. According to the learned counsels for the respondents the writ petition is inordinately delayed. The writ petition has been filed in the year 1994 though the acquisition of land was finalized in the year 1988 and, in fact, the possession of the land to the respondent No.28-Society was handed over as far back as on 26th September, 1988. It is further pointed out that the fact that the acquisition was being made, in part, for the respondent No.28-Society is amply clear from the recitals contained in the order dated 31st July, 1987, by which the objections of the appellant under Section 16(2) was rejected. In this regard, it is also pointed out that in the course of the objection hearing the appellant was represented by his counsel. It is therefore contended that the statement made by the writ petitioner – appellant that he came to know about the allotment of the land for the respondent No.28-Society when the said Society had made attempts to construct a wall on the land in the year 1994 is wholly incorrect and the entire premise on the basis of which the writ petition has been filed is false. Therefore, on the aforesaid twin grounds of delay and lack of bona fides of the writ petitioner, the present appeals are liable to be dismissed.

28. It has been vehemently argued on behalf of the respondents that the writ petition ought not to have been entertained and any order thereon could not have been passed as it is inordinately delayed and the appellant has made certain false statements in the pleadings before the High Court details of which have been mentioned hereinabove. This issue need not detain the Court. Time and

again it has been said that while exercising the jurisdiction under Article 226 of the Constitution of India the High Court is not bound by any strict rule of limitation. If substantial issues of public importance touching upon the fairness of governmental action do arise the delayed approach to reach the Court will not stand in the way of the exercise of jurisdiction by the Court. Insofar as the knowledge of the appellant – writ petitioner with regard to the allotment of the land to the respondent No.28-Society is concerned, what was claimed in the writ petition is that it is only in the year 1994 when the respondent No.28- Society had attempted to raise construction on the land that the fact of allotment of such land came to be known to the writ petitioner – appellant.

29. A mere recital of the fact that a part of the land proposed for acquisition is contemplated to be allotted to the Respondent No. 28 in the order dated 31st July, 1987 rejecting the objections filed by the writ petitioner – appellant in response to the notice issued under Section 16(2) of the 1903 Act, in our considered view, cannot conclusively prove that what was asserted in the writ petition has to be necessarily understood to be false and incorrect. At the highest, the fact claimed by the respondents that the appellant had previous knowledge may be a probable fact. The converse is also equally probable. Taking into account the above position and the contentious issues raised and the conduct of the State Authorities and the MUDA, we are of the view that the said fact by itself i.e. delay should not come in the way of an adjudication of the writ petition on merits. We, therefore, hold that the impugned acquisition by MUDA under the provisions of the 1903 Act is invalid in law and has to be so adjudged."

12. Accordingly, in view of the aforesaid observations/findings of the Hon'ble Apex Court, the plea of inordinate delay having been raised by the respondents deserves to be rejected outrightly. In the aforesaid judgment, Hon'ble Apex Court has observed that time and again it has been said that while exercising jurisdiction under Article 226 of the Constitution of India, the High Courts are not bound by strict rule of limitation. In the instant case, this Court would be failing in discharging its duties, in case appropriate directions are not issued to the respondents to pay due and admissible compensation to the petitioner, whose land has been used by the State for the construction of the road in question.

13. Consequently, in view of detailed discussion as well as law referred to herein above, this petition is allowed. Respondents are directed to pay due and admissible compensation to the petitioner in lieu of land admittedly used by them for the construction of road in question by resorting to the procedure as is envisaged in Land Acquisition Act. Since considerable delay has already occurred in initiation of proceedings under Land Acquisition Act, respondents are directed to complete the acquisition proceedings under Land Acquisition Act for the acquisition of land within six months from today and pay the compensation to the petitioner thereafter.

14. Pending applications, if any, are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Mohan Singh ....Appellant-Plaintiff
Versus
Inder Singh & Others ....Respondents-Defendants

Regular Second Appeal No.41 of 2006
Date of decision: 06.12.2016

Specific Relief Act, 1963- Section 34- Plaintiff pleaded that D was the owner of the suit land- suit land was acquired by the plaintiff and the proforma defendants by way of gift- it was given to

R for the purpose of living on Dharmarth – defendant No.1 and 2 got a Will executed by R – R had no right in the suit land – the defendants pleaded that D had executed a gift in favour of RS, who was tenant of D – his widow R remained in possession of the property as owner- she executed a Will in favour of the defendants No.1 and 2- they filed a counter claim seeking declaration – suit was dismissed by the Trial Court and counter claim was decreed- an appeal was filed, which was dismissed- held in second appeal that Trial Court had dismissed the suit and had decreed the counter-claim – one appeal was filed for setting aside the decree passed in the civil suit- no prayer was made for setting aside the decree in the counter-claim- counter-claim is a suit for all intents and purposes – separate appeals were required to be filed against the dismissal of the suit and decree of the counter-claim – once the defendants have been declared to be the owners while decreeing their counter-claim, relief could not have been granted to the plaintiff without setting aside the decree in the counter-claim- composite appeal was not maintainable- appeal dismissed.(Para-23 to 44)

Cases referred:
Rajni Rani and versus Khairati Lal and Others, (2015)2 SCC 682
Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11
Narhari and others vs. Shanker and others, AIR 1953 S.C.419
Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202
Tamilnad Mercantile Bank Shareholders welfare Association(2) versus S.C.Sekar and others (2009)2 Supreme Court Cases 784
B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 SCC 123
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant: Mr.N.K. Sood, Senior Advocate with Mr.Aman Sood, Advocate.
For Respondents No.1 and 2(a): Mr.N.K. Thakur, Senior Advocate with Ms.Jamuna, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellant-plaintiff against the judgment and decree dated 27.12.2005, passed by the learned District Judge, Chamba, District Chamba, H.P., affirming the judgment and decree dated 30.11.2004, passed by the learned Civil Judge(Junior Division), Chamba, whereby the suit filed by the appellant-plaintiff has been dismissed.

2. The brief facts of the case are that the appellant-plaintiff *(herein after referred to as the 'plaintiff'),* filed a suit for declaration to the effect that the plaintiff alongwith proforma defendants are owners of the land comprised in Khasra No.263, situated in village Tissa Kaswati *(hereinafter referred to as the `suit land')* and the entry in the revenue record in favour of the defendants qua the suit land are wrong and illegal. Plaintiff further prayed that the defendants be restrained permanently from raising any construction over the suit land and in the alternative for possession of the suit land.

3. It is averred by the plaintiff that he is recorded owner in possession of the land comprised in Khasra Nos.264, 265 and 267, measuring 205 square yards and one square feet, which is adjoining to the suit land, which was recorded in the ownership of the plaintiff and proforma defendants, but in possession of defendants Nos.1 and 2 without any status. It is further averred that at one point of time, the suit land was owned by one Sh.Dass son of Sh.Harkha and the same was acquired by the plaintiff and proforma defendants by way of gift vide mutation No.38. It is alleged by the plaintiff that the suit land was given to one Smt.Rukmani widow of Sh.Ram Singh for the purpose of living on 'Dharmarth', but defendants Nos.1 and 2, in connivance with the revenue agency on the basis of some forged Will allegedly executed by

Smt.Rukmani, got themselves recorded in possession of the same, which entry is wrong, illegal and not binding upon the plaintiff and proforma defendants. It is averred by the plaintiff that Smt.Rukmani was not having any right, title or interest in the suit land, except that she was in permissive possession of the same and, as such, the defendants could not have inherited the suit land on the basis of Will. It is further averred by the plaintiff that the defendants, taking advantage of the wrong entry in connivance with the revenue staff, got attested mutation No.64 on 30.1.1976, according to which proprietary rights were conferred upon them qua the suit land without any lawful authority as the suit land, which is comprising of a house, could not have been the subject of acquisition of proprietary rights under tenancy or any other law. It is further averred by the plaintiff that the defendants were recorded in possession of the suit land, not as a tenant, but without any status. Thereafter, defendant No.1 on 27.1.1995 has dismantled the building situated over the suit land with a view to raise fresh construction to which he has no right, title or interest. In the aforesaid background the plaintiff filed a civil suit.

4. Defendants, by way of filing written statement, refuted the claim of the plaintiff on the ground of maintainability, estoppel, limitation and *locus standi*. They also filed counter claim against the plaintiff. On merits, the defendants have denied the claim of the plaintiff that he is recorded as owner in possession of the land comprised in Khasra Nos.264, 265 and 267. The possession of defendant No.1 on the suit land has been admitted, whereas it is denied that that the plaintiff and proforma defendants are either owners or in possession of the suit land. It is also denied that Sh.Dass executed a gift deed qua the suit land in favour of the plaintiff, but stated that one Sh.Ram Singh was a tenant of Dass, as he used to cultivate the land comprised in Khasra Nos.267 and 268 as a tenant and a house comprised in Khasra No.263 was gifted to Sh.Ram Singh by Sh.Dass and after the death of Shri Ram Singh, his widow Smt.Rukmani remained in possession of the suit land as owner. Smt.Rukmani, therefore, executed a Will in favour of defendant No.1. It is averred that Smt.Kunanu was not competent to dispose of the house situated over the suit land in favour of the plaintiff and proforma defendants as she was not in possession of the suit property. The possession of the suit property was never delivered to the plaintiff and, as such, revenue entry qua the suit land in favour of the plaintiff and proforma defendants are wrong and the same is not binding upon the defendants. It is further averred by the defendants that they have repaired the house in dispute and have also made improvement therein. It is further averred by the defendants that since Smt.Rukmani got the disputed house from her husband late Shri Ram Singh, she was competent to dispose of the same. It is denied that the Will executed by Smt.Rukmani is forged document. It is averred by the defendants that for the last more than 38 years Sh.Ram Singh, Smt.Rukmani and thereafter defendants No.1 and 2 are in possession of the disputed house to the knowledge of the plaintiff and profroma defendants and, as such, the defendants have acquired ownership rights over the disputed house by way of adverse possession as the defendants are in physical possession of the disputed house for the last more than 12 years. It is further averred by the defendants that they have also set up a counter claim seeking declaration that the suit property is in their possession as owners and entry in the revenue record qua the suit property in favour of the plaintiff and proforma defendants is null and void and not binding upon the rights of the defendants. In the aforesaid background the defendants prayed for dismissal of the suit.

5. On the pleadings of the parties, the learned trial Court framed the following issues:-

> "1. Whether the plaintiff and the proforma defendants are owners of the property comprised in Khasra No.263 as alleged? OPP.
>
> 2. Whether the suit property was given to Smt.Rukmani for residence purpose as 'Dharmarth' as alleged. If so, its effect? OPP.
>
> 3. Whether the revenue entries existing in favour of the defendants Nos.1 and 2 are wrong and illegal as alleged? OPP.
>
> 4. Whether the plaintiff and the proforma defendants are entitled to decree for possession of the disputed property as claimed? OPP.

5. Whether the suit is not maintainable in the present form? OPD.
6. Whether the plaintiff is estopped from filing the present suit by his act and conduct? OPD.
7. Whether the suit is time barred? OPD.
8. Whether the plaintiff has no locus standi to sue? OPD.
9. Whether Smt.Rukmani was competent and validly willed away the suit property in favour of the defendants as alleged? OPD.
10. Whether the disputed property was gifted to Sh.Ram Singh as alleged. If so, its effect? OPD.
11. Whether mutation No.64 has been wrongly and illegally attested in favour of the defendants as alleged? OPP.
12. Whether the suit has been properly valued for the purpose of court fee and jurisdiction? OPP.
13. Whether the defendants have become the owners of the suit property by way of adverse possession? OPD.
14. Whether the defendants are owners in possession of the suit property as alleged? OPD.
15. Relief."

6. Learned trial Court vide common judgment and decree dated 30.11.2004 dismissed the suit of the plaintiff and decreed the counter claim filed by the defendants.

7. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiff was dismissed and counter claim by the defendants-respondents were decreed, appellant-plaintiff filed an appeal under Section 96 of the Code of Civil Procedure *(for short 'CPC')* read with Section 21 of the H.P. Courts Act assailing therein judgment and decree dated 30.11.2004 passed by learned Civil Judge(Junior Division) in the Court of learned District Judge, Chamba.

8. Learned District Judge, Chamba vide judgment and decree dated 27.12.2005 dismissed the appeal preferred by the plaintiff by affirming the judgment and decree passed by the learned trial Court. Learned first appellate Court also affirmed the decreed passed by the learned trial Court in the counter claim.

9. In the aforesaid background, the present appellant-plaintiff filed this Regular Second Appeal before this Court, details whereof have already been given above.

10. This second appeal was admitted on the following substantial question of law:

"(1) Whether the respondents/defendants No.1 and 2 could not have claimed title to the suit property both on the basis of the will from Rukmani, in whose favour a gift had allegedly been made by the original owner Dass, and also on the basis of plea of adverse possession at the same time?

2. Whether the finding that the respondents/defendants No.1 and 2 have acquired title by prescription, could not have been returned when it was also found that possession of Rukmani and prior to her that of Ram Singh, her husband, was permissive?"

11. At this stage, it may be noticed that on 15th November, 2016, the matter was listed before this Court, and attention of Mr. N.K. Sood, Senior Advocate, representing the appellant-plaintiff was invited towards the judgment passed by Hon'ble Apex Court in ***Rajni Rani and versus Khairati Lal and Others, (2015)2 SCC 682*** and ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11***, which was further followed by this Court while dismissing ***RSA No.293 of 2006***, *titled as* ***Piar Chand & Others versus***

Ranjeet Singh & Others, wherein Hon'ble Apex Court has held that while dismissing the counter claim, Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree and same needs to be laid challenge, if any, by way of filing separate appeal affixing required court fee.

12. In view of aforesaid law having been brought to the notice of Mr.N.K. Sood, learned Senior Advocate, representing the appellant-plaintiff, he sought time to go through the same. Thereafter, today i.e. on 6.12.2016, when the matter was listed before this Court, this Court in view of aforesaid law having been laid down by the Hon'ble Apex Court deemed it fit to frame additional substantial question of law for proper adjudication of the case at hand. The additional substantial question of law is as under:-

1. "Whether the learned First Appellate Court has erred in entertaining the composite appeal having been preferred by the appellant-plaintiff against the judgment and decree passed by learned trial Court dismissing the suit of the plaintiff and decreeing the counter claim preferred by the defendants-respondents that too without affixing separate/ requisite court fee as far as counter claim is concerned.

13. Mr.Sood, learned Senior Advocate, vehemently argued that the judgments passed by both the Courts below are not sustainable as the same are not based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, same deserves to be quashed and set-aside. Mr. Sood, further contended that bare perusal of the of the judgments passed by both the Courts below suggests that evidence led on record by the appellant-plaintiff has not been read in its right perspective and as such, great prejudice has been caused to the appellant-plaintiff against whom decree for possession has been passed.

14. Mr.Sood, while making his submission qua the additional issue having been framed by this Court, contended that genuine and legitimate claim of the appellant-plaintiff cannot be allowed to be defeated on mere technicalities and this Court has wide power to ignore such technicalities and can proceed ahead to decide the matter on the basis of the evidence adduced on record by the respective parties to do substantive justice in the matter. Mr.Sood, further claimed that the learned trial Court decreed the counter claim of the defendants-respondents and appellant-plaintiff rightly preferred composite appeal against the same before the learned District Judge laying challenge therein to the composite decree passed in the suit as well as in the counter claim in favour of the defendants. He further contended that no appeal, if any, could be filed without there being any decree and as such, appellant-plaintiff had no option but to file composite appeal, whereby suit of the plaintiff was dismissed and counter claim of the defendants-respondents was decreed.

15. In the aforesaid background, Mr. Sood, strenuously argued that the counter claim filed by the defendants-respondents deserve to be dismissed after setting aside the judgment and decree passed by the Courts below. In support of his contention Mr. Sood, also placed reliance on the judgments of Hon'ble Apex Court in ***Narhari and others vs. Shanker and others, AIR 1953 S.C.419, Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202, Tamilnad Mercantile Bank Shareholders welfare Association(2) versus S.C.Sekar and others (2009)2 Supreme Court Cases 784 and B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 Supreme Court Cases 123.***

16. Mr.N.K. Sood, Learned Senior Counsel appearing for the appellant-plaintiff, vehemently argued that the impugned judgment and decree passed by learned first appellate is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence as well as law on point. Mr.Sood contended that bare perusal of impugned judgment passed by learned first appellate Court suggests that the same is based on conjectures and surmises and learned first appellate Court has fallen in grave error while affirming the judgment and decree passed by the learned trial Court that too on the very flimsy grounds.

17. Mr.N.K. Sood,Learned Senior Counsel appearing for the appellant-plaintiff, vehemently argued that the learned court below has fallen in error of law as also on facts while holding that the defendants have perfected their title by adverse possession. He further contended that pleadings qua plea of adverse possession were not sufficient and adequate as required in law. It ought to have been specifically pleaded and proved how and at what time the hostile title started and began to be prescribed or on what date the defendants came into possession or that possession was open, peaceful and continuous. Mr.Sood forcefully contended that adverse possession does not begin to operate unless the plea of title is renounced and disclaimed and without renouncing and disclaiming the plea of acquisition of title on the basis of Will, the defendants could not have raised the plea of adverse possession. Mr.Sood further contended that the averment made by the defendants that the plaintiff and proforma defendants were not the owners of the suit property and that the title vested in Ram Singh and then Rukmani itself demolishes their case of adverse possession. Mr.Sood vehemently argued that once the courts below have conclusively held that the gift dated 1.12.1969 (Ex.D-1) in favour of plaintiff and proforma defendants of the suit property from Kunanoo widow of Sh.Dass was proper and legal, in that event, the very basic, essential and classic requirement of setting up hostile title against the true owner and further animus to hold suit property in denial to the title of the plaintiff and proforma defendants is missing.

18. Mr.Sood, forcefully contended that the courts below have wrongly and illegally held that the hostile possession of the defendants started from the year 1971. In the absence of such specific pleadings, the starting point could not have been presumed and thus the courts below have made out a case for the defendants on its own presumptions, assumptions, conjectures and surmises. Mr.Sood vehemently contended that even the oral evidence of the defendants was not sufficient to sustain and establish the plea of adverse possession. Statements of defendants as well as their witnesses have been misread and misconstrued which are contrary to the pleadings of adverse possession and the same not sufficient to constitute a lawful proof of adverse possession and the entire approach of the courts below on the question of adverse possession is illegal, unsustainable and has vitiated the findings.

19. Mr.N.K. Thakur, learned Senior counsel appearing for the respondents-defendants, supported the judgment passed by the learned first appellate Court. Mr. Thakur, vehemently argued that bare perusal of the judgment passed by the learned first appellate Court suggests that the same is based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, there is no scope of interference, whatsoever, by this Court especially in view of the concurrentfindings of fact recorded by the Court below. He further contended that the present appeal is not maintainable in view of the law laid down by the Hon'ble Apex Court in ***Rajni Rani and another vs. Khairati Lal and Others, (2015) 2 SCC 682,*** which was further followed by this Court while passing ***judgment dated 16.9.2016 in RSA No.293 of 2006.***Mr. Thakur also placed reliance on the judgment of Hon'ble Apex Court in ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilala Kabrawala and others, AIR 1964 SC 11.***

20. Mr. Thakur, while concluding his arguments, further contended that apart from above, this Court has very limited power while exercising power under Section 100 CPC to re-appreciate the evidence and as such, he placed reliance on the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**, herein below:-

> "16. Based on oral and documentary evidence, both the Courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100

> C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the Courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."

21. I have heard learned counsel for the parties and have gone through the record of the case.

22. Keeping in view the specific objection with regard to maintainability having been raised by the appellant-plaintiff in the light of the judgment passed by the Hon'ble Apex Court, this Court deems it fit to take additional substantial question of law framed by this Court at first instance for adjudication.

23. Perusal of the counter claim filed on behalf of the defendants-respondents suggests that while filing written statement they asserted counter claim but fact remains that no requisite fee was paid on the aforesaid counter claim. The appellant-plaintiff denied the aforesaid counter claim of the respondents-defendants terming the same to be false and claimed that there was no negligence on the part of the appellant-plaintiff as claimed in the counter claim.

24. Careful perusal of the trial court record further suggests that appellant-plaintiff refuted the aforesaid counter claim of the respondents-defendants by way of replication as well as by filing separate written statement. However, the fact remains that learned trial Court after framing issues, as have been reproduced above, dismissed the suit of the plaintiff and decreed the cross-objection having been filed by the respondents-defendants. Operative part of the judgment and decree passed by the learned trial Court clearly suggests that the learned trial Court dismissed the suit of the appellant-plaintiff for possession, whereas decreed the counter claim of ownership and possession preferred on behalf of the respondents-defendants. Careful perusal of the decree sheet available on record suggests that decree for possession was passed in favour of the respondents-defendants and against the appellant-plaintiff.

25. Careful perusal of the decree, as referred, hereinabove, suggests that it also stands mentioned, ***"in view of my findings on the aforesaid issues, the suit of the plaintiff fails and the same is, accordingly, dismissed, whereas, the counter claim of the defendants is decreed and the defendants are declared to be the owners in possession of the suit property."*** Perusal of aforesaid decree prepared by the learned trial Court while dismissing the suit and accepting the counter claim of the defendants, clearly suggests that proper decree was drawn as far as acceptance of the counter claim filed by the defendants is concerned.

26. Appellant-plaintiff, being aggrieved with the aforesaid judgment and decree, approached the learned District Judge by way of an appeal under Section 96 CPC laying therein challenge to aforesaid judgment and decree passed by the learned trial Court. At this stage, it would be appropriate to reproduce cause title/ head note of appeal preferred by the appellant-plaintiff before the learned District Judge, which reads thus:-

> "Civil appeal under section 96 CPC read with section 21 of the H.P. Courts Act against the judgment and decree dated 30.11.2004 passed by the learned Civil Judge (Jr.Division), Chamba in Civil Suit no.2 of 1995, titled as Mohan Singh-Versus-Inder Singh and others, with a prayer to set-aside the same."

27. Careful perusal of aforesaid cause title as well as relief claimed in the appeal clearly suggests that appellant-plaintiff before the learned first appellate Court prayed that the appeal filed by him be accepted with costs and the judgment and decree dated 30.11.20-4 passed by learned trial Court be set aside, but there is no prayer, if any, for setting aside the judgment and decree passed by the learned trial Court, whereby counter claim filed by the defendants-respondents have been decreed and they were declared owners in possession of the suit property.

28. Before adverting to the submissions having been made on behalf of the learned counsel representing both the parties, it would be appropriate to refer to relevant provisions of law applicable in the present case i.e. Order 8 Rule 6A:

> "6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:
>
> Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.
>
> (2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.
>
> (3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.
>
> (4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

29. Aforesaid provisions of law entitles defendant in a suit to set up counter claim against the claim of the plaintiff in respect of cause of action accruing to him against the plaintiff either before or after filing the suit, butdefinitely before defendant files his defence or before the time stipulated for delivering the defence is expired. Needless to say that aforesaid right of filing counter claim is in addition to his right of pleading as set up in Rule 6. Further perusal of aforesaid provisions of law suggests that counter claim, if any, filed on behalf of the defendant would be treated as a plaint and same would be governed by Rules applicable to the plaint. Similarly, counter claims filed on behalf of the defendant would have same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and the counter claim.

30. Similarly, Rule 6A(3) enables the plaintiff to file a written statement, if any, to the counter claim filed by the defendant. Rule 6D specifically provides that in case suit of the plaintiff is stayed, discontinued or dismissed, the counter claim filed on behalf of the defendant would nevertheless be proceeded with.

31. Similarly, Rule 6E provides that if plaintiff fails to file reply to the counter claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him/her, or make such order in relation to the counter-claim as it deems fit. It would be relevant here to refer to Order VIII Rule 6F:

> "6F. Relief to defendant where counter-claim succeeds.- Where in any suit a set-off or counter-claim is established as a defence against the plaintiffs claim and any balance is found due to the plaintiff or the defendant, as the case may be , the Court may give judgment to the party entitled to such balance."

32. Perusal of aforesaid Order VIII Rule 6F clearly suggests that where in any suit a set-off or counter claim is established as a defence against the plaintiffs' claim and any balance is found due to the plaintiff or the defendant, Court may give judgment to the party entitled to such balance. Further perusal of Order VIII Rule 6G suggests that no pleadings, if any, subsequent to the written statement filed by a defendant other than by way of defence to set up a claim can be presented except with the leave of Court.

33. Under Order VIII Rule 10 when any party fails to file written statement as required under rule 1 or rule 9 within the stipulated time, the Court shall pronounce judgment

against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

34. Careful perusal of aforesaid provisions of law clearly suggests that counter claim, if any, preferred by the defendant in the suit is in nature of cross suit and even if suit is dismissed counter claim would remain alive for adjudication. Since counter claim is in nature of cross suit, defendant is required to pay the requisite court fee on the valuation of counter claim. It has been specifically provided in the aforesaid provisions that the plaintiff is obliged to file a written statement qua counter claim and in case of default court can pronounce the judgment against the plaintiff in relation to the counter claim put forth by the defendant as it has an independent status. As per Rule 6A(2), the Court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim.

35. In the present case, as clearly emerged from the judgment passed by the learned trial Court, learned trial Court effectively determined the rights of the parties on the basis of counter claim as well as written statement thereto filed by the respective parties and as such it attained the status of decree. It would be profitable here to reproduce definition of the term *'decree'* as contained in Section 2(2) of CPC:-

> "2.(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [1][* * *] Section 144, but shall not include –
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

36. Close scrutiny of aforesaid definition of "decree" clearly suggests that there should be formal expression of adjudication by the Court while determining the rights of the parties with regard to controversy in the suit, which would also include the rejection of plaint. Similarly, determination should be conclusive determination resulting in a formal expression of the adjudication. It is settled principle that once the matter in controversy has received judicial determination, the suit results in a decree, either in favour of the plaintiff or in favour of the defendant.

37. In this regard, it would be appropriate to place reliance on the judgment of the Hon'ble Apex Court in ***Rajni Rani and Another vs. Khairati Lal and Others,*** **(2015)2 SCC 682**, wherein the Court has held as under:-

> "16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."

38. After perusing aforesaid judgment passed by Hon'ble Apex Court, this Court need not to elaborate further on the issue at hand because Hon'ble Apex Court has categorically held that if by virtue of order of the Court rights have finally been adjudicated, it would assume the status of decree. Hon'ble Apex Court has also stated that Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree. Learned Apex Court has further held that in such like situation order passed by trial Judge has the status of decree and challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

39. Apart from above, this Court viewed this matter from another angle also. Admittedly, appellant-plaintiff claiming himself to be the owner of the suit land, as recorded in Jamabandi for the year 1970-71, filed a suit for declaration and permanent prohibitory injunction restraining defendants No.1 and 2 from changing the nature of the suit land. The aforesaid claim having been set up by the plaintiff in the instant Civil Suit was dismissed; meaning thereby that he was not declared as owner of the suit land entitling him to seek possession of the same. Whereas, in the aforesaid suit having been filed by the plaintiff, defendants filed written statement-cum-counter claim seeking declaration to the effect that they may be declared owners in possession of the suit property, which relief was extended by the trial Court by decreeing the counter claim of the defendants declaring them to be the owners in possession of the suit property.

40. Since, as has been observed above, no challenge has been laid to the judgment and decree passed by the trial Court decreeing the counter claim of the defendants, whereby they have been declared to be owners in possession of the suit property, composite appeal laying therein challenge to the judgment and decree passed by learned Civil Judge in Civil Suit No.2 of 1995 was not maintainable. Moreover, relief as claimed in the appeal having been filed by the appellant-plaintiff could not be extended to him without setting aside the judgment and decree passed in the counter claim in favour of the defendants. Once defendants have been declared to be owners in possession of the suit property by the trial Court while decreeing their counter claim, it is not understood how relief as prayed for in Civil suit having been filed by the plaintiff can be extended without setting aside the judgment and decree passed in the counter claim.

41. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this Court sees no force in the contention put forth on behalf of the counsel representing the appellant-plaintiff that in the absence of specific decree drawn by learned trial Court at the time of decreeing the counter claim filed by the defendants, plaintiff could not file separate appeal. Substantial question is answered accordingly.

42. Consequently, in view of the detailed discussion made hereinabove, this Court is of the view that learned first appellate Court erred in entertaining the composite appeal having been preferred on behalf of the appellant-plaintiff laying challenge therein to the judgment passed by the learned trial Court dismissing the suit of the appellant-plaintiff as well as decreeing the counter claim preferred on behalf of the defendants-respondents. In view of the latest law laid down by the Hon'ble Apex Court as well as provisions contained in the law as discussed above, appellant-plaintiff being aggrieved with the dismissal of the suit and decreeing the counter claim ought to have filed separate appeals by affixing separate court fee and composite appeal, as has been preferred in the present case, was not maintainable. In view of the aforesaid findings having been returned by this Court on the additional substantial question of law, other substantial questions of law have become redundant and as such, are not required to be answered at this stage.

43. As far as judgments relied upon by the learned counsel appearing for the appellant-plaintiff are concerned, this Court is of the view that the same are not applicable in the present facts and circumstances of the case, especially in view of the law laid down by the Hon'ble Apex Court *(supra).*

44. In view of the detailed discussion made hereinabove, as well as latest law laid down by the Hon'ble Apex Court in ***Rajni Rani's*** case *(supra)*, the present appeal is not maintainable and the same is accordingly dismissed. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s Italian-Thai Development Public Company Ltd. …Petitioner
Vs.
State of HP & Others …Respondents.

CWP No. 9552 of 2013
Judgment reserved on: 22.11.2016
Date of decision: December 06, 2016

H.P. Motor Vehicles Taxation Act, 1972- Section 3- Petitioner had purchased different construction equipment vehicles- respondents have imposed tax on them – the petitioner filed a writ petition pleading that construction equipment vehicles do not fall within the definition of motor vehicle- held, that machinery like excavator, loader, dumpers have been included as construction equipment vehicle and have been termed as non-transport vehicle- therefore, there cannot be any exemption regarding the imposition of tax – petition dismissed. (Para-5 to 25)

Cases referred:
M/s Kshardas & Co. vs. State of Maharashtra 1986 AIR (Bom) 348
Poomani vs. Tuticorin Thermal Power Project, 1990 AIR (Mad), 372
M/s Chakkiat Agencies Pvt. Ltd. vs. State of Kerala, 2001 AIR (Ker), 363
M/s Birla Cement Works vs. State of Rajasthan, 2003 AIR (Raj) 25,
Dinesh Mehta vs. Kaushikbhai K. Patel and others, C.W.P. No. 5373 of 2015, decided on 15.12.2015
Bolani Ores Ltd. vs. State of Orissa, 1975 AIR SC, 17
Travancore Tea Co. Ltd. vs. State of Kerala, 1980 (3) SCC 619
Union of India vs. Cowgule and Co. Pvt. Ltd. 1992 Supp 3 SCC 141
Chief General Manager, Jagannath Area vs. State of Orissa (1996) 10 SCC 676
Bose Abraham vs. State of Kerala and another (2001) 3 SCC 157,
M/s Natwar Parikh and Co. Ltd. vs. State of Karnataka, 2005 AIR (SC) 3428
National Insurance Company Ltd. vs. Sharda Devi and others (2016) 3 ACC, 627 (HP)

For the Petitioner : Mr. C. N. Singh, Advocate.
For the Respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

<u>Tarlok Singh Chauhan, Judge</u>

This writ petition involves the seminal question as to whether the construction equipment vehicles, more particularly, water tankers, heavy hyvas, farm tractors, transit mixtures and other heavy machines do not fall within the scope and purview of the definition of 'Motor Vehicles' and thus are exempted from tax?

2. The petitioner is executing the construction of Kol Dam Hydro Electric Power Project, main civil works Package 1 and has purchased different construction equipment vehicles. Being aggrieved by the imposition of tax on these vehicles, has filed the instant petition for the following substantive reliefs:

> *(i) Issue a writ in the nature of certiorari, mandamus or other appropriate writ or directions quashing the notification dated 31.12.2003 being ultra vires (Annexure P-6) for all intents and purposes.*
>
> *(ii) Consequentially issue a writ in the nature of certiorari, mandamus or other appropriate writ or directions quashing impugned orders dated 20.4.2012 (Annexure P-4).*
>
> *(iii) Issue a writ in the nature of mandamus or other appropriate writ or directions to the respondents to refund the tax collected by the respondent authority under the aforementioned notification /order dated 20.4.2012 with 12% interest per annum.*

3. It is averred that no tax is leviable on construction equipment vehicles as these do not fall within the definition of 'Motor Vehicles' in terms of Motor Vehicle Taxation Act, 1972 (for short 'Act of 1972').

4. The respondents filed the reply wherein it is averred that the tax levied on the vehicles in question is as per the provisions of Section 3 of the Himachal Pradesh Motor Vehicles Taxation Act, 1972 (for short Act of 1972) and the notifications dated 24.12.2003 and 31.12.2003 issued under the Act of 1972. It is averred that the vehicles in question have in fact been registered as per the Motor Vehicles Act (for short 'M.V.Act') and, therefore, the petitioner is liable to pay tax on the same.

We have heard the learned counsel for the parties and have gone through the records of the case.

5. The term "Motor Vehicle" has been defined in Section 2 (28) of the Motor Vehicles Act, 1988 which reads thus:

> *"(28) "Motor Vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimeters."*

6. The term "Construction Equipment Vehicle" has been defined under Rule 2 (ca) of the Central Motor Vehicles Rules, 1989, which reads as under:

> *"(ca) 'construction equipment vehicle' means rubber-tyred (including pneumatic tyred), rubber-padded or steel drum wheel mounted, self-propelled, excavator, loader, backhoe, compactor roller, dumper, motor grader, mobile crane, dozer, fork-lift truck, self-loading concrete mixer or any other construction equipment vehicle or combination thereof designed for off-highway operations in mining, industrial undertaking, irrigation and general construction but modified and manufactured with 'on or off or' on and off highway capabilities.*
>
> ***Explanation**.- A construction equipment vehicle shall, be a non-transport vehicle the driving on the road of which is incidental to the main off-highway function and for a short duration at a speed not exceeding 50 KMs per hour, but such vehicle does not include other purely off-highway construction equipment vehicle designed and adopted for use in any enclosed premises, factory or mine other than road network, not equipped to travel on public roads on their own power."*

7. It is clear from the aforesaid clause that the machineries like excavator, loader, dumpers have been included as 'construction equipment vehicle' and have been termed 'non-transport vehicle' under the explanation given to this clause.

8. Likewise, a 'non-transport vehicle' has been defined under sub rule (h) of Rule 2 as under:

> *"2 (h): 'Non-transport vehicle' means a motor vehicle which is not a transport vehicle."*

9. It is evident from the perusal of the above definition that the vehicles of special nature like dumpers, tippers and excavators are non-transport vehicles but nonetheless they are motor vehicles within the definition of Section 2 (28) of the Act. Even if the driving of the same on the road is incidental and for a short duration and its speed is 50 Kms per hour, even then, what has been excluded or not included in the definition is the equipments which are purely off-highway construction equipment designed and adopted for use in any enclosed premises, factory or mines, other than road work, not equipped to travel on public roads on their own power.

10. At this stage, we may refer to some of the opinions rendered by the various Hon'ble High Courts on the issue.

11. In ***M/s Kshardas & Co. vs. State of Maharashtra 1986 AIR (Bom) 348,*** a Division Bench of the Bombay High Court held that motor crane has mobility and is also suitable for use on a public road so far as its movement is concerned and mere fact that it had been used in the closed premises, cannot be said that it is not a motor vehicle as defined in Section 2 (28) of the Act.

12. In ***Poomani vs. Tuticorin Thermal Power Project, 1990 AIR (Mad), 372***, the learned Single Judge of the Madras High Court held that crane driven on public road is a motor vehicle, though this was a case arising out of motor accident compensation claim.

13. Likewise, in ***M/s Chakkiat Agencies Pvt. Ltd. vs. State of Kerala, 2001 AIR (Ker), 363*** a Division Bench of the Kerala High Court held that trailers kept in the area of the Port Trust and which are used for transport inside the Port area can still be said to be motor vehicles kept for use in the State would nonetheless the motor vehicle as defined under the Act.

14. In ***M/s Birla Cement Works vs. State of Rajasthan, 2003 AIR (Raj) 25***, a Division Bench of the Rajasthan High Court while going into the question whether dumpers would be amenable to tax since the same were being used in the factory premises came to hold that simply because it is the special type of vehicle that are being used in the factory premises will not bring dumpers within the exemption provided under Section 2 (28) as it is the user of the vehicle which determines its adaptability.

15. Similar issue came up before the Rajasthan High Court in ***Dinesh Mehta vs. Kaushikbhai K. Patel and others, C.W.P. No. 5373 of 2015, decided on 15.12.2015***, wherein it was held as under:

> *"6. The question posed before this Court is whether the Notification dated 1.1.2015 is beyond the competence of the State Legislature in so far as the State is only competent to levy tax as per Entry No. 57 of List II of Schedule 7 of the Constitution of India on such vehicles as are suitable for use on roads and whether NORMET MULTIMEC 6600 S.No. GB 821 equipment is to be treated as a construction equipment or whether it is to be treated as off-roading vehicle, as described under Section 2(p) of the Rajasthan Motor Vehicles Taxation Act, 1951.*
>
> *7. The term "Motor Vehicle" has been defined in Section 2 (28) of the Motor Vehicle Act, 1988, which reads as under:-*
>
> > *" "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a*

> *chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimetres."*

8. The term "construction equipment vehicle" has been defined in Rule 2(ca) of the Central Motor Vehicles Rules, 1989, which reads as under:-

> *"2 (ca) "construction equipment vehicle" means rubber tyred (including pneumatic tyred), rubber padded or steel drum wheel mounted, self-propelled, excavator, loader, backhoe, compactor roller, dumper, motor grader, mobile crane, dozer, fork lift truck, self-loading concrete mixer or any other construction equipment vehicle or combination thereof designed for off highway operations in mining, industrial undertaking, irrigation and general construction but modified and manufactured with "on or off" or "on and off" highway capabilities.*
>
> *Explanation.--A construction equipment vehicle shall be a non-transport vehicle the driving on the road of which is incidental to the main off-highway function and for a short duration at a speed not exceeding 50 kms per hour, but such vehicle does not include other purely off-highway construction equipment vehicle designed and adopted for use in any enclosed premises, factory or mine other than road network, not equipped to travel on public roads on their own power."*

9. The contention raised by the counsel appearing on behalf of the petitioner that the Notification dated 1.1.2015 issued by the State Government including the term of purely Off-road vehicle is beyond the scope and ambit of the power conferred upon the State vide Entry No. 57 of List II of Schedule 7 of the Constitution of India since the State has been conferred power to impose tax only on such vehicles as are suitable for use on roads (emphasis supplied) and furthermore section 2(28) of the Motor Vehicle Act 1988 specifies that a vehicle of a special type adapted for use only in a factory or in any other enclosed premises will not be included in the definition of a vehicle. This argument is without merit. A Division bench of this court in Birla Cement Works and Anr. Vs. State Of Rajasthan And Ors. AIR 2003 Raj 251 while going into the question whether dumpers would be amenable to tax since the same were being used in factory premises , came to hold that simply because it is the special type of vehicle and that they have been used in the factory premises will not bring dumpers within the exemption provided under Section 2(28). It is the user of the vehicle who determines its adaptability.

> *38. Thus, we are of the view that the definition of the Motor Vehicles Act under Section 2(28) is quite comprehensive. The exemption incorporated therein relating to the vehicle "all special type adopted or used only in a factory or any other enclosed premises significantly has used word 'adapted' and another word 'only'. The expression "adapted" for use on roads means that the vehicle should be fit and apt to use on roads. It does not mean "actually used on roads". By the use of rubber tyres it is evident that they have been adapted for use on roads, which means that they are suitable for being used on public roads. The dumpers can certainly be used for carrying loads even outside the factory premises. The dumpers are suitable for use on public or private roads. Simply because it is the special type of vehicle and that they have been used in the factory premises will not bring within the exemption provided under Section 2(28). It is the user of the vehicle who determines its adaptability. The test is if the vehicle is reasonably suitable for being used along with the public roads the mere fact that the manufacturer have made or intended a*

particular vehicle for one purpose or the other or the dealers have sold it for a particular purpose or that a particular vehicle is described by a particular name or description is no criteria to decide whether the vehicle is adapted for use upon the roads within the meaning of definition of Motor Vehicles Act under Section 2(28) of the M.V. Act. 1998.

Another word 'only' is also of a great significance. It clearly shows that the exemption is confined to only those kinds of vehicles which are exclusively designed for use in a factory or any enclosed premises, the actual use for particular purpose is no criteria to decide whether the vehicle is a motor vehicle. Thus, if the dumpers are suitable for use on public roads, it is a motor vehicle despite the fact they may have been used only in factory premises. Thus, we hold that the dumpers owned by the appellants/petitioners are motor vehicles within the meaning of Section 2(28) of the Motor Vehicles Act, 1988 as it does not fall in the exempted category in spite of being a special type of vehicle, being adaptable or suitable for being used on roads (by the use of rubber tyres) even though actually used only within the enclosed premises of the appellants/petitioners' factory. Hence they are liable to be taxed."

10. Similarly in the present case, the equipment imported by the petitioner is suitable for being used on public roads and the petitioner has not been able to demonstrate otherwise. The equipment in question, though used and adapted for mining purposes, is mounted on four rubber wheels .The description in the invoice itself describes it as a utility vehicle and as per the technical details of the equipment, it is shown as an underground carrier having its use for logistics underground mines for scissor lift, personnel carrier with a diesel tank. Furthermore, it is a three gear vehicle with a reverse gear and is a four wheel drive. There is nothing available on record which would indicate that the said vehicle cannot be used on roads ,is not capable of being propelled mechanically, neither is it a vehicle running on fixed trails . Once it is a vehicle which is capable of being on the road , the State Government is competent to legislate and the notification dated 1.1.2015 is held to be valid."

16. Having considered the view taken by the various Hon'ble High Courts, we would now proceed to consider the judgments rendered by the Hon'ble Supreme Court on the subject.

17. One of the first judgment which otherwise has heavily relied upon by learned counsel for the petitioner has been rendered in ***Bolani Ores Ltd. vs. State of Orissa, 1975 AIR SC, 17,*** wherein it was held that the water tankers, heavy hyvas, farm tractors, transit mixtures and other heavy machines do not fall within the scope and purview of the definition of 'Motor Vehicle' and it is apt to reproduce the relevant observations which reads thus:

"23. The meaning of the word "adapted" in s. 2(18) of the Act is itself indicated in entry 57 of List II of the Seventh Schedule to the Constitution, which confers a power on the State to tax vehicles whether propelled mechanically or not and uses the word "suitable" in relation to its use on the roads. The words "adapted for use" must therefore be construed as "suitable for use". At any rate, words "adapted for use" cannot be larger in their import by including vehicles 'Which are not " suitable for use' on roads. In this sense, the words "is adapted" for use have the same connotation as "is suitable" or" is fit" for use on the roads."

18. However, we find that not only has the Motor Vehicle Act undergone a sea change, but even the judgment rendered by the Hon'ble Supreme Court in ***Bolani's*** case has been subsequently distinguished in number of cases and reference in this regard can conveniently be made to the decision in the case of ***Travancore Tea Co. Ltd. vs. State of Kerala, 1980 (3) SCC 619*** wherein it was ruled that dumpers, rockers with rubber tyres,

though used for transporting goods within the enclosed factory premises were nevertheless adaptable and suitable for use on public roads and were thus motor vehicles.

19. Likewise, in ***Union of India vs. Cowgule and Co. Pvt. Ltd. 1992 Supp 3 SCC 141*** while distinguishing the decision in ***Bolani's*** case, it was held that dumpers and shovels used in mining activities were motor vehicles.

20. In ***Chief General Manager, Jagannath Area vs. State of Orissa (1996) 10 SCC 676,*** the Hon'ble Supreme Court held that dumpers running on tyres and used within mining areas were motor vehicle within the meaning of Section 2 (28) of the Act even though it was contended that such vehicles exceeded the permissible restrictions laid down in Rules 92 and 93 of the Central Motor Vehicles Rules, the Hon'ble Supreme Court opined that once the vehicles which otherwise fall within the definition of Motor Vehicles, would not go out of definition the moment it exceeds the limit as provided in Rules 92 and 93 of the Rules and it was held as under:

> "7. *The various restrictions contained in Rules 92 and 93 referred to by Mr. Shanti Bhushan, learned senior counsel are intended to lay down the outer limits for the vehicles to be plied or, the public road. But that does not mean that the vehicles which are otherwise motor vehicles within the definition clause go out of the definition the moment they exceed the limit as provided in Rules 92 or 93 of the Rules. the taxability of dumpers again came up before this Court in the case of Union of India & Ors. vs. Chowgule & Co. Pvt. Ltd. & Ors.- 1992 Sup. (3) Supreme Court Cases 141. In this case an argument had been advanced that the dumpers are used only in mining operation within the mining area and are not actually used on roads nor are suitable for use on roads and, therefore, are not taxable. The Judicial Commissioner of Goa, Daman and Diu accepted the contention and allowed the appeal. Union of India had come up in appeal to this Court. This Court reversed the decision of the Judicial Commissioner of Goa, Daman and Diu and relying upon the earlier decision of this Court in Central Coal Fields Ltd. vs. State of Orissa - 1992 Suppl. (3) SCC 133 held the mere fact that dumpers were used solely on the premises of the owner or that they were in closed premises or permission of the authorities was needed to move them from one place to another or that they are not intended to be used or are incapable of being used for general purposes or that they have an unladen and laden capacity depending on their weight and size is of no consequence for dumpers are vehicles used for transport of goods and thus liable to pay a compensatory tax for the availability of roads for them to run upon commission."*

21. In ***Bose Abraham vs. State of Kerala and another (2001) 3 SCC 157,*** the Hon'ble Supreme Court categorically held that once the equipments like excavators and roadrollers are motor vehicles under the M.V. Act and further held that merely because a motor vehicle is put to a specific use such as being confined to enclosed premises, will not render the same to be a different kind of vehicle. It is apt to reproduce the following observations:

> "6. Section 2 (j) *of the Act defines motor vehicle to mean a motor vehicle as defined in Section 2(28) of the Motor Vehicles Act, 1988 [Central Act 59 of 1988]. Subject to the provisions of the Act, Section 3 of the Act enables the levy and collection of tax on the entry of any motor vehicle into local area for use or sale therein which is liable for registration in the State under the Motor Vehicles Act at such rate as may be fixed by the Government. Therefore, in order to attract tax under the provision of Section 3 of the Act, a motor vehicle must have entered into a local area for use or sale therein and secondly which is liable for registration under the Motor Vehicles Act.*
>
> *7. We hold that the excavators and road rollers are motor vehicles for the purpose of the Motor Vehicles Act and they are registered under that Act. The High Court has noticed the admission of the appellants that the excavators and road*

rollers are suitable for use on roads. However, the contention put forth now is that they are intended for use in the enclosed premises. Merely because a motor vehicle is put to a specific use such as being confined to an enclosed premises, will not render the same to be a different kind of vehicle. Hence, in our view, the High Court has correctly decided the matter and the impugned order does not call for any interference by us. However, the question whether any motor vehicle has entered into a local area to attract tax under the Entry Tax Act or any concession given under the local Sales Tax Act will have to be dealt with in the course of assessment arising under the Entry Tax Act."

22. In ***M/s Natwar Parikh and Co. Ltd. vs. State of Karnataka, 2005 AIR (SC) 3428,*** the Hon'ble Supreme Court interpreted the term 'motor vehicle' in the broadest possible sense keeping in mind that the Act had been enacted in order to keep control over vehicles.

23. As a matter of fact, similar issue has been considered in detail by one of us (Justice Mansoor Ahmad Mir, C.J.) in ***National Insurance Company Ltd. vs. Sharda Devi and others (2016) 3 ACC, 627*** (***HP)*** wherein the question posed before this Court was as to whether the JCB machine (excavator) is a motor vehicle and it was held as under:

"15. Section 2 (28) of the Act defines definition of a motor vehicle and while going through the said definition, it appears that JCB machine is a motor vehicle. It is apt to reproduce Section 2 (28) of the Act herein.

"2 (28) "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding 4 [twenty-five cubic centimetres];"

16. It is also profitable to reproduce the definition of JCB given in Oxford dictionary at page 695.

"A powerful motor vehicle with a long arm for digging and moving earth."

17. The above quoted definition does disclose that the JCB is a powerful motor vehicle with a long arm for digging earth. In terms of the said definition, the JCB is a motor vehicle.

*18. The same question arose before the Madhya Pradesh High Court in case titled **New India Assurance Co. Ltd. Indore versus Balu Banjara and others** reported in **2008 (2) MPHT 252**. It is apt to reproduce relevant portion of para 8 of the said judgment herein.*

"8. …… ……In the present case the JCB machine is running on the roads and is being used for construction of the roads. Only because it is not being registered by the Regional Transport Authority as motor vehicle and no registration number is being given, it cannot be said that the JCB was not a motor under the provisions of the Motor Vehicles Act. In the facts and circumstances of the case, this Court is of the view that the learned Tribunal has rightly held that the JCB machine is motor for the purpose of Motor Vehicles Act."

*19. The apex Court in **Bose Abraham** versus **State of Kerala and another** reported in **AIR 2001 SC 835** has discussed Section 2 (28) of the Act and held that the excavators and road rollers are motor vehicles. It is apt to reproduce para 7 of the said judgment herein.*

"7. We hold that the excavators and road rollers are motor vehicles for the purpose of the Motor Vehicles Act and they are registered under that Act. The High Court has noticed the admission of the appellants that the excavators and road rollers are suitable for use on roads. However, the contention put forth now is that they are intended for use in the enclosed premises. Merely because a motor vehicle is put to a specific use such as being confined to an enclosed premises, will not render the same to be a different kind of vehicle. Hence, in our view, the High Court has correctly decided the matter and the impugned order does not call for any interference by us. However, the question whether any motor vehicle has entered into a local area to attract tax under the Entry Tax Act or any concession given under the local Sales Tax Act will have to be dealt with in the course of assessment arising under the Entry Tax Act".

*20. The apex Court in another judgment rendered in case titled **Nagashetty versus United India Insurance Co. Ltd and others,** reported in **AIR 2001 SC 3356,** held that the trailer attached with the tractor is a motor vehicle.*

*21. The apex Court in another judgment in case **M/s Natwar Parikh and Co. Ltd. versus State of Karnataka and others** reported in **AIR 2005 SC 3428** discussed Sections 2 (28), 2 (14) and 2 (47) of the Act and held that tractor-trailer is a transport vehicle under Section 2 (47) of the Act. It is apposite to reproduce para 24 of the said judgment herein.*

"24. Section 2(28) is a comprehensive definition of the words "motor vehicle". Although, a "trailer" is separately defined under Sec. 2(46) to mean any vehicle drawn or intended to be drawn by a motor vehicle, it is still included into the definition of the words "motor vehicle" under Sec. 2(28). Similarly, the word "tractor" is defined in Sec. 2(44) to mean a motor vehicle which is not itself constructed to carry any load. Therefore, the words "motor vehicle" have been defined in the comprehensive sense by the legislature. Therefore, we have to read the words "motor vehicle" in the broadest possible sense keeping in mind that the Act has been enacted in order to keep control over motor vehicles, transport vehicles, etc. A combined reading of the aforestated definitions under Sec. 2, reproduced hereinabove, shows that the definition of "motor vehicle" includes any mechanically propelled vehicle apt for use upon roads irrespective of the source of power and it includes a trailer. Therefore, even though a trailer is drawn by a motor vehicle, it by itself being a motor vehicle, the tractor-trailer would constitute a "goods carriage" under Sec. 2(14), and consequently, a "transport vehicle" under Sec. 2(47). The test to be applied in such a case is whether the vehicle is proposed to be used for transporting goods from one place to another. When a vehicle is so altered or prepared that it becomes apt for use for transporting goods, it can be stated that it is adapted for the carriage of goods. Applying the above test, we are of the view that the tractor-trailer in the present case falls under Sec. 2(14) as a "goods carriage" and consequently, it falls under the definition of "transport vehicle" under Sec. 2(47) of the M.V. Act, 1988."

*22. The Gujarat High Court in case **National Insurance Co. Ltd. v. Baby Anjali & Ors**., reported in **AIR 2008 Gujarat 12,** has discussed the*

definition in terms of Sections 2 (18) and 2 (19) of the Act and held that the trailer attached to the tractor falls within the definition of motor Vehicle.

23. The question arose before the Gujarat High Court in case titled ***State of Gujarat versus Danabhai Bhulabhai and Ors.,*** *reported in* ***1991 (2) G.L.H. 404****, whether the bulldozer is a motor vehicle and it was held that the same is a motor vehicle. It is appropriate to reproduce relevant portion of para 11 of the said judgment herein.*

> *"11. ....Therefore, going by the definition of the expression 'Motor Vehicle' and keeping in mind the evidence on record, the submission that bulldozer cannot be said to be a motor vehicle must be said to have been rightly rejected by the Tribunal."*

24. In case ***Kusum and others versus Kamal Kumar Soni and another*** *reported in* ***2009 ACJ 1613,*** *the Madhya Pradesh High Court held that the power-tiller is a motor vehicle.*

25. The apex Court in a latest judgment in case titled Chairman, ***Rajasthan State Road Transport Corporation & Ors versus Smt. Santosh & Ors.*** *reported in* ***2013 AIR SCW 2791*** *has discussed the object of the Motor Vehicles Act and also Sections 2 (28) and 2(44). It is apt to reproduce relevant portion of para 22 of the said judgment herein.*

> *"22. The Tractor is a machine run by diesel or petrol. It is a self-propelled vehicle for hauling other vehicles. It is used for different purposes. It is also used for agricultural purposes, along with other implements; such as harrows, ploughs, tillers, blade-terracers, seed- drills etc. It is a self-propelled vehicle capable of pulling alone as defined under the definition of Motor Vehicles. It does not fall within any of the exclusions as defined under the Act. Thus, it is a Motor Vehicle in terms of the definition under Section 2(28) of the Act, which definition has been adopted by the Act. So, even without referring to the definition of the Tractor, if the definition of the Motor Vehicle as given under the Act is strictly construed, even then the Tractor is a Motor Vehicle as defined under the Act. The Tractor is not only used for agricultural purposes but is also used for other purposes as stated above. Therefore, it cannot be said that the Tractor in its popular meaning is only used for agricultural purposes and, thus, is not a Motor Vehicle as defined under the Act. The Tractor is a Motor Vehicle is also proved by this definition under Section 2(44) of the Act. Different types of Motor Vehicles have been defined under the provisions of the Act, and the Tractor is one of them. Thus, considering the question from any angle, the Tractor is a Motor Vehicle as defined under the Act."*

26. Viewed thus, it is held that the JCB is a motor vehicle."

24. In view of the aforesaid discussion, the question posed in this writ petition is answered by holding that the construction equipment vehicles, more particularly, water tankers, heavy hyvas, farm tractors, transit mixtures and other heavy machines definitely fall within the definition of 'Motor Vehicles' and thus cannot claim any exemption against the imposition of tax. Even otherwise, once these vehicles have been duly registered as Motor Vehicles under the Act, the petitioner can have no legitimate grievance for claiming that these vehicles do not fall within the definition of 'Motor Vehicles', that too, only on the ground that these machines are designed and adopted for use in an enclosed premises.

25. Having said so, we find no merit in this petition and the same is accordingly dismissed alongwith pending application(s), leaving the parties to bear their costs.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Rameshwar Dass (Deceased) through LR Bhushan Lal ....Appellant

Versus

State of Himachal Pradesh and others ....Respondents

RSA No. 319 of 2006

Decided on: December 6, 2016

Specific Relief Act, 1963- Section 5- Plaintiff pleaded that he is owner of the suit land- water pipe lines were laid through his land despite his objection – Officers of the State assured to acquire the land and to give employment to the son of the plaintiff - these promises were not fulfilled and the plaintiff instituted a suit for mandatory injunction- the job was provided to the son of the plaintiff and plaintiff got the suit dismissed in default- however, son of the plaintiff was removed from service- hence, the suit was filed for seeking possession- the suit was dismissed by the Trial Court- an appeal was filed, which was also dismissed- held, that earlier suit was dismissed in default for non-appearance – plaintiff failed to prove that assurances were made to him at the time of laying pipe lines – circumstances show that pipe line was laid with the consent of the plaintiff- the suit was rightly dismissed by the Court- appeal dismissed.(Para-14 to 19)

Cases referred:

Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others, (2013)15 SCC 161

For the appellant Ms. Ruma Kaushik, Advocate.

For the respondents: Mr. P.M. Negi, Deputy Advocate General,

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

Instant regular second appeal filed under Section 100 CPC is directed against judgment and decree dated 27.4.2006 passed by learned District Judge, Sirmaur at Nahan in Civil Appeal No. 66-CA/13 of 2005 affirming judgment and decree dated 12.8.2005 passed by the learned Civil Judge (Senior Division) Sirmaur District at Nahan, HP in Civil Suit No. 75/1 of 2003 whereby suit for possession having been filed by the present appellant-plaintiff (in short, 'plaintiff') was dismissed.

2. Briefly stated the facts as emerge from the record are that the plaintiff filed a suit for possession claiming therein that he is owner-in-possession of the land comprised in Khewat Khatauni No. 10 min/ 24 min, Khasra Nos. 439 and 453 measuring 356-47 hectares situated at village and Mauza Nauni of Nahan town, District Sirmaur, Himachal Pradesh as per Jamabandi for the year 1995-96 (hereinafter, 'suit land'). Plaintiff further claimed that in the year 1995, at the instance of officials of defendant No.2, the Irrigation and Public Health Department installed water pipe line under Nahan-Khairi pipe line scheme through the land of the plaintiff. Plaintiff claimed that aforesaid line was laid down by the authorities despite the resistance on the part of the plaintiff and the officials of the I&PH Nahan had assured him that land over which pipe line has been laid down, would be acquired by the State Government in accordance with law and he would be given reasonable compensation. Plaintiff further stated that he was induced by the then

officers of the defendants that permanent job would be provided to his son. Since the defendants failed to fulfill aforesaid commitment having been made at the time of laying down pipe line through the land of the plaintiff, he was compelled to file suit bearing No. 42/1 of 97 titled as Rameshwar Dass versus State of Himachal Pradesh and others in the Court of learned Sub Judge, 1st Class, Nahan, for mandatory injunction for removal of aforesaid water pipe line from the suit land. Plaintiff further averred in the plaint that during the pendency of the suit, defendants provided job to his son therefore, plaintiff got the suit dismissed in default. Defendants after dismissal of the suit removed the son of the plaintiff from the job illegally and also backed out from their commitment. Plaintiff further claimed that he requested the defendants several times after aforesaid event to acquire the land and to pay compensation but no action was taken by them and as such he was compelled to file instant suit for possession.

3. Defendants by way of written statement, refuted the claim put forth on behalf of the plaintiff by stating that suit is not maintainable since plaintiff had earlier filed Civil Suit on same and similar cause of action, which was dismissed in default and suit is also not properly valued for the purpose of court fee and jurisdiction. On merits, defendants claimed that the pipe line in question was laid down in the year 1995 with the consent of the plaintiff and at no point of time, during laying of pipe line, objection was raised by him. Defendants further denied that the plaintiff at any point of time was given assurance by the officials of the respondent-Department that his son would be given permanent job and compensation would be paid after acquiring the suit land. Defendants further claimed in the written statement that there is no vegetation on the suit land and they have constructed one pillar of size 1.25x 1.25 metres and a pipe of 300 MM dia rests on this pillar and 4.20 RMT of pipe line falls in Khasra No. 453 and 17 RMT pipe line falls in Khasra Nno. 439, which is above the ground level. Defendants specifically pleaded in the written statement that civil suit No. 42/1 of 97 having been filed by the plaintiff was dismissed in default for non-appearance of the plaintiff, vide order dated 6.7.1998, passed by Sub Judge, First Class, Nahan. Defendants further averred that the son of the plaintiff was given appointment on daily wages but he himself abandoned the job voluntarily and thereafter, plaintiff approached the defendant for payment of compensation or removal of the water pipe line from suit land, because he had voluntarily given suit land for laying pipe line.

4. On the basis of the pleadings of the parties, learned trial Court settled following issues on 24.6.2004

> "1) Whether plaintiff is entitled for the relief of mandatory injunction/possession directing the defendants to remove the water pipe line illegally laid by the defendants on the suit land? ...OPP
>
> 2) Whether the suit is not maintainable in the present form? ... OPD
>
> 3) Whether the suit is not properly valued for the purpose of court fee and jurisdiction ..... OPD
>
> 4) Whether no cause of action has accrued to the plaintiff to file the present suit against the defendants? . OPD
>
> 5) Relief:"

5. Subsequently, vide judgment and decree dated 12.8.2005, learned trial Court dismissed the suit of the plaintiff. Being aggrieved and dissatisfied with the dismissal of the suit by the learned trial Court, plaintiff preferred an appeal before the learned District Judge, which was also dismissed vide judgment and decree dated 27.4.2006, hence, this Regular Second Appeal.

6. Present regular second appeal was admitted on 27.5.2005, on the following substantial questions of law:

> "1. Whether non-consideration of oral as well as documentary evidence, which goes to the root of the matter has vitiated the findings of the ld. Court below?
>
> 2. Whether the suit of the plaintiff was barred under the law and as such was not maintainable?"

7. Ms. Ruma Kaushik, Advocate on behalf of appellant vehemently argued that the judgments and decrees passed by the learned Courts below are not sustainable as the same are not based on correct appreciation of evidence adduced on record by the respective parties, as such same are liable to be set aside. Ms. Kaushik, while referring to the judgments of the courts below, contended that bare perusal of same suggests that the evidence led on record by the plaintiff has not been read in its right perspective, as a result of which great prejudice has been caused to the plaintiff, whose land has been admittedly used by the defendants while laying water pipe lines. Ms. Kaushik further contended that both the learned Courts below miserably failed to appreciate that considerable portion of land has been used by the defendants for laying water pipe lines that too without there being any acquisition in accordance with law. She further contended that for the last 25 years, defendants have been using this land without awarding any compensation to the plaintiff and as such judgments passed by both the Courts deserve to be set aside. While concluding her arguments, Ms. Kaushik further contended that it is ample clear from the record that in lieu of land having been used by the defendants, son of plaintiff was offered appointment but subsequently, after dismissal of the suit having been filed by the plaintiff, he was illegally removed from service and as such impugned judgments and decrees passed by the Courts below deserve to be set aside. In the aforesaid background, Ms. Kaushik forcefully contended that the present appeal deserves to be allowed, after setting aside the judgments and decrees passed by the Courts below.

8. Mr. P.M. Negi, Deputy Advocate General duly assisted by Mr. Ramesh Thakur, Deputy Advocate General, supported the judgments and decrees passed by the Courts below. Mr. Negi, while referring to the judgments passed by Courts below, strenuously argued that same nowhere suggest that the evidence led on record by the respective parties has not been dealt with in its right perspective rather as per perusal of judgments, it is revealed that each and every aspect of the matter has been dealt with meticulously by the Courts below and there is no scope of interference, whatsoever by this Court, especially in view of the concurrent findings of fact and law recorded by the Courts below. While referring to the statements having been made by the plaintiff himself, as PW-1, Mr. Negi strenuously argued that the plaintiff was unable to prove on record that at the time of laying of pipes over his land, any assurance was given to him that land would be acquired and he would be paid compensation. Similarly, he further argued that there is no evidence, be it ocular or documentary, adduced on record by the plaintiff suggestive of the fact that any assurance was given to the plaintiff for offering appointment to the son of the plaintiff, as such there is no illegality or infirmity in the judgments and decrees passed by the learned Courts below and same deserve to be upheld. While concluding his arguments, Mr. Negi contended that this Court has limited jurisdiction to re-appreciate evidence while exercising powers under Section 100 CPC, especially when both the Courts below have returned concurrent findings of facts and law.

9. Before adverting to the merits of the case, it would be appropriate to deal with the specific objection raised by the learned counsel representing the defendants with regard to maintainability and jurisdiction of this Court, while examining the concurrent findings returned by both the Courts below, learned counsel for the defendants had invited the attention of this Court to the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264,** wherein the Hon'ble Supreme Court has held:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High

Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***(p.269)***

10. Perusal of the judgment, referred hereinabove, suggests that in exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. There can be no quarrel (dispute) with regard to aforesaid observation made by the Court and true it is that in normal circumstances High Courts, while exercising powers under Section 100 CPC, are restrained from re-appreciating the evidence available on record, but as emerges from the case referred above, there is no complete bar for this Court to upset the concurrent findings of the Courts below, if the same appears to be perverse.

11. In this regard reliance is placed upon judgment passed by Hon'ble Apex Court in **Sebastiao Luis Fernandes (Dead) through LRs and Others vs. K.V.P. Shastri (Dead) through LRs and Others,** (2013)15 SCC 161 wherein the Court held:

"35. The learned counsel for the defendants relied on the judgment of this Court in Hero Vinoth v. Seshammal, (2006)5 SCC 545, wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below : (SCC pp.555-56)

"24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:

(i) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.

(ii) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.

(iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

We have to place reliance on the afore-mentioned case to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same." ***(pp.174-175)***

12. I have heard the learned counsel for the parties and gone through the record carefully.

13. Since both the substantial questions of law are interconnected as such are being taken up together to avoid repetition of discussion of evidence.

14. With a view to explore answer to aforesaid substantial questions of law, this Court carefully analyzed evidence adduced on record by the respective parties, perusal whereof nowhere suggests that there is non-consideration of oral as well as documentary evidence by the Courts below while dismissing the suit of the plaintiff. Similarly, this Court, after carefully examining the judgments passed by the learned Courts below, finds no illegality or infirmity in the findings returned by the learned Courts below that the suit of the plaintiff is barred in law in view of dismissal of earlier suit filed by the plaintiff on same and similar cause of action.

15. Perusal of pleadings available on record suggests that there is no dispute that in the year 1995, Irrigation and Public Health Department Nahan installed water pipe lines under Nahan-Khairi Scheme through the land of the plaintiff. It also emerges from the pleadings that apart from the land of the plaintiff, Department also used land of certain other persons. It is also not in dispute that no compensation was paid to the plaintiff at the time of laying of aforesaid water pipe lines through his land. Since land was never acquired in terms of the Land Acquisition Act, there was no occasion for the defendants to pay compensation to the plaintiff. Though the plaintiff in his pleadings claimed that at the time of laying of pipes, he resisted but later on, on the assurance of officials of the I&PH Department, he allowed to lay pipes through his land. Plaintiff has further claimed that he was assured by the officials of the Department that once work of laying water pipe lines is over, land would be acquired and he would be paid compensation and his son would be offered appointment in the Department.

16. Defendants by way of written statement has specifically denied the aforesaid claim of the plaintiff. It also emerges from the record that in the year 1997, plaintiff had filed Civil Suit on same and similar grounds, which was dismissed in default for non-appearance of the plaintiff vide order dated 6.7.1998, perusal whereof suggests that earlier suit filed by the plaintiff was dismissed in default for non-appearance of the plaintiff as such there is no force in the contention of the plaintiff that he had got his suit dismissed in default because his son was given appointment on daily wages by the Department. With a view to substantiate his case, plaintiff examined himself as PW-1 and also tendered in evidence copies of Jamabandi for the year 1995-96 (Ext. P1), copy of Aks Shajra (Ext. P2), copy of order dated 6.7.1998 (Ext. P3) and notice (Ext. P4). Perusal of Exts. P-1 and P-2 clearly suggests that the suit land is owned and possessed by the plaintiff and there is no dispute qua the same. It also appears from the pleadings that some portion of land has been used by the defendants for laying pipes rather, defendants have only constructed pillars of dimensions of 1.25 x 1.25 and a pipe of 300 mm dia has been rested on the raised pillar in Khasra No. 453 of suit land and a pipe of17 m in Khasra No. 439 of suit land. Remaining portion of suit land is in possession of the plaintiff.

17. This Court while sifting evidence, be it ocular or documentary, adduced on record by the plaintiff was unable to lay its hand on any document, suggestive of the fact that at the time of laying pipelines, assurance was given by the defendants that land would be acquired and plaintiff would be paid compensation. Similarly, there is no evidence suggestive of the fact that defendants at the time of laying pipes had assured to offer appointment to the son of the plaintiff. Though, it emerges from the record that son of the plaintiff was working on daily wages in the Department but admittedly no evidence has been led on record by the plaintiff that his son got appointment in lieu of land offered by him for laying pipe line. Though, there is no dispute regarding laying of pipeline over the suit land, which definitely belongs to the plaintiff but work of laying pipeline was started and completed in 1995 whereas, plaintiff at first instance filed Civil Suit bearing No. 42/1 of 1997 in the year 1997 i.e. after two years, seeking relief of mandatory injunction but admittedly, same was dismissed in default. At the cost of repetition, it may be stated that though the plaintiff claimed that he got suit dismissed in default since his son was provided employment on daily wages by the defendants but aforesaid version of the plaintiff was

not rightly accepted by the Courts below in the absence of cogent and convincing evidence adduced on record by the plaintiff, whereas as has been noticed above, perusal of Ext. P3 i.e. order dated 6.7.1998, clearly suggests that earlier suit filed by the plaintiff was dismissed in default for non-appearance of the plaintiff. In the written statement, defendant have admitted that the son of plaintiff was offered appointment in the Department but they stated that son, who was working in their Department, himself abandoned the job. Similarly, this Court finds no evidence in support of the claim of the plaintiff that at the relevant time, when pipe line was being laid by the defendants, he was assured by the officials of the Department that he would be paid adequate compensation after acquisition of land rather, this Court, after noticing that earlier suit was filed in the year 1997, is convinced and satisfied that water pipe line was laid through the land of plaintiff with the consent of the plaintiff. Had the plaintiff not consented for laying pipe through his land, he would have raised dispute immediately but in the present case, as has clearly emerged, dispute for the first time was raised after two years in 1997.

18. Interestingly, in the present case, earlier suit filed by plaintiff was dismissed on 6.7.1998. and thereafter no effort was made by the plaintiff to get that suit restored by moving application in accordance with law rather the plaintiff chose to wait for another five years to file another Civil Suit being Civil Suit No. 75/1 of 2003, which itself suggests that the plaintiff had no cause of action rather instant suit has been filed solely with a view to pressurize the defendants to either pay compensation in lieu of land or to offer employment to his son, who admittedly abandoned the job.

19. This Court, after carefully examining the entire evidence led on record by respective parties, sees no illegality or infirmity in the judgments passed by the Courts below and as such there is no force in the contentions raised by the plaintiff that there has been non-consideration of oral as well as documentary evidence, which goes to the root of the matter. This Court, with a view to answer aforesaid substantial question of law, minutely examined entire evidence led on record and found no reason to differ with the findings returned by the learned Courts below, which otherwise appear to be based on correct appreciation of evidence adduced on record. Similarly, this Court, after perusing Ext. P3 sees no illegality in the findings returned by the Courts below that instant suit filed by the plaintiff is barred in law.

20. Substantial questions of law are answered accordingly.

21. Consequently, in view of aforesaid discussion above, there is no merit in the present appeal and the same is dismissed.

22. Pending applications, if any, are disposed of. Interim directions, if any, are also vacated.

23. This Court, after noticing the fact that the land of the plaintiff has been used by the defendants, that too without paying any compensation to the plaintiff, deems it fit to direct the defendants to consider the request, if any, made by the plaintiff for offering job to his son, who was working with the defendants as daily wager.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sreshta Devi. …Petitioner.

Versus

State of Himachal Pradesh and others. …Respondents.

CWP No. 294/2016
Reserved on 17.11.2016
Decided on: 6.12. 2016

Constitution of India, 1950- Article 226- Petitioner is the sole surviving daughter of late J, who belonged to ST category – the petitioner performed marriage with the non-tribal – the application

for grant of tribal certificate was rejected – aggrieved from the rejection, present writ petition has been filed – held, that in case of inter caste marriage or marriage between a tribal and non-tribal person, the status of children is a question of fact – there can be a presumption that children have the status of the father but the presumption is rebuttable – the children had received middle and higher education at Chamba – they had not suffered the disabilities suffered by other members of the scheduled tribe- the application was rightly rejected- appeal dismissed.

(Para-6 to 17)

Case referred:

Rameshbhai Dabhai Naika vs. State of Gujarat and others, (2012) 3 SCC 400

For the Petitioner: Mr. S.R. Chauhan, Advocate.

For the Respondents: Ms. Meenakshi Sharma and Rupinder Singh, Addl. A.Gs with Mr. J.S. Guliera, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The seminal issue which arises for consideration in this writ petition is: as to whether the children of a tribal woman, who admittedly is married to non-tribal, can claim the status of Scheduled Tribe solely on the basis of their having resided for sometime with the mother (petitioner) in the tribal area, that too, not on account of compulsion, but on account of the petitioner being posted there while working as a Teacher in the Education Department.

2. The bare minimal facts, as are necessary for deciding the controversy in issue, are that the petitioner is alleged to be the only surviving daughter of late Sh. Jodh Singh, who belonged to the Scheduled Tribe category. The petitioner performed marriage with Madan Kumar, who admittedly, was non-tribal. The petitioner is admittedly working in the Education Department and chose to stay back at her native place while being posted there, when her husband was employed and posted elsewhere in SSB.

3. The petitioner has assailed the decision passed by the Sub Divisional Magistrate, Bharmour rejecting the application for the grant of tribal certificate to her children on the ground that he has not at all taken into consideration that not only did the children of the petitioner reside with her at her house at Ullansa, but even the Gadi community there had accepted these offspring in their folds and had unanimously passed a resolution in favour of the claim being raised by the petitioner.

4. The respondents have filed reply wherein it has been stated that the inquiry into the status of the community of the petitioner was got conducted through Tehsildar, Chamba, who found that in the year 1985, the petitioner had solemnized inter-caste marriage with Madan Kumar son of Prem Lal, resident of village and Post Office Mohal Mangla, Tehsil and District Chamba. He also found that Madan belonged to Rajput/Kashav caste, whereas the petitioner belonged to Scheduled Tribe caste (Gaddi Hali). Madan Kumar was living at Mohalla Obri, Sultanpur, Chamba on the property, which had been purchased by him, whereas the petitioner was reported to be a Government servant and was working as a Teacher in Government Primary School, Udaipur and presently residing at Mohalla Obri, Tehsil and District Chamba with her husband. It was also found that the children of the petitioner had not suffered any disabilities socially, economically and educationally either individually or cumulatively as the children remained with their mother in the tribal area only till their primary education and subsequently all these children got middle and higher education in non-tribal area while residing with their parents in Mohalla Obri, Chamba Town and were, therefore, not entitled to claim the status of Scheduled Tribe.

5. I have heard the learned counsel for the parties and have perused the material placed on record.

6. At the outset, it may be observed that the petitioner has referred to various texts and judgments in support of the claim that her children are entitled to be considered as Scheduled Tribe.

7. However, I do not feel the necessity to go into the text and the judgments so relied upon, as the question posed in this petitioner has been elaborately and lucidly dealt with by the Hon'ble Supreme Court in ***Rameshbhai Dabhai Naika*** vs. ***State of Gujarat and others***, (2012) 3 SCC 400, wherein it was observed as under:

> "[54] In view of the analysis of the earlier decisions and the discussion made above, the legal position that seems to emerge is that in an inter-caste marriage or a marriage between a tribal and a non-tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case.
>
> [55]. In an inter caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non-tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the scheduled caste/scheduled tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well."

8. The Hon'ble Supreme Court made a incisive study of the entire case law on the subject and it was thereafter held that any inter-caste marriage or a marriage between a tribal and a non- tribal the determination of the caste of the offspring is essentially a question of fact to be decided on the basis of the facts adduced in each case. The determination of caste of a person born of an inter-caste marriage or a marriage between a tribal and a non-tribal cannot be determined in complete disregard of attending facts of the case. In an inter-caste marriage or a marriage between a tribal and a non-tribal there may be a presumption that the child has the caste of the father. This presumption may be stronger in the case where in the inter-caste marriage or a marriage between a tribal and a non tribal the husband belongs to a forward caste. But by no means the presumption is conclusive or irrebuttable and it is open to the child of such marriage to lead evidence to show that he/she was brought up by the mother who belonged to the Scheduled Caste/Scheduled Tribe. By virtue of being the son of a forward caste father he did not have any advantageous start in life but on the contrary suffered the deprivations, indignities, humilities and handicaps like any other member of the community to which his/her mother belonged. Additionally, that he was always treated a member of the community to which her mother belonged not only by that community but by people outside the community as well.

9. As already observed earlier, it was on account of petitioner being an employee in the Education Department and having been posted in Government Primary School, Udaipur that she of her own volition and free will chose to remain in the tribal area in the house of her parents' and further it was only on this account that the children of the petitioner got the primary education in Government Primary School, Ullansa. There was no compulsion or even a pressing need for the petitioner to reside in her residential house and this choice was obviously based upon the convenience of the petitioner.

10. It would be noticed that on the transfer of the petitioner to Government Primary School, Gajnui, Kiani and Mehla Block-I/II, all her children came and resided with their parents in the property purchased by them in the Chamba town itself. It is thereafter at Chamba that the

children then received their middle and higher education. Therefore, in such circumstances, the certificates produced by the petitioner in support of the claim that her children are recognized as members of the tribal community are of no avail.

11. Learned counsel for the petitioner would then heavily rely upon the revenue record to claim that the children of the petitioner having been born and brought up and accepted by the tribal Gadi community at Ullansa Panchayat have to be recognized as Schedule Tribe.

12. It has to be borne in mind that it is on account of extreme socially and economic backwardness arising out of traditional practices of untouchability that is normally considered as a criteria for including a community in the list of Scheduled Caste and Scheduled Tribe. However, it does not mean that where a woman belongs to Schedule Tribe and decides to reside for sometime in tribal area with her parents more out of convenience than out of necessity or compulsion, she cannot be heard to claim that her children have been made to face disadvantages as once faced by her after birth.

13. Even otherwise, it has come on record that as per the local custom of the tribal area only the male members of the family has right to inherit the property. Female members of the family can acquire the right to inherit the property on the basis of Will and gift deed. Mere fact that the petitioner possessed a separate ration card would not support the claim of the petitioner as I find that most of the documents placed on record have been created with the sole aim of getting conferred the status of Scheduled Tribe conferred upon the children of the petitioner.

14. In the instant case, it has come on record that the petitioner has purchased the land from her father and thereafter became the owner thereof. Thus, the property has not been acquired by way of inheritance.

15. Before parting, it would be once again necessary to avert to the decision of the Hon'ble Supreme Court in ***Rameshbhai Dabhai Naika's*** case (supra), wherein the Hon'ble Supreme Court did not accept the guiding principle that no person, who was not a Scheduled Caste or Scheduled Tribe by birth would be deemed to be a member of the Scheduled Caste or Schedule Tribe merely because he or she had married a person belonging to Scheduled Caste or Scheduled Tribe and further did not readily accept the presumption that the child has the caste of the father.

16. However, these findings were rendered in the peculiar facts and circumstances of that case where the High Court had not at all adverted to the fact that the mother of the appellant on the question of his upbringing as a member of the Nayak community and his acceptance in the community. It was in these circumstances that the Hon'ble Supreme Court held the presumption of caste to be rebuttable one.

17. However, this is not the fact situation obtaining in the instant case. Rather, it is a clear case where the petitioner has tried to get a Schedule Tribe certificate in favour of her children despite being disentitle to the same.

18. Having said so, there is no merit in the petition and the same is dismissed, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh & another. .....Petitioners.

Versus

Shri Ashok Kumar. ......Respondent.

CWP No. 3399 of 2014
Reserved on: 15.11.2016
Decided on: 06.12.2016

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11)

Case referred:
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301

For the petitioners: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.
For the respondent: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being aggrieved by the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., passed in Reference No. 367 of 2009, decided on 14.05.2013, maintained this writ petition to set aside and quash the same.

2. Brief facts of the case are that respondent Ashok Kumar had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie from 1995 to October, 2000 and he has worked for 64 days in 1995, 193 days in 1996, 276 days in 1997, 272 days in 1998, 316 days in 1999 and 261 days in 2000 (up to 13.11.2000). It is pleaded in the petition that all surplus workers were disengaged after complying with the provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and after following the principle of *"Last Come First Go"*. The respondent has challenged the retrenchment before the learned Labour Court by way of filing claim petition and the learned Labour Court set aside the retrenchment order of the respondent-workman and directed that respondent be re-engaged forthwith granting respondent continuity and seniority in service w.e.f. 13.11.2000, except back wages and further directed that case of the respondent would be considered for regularization from the date/month of the regularization of the services of the juniors.

3. The petitioners have prayed for the dismissal of the claim petition and averred that the order has been passed by the Tribunal below without appreciating the facts and law to its true perspective. It is averred that petitioner has complied with the provisions of Section 25(F), (G) & (H) of the Act and the award passed by the Court below is contrary to the law and the same be set-aside.

4. It is averred that respondent/workman had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. October, 1995 to 13.11.2000 and he has worked for 64 days in 1995, 193 days in 1996, 276 days in 1997, 272 days in 1998, 316 days in 1999 and 261 days in 2000 (up to 13.11.2000). It is further averred that due to shortage of funds and work in the Division, the petitioner was facing huge financial constraints and there being a large number of daily waged workers engaged in the Division, it had become impossible to adjust all the workers. It is further averred that due to less budget provision, the availability of work has decreased such as the service of the respondent, alongwith 363 number of workers were retrenched after complying with the provision of Section 25-F of the Act and by adhering to the principle of *"Last Come First Go"*. It is further averred that the petitioner has duly issued a notice under Section 25-F of the Act to the respondent and similarly situated workmen and had paid the due compensation, preceding retrenchment. It is further averred while disengaging the respondent, the seniority of the Division has been taken into consideration. The seniority is maintainable at Divisional level and the principle of *"Last Come First Go"* has been strictly followed.

5. In reply, filed by the respondent, it is averred that the petitioners (employer) have challenged the award dated 14.05.2013 rendered by the learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, in Reference Petition No. 367 of 2009, which has attained finality after one month on 14.06.2013. It is further averred that the civil writ petition filed by the petitioner is not maintainable, without explaining the delay in filing of the civil writ petition. The petitioners have chosen to harass the respondent/claimant so that he may not perform his duties and earn his livelihood/remuneration, which action is in violation of various provisions of the Act.

6. It is further averred that the respondent-workman was working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie, from 1995 to 13.11.2000 and he has worked for 64 days in 1995, 193 days in 1996, 276 days in 1997, 272 days in 1998, 316 days in 1999 and 261 days in 2000 (up to 13.11.2000). It is further averred that he has clearly mentioned in his claim petition, rejoinder with affidavit and also in examination-in-chief, that his juniors were engaged by the petitioners after the retrenchment of the respondent.

7. Learned Additional Advocate General has argued that the award of the learned Labour court is without appreciating the facts, which has come on record and is liable to be set-aside. On the other hand, the learned counsel appearing for the respondent has argued that the award passed by the Labour Court, Dharamshala is as per law and no interference is required and the jurisdiction of this Court is wrongly invoked and writ petition deserves dismissal. To appreciate the arguments, this Court has gone through the record of the case carefully and the law as settled by this Hon'ble Court. Admitted fact is that the respondent was engaged by the petitioners and he has worked with them from 1995 to 13.11.2000 and he has worked for 64 days in 1995, 193 days in 1996, 276 days in 1997, 272 days in 1998, 316 days in 1999 and 261 days in 2000 (up to 13.11.2000).

8. It is further case of the respondent that the petitioners have not re-engaged the respondent till date neither he was given opportunity for re-employment whereas his juniors were engaged. However, the petitioners have denied that any junior was engaged.

9. Seniority list relating to Shri Angrej Singh and others reveals that Smt. Sodha Devi was appointed by the State in the year 1999, whereas the services of Smt. Lata Devi engaged in the year 2000. However, a note has been given that both these ladies were appointed on compassionate grounds. The date of death of their husbands, namely, S/Sh. Ashok Kumar and Tarbeej Singh have not come on the file. The Court below has rightly held that the respondent (petitioners herein) has not complied with the provisions of Section 25(H) of the Act. Shri L.S. Thakur (RW-1) in cross-examination has admitted that Smt. Biasa Devi and Shri Hem Raj have been re-engaged. The names of these two workmen figure at serial No. 414 and 435 of the seniority list. Shri Hem Raj and Smt. Biasa Devi were juniors to the respondent. There is nothing on record that before engaging the freshers, opportunity of re-employment was afforded to the respondent.

10. As discussed above, the impugned award does not suffer from any perversity. The learned Additional Advocate General for the petitioners has canvassed before this Court with vigour that the reference is stale. However, the said submission is unacceptable given the fact that the said fact was not agitated by the employer/petitioner before the appropriate Government at the time Government proceeded to make a reference of the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. It has been held in ***Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301*** that there is no limitation for reference to Labour Court under Section 10 of the Act. It was held that words *"At any time"* mentioned in Section 10 of the Act clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of the Act. Operative part of Section 10 of the Act is quoted in *extenso*:

> "**Section 10 of Industrial Disputes Act, 1947:-** Reference of dispute to Boards, Courts or Tribunals-(1) where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, (a) Refer the dispute to a Board for promoting a settlement thereof, (b)

Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry."

11. In view of the above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 367 of 2009, decided on 14.05.2013, is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal, Dharamshala. Therefore, the writ petition is without any basis, requires dismissal and is accordingly dismissed. No order as to costs. All pending application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh & another .....Petitioners.

Versus

Shri Bhuri Singh. .....Respondent.

CWP No. 4592 of 2014
Reserved on: 15.11.2016
Decided on: 06.12.2016

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11)

Case referred:

Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301

For the petitioners: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.

For the respondent: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being aggrieved by the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., passed in Reference No. 336 of 2009, decided on 12.08.2013, maintained this writ petition to set aside and quash the same.

2. Brief facts of the case are that respondent Ashok Kumar had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. July, 1994 to 16.11.2000, and he has worked for 147 days in 1994, 138 days in 1995, 267 days in 1996, 344 days in 1997, 342 days in 1998, 247 days in 1999 and 309 days in 2000 (up to 16.11.2000). It is pleaded in the petition that all surplus workers were disengaged after complying with the provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and after following the principle of *"Last Come First Go"*. The respondent has challenged the retrenchment before the learned Labour Court by way of filing claim petition and the learned Labour Court set aside the retrenchment order of the respondent-workman and directed that respondent be re-engaged forthwith granting respondent continuity and seniority in service w.e.f. 16.11.2000, except back wages and further directed that case of the respondent would be

considered for regularization from the date/month of the regularization of the services of the juniors.

3. The petitioners have prayed for the dismissal of the claim petition and averred that the order has been passed by the Tribunal below without appreciating the facts and law to its true perspective. It is averred that petitioner has complied with the provisions of Section 25(F), (G) & (H) of the Act and the award passed by the Court below is contrary to the law and the same be set-aside.

4. It is averred that respondent/workman had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. July, 1994 to 16.11.2000, and he has worked for 147 days in 1994, 138 days in 1995, 267 days in 1996, 344 days in 1997, 342 days in 1998, 247 days in 1999 and 309 days in 2000 (up to 16.11.2000). It is further averred that due to shortage of funds and work in the Division, the petitioners were facing huge financial constraints and there being a large number of daily waged workers engaged in the Division, it had become impossible to adjust all the workers. It is further averred that due to less budget provision, the availability of work has decreased such as the service of the respondent, alongwith 363 number of workers were retrenched after complying with the provision of Section 25-F of the Act and by adhering to the principle of *"Last Come First Go"*. It is further averred that the petitioner has duly issued a notice under Section 25-F of the Act to the respondent and similarly situated workmen and had paid the due compensation, preceding retrenchment. It is further averred that while disengaging the respondent, the seniority of the Division has been taken into consideration. The seniority is maintainable at Divisional level and the principle of *"Last Come First Go"* has been strictly followed.

5. In reply, filed by the respondent, it is averred that the petitioners (employer) have challenged the award dated 12.08.2013 rendered by the learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, in Reference Petition No. 336 of 2009, which has attained finality after one month on 12.09.2013. It is further averred that the civil writ petition filed by the petitioners is not maintainable, without explaining the delay in filing of the civil writ petition. The petitioners have chosen to harass the respondent/claimant so that he may not perform his duties and earn his livelihood/remuneration, which action is in violation of various provisions of the Act.

6. It is further averred that the respondent-workman was working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie, w.e.f. July, 1994 to 16.11.2000, and he has worked for 147 days in 1994, 138 days in 1995, 267 days in 1996, 344 days in 1997, 342 days in 1998, 247 days in 1999 and 309 days in 2000 (up to 16.11.2000). It is further averred that he has clearly mentioned in his claim petition, rejoinder with affidavit and also in examination-in-chief, that his juniors were engaged by the petitioners after the retrenchment of the respondent.

7. Learned Additional Advocate General has argued that the award of the learned Labour court is without appreciating the facts, which has come on record and is liable to be set-aside. On the other hand, the learned counsel appearing for the respondent has argued that the award passed by the Labour Court, Dharamshala is as per law and no interference is required and the jurisdiction of this Court is wrongly invoked and writ petition deserves dismissal. To appreciate the arguments, this Court has gone through the record of the case carefully and the law as settled by this Hon'ble Court. Admitted fact is that the respondent was engaged by the petitioners and he has worked with them w.e.f. July, 1994 to 16.11.2000, and he has worked for 147 days in 1994, 138 days in 1995, 267 days in 1996, 344 days in 1997, 342 days in 1998, 247 days in 1999 and 309 days in 2000 (up to 16.11.2000).

8. It is further case of the respondent that the petitioners have not re-engaged the respondent till date neither he was given opportunity for re-employment whereas his juniors were engaged. However, the petitioners have denied that any junior was engaged.

9. Seniority list relating to Shri Angrej Singh and others reveals that Smt. Sodha Devi was appointed by the State in the year 1999, whereas the services of Smt. Lata Devi engaged

in the year 2000. However, a note has been given that both these ladies were appointed on compassionate grounds. The date of death of their husbands, namely, S/Sh. Ashok Kumar and Tarbeej Singh have not come on the file. The Court below has rightly held that the respondent (petitioners herein) has not complied with the provisions of Section 25(H) of the Act. Shri L.S. Thakur (RW-1) in cross-examination has admitted that Smt. Biasa Devi and Shri Hem Raj have been re-engaged. The names of these two workmen figure at serial No. 414 and 435 of the seniority list. Shri Hem Raj and Smt. Biasa Devi were juniors to the respondent. There is nothing on record that before engaging the freshers, opportunity of re-employment was afforded to the respondent.

10. As discussed above, the impugned award does not suffer from any perversity. The learned Additional Advocate General for the petitioners has canvassed before this Court with vigour that the reference is stale. However, the said submission is unacceptable given the fact that the said fact was not agitated by the employer/petitioner before the appropriate Government at the time Government proceeded to make a reference of the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. It has been held in ***Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301*** that there is no limitation for reference to Labour Court under Section 10 of the Act. It was held that words *"At any time"* mentioned in Section 10 of the Act clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of the Act. Operative part of Section 10 of the Act is quoted in *extenso*:

> "**Section 10 of Industrial Disputes Act, 1947:-** Reference of dispute to Boards, Courts or Tribunals-(1) where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, (a) Refer the dispute to a Board for promoting a settlement thereof, (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry."

11. In view of the above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 367 of 2009, decided on 14.05.2013, is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal, Dharamshala. Therefore, the writ petition is without any basis, requires dismissal and is accordingly dismissed. No order as to costs. All pending application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh & another. ....Petitioners.

Versus

Shri Inder Singh. ....Respondent.

CWP No. 4591 of 2014
Reserved on: 15.11.2016
Decided on: 06.12.2016

Industrial Disputes Act, 1947- Section 25-F- A was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that employer had not complied with the provision of Section 25-H – the person who were junior to A were re-engaged – there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-9 to 11)

Case referred:

Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301

For the petitioners: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy. AG.
For the respondent: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being aggrieved by the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., passed in Reference No. 5 of 2010, decided on 03.07.2013, maintained this writ petition to set aside and quash the same.

2. Brief facts of the case are that respondent Ashok Kumar had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. November, 1995 to 01.09.2000, and he has worked for 44 days in 1995, 163 days in 1996, 218 days in 1997, 238 days in 1998, 132 days in 1999 and 146 days in 2000 (up to 01.09.2000). It is pleaded in the petition that all surplus workers were disengaged after complying with the provisions of Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and after following the principle of *"Last Come First Go"*. The respondent has challenged the retrenchment before the learned Labour Court by way of filing claim petition and the learned Labour Court set aside the retrenchment order of the respondent-workman and directed that respondent be re-engaged forthwith granting respondent continuity and seniority in service w.e.f. 01.09.2000, except back wages and further directed that case of the respondent would be considered for regularization from the date/month of the regularization of the services of the juniors.

3. The petitioners have prayed for the dismissal of the claim petition and averred that the order has been passed by the Tribunal below without appreciating the facts and law to its true perspective. It is averred that petitioner has complied with the provisions of Section 25(F), (G) & (H) of the Act and the award passed by the Court below is contrary to the law and the same be set-aside.

4. It is averred that respondent/workman had been working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie w.e.f. November, 1995 to 01.09.2000, and he has worked for 44 days in 1995, 163 days in 1996, 218 days in 1997, 238 days in 1998, 132 days in 1999 and 146 days in 2000 (up to 01.09.2000). It is further averred that due to shortage of funds and work in the Division, the petitioners were facing huge financial constraints and there being a large number of daily waged workers engaged in the Division, it had become impossible to adjust all the workers. It is further averred that due to less budget provision, the availability of work has decreased such as the service of the respondent, alongwith 363 number of workers were retrenched after complying with the provision of Section 25-F of the Act and by adhering to the principle of *"Last Come First Go"*. It is further averred that the petitioners have duly issued a notice under Section 25-F of the Act to the respondent and similarly situated workmen and had paid the due compensation, preceding retrenchment. It is further averred that while disengaging the respondent, the seniority of the Division has been taken into consideration. The seniority is maintainable at Divisional level and the principle of *"Last Come First Go"* has been strictly followed.

5. In reply, filed by the respondent, it is averred that the petitioners (employer) have challenged the award dated 03.07.2013 rendered by the learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, in Reference Petition No. 5 of 2010, which has attained finality after one month on 03.08.2013. It is further averred that the civil writ petition filed by the petitioners is not maintainable, without explaining the delay in filing of the civil writ petition. The petitioners have chosen to harass the respondent/claimant so that he may not perform his duties and earn his livelihood/remuneration, which action is in violation of various provisions of the Act.

6. It is further averred that the respondent-workman was working on daily wage basis with the Executive Engineer, I&PH Division, Dalhousie, w.e.f. November, 1995 to 01.09.2000, and he has worked for 44 days in 1995, 163 days in 1996, 218 days in 1997, 238

days in 1998, 132 days in 1999 and 146 days in 2000 (up to 01.09.2000). It is further averred that he has clearly mentioned in his claim petition, rejoinder with affidavit and also in examination-in-chief, that his juniors were engaged by the petitioners after the retrenchment of the respondent.

7. Learned Additional Advocate General has argued that the award of the learned Labour Court is without appreciating the facts, which have come on record and is liable to be set-aside. On the other hand, the learned counsel appearing for the respondent has argued that the award passed by the Labour Court, Dharamshala is as per law and no interference is required and the jurisdiction of this Court is wrongly invoked and writ petition deserves dismissal. To appreciate the arguments, this Court has gone through the record of the case carefully and the law as settled by this Hon'ble Court. Admitted fact is that the respondent was engaged by the petitioners and he has worked with them w.e.f. November, 1995 to 01.09.2000, and he has worked for 44 days in 1995, 163 days in 1996, 218 days in 1997, 238 days in 1998, 132 days in 1999 and 146 days in 2000 (up to 01.09.2000).

8. It is further case of the respondent that the petitioners have not re-engaged the respondent till date neither he was given opportunity for re-employment whereas his juniors were engaged. However, the petitioners have denied that any junior was engaged.

9. Seniority list relating to Shri Angrej Singh and others reveals that Smt. Sodha Devi was appointed by the State in the year 1999, whereas the services of Smt. Lata Devi engaged in the year 2000. However, a note has been given that both these ladies were appointed on compassionate grounds. The date of death of their husbands, namely, S/Sh. Ashok Kumar and Tarbeej Singh have not come on the file. The Court below has rightly held that the respondent (petitioners herein) has not complied with the provisions of Section 25(H) of the Act. Shri L.S. Thakur (RW-1) in cross-examination has admitted that Smt. Biasa Devi and Shri Hem Raj have been re-engaged. The names of these two workmen figure at serial No. 414 and 435 of the seniority list. Shri Hem Raj and Smt. Biasa Devi were juniors to the respondent. There is nothing on record that before engaging the freshers, opportunity of re-employment was afforded to the respondent.

10. As discussed above, the impugned award does not suffer from any perversity. The learned Additional Advocate General for the petitioners has canvassed before this Court with vigour that the reference is stale. However, the said submission is unacceptable given the fact that the said fact was not agitated by the employer/petitioner before the appropriate Government at the time Government proceeded to make a reference of the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. It has been held in ***Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301*** that there is no limitation for reference to Labour Court under Section 10 of the Act. It was held that words *"At any time"* mentioned in Section 10 of the Act clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of the Act. Operative part of Section 10 of the Act is quoted in *extenso*:

> "**Section 10 of Industrial Disputes Act, 1947:-** Reference of dispute to Boards, Courts or Tribunals-(1) where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, (a) Refer the dispute to a Board for promoting a settlement thereof, (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry."

11. In view of the above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 5 of 2010, decided on 03.07.2013, is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal, Dharamshala. Therefore, the writ petition is without any basis, requires dismissal and is accordingly dismissed. No order as to costs. All pending application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh & another. ……Petitioners.
Versus
Shri Partap Singh. ……Respondent.

CWP No. 4481 of 2013
Reserved on: 15.11.2016
Decided on: 06.12.2016

Industrial Disputes Act, 1947- Section 25-F- P was working on daily wages with I &P.H.- he was retrenched – he challenged his retrenchment- the Labour Court set aside the retrenchment order and directed the re-engagement with continuity in service except back wages – held, that plea of the employer that P had abandoned the service has not been established- merely because a workman had not reported for duty cannot lead to an inference of abandonment- a disciplinary inquiry should have been initiated against the workman for abandoning the service, which was not done- fresh hands were engaged and employer had not complied with the provision of Section 25-H –there is no limitation for making the reference- the award was rightly passed – petition dismissed.(Para-10 to 13)

Case referred:
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301

For the petitioners: Mr. Virender K. Verma, Addl. AG, with Mr. Rajat Chauhan, Law Officer.
For the respondent: Mr. Vinod Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The petitioners, being aggrieved by the award of the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., passed in Reference No. 15 of 2010, decided on 13.09.2013, maintained this writ petition to set aside and quash the same.

2. Succinctly the key facts necessary for adjudication of the present petition are that the State Government referred the following reference to the learned Labour Court-cum-Industrial Tribunal, Dharamshala, H.P.:

> *"Whether termination of services of Shri Partap Singh s/o Shri Lajju Ram, by The Executive Engineer, IPH division Padhar, Distt. Mandi, H.P. w.e.f. 12.12.2000, without complying the provisions of the Industrial Disputes Act, 1947 whereas junior to him are retained by the employer, is legal and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"*

3. As per the petitioners, respondent Partap Singh (workman) had been working on daily wage basis with the Executive Engineer, I&PH Division, Padhar w.e.f. 21.06.1987 to 11.12.2000, and he did not complete 240 days in the years 1989 to 1992 and 1997. The workman also did not complete 240 days in the calendar year preceding twelve calendar months of his retrenchment. It is pleaded that after 11.12.2000, the workman himself abandoned the work. As the workman, did not complete 240 days during the calendar year preceding his retrenchment, there is break in service disentitling him the protection under Section 25F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act"). As per the petitioners, the workman remained dormant for nine years and ultimately maintained the reference petition, which was hit by delay and laches, but the fact qua delay and laches was overlooked by the

learned Tribunal below. The workman abandoned the job himself, thus he has no right to take benefit of the fact that his juniors have been retained. The workman has challenged the retrenchment before the learned Labour Court by way of filing the claim petition and the learned Labour Court set aside the retrenchment order of the respondent-workman and directed that he be re-engaged forthwith granting continuity and seniority in service w.e.f. 12.12.2000, except back wages and the order is thus against law and required to be set-aside.

4. As per the petitioners, the reference petition was hit by delay and laches, but the said fact was ignored by the learned Tribunal below. The petitioners have prayed for quashing and setting aside the impugned award and averred that the award has been passed by the learned Tribunal below without appreciating the facts and law to their true perspective. It is averred that award of the learned Tribunal below holding that the petitioners have not complied with the provisions of Section 25(G) and 25(H) of the Act is contrary to the evidence and the same also being contrary to law may be set-aside.

5. The workman did not file any reply to the petition. However, the stand of workman, as taken in the reference petition, was that he was engaged as daily waged *beldar* by the petitioners on muster roll basis w.e.f. 21.06.1987. On 12.12.2000 his services were illegally terminated without adhering to the mandatory provisions of the Act. As per the workman, he was given artificial breaks during employment and the same is required to be counted towards his continuous service. His services were terminated verbally and the persons junior to him were retained. Thus, the petitioners did not adhere to the principle of *'last come first go'*. The action of the petitioners was highly illegal and unjustified, thus violative of Sections 25-F, 25-G and 25-H of the Act.

6. Learned Additional Advocate General has argued that the award of the learned Tribunal below is without appreciating the facts, which have come on record and is liable to be set-aside. On the other hand, the learned counsel appearing for the respondent has argued that the award passed by the Labour Court, Dharamshala, is as per law and no interference is required and the jurisdiction of this Court is wrongly invoked and writ petition deserves dismissal.

7. In order to appreciate the arguments, this Court has gone through the record of the case carefully.

8. The workman, who tendered his affidavit, Ex. PW-1/A, has submitted that he joined the service in the year 1987 and was removed in the month of November, 2000. He has admitted that he raised the industrial dispute in the year 2010 and prior to that he had approached the H.P. State Administrative Tribunal. The workman has denied that he left the job on his own.

9. RW-1, Shri Arun Sharma, Executive Engineer, I&PH Division, Padhar, in his cross-examination has admitted that after the disengagement of the services of the petitioner, new labour has been employed and the workman was not afforded any opportunity of re-employment. The workman was not served with any notice to resume his duties.

10. Indisputably, the workman was engaged as a daily waged *beldar* on 21.06.1987 and he, with frictional breaks, worked upto 11.12.2000. As per the petitioners, the workman himself abandoned the job. It is settled that abandonment is not to be lightly presumed, but it has to be unequivocally proved by the employer. The workman did fails to report for duty does not in any way raise a presumption that the workman himself left the job. Admittedly, while analyzing the statement of RW-1, it is manifest that no notice was served upon the petitioner asking him to resume duties. Even if, it is presumed that the workman had abandoned the job himself and the same is a gross misconduct, in that case some disciplinary inquiry should have been initiated against the workman, but there is no evidence which reveals that the employer ever conducted any disciplinary inquiry. Therefore, the plea of willful absence, unestablished.

11. It has also come on record that fresh hands were engaged by the employer without affording opportunity to the workman. The seniority list, Ex. RW-1/B, if read in conjunction with statement of RW-1, clearly demonstrates that persons junior to the workman are serving with the petitioners, which is in defiance to the principle of *'last go first come'.* Therefore, provisions of Sections 25-G and 25-H of the Act have been contravened and it is not obligatory for the workman to have completed 240 days in a block of 12 calendar months preceding termination to derive the benefit under these sections of the Act. As per the petitioners, Section 25-F of the Act, is not applicable as the workman did not complete 240 days in cumulative period of 12 calendar months preceding his termination.

12. The learned Additional Advocate General for the petitioners has canvassed before this Court with vigour that the reference is stale. However, the said submission is unacceptable given the fact that the said fact was not agitated by the employer/petitioner before the appropriate Government at the time Government proceeded to make a reference of the dispute to the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. It has been held in ***Raghuvir vs. G.M. Haryana Roadways Hissar, (2014) 10 SCC 301*** that there is no limitation for reference to Labour Court under Section 10 of the Act. It was held that words *"At any time"* mentioned in Section 10 of the Act clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of the Act. Operative part of Section 10 of the Act is quoted in *extenso*:

> "**Section 10 of Industrial Disputes Act, 1947:-** Reference of dispute to Boards, Courts or Tribunals-(1) where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing, (a) Refer the dispute to a Board for promoting a settlement thereof, (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry."

Further it has come on record that the workman, in the meantime, had also approached the H.P. State Administrative Tribunal, thus, it cannot be said the workman has delayed the proceedings.

13. In view of the above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 15 of 2010, decided on 13.09.2012, is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal, Dharamshala. Therefore, the writ petition is without any basis, requires dismissal and is accordingly dismissed. No order as to costs. All pending application(s), if any, also stand(s) disposed of.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J.

Sh. Sunil Kumar s/o Sh. Sanjay Kumar and others ….Revisionists.

Versus

Ms. Sudesh Kumari w/o Sh. Satish Kumar and others ….Non-revisionists

Civil Revision Petition No.110/2016
Order Reserved on 25.11.2016
Date of order: 6.12.2016

Code of Civil Procedure, 1908- Order 1 Rule 10- An application for impleadment was filed pleading that applicant is co-owner of the suit land and is not in a position to alienate her share in view of the injunction granted by the Court- the application was allowed by the Trial Court- held in revision that applicant is recorded to be the co-owner of the property – suit has been filed for declaration – all the co-owners are necessary parties in a suit for declaration- her interest

would be directly affected by the declaration- the Court had rightly allowed the application- revision dismissed.(Para-10 to 12)

Cases referred:
Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and others, AIR 1961 Punjab 528
Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay, (1992) 2 SCC 524
New Redbank Tea Co.Pvt Ltd. Vs. Kumkum Mittal and others, (1994)1 SCC 402

For revisionists : Mr. R. K. Gautam, Sr. Advocate with Ms. Megha Kapoor Gautam, Advocate
For non-revisionists : Mr. Bhupinder Gupta, Sr.Advocate with Mr. Janesh Gupta, Advocate

The following order of the Court was delivered:

P. S. Rana, J.

Present civil revision petition is filed under section 115 Code of Civil Procedure 1908 against order dated 02.07.2016 passed by learned Civil Judge (Sr. Division) Dehra Distt. Kangra (H.P.) whereby learned Civil Judge (Sr. Division) allowed the application filed under order I Rule 10 read with section 151 CPC by Ms. Sudesh Kumari.

Brief facts of the case:

2. Sh. Sunil Kumar and others filed civil suit for declaration to the effect that plaintiffs are owners in possession of suit land. It is pleaded that suit land is ancestral coparcenery property. It is further pleaded that co-defendant No.1 got no right for alienation creating any charge or mortgaging or disposing of the suit property. It is further pleaded that mortgage deed dated 12.03.2014 executed by co-defendant No.1 in favour of co-defendant No.2 is without consideration, collusive and has been fraudulently got executed to defeat the legal rights of plaintiffs. It is further pleaded that same be declared as null and void.It is further pleaded that mutation No.235 dated 10.06.2014 be also declared as illegal. Additional relief of perpetual and prohibitory injunction also sought restraining defendants from dispossessing plaintiffs or raising any construction or alienating suit land or creating any charge, mortgage or cutting or removing trees. Additional relief of mandatory injunction also sought directing defendants to restore the land to its original position. In alternative relief of possession of suit land also sought.

3. Per contra written statement filed on behalf of co-defendant No.1 pleaded therein that suit is not maintainable and plaintiffs are estopped by their act conduct and acquiescence to file present suit. It is pleaded that plaintiffs have no cause of action to file suit. It is further pleaded that plaintiffs have no locus standi to file present suit. It is further pleaded that suit is not properly valued for purposes of Court fee and jurisdiction and suit is bad for non-joinder of necessary parties i.e. Sonu Sharma and Sudesh. It is further pleaded that suit land is not ancestral joint Hindu coparcenery property. It is further pleaded that plaintiffs have no cause of action to file present suit and prayer for dismissal of suit sought.

4. Per contra separate written statement filed on behalf of co-defendant No.2 pleaded therein that suit is not maintainable and plaintiffs have no cause of action to file suit and plaintiffs have no locus standi to file present suit and suit is not properly valued. It is further pleaded that plaintiffs are estopped by their act conduct and acquiescence from filing present suit. It is further pleaded that entry of mortgage in favour of co-defendant No.2 relating to suit land is in consonance with law. It is further pleaded that co-defendant No.1 took loan from co-defendant No.2 to the tune of Rs.12 lacs for education of his children and for repair of his shop. It is further pleaded that plaintiffs are not entitled for any decree as prayed and prayer for dismissal of suit sought.

5. During pendency of suit Ms. Sudesh Kumari filed application under Order I Rule 10 CPC pleaded therein that she is co-owner of suit land and her ownership is recorded in record of rights prepared by revenue officials. It is pleaded that ad-interim injunction has been granted by learned Trial Court and she being co-owner of suit land is not in a position to alienate her own share. It is further pleaded that Ms. Sudesh Kumari is necessary party in civil suit and prayer for acceptance of application filed under Order I Rule 10 CPC sought.

6. Response filed on behalf of plaintiffs to application filed under Order I Rule 10 CPC. Plaintiffs contested the application pleaded therein that application is not maintainable. It is pleaded that Ms. Sudesh Kumari is not necessary party in present civil suit. It is further pleaded that present suit is filed for declaration and mortgage executed by co-defendant No.1 in favour of co-defendant No.2 has been challenged in present civil suit. It is further pleaded that Ms. Sudesh Kumari has no concern with share of co-defendant No.1. It is further pleaded that present application is filed in collusion with other co-defendants and prayer for dismissal of application sought.

7. Learned Trial Court impleaded Ms. Sudesh Kumari as co-defendant No.3 in civil suit under Order I Rule 10 CPC. Feeling aggrieved against order passed by learned Trial Court plaintiffs have filed present revision petition.

8. Court heard learned Advocate appearing on behalf of revisionists and learned Advocate appearing on behalf of non-revisionists and Court also perused entire record of case carefully.

9. Following points arises for determination:

1) Whether civil revision petition filed by revisionists is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2) Relief.

<u>Findings upon Point No.1 with reasons.</u>

10. Submission of learned Advocate appearing on behalf of revisionists that Ms. Sudesh Kumari is not necessary party in present civil suit and no relief is claimed against her by revisionists in civil suit and on this ground revision petition be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Name of Ms. Sudesh Kumari is recorded as one of co-owners of suit property in jamabandies prepared by revenue officials under H.P. Land Revenue Act 1954. Jamabandies have been prepared by public official in discharge of their official duties and are relevant fact under section 35 of Indian Evidence Act 1872. It is well settled law that in suit for declaration all the co-owners are necessary parties because all the co-owners in joint property have direct interest in suit property till joint land is not partitioned in accordance with law. Following are the rights of co-owners in the suit property: (1) A co-owner has an interest in the whole property and also in every parcel of it. (2) Possession of one co-owner in joint property is possession of all. (3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster because possession of one is deemed to be on behalf of all. (4) The above rule admits of one exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all on the ground of ouster the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other. (5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment. (6) Every co-owner has a right to use the joint property in a husband like manner. (See **AIR 1961 Punjab 528 Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram and others.**

11. It is well settled law that Court can direct impleadment of parties at any stage of civil suit under Order I Rule 10(2) Code of Civil Procedure 1908 whose presence before Court is necessary in order to effectively and completely adjudicate and settled all questions involved in suit property and concept of *dominus litis* would not apply upon necessary parties in civil suit. See **(1992) 2 SCC 524Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay.** See **(1994)1 SCC 402 New Redbank Tea Co.Pvt Ltd. Vs. Kumkum Mittal and**

others. It is held that Ms. Sudesh Kumari is necessary party in civil suit because Ms. Sudesh Kumari is one of co-owners of suit land and she has direct interest in the decision of present civil suit of declaration. It is held that interest of Ms. Sudesh Kumari will be adversely effected in a declaratory suit if Ms. Sudesh Kumari is not impleaded as co-defendant in civil suit being co-owner in suit property because plaintiffs have sought relief of declaration to the effect that plaintiffs are owners in possession of suit land with specific shares. In view of above stated facts and case law cited supra it is held that order of learned Trial Court is in consonance with law. It is held that there is no illegality in the order of learned Trial Court. In view of above stated factspoint No.1 is answered in negative.

Point No.2 (Relief).

12. In view of findings upon point No.1 present civil revision petition is dismissed. Parties are left to bear their own costs. Observations will not effect merits of case in any manner and will be strictly confined for disposal of present revision petition. Parties are directed to appear before learned Trial Court on **20.12.2016.** File of learned Trial Court alongwith certified copy of order be sent back forthwith. C.R. No.110/2016 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

United India Insurance Co. Ltd. .....Appellant.

Versus

Smt. Teji Devi & others ....Respondents.

FAO No. 416 of 2016 along
with Cross Objection No. 122 of 2016.
Decided on : 6th December, 2016.

Employees Compensation Act, 1923- Section 4- Deceased was a conductor in a truck- he died in an accident- compensation of Rs.9,05,520/- was awarded – held in appeal that the monthly wages of the workmen have to be taken as Rs.4,000/- in view of the statutory provisions – the Commissioner had wrongly taken the income as Rs.8,000/- - after deducting 50% amount and taking the factor as 225.22, compensation of Rs.4,50,440/- (2000 x 225.22) awarded- along with interest @ 12% per annum. (Para-5 to 8)

For the Appellant: Mr. Lalit K. Sharma, Advocate.
For respondents No.1 &2: Mr. G.R. Palsra, Advocate.
For Respondents No.3 and 4: Ms. Archana Dutt, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal arises from the impugned order rendered on 16.02.2016 in W.C. Petition No.66 of 2011 by the learned Commissioner, Employees Compensation, Civil Judge (Senior Devision) Mandi, District Mandi, H.P., (for short the "Commissioner"), whereby he allowed the petition preferred thereat by the claimants/respondents No.1 & 2 for the grant of compensation under the Workmen (Employee's) Compensation Act (for short the "Act").

2. The predecessor-in-interest of respondents No.1 and 2 herein during the course of his employment as a conductor in truck bearing No. HP-38-F-8529 owned by respondent No.3 herein suffered his end in a motor vehicle accident involving the aforesaid vehicle. Under the impugned award the learned Commissioner assessed compensation in a sum of Rs.9,05,520/-

vis-a-vis the successor-in-interest of deceased Bhimi Singh, liability whereof for its defrayment qua them stood fastened upon the insurer/appellant herein.

3. Uncontrovertedly, in the accident involving truck bearing No. HP-30F-8529 owned by respondent No.4, whereon the deceased stood engaged as a conductor by its owner, the truck aforesaid suffered a mishap on 2.11.2009, in sequel whereof, deceased Bhimi Singh met his end, obviously when thereat he was performing thereon his relevant employment as a conductor under respondent No.3 herein.

4. After hearing the learned counsel appearing for the appellant/insurer also the counsel for the Cross-objector, the instant appeal as also the cross-objections instituted by the Cross-objector stand admitted by this Court on the hereinafter extracted substantial questions of law:-

FAO No. 416 of 2016.

"1. Whether the Commissioner is justified to conclude the salary of the deceased Bhimi Singh for Rs.8000/- per month without there being any evidence and whether the Commissioner is competent to ignore the maximum ceiling of salary of a workman for Rs.4000/0 per month as contemplated in Section 4(a)(a)(b), Explanation II of The Employees Compensation Act, 1923, where the monthly wages of a workman exceeded 4000/- rupees, his monthly wages for the purpose of Clause (a) and (b) shall be deemed to be 4000/- rupees only?

2. Whether the Commissioner below is justified in to apply relevant factor of 226.38 in the instant case especially when the age of deceased was 19 years and as per schedule IV under Section 4 of the Employees Compensation Act, 1923 the relevant factor is 225.22?

Cross Objections No.122 of 2016.

3. Whether the objectors/respondents No.1 and 2 are entitled to interest on the compensation amount awarded @ 12% per annum in terms of Section 4 of the Employees Compensation Act?

Substantial Question of law No.1.

5. Given the uncontroverted factum qua the accident involving the vehicle aforesaid occurring on 2.11.2009 warranted the learned Commissioner to in his proceeding to assess compensation qua the claimants/successors-in-interest of deceased Bhimi Singh to mete deference to the apposite statutory provisions of the Workmen's Compensation Act, apposite provisions whereof stand encapsulated in Explanation-II occurring in Section 4 of The Workmen's Compensation Act, 1923, Explanation-II whereof stood incorporated therein by a legislative Enactment brought into force by the Act of 46 of 2000 besides under the amendment aforesaid carried vis-a-vis Section 4 of the Act whereby Explanation-II stood incorporated therein, the apposite Explanation-II embodied therein acquired force on 8.12.2000. The currency of the aforesaid Explanation-II, added to Section 4 of the Workmen Compensation Act, 1923 by the legislative amendment aforesaid remained in existence upto 17.01.2010 therewithin a mandate stands cast upon the learned Commissioner to in sequel thereof imminently with the accident hereat occurring on 2.11.2009, hence, during the currency of the provisions of Explanation-II added to the statute by way of an amendment effectuated on 8.12.2000, to where evidently the monthly wages of a workman exceed Rs.4000/-, his monthly wages for the purpose of applying thereon the relevant statutory factor standing circumscribed in a sum of Rs.4000/-, hence, mete deference thereto. Contrarily, the learned Commissioner has inaptly drawn a conclusion qua with the evident factum of the deceased drawing from his relevant employment as a conductor under respondent No.3 herein in the ill-fated vehicle herein monthly wages in a sum of Rs.8000/, whereupon he by applying the inapposite statutory provisions circumscribed his wages in a sum of Rs.4000/-, for the relevant computation standing made therefrom, he thereafter made an erroneous computation of compensation amount payable to the claimants. The inherent fallacy ingraining the factum of the learned Commissioner inaptly proceeding to mete deference to the

amended provisions of Section 4 of The Employee's Compensation Act, 1923, whereupon under an apposite legislative amendment brought into force with effect from 18.01.2010, Explanation-II incorporated therein by an amendment which previously occurred in the year 2000 stood omitted, visibly arises from his fallaciously meteing retrospective effect thereto, whereas with the ill-fated accident involving truck bearing No. HP-38-F-8429, whereupon, deceased Bhimi Singh stood employed as a conductor under respondent No.3 herein occurring on 2.11.2009 whereat the provisions of Explanation-II occurring in Section 4 of the Workmen's Compensation Act, 1923 enjoyed force besides sanctity warranted deference standing meted thereto by the learned Commissioner, reiteratedly his conspicuously proceeding to revere or mete deference to the provisions of Section 4 of the Employee's Compensation Act, 1923 whereby in the year 2010, explanation-II which hitherto occurred therewithin stood deleted is grossly unwarranted. Consequently, the learned Commissioner has fallen in gross error while computing the reckonable salary of the deceased at Rs.8000/- per month, whereas, by applying the rigors of the apposite Explanation-II of Section 4 of the Workmen's Compensation Act it is to stand statutorily restricted in a sum of Rs.4000/- per month whereon after meteing thereto the apposite statutory deduction, the apposite factor for computing compensation vis-a-vis the claimants/respondents No.1 and 2 is to be applied. Accordingly, substantial questions of law No.1 is answered in favour of appellant and against the respondents.

Substantial question of law No.2.

6. The learned Commissioner while applying the relevant statutory principle/factor for computing compensation qua the claimants/respondents No.1 and 2 herein has slighted the age of the deceased workman which indisputably at the time of accident was 19 years, whereupon, the relevant factor for application vis-a-vis the compensation amount prescribed in Schedule-II is 225.22, whereas, his applying the inapposite factor of 226.38 has resulted in his computing an unfair or an erroneous compensation amount vis-a-vis the successors-in-interest of the deceased workman. Consequently, for the reasons aforestated, when explanation-II of The Workmen's Compensation Act was applicable at the relevant time of occurrence of the ill-fated mishap, thereupon with this Court concluding qua the deceased workman uncontrovertedly at the relevant time of his employment under his employer earning a salary exceeding Rs.4000/- per month, whereupon with the apt Explanation-II mandating qua his salary standing pegged in a sum of Rs.4000/- per month, whereupon after meteing 50% deduction thereto, the apt reckonable amount per mensem comes to Rs.2000/-, on application thereon of the relevant statutory factor of 225.22, the compensation amount assessable vis-a-vis the claimants/successor-in-interest/respondents No.1 and 2 is computable in a sum of Rs.4,50,440/- (Rs. 2000X225.22). Accordingly, substantial question of law No.2 is answered in favour of the appellant and against the respondents.

Substantial Question of Law No.3.

7. The learned counsel appearing for respondents No.1 and 2/cross-objectors submits that the learned Commissioner erroneously awarded interest @ 6% per annum on the compensation amount. The aforesaid submission warrants it being accepted as the levying of interest by the learned Commissioner on the compensation amount is beyond the statutory prescription held in clause (a), sub-section (3) of Section 4-A of the Workmen's Compensation Act, 1923 wherewithin a mandate is held qua interest @ 12% being leviable since the elapse of one month since the accident. Consequently, the aforesaid compensation amount assessed at Rs. 4,50,440/- qua the claimants/ respondents No.1 and 2 shall carry interest at the rate of 12% per annum from one month elapsing since the date of accident till its realization. Accordingly, substantial question of law No.3 is answered in favour of the cross-objectors/respondents No.1 and 2 and against the appellant. Liability qua the aforesaid compensation amount shall be borne by the insurer.

8. For the reasons recorded hereinabove, the instant appeal as also the cross-objections are both allowed. Consequently, the impugned award is modified in the manner aforestated. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Ganga Ram ....Petitioner/JD.
Versus
Prakash Verma ... Respondent/DH.

Civil Revision No. 158 of 2011.
Reserved on 25.11.2016.
Decided on: 7.12.2016.

Code of Civil Procedure, 1908- Order 21 Rule 32- Civil suit was decreed for specific performance of the agreement – the decree was put to execution – Court ordered the execution of the sale deed and directed the vendee to join J.D. for completing the sale – held, that decree was passed for specific performance of the agreement relating to Khasra No.508 – the Court had directed the execution of the sale deed in respect of Khasra No.508/8- the Executing Court cannot go behind the decree – revision allowed and the Court directed to execute the sale deed in accordance with the decree. (Para- 5 to 9)

For the petitioner. : Mr. G.C. Gupta, Sr. Advocate with Ms. Meera, Advocate.
For respondent. : Mr. H. C. Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of this revision petition, the petitioner/judgment debtor has challenged the order passed by executing Court i.e. the Court of learned Civil Judge (Sr. Division), Karsog, Distt. Mandi in Execution Petition No. 16-10/2010 dated 6.9.2011, vide which executing Court has directed the petitioner/judgment debtor to execute sale deed in favour of respondent/decree-holder out of the land comprised in khasra No. 508/8 to the extent mentioned in the decree.

2. Brief facts necessary for adjudication of the present case are that in Civil Suit No. 41/2008 filed by the respondent/decree-holder against petitioner/judgment debtor, the following judgment and decree was passed by the Court of learned Civil Judge (Jr. Division), Karsog dated 27.8.2009:

> *"It is ordered that suit filed by the plaintiff is decreed to the effect that plaintiff is entitled to specific performance of agreement dated 15.2.2007 in respect of the land comprised in khata/khatauni No. 486/669 khasra No. 508, measuring 6-16-13 bighas situated at muhal karsog/416, Tehsil Karsog, Distt. Mandi, HP to the extent of 0-1-16 bighas out of the share of defendant total measuring 0-18-15 bighas. The defendants are also directed to execute the sale deed of the suit land measuring of 0-1-16 bighas as per agreement dated 15.2.2007 on payment to him or depositing of remaining sale consideration amount in the Court within three months. Keeping in view the peculiar facts and circumstances of the case, parties are left to bear their own costs."*

3. It is also pertinent to refer to the prayer clause of the plaint, on the basis of which the said judgment and decree was passed by learned trial court which is quoted herein below:-

> *"It is, therefore, prayed that a decree for specific performance of agreement dated 15.2.2007 may kindly be passed in favour of the plaintiff while directing the defendant to execute the Registered sale deed of his share to the extent of 33 x 22 feets i.e. measuring about 0-1-16 bighas in the land comprised in Khata/Khatauni No. 486/669 Khasra No. 508 measuring 6-16-13 bighas situated in muhal*

Karsog/416, Tehsil Karsog, Distt. Mandi H.P. in which the defendant has got 0-18-15 bighas and the plaintiff is ready and willing to perform his part of contract i.e. to pay the balance sale amount of Rs. 25000/- to the defendant and it is the defendant who has failed to perform his part of contract i.e. the defendant has failed to execute the sale deed of the suit land in favour of the plaintiff in stipulated period i.e. upto 15.8.2007 and a decree to this effect may kindly be passed in favour of the plaintiff and against the defendant together with cost of the suit and in spite of it the double amount to the tune of Rs. 1,42,000/- as agreed may also be decreed in favour of the plaintiff and against the defendant and any other relief to which the plaintiff be found entitled to in the circumstances of the case be passed in favour of the plaintiff and against the defendant for which the plaintiff shall ever pray."

4. It is not a disputed fact that the judgment and decree passed by learned trial court has attained finality.

5. In the execution petition filed by respondent/decree-holder for execution of the judgment and decree passed in his favour by learned trial court, executing court passed the following order:-

> "I have heard ld. Counsels for the parties. Ld. Counsel for the D.H. argues that respondent/J.D. has tried to frustrate the decree passed in his favour by selling a portion of land to Bihar Lal which was agreed to be sold to D.H. To the contrary, ld. Counsel for the J.D. argues that J.D. is ready and willing to execute sale deed as per decree but D.H. cannot demand specific property as he had purchased the land from the joint land.
>
> The trial Court has specifically ordered that J.D. shall execute the Sale deed to the extent of 0-1-16 bighas as per agreement dated 15.2.2007. Now this agreement clearly reads that J.D. had agreed to sell 33x22 feet land adjoining to Karsog-Gharatha Road towards upper side for Rs.96,000/-. Now the contents of this agreement do not leave any doubt that D.H. is entitled to get sale deed executed in his favour of the land which is adjoining to Gharatha-Karsog road.
>
> Now it is emerging from the oral as well as written contentions of the parties before the court that J.D. has got only one Khasra number adjoining to the road i.e. 508/8. Now J.D. is duty bound to execute the sale deed in favour of D.H. out of that land and any sale made by him in violation of the directions given in the decree cannot sustain and accordingly vendee shall be bound by the decree in view of Section 52 of T.P. Act. Accordingly, it is direct5ed that J.D. shall execute the sale deed in favour of the D.H. out of the land comprised in Khasra No. 508/8 to the extent of mentioned in the decree. The vendee Bihari Lal shall join the J.D. in completing the sale deed in favour of the D.H. within 45 days.
>
> Let file be fixed for consideration on 21.10.2011."

6. Mr. G.C. Gupta learned Senior Counsel appearing of the petitioner/judgment debtor argued that the impugned order passed by executing Court is not sustainable in the eyes of law as executing Court while passing the order under challenge has failed to follow the well settled principle of law that an executing Court cannot go behind the decree. Mr. Gupta argued that the decree passed by learned trial court entitles plaintiff for specific performance of agreement dated 15.2.2007 in respect of land comprised in khata khatauni No. 486/669 khasra No. 508, measuring 6.6.13 bighas situated at Muhal Carsog/416, Tehsil Karsog, Distt. Mandi to the extent of 0-1-16 bighas out of the share of the defendant/judgment debtor and rather than executing the said decree, executing Court has directed the decree-holder to execute sale deed out of land comprised in khasra No. 508/8 to the extent mentioned in the decree. This direction as per Mr. Gupta passed by executing Court was beyond the decree. According to Mr. Gupta the judgment-debtor was still ready and willing to execute sale deed as per decree but decree-holder

cannot demand specific property as he had purchased land out of the joint holdings. Accordingly, Mr. Gupta has prayed that the impugned order passed by executing Court be set aside.

7. Mr. H.C. Sharma, learned counsel for the respondent argued that there is no infirmity or perversity with the order passed by executing Court because after the passing of the judgment and decree by learned trial court, the judgment debtor in fact had sold portion of suit land in favour of one Bihari Lal, therefore, executing Court had rightly directed the decree holder to execute sale deed out of land comprised in khasra No. 508/8 to the extent mentioned in the decree.

8. I have heard learned counsel for the parties and have also gone through the records of the case as well as plaint, agreement to sell, judgment and decree passed by the learned trial court and the impugned order.

9. In my considered view, there is error and perversity in the order which has been passed by executing Court whereby it has issued directions to the judgment debtor to execute the sale deed in favour of decree holder out of land comprised in khasra No. 508/8 to the extent mentioned in the decree. While passing the said order, executing Court has erred in not appreciating that as executing Court cannot go behind the decree, therefore, it was not having any jurisdiction to direct the judgment debtor to execute a sale deed in favour of decree holder out of land comprised in khasra No. 508/8 as it was not so contemplated either in the agreement to sell or in the plaint or in the judgment and decree passed by the Court of learned Civil Judge (Jr. Division), Karsog dated 27.8.2009. The judgment and decree passed by the Court of learned Civil Judge (Jr. Division), Karsog held plaintiff entitled for specific performance of agreement dated 15.2.2007 in respect of land comprised in khasra No. 508 to the extent of 0-1-16 bighas. There is no decree in favour of decree holder for specific performance of agreement dated 15.2.2007 out of khasra No. 508/8. This very important aspect of the matter has lost sight of the matter by executing court while passing the impugned order.

Therefore, in view of the above discussion this revision petition is allowed and order dated 6.9.2011 passed by executing Court i.e. Court of learned Civil Judge (Sr. Division), Karsog, in case No. 16-10/2010 is set aside and the case is remanded back to the executing Court to pass appropriate order in the execution petition filed by the decree holder strictly taking into consideration the judgment and decree which has been passed in favour of the decree holder. Parties through their learned counsel are directed to put in appearance before executing Court on 26.12.2016. Registry is directed to forthwith send back the records of the case to the executing Court.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Sh. Mahinder Singh …..Petitioner

Versus

Sh.Prabodh Saxena and another …..Respondents.

COPC No. 662/2015.
Reserved on 24th November, 2016
Date of order: 7th December, 2016.

Contempt of Courts Act, 1971- Section 12- It was pleaded that the Court had directed the respondents to consider the case of the petitioner for placement as S.P.- respondents stated that they had adopted sealed cover procedure and had complied with the directions – held, that the respondents were directed to consider the case of the petitioner for placement as S.P. and release

all consequential benefits - the respondents are in breach – they are directed to comply with the directions and report compliance.(Para-5 to 9)

Present: Mr. Onkar Jairath, Advocate, for the petitioner.
Mr. Shrawan Dogra, Advocate General with M/s Anup Rattan, Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

It is stated at the Bar that Shri P. Mitra, Chief Secretary, to the Government of H.P., has retired and his successor has taken over in his place. We deem it proper to substitute Principal Secretary (Home) to the Government of H.P. and Director General of Police, H.P. as party respondents in this petition in place of Sh. P.Mitra, Chief Secretary to the Government of HP, shall figure as respondents No. 1 and 2 respectively in the petition. Registry to carry out necessary correction in the memo of parties. Petitioner to file fresh memo of parties within one week.

2. Issue notice to the newly substituted respondents. Mr. Anup Rattan, learned Additional Advocate General waives notice on behalf of the said respondents.

3. Petitioner, by the medium of this Contempt Petition, has invoked the jurisdiction of this Court for drawing contempt against the respondents in terms of the provisions contained in the Contempt of Courts Act, 1971, for short “the Act”.

4. It is specifically averred in the contempt petition that the respondents have not complied with the directions contained in the Judgment delivered by the learned Single Judge dated 30.4.2015, in CWP No. 9954 of 2011, titled **Mahinder Singh versus State of Himachal Pradesh.**

5. Precisely, the case of the petitioner is that he has earned the judgment dated 30.4.2015 in CWP No. 9954 of 2011 made by the learned Single Judge of this Court, whereby respondents were directed to consider the case of the petitioner for placement as Superintendent of Police. It is apt to reproduce operative portion of the said judgment herein.

> **“**8.In view of the settled position, this Court is left with no option but to allow the petition. Ordered accordingly. The respondent is directed to consider the case of the petitioner for placement as Superintendent of Police within a period of six weeks and in case the petitioner is found entitled for such placement, he shall be released and given all actual consequentialbenefits within another period of eight weeks. The petition is allowed in the aforesaid terms, leaving the parties to bear their **costs.”**

6. Respondents have filed the reply and have stated that they have invoked the sealed cover procedure and the directions contained in the aforesaid judgment have been fully complied with, in letter and spirit.

7. Learned counsel for the petitioner argued that it is utter disregard to the Court directions and respondents are in breach. Learned Single Judge has categorically held that the action of respondents was not in accordance with law and directed them to consider the case of the petitioner for placement as Superintendent of Police and release all actual consequential benefits. Thus, it cannot lie in the mouth of respondents at this stage that the enquiry is pending against the petitioner and he is facing trial in FIR No. 13/2009. At the relevant point of time, petitioner had neither been served with the memo of charge in the departmental inquiry nor was charge-sheeted in the criminal case.

8. Having said so, it appears that the respondents are in breach, are directed to appear in person and explain why they be not dealt with in terms of the provisions of the Act.

9. In the meantime, respondents to comply with the Court directions contained in the judgment dated 30.4.2015 in CWP No. 9954 of 2011, and report compliance. List on **5th January, 2017.** Copy dasti.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Mohinder Nath Sofat son of Shri Ram Krishan Sofat ….Petitioner/Accused

Versus

Dr. Rajeev Bindal Ex-Health Minister of H.P. ….Non-petitioner/Complainant

Cr.MMO No. 10 of 2016
Order Reserved on 21st November 2016
Date of Order 07 December 2016

Code of Criminal Procedure, 1973- Section 482- A complaint was filed for the commission of offences punishable under Sections 500, 501, 502, 503, 504, 505, 506 read with Section 177, 182 and 186 of I.P.C.- the Magistrate found that a prima facie case was made for the commission of offences punishable under Sections 500, 504 and 506 of I.P.C but no case was made for the commission of other offences- a revision was preferred, which was partly allowed and it was held that prima facie case was made out for the commission of offence punishable under Section 500- held, that the statements and the documents prove that there are sufficient ground to proceed against the accused for the commission of offence punishable under Section 500 of I.P.C – the Court has to satisfy prima facie itself that there are sufficient ground for proceeding against the accused at the stage of summoning of the accused - mere pendency of the civil suit is not sufficient to dismiss the criminal complaint – petition dismissed. (Para-9 to 17)

Cases referred:

Nagawwa vs. Veeranna Shivalingappa Konjalgi, AIR 1976 SC 1947
Chandra Deo Singh vs. Prokash Chandra Boase, AIR 1963 SC 1430
Madan Razak vs. State of Bihar, AIR 2016 SC (Weekly) 122
Ashok Kumar Sarkar vs. Radha Kanto Pandey and others, AIR 1967 Calcutta (DB) 178
State of Bombay vs. S.L. Apte and another, AIR 1961 SC 578

For Petitioner: Mr. H.S. Rana, Advocate.
For Non-petitioner: Mr. Sudhir Thakur Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Article 227 of Constitution of India read with Section 482 Cr.P.C. against summoning order dated 2.6.2012 passed by learned Chief Judicial Magistrate Solan District Solan H.P. in private complaint No. 49/2 of 2012 registered under Sections 499, 500, 501, 502, 503, 504, 505, 506 read with Section 177, 182 and 186 of Indian Penal Code and against order of learned Additional Sessions Judge-I Solan District Solan passed in revision petition No. 17-S/10 of 2012 vide which learned Additional Sessions Judge partly accepted the revision petition and affirmed summoning order issued against petitioner qua criminal offence punishable under Section 500 IPC only.

Brief facts of the case

2. Dr. Rajiv Bindal Ex-Health minister of H.P. filed private criminal complaint against Shir Mohinder Nath Sofat under Sections 500, 501, 502, 503, 504, 505 and 506 read with Section 177, 182, and 186 of Indian Penal Code alleging that at the time of filing of complaint complainant was Health Minister in Government of H.P. for the last four years and previously he was member of legislative assembly of Himachal Pradesh from Solan constituency (H.P.). It is alleged that complainant namely Dr. Rajiv Bindal enjoys very good reputation. It is further alleged that accused alleged false allegations of corruption against complainant namely Dr. Rajiv Bindal. It is further alleged that accused has alleged by way of publication in news that complainant was owning 300 metres of land only prior to elections and after elections complainant is owner of 160 bighas of land. It is alleged that accused has uttered words that complainant is brand ambassador of corruption. It is alleged that above stated act of accused is highly defamatory and highly derogatory in nature. Prayer for punishment of accused in accordance with law sought.

3. Learned Trial Court examined three witnesses in preliminary evidence namely CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup. Learned Judicial Magistrate held that after perusal of oral statements of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup coupled with documentary evidence Ext.P1 to Ext.P82 prima facie case is made out against accused under Sections 500, 504, 506 IPC. Learned Chief Judicial Magistrate Solan held that no primafacie case against accused is made out qua criminal offence punishable under Sections 501, 502, 503, 505, 177, 182 and 186 IPC.

4. Feeling aggrieved against summoning order of learned Chief Judicial Magistrate accused Mohinder Nath Sofat filed revision petition No. 17-S/10 of 2012 before learned Additional Sesisons Judge-I Solan. On 29.10.2015 learned Additional Sessions Judge-I Solan District Solan H.P. partly allowed the revision petition. Learned Additional Sessions Judge held that no primafacie case under Sections 504 and 506 IPC is made out against accused Mohinder Nath Sofat. However learned Additional Sessions Judge-I Solan District Solan H.P. held that primafacie case under Section 500 IPC is made out against accused.

5. Feeling aggrieved against order of learned Additional Sessions Judge-I Solan District Solan H.P. accused Mohinder Nath Sofat filed present petition under Article 227 of Constitution of India read with Section 482 of Code of Criminal Procedure 1973 before High Court of H.P.

6. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and also perused the entire record carefully.

7. Following points arises for determination in this petition:-

1. Whether petition filed under Article 227 of Constitution of India read with Section 482 of Code of Criminal Procedure is liable to be accepted as per grounds mentioned in petition?
2. Final Order.

8. Findings upon Point No.1 with reasons

8.1 CW1 Dr. Rajiv Bindal has stated in preliminary evidence that he is doctor by profession and he is private practitioner. He has stated that he is also social worker. He has stated that he was elected as legislature from Solan in the year 2000. He has stated that thereafter he was again elected as legislature in the year 2003. He has stated that thereafter he was again elected as legislature in the year 2007. He has further stated that thereafter he was appointed as Health Minister in H.P. Government w.e.f. 9.1.2008. He has stated that he belongs from reputed family and his father used to pay income tax. He has stated that accused is his political rivalry. He has stated that accused contested the assembly elections against him in the year 2003 but he was defeated. He has stated that accused started giving defamatory statement against him in the media. He has stated that defamatory statement was also published in

newspaper against him. He has stated that accused uttered false defamatory statement against him with intention to defame him in general public. He has further stated that his reputation was effected in general public due to defamatory statement given by accused in press. He has tendered into evidence news items Ext.P1 to Ext.P86 placed on record. He has stated that thereafter he issued notice Ext.PX to accused. He has also stated that postal receipt is Ext.PY and reply of notice is Ext.PZ. He has stated that accused be punished in accordance with law.

8.2 CW2 Lokeshwar has stated in preliminary evidence that complainant Dr.Rajiv Bindal is known to him and accused namely Mohinder Nath Sofat is also known to him. He has stated that doubt has created in his mind about integrity of Dr.Rajiv Bindal after allegations of corruption levelled by accused Mohinder Nath Sofat against Dr.Rajiv Bindal. He has stated that after allegations of corruption he did not generally meet Dr.Rajiv Bindal. He has stated that Dr.Rajiv Bindal was not called in social functions due to allegations of corruption levelled against Dr.Rajiv Bindal in press and media by accused Mohinder Nath Sofat.

8.3 CW3 Kanti Sarup has stated that he remained as Pardhan of Gram Panchayat continously for two times and remained Up-Pardhan of Panchayat for one time. He has stated that complainant Dr.Rajiv Bindal is known to him. He has stated that Dr.Rajiv Bindal complainant is honest person and he has great reputation in society. He has stated that complainant Dr.Rajiv Bindal has won assembly elections due to good reputation. He has stated that accused Mohinder Nath Sofat levelled false allegations against Dr.Rajiv Bindal relating to acquirement of property in illegal manner. He has stated that defamatory statements were published in papers and media. He has further stated that Mohinder Nath Sofat accused visited village to village and spread defamatory statements against Dr.Rajiv Bindal. He has stated that when he read defamatory statement against complainant Dr.Rajiv Bindal in newspaper he stopped meeting with Dr.Rajiv Bindal. He has stated that reputation of Dr.Rajiv Bindal effected due to defamatory statements published in newspaper.

8.4 Complainant also tendered into preliminary evidence news publications Ext.P1 to Ext.P86.

9. Submission of learned Advocate appearing on behalf of petitioner that there is no sufficient ground for summoning the accused under Section 500 IPC in present case is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimonies of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup recorded under preliminary evidence and Court has also carefully perused documentaries evidence Ext.P1 to Ext.P86 placed on record. After careful perusal of testimonies of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup in preliminary evidence and after careful persual of documentaries evidence Ext.P1 to Ext.P86 annexed with complaint Court is of the opinion that there are sufficient grounds to proceed against accused under Section 500 IPC.

10. Submission of learned Advocate appearing on behalf of petitioner that accused did not commit any offence punishable under Section 500 IPC and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that judicial findings whether accused committed criminal offence punishable under Section 500 IPC or not cannot be given at this stage of case and judicial findings relating to fact whether accused has committed criminal offence or not will be given by learned Trial Court after giving due opportunities to both parties to lead evidence in support of their case. It is well settled law that at the time of summoning accused learned Trial Court is not under legal obligation to weigh evidence in meticulous consideration. It is held that at the stage of summoning the accused Magistrate is mainly concerned with allegations made in complaint and preliminary oral evidence and documentaries evidence adduced in support of complainant. It is well settled law that Magistrate should not enter into detailed discussion of merits and demerits of case and Magistrate should primafacie satisfy whether there are sufficient grounds for proceeding against accused or not at the summoning stage of case. ***See AIR 1976 SC 1947 Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi. See AIR 1963 SC 1430 Chandra Deo Singh vs. Prokash Chandra Boase. See AIR 2016 SC (Weekly) 122 Madan Razak vs. State of Bihar.***

11. Submission of learned Advocate appearing on behalf of petitioner that complainant did not examine publisher or auditor in preliminary evidence and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that oral testimonies of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup are prima facie sufficient grounds to proceed against accused under Section 500 IPC because CW2 Lokeshwar has specifically stated when he appeared in witness box that after publication of defamatory statement in newspaper reputation of complainant CW1 Dr.Rajiv Bindal lowered down in his eyes and he ceased his links with Dr.Rajiv Bindal. Similarly CW3 Kanti Sarup has also stated that after publication of defamatory statement against complainant Dr.Rajiv Bindal in press reputation of Dr.Rajiv Bindal lowered down in his eyes and he stopped meeting Dr.Rajiv Bindal. It is held that oral testimonies of CW2 Lokeshwar and CW3 Kanti Sarup are sufficient to proceed against accused Mohinder Nath Sofat under Section 500 IPC.

12. Submission of learned Advocate appearing on behalf of petitioner that testimonies of CW1 Dr.Rajiv Bindal, CW2 Lokeshwar and CW3 Kanti Sarup are not sufficient to proceed against accused because none of witnesses has stated that they have seen the petitioner issuing statement in press or public and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. CW2 Lokeshwar and CW3 Kanti Sarup have specifically stated in preliminary oral evidence that when they read the news in newspaper that complainant Dr.Rajiv Bindal has acquired illegal property by way of corruption after becoming Health Minister of H.P. Government then reputation of Dr.Rajiv Bindal lowered down in their eyes. There are direct allegations against accused Mohinder Nath Sofat that news were published in newspaper at the instance of accused Mohinder Nath Sofat. It is held that in view of above stated facts primafacie there are sufficient grounds to proceed against accused under Section 500 IPC.

13. Submission of learned Advocate appearing on behalf of petitioner that dcouments were released to media on behalf of H.P. Lokhit Paty a breakaway group of BJP and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Accused Mohinder Nath Sofat at the time of release of news item was member of Lokhit party a breakaway group of BJP and Mohinder Nath Sofat had released the documents to media directly and direct active participation of accused is primafacie proved at this stage of case as per testimonies of CW2 Lokeshwar and CW3 Kanti Sarup and as per documents Ext.P1 to Ext.P86 adduced in preliminary evidence.

14. Submission of learned Advocate appearing on behalf of petitioner that complainant did not implead Lokhit party as co-accused in present case and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. There are direct allegations against accused Mohinder Nath Sofat that accused Mohinder Nath Sofat directly took active part and used defamatory statement against complainant. It is well settled law that learned Trial Court can implead a person as co-accused at any stage of case if learned Trial Court comes to conclusion that other persons have also committed criminal offence.

15. Submission of learned Advocate appearing on behalf of petitioner that complainant Dr.Rajiv Bindal has also filed civil suit for damage to the tune of Rs.fifteen lacs and parallel civil and criminal proceedings relating to similar facts cannot continue is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that suit for damage to the tune of Rs.fifteen lacs and criminal complaint under Section 500 IPC are two distinct civil and criminal offence. It is well settled law that harm to reputation of person defamed is common ground in both civil and criminal proceedings and truth of imputation is defence in both civil and criminal proceedings. It is well settled law that damage is granted in civil defamation proceedings and conviction and sentence of imprisonment are granted in criminal proceedings of defamation. It is well settled law that defamation is of two kinds. (1) Libel (2) Slander. It is well settled law that libel is by way of (1) Writing (2) Printing (3) Picutres (4) Effigies. It is well settled law that slander defamation is always made by spoken words. ***See AIR 1967 Calcutta (DB) 178 Ashok Kumar Sarkar vs. Radha Kanto Pandey and others.*** It is well

settled law that if two remedies are distinct then notwithstanding the fact that allegations of facts into two remedies are substantially similar then two parallel civil and criminal proceedings would be continued. ***See AIR 1961 SC 578 State of Bombay vs. S.L. Apte and another.***

16. Submission of learned Advocate appearing on behalf of petitioner that accused is innocent person and he has been falsely implicated in present case and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Judicial findings whether accused is guilty or not cannot be given at this summoning stage of case. Judicial findings about absence of mensrea or actus reus would be given by learned Trial Court after giving due opportunities to both parties to lead evidence in support of their case. Accused would be at liberty to take all defences available to him as provided in exception first to tenth exception provided under Section 499 of Indian Penal Code during trial of case. It is held that at the stage of summoning the accused the Magistrate has to simply see whether primafacie there are sufficient grounds to proceed against accused or not. It is held that at the stage of summoning the accused Magistrate is not under legal obligation to meticulously discuss merits and demerits of case. In view of above stated facts point No.1 is answered in negative.

Point No. 2 (Final Order)

17. In view of findings upon point No. 1 above petition is dismissed. Parties are directed to appear before learned Trial Court on ***20.12.2016.*** Observations made in this order will not effect merits of case in any manner and will strictly confine for disposal of petition. File of learned Trial Court and learned Additional Sessions Judge-I Solan District Solan H.P. be sent back forthwith along with certify copy of order. Learned Trial Court will dispose of petition expeditiously within three months because private criminal complaint is pending since 2012 and requires expeditious disposal. Cr.MMO No. 10 of 2016 is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

M/s Quality Industries Corporation ………Petitioner
Versus
State of Himachal Pradesh and another ………Respondents

CWP No. 2544 of 2016
Reserved on: November 11, 2016
Decided on: December 7, 2016

Constitution of India, 1950- Article 226- Petitioner participated in tender process for the supply of tools and equipments for vocational laboratories/workshop – petitioner was recommended for grant of contract by Tender Evaluation Committee- however, the tender process was cancelled- respondent pleaded that complaints were received regarding discrepancies in the tendering process- hence, a decision was taken to cancel the whole process- held, that it was not disputed that the petitioner was the lowest tenderer – tender was cancelled on the ground of discrepancies and the shortcomings – all purchases beyond Rs.50 lacs were to be carried out by e-tender but in the present case this procedure was not adopted – there was no infirmity in the cancellation of the tender – Court can interfere in the tender or contractual matter only when the process adopted or the decision taken is malafide or intended to favour some persons – no such circumstances were established in the present case- writ petition dismissed.(Para-8 to 30)

For the petitioner	:	Mr. Rajnish Maniktala, Advocate.
For the respondents	:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Varun Chandel, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Instant petition under Article 226 of the Constitution of India has been filed seeking following main reliefs:

"(i) That the orders of cancellation of tenders dated 19.09.2016 (Annexure P-16) issued by respondent No.2 may be quashed and set aside.

(ii) That the respondents may be directed to finalize the present tendering process issued vide tender documents placed on record as Annexure P-13."

2. Briefly stated the facts of the case, as emerge from the record are that petitioner is a proprietor firm having its office at Ambala Cantt. Petitioner participated in tender process for the supply of the tools and equipments for vocational laboratories/ workshops of functional trades in National Skill Qualification Framework (NSQF) which was floated by respondent No.2. Petitioner was found to be lowest bidder and petitioner firm was recommended for grant of contract by the Tender Evaluation Committee. However, on 19.9.2016, tendering process was cancelled.

3. The respondents-State by its reply stated that a tender notice was published in three leading newspapers dated 1.6.2016, for the supply of tools and equipment for establishing vocational laboratories in various Government Senior Secondary Schools on the basis of technical specifications finalized by a Technical Committee constituted for this particular purpose by the Government of HP. 8 Firms participated in the pre-bid meeting, wherein all the points about the technical specifications were addressed. Technical bids were opened on 23.6.2016 by the Technical Evaluation Committee and four participating firms including petitioner were found qualified. Financial bids were opened on 19.7.2016 and rates quoted by the petitioner firm were found to be lowest and same were announced. However, various complaints were received by respondents regarding discrepancies in the tendering process and pointed out shortcomings in the specifications. On the direction of State Government to conduct tendering process as per Rules, respondent No. 2 took decision to cancel the tendering process. It was specifically averred in the reply that the tendering process was cancelled on following shortcomings, i.e. (a) That e-tendering process was not followed as the department did not have e-tendering Platform, and (b) that specifications of some of the items were found lengthy and exaggerated. These errors crept in due to lack of technical know-how of the Committee constituted for the purpose. It was further stated that petitioner was free to compete in e-tendering process as it would be much fair and transparent.

4. During the course of proceedings, petitioner filed an application for placing on record additional documents suggestive of the fact that despite there being aforesaid decision of cancellation on the ground of e-tendering, respondent department is still continuing with the procedure of inviting offline/manual tender. Petitioner also placed on record documents to demonstrate that objections with regard to e-tendering in the instant case were also overruled by the Joint Controller (Finance) and thereafter department proceeded ahead by inviting offline/manual tender, in which petitioner emerged as the lowest bidder.

5. Mr. Rajnish Maniktala, Advocate appearing for the petitioner, vehemently argued that action of the respondents in cancelling the tender for the supply of Tools and Equipments for Vocational Laboratories/Workshops of Vocational Trades/Subjects under National Skill Qualification Framework in 300 Government Senior Secondary Schools of Himachal Pradesh, is illegal and colourable exercise of power, especially in view of the fact that entire process was completed and bids furnished by petitioner were duly accepted by the Technical Committee constituted in this regard by the Department. While referring to the cancellation order, annexure P-16, Mr. Maniktala, strenuously argued that it suffers from legal malafides especially when petitioner had furnished all requirements and after valuation of Technical Committee, he was found to be successful bidder, respondents had no authority to cancel the same that too without

assigning any reason in the cancellation order. He further argued that cancellation of tender dated 19.9.2016, is a non-speaking order because, save and except, ''due to administrative reasons", no other plausible reason has been assigned, which itself suggests unreasonableness, arbitrariness of the action taken by the respondents in haste. He further invited attention of the Court to the reply filed by the respondents to demonstrate that the decision to cancel the order has been taken at the behest of those firms, which had participated in the tender process and had failed to procure the tender, since their specifications and rates were not found suitable by the respondent department. While concluding his arguments, Mr. Maniktala forcefully contended that no action could be taken on the complaints having been filed by the other competitors, who had admittedly participated in the tender.

6. Mr. Shrawan Dogra, learned Advocate General, duly assisted by Mr. Anup Rattan, Additional Advocate General, supported the decision of cancellation of tender passed by the authorities and stated that since entire process initiated by the Department for inviting tender in question was in violation of the policy of procurement framed by the Government of Himachal Pradesh, wherein material/ specifications provided in the tender in question could only be procured through e-tender, there is no illegality in the cancellation order passed by the respondents. Mr. Dogra, strenuously argued that before any final decision could be taken in the matter, after valuation of the bid by the Technical Committee, respondent-State received certain complaints with regard to procedure adopted by the department while inviting tender, as a result of which matter traveled upto the Minister in-charge i.e. Hon'ble Chief Minister, who after verifying the records directed the authorities concerned to take decision in accordance with rules. He further invited attention of the Court to clause 15 of the tender document, to suggest that decision with regard to acceptance of tender entirely vested with the State Project Director, Rashtriya Madhyamik Shiksha Abhiyan (RMSA), and he has right to accept or reject the tender without assigning any reason. While concluding his arguments, Mr. Dogra also invited attention of the Court to the procedure of procurement i.e. FM&P manual prepared in accordance with the provisions of GFR-2005 and as per latest CVC guidelines, required to be adopted, especially under RMSA, wherein it has been specifically provided that procurement of all goods, work and consultancy services under RMSA project is required to be carried out in accordance with principles, rules and procedure contained in Chapter 8 i.e. 'procurement under RMSA'. Table 6, Annexure XXV, column No.5 suggests that any procurement above Rs. 50.00 Lakh is required to be done through open tender for civil works, goods and services. Mr. Dogra while referring to the documents having been annexed by the petitioner alongwith petition as well as application for placing on record additional documents, contended that, true it is that petitioner firm was found to be lowest bidder but that can not be the sole ground to award work in its favour, especially in view of non-compliance of procedure as prescribed under the provisions of "FM&P manual). The material advertised in the Notice Inviting Tender could only be procured through e-tendering.

7. We have heard the learned counsel for the parties and also gone through the records.

8. This Court, after perusing documents available on record and after hearing submissions having been advanced by the counsel representing the petitioner, at the stage of issuance of notice, called for the original record of the case from the respondent-State, which was produced and same was perused by this Court at the time of final hearing of the case. After carefully perusing the pleadings as well as documents annexed thereto, it is undisputed that petitioner firm was found to be the lowest bidder and it was recommended for grant of contract by the Tender Evaluation Committee. Aforesaid factum of petitioner firm having been found to be the lowest bidder has also not been disputed by the respondent-State. Vide order dated 19.9.2016, respondent-State took a conscious decision to cancel tender process invoking clause 15 of the tender document, which empowers the State Project Director, RMSA to cancel any tender without assigning any reason.

9. True it is, perusal of annexure P-16 i.e. cancellation order nowhere stipulates specific reasons for cancellation of tender in question. Respondents have simply cancelled the

tender citing administrative reasons, which may not be sufficient to justify cancellation. However, perusal of reply filed by respondents No.1 and 2, which is supported by affidavit of State Project Director, RMSA, suggests that after completion of evaluation by the Technical Evaluation Committee, wherein petitioner alongwith four other participating firms was found to be qualified as per specifications, complaints were received regarding discrepancies in the tendering process and tender document. It would be appropriate to reproduce following portion of the reply filed by respondents No.1 and 2:

> 1. That, the tender was issued for the supply of tools & equipment for establishing vocational laboratories in various Government Senior Secondary Schools on the basis of technical specifications finalized by a technical committee constituted for this particular purpose by the Government of HP through a tender notice published in three leading newspaper on dated 1/6/2016 and 8 firms participated in the pre bid meeting wherein all the points raised by the participating firms about the technical specifications were addressed. Subsequently eight firms submitted their bids.
>
> 2. The technical bids were opened on 23/6/2016 by the technical evaluation committee and four participating firms including that of the petitioner were found to be qualified as per the specifications. As a result financial bids were opened on 19/7/2016 and the rates quoted by the petitioner firm were found to be lowest and the same were announced. On finding the rates of the petitioner firm lowest in all the tendered items, various complaints were received in the office of the Respondent No. 2 regarding discrepancies in the tendering process and tender document .
>
> 3. That one firm Science and Surgical House averred that there were some faulty specifications which are not common in the market and hence prejudiced. The firm namely Amco Industries and Export Corporation stated that there was fixing with the party and the process was not fair. It further stated that there was big difference in lowest and highest bid and the foul play was apprehended.
>
> 4. That the same firm namely Amoco Industries stated that the specifications were manipulated and rigid in nature. On examination of the complaints it was found that the averments made by the complainants were just an after thought and same were designed to somehow
>
> stall the process and press for retendering. However, demand for E-Tendering and some infirmities in specification were found to be a fair demand. The demand for e-tendering was examined in lien with the procurement plan as suggested under Rashtriya Madhyam shiksha Abhiyan (RMSA) manual RMSA Manual has prescribed that for procurement over 50 lakh , e-procurement should be followed.
>
> 5. That considering the urgency of vocational LABS IN 300 Government senior secondary schools in wchich vocational streams have been started during 2015-16 , the matter was referred to the Government for relaxation of e-tendering process as the incumbent office does not have e-tendering platform as on date and in anticipation of that a fair and transparent tendering process had been adopted for the captioned procurement. The Government however, directed that the entire procurement must be done as per rules.
>
> 6. That, the Respondent no. 2 took the decision to cancel the tender on dated 19/09/2016 by invoking clause 15 of the tender document and decided to go for e-tendering as per the RMSA framework.
>
> 7. That in addition to E-tendering the decision was also taken in view of the various discrepancies such as item No. 6,9,11,12,13,14,34,38, 40, 41,35,52 in the specification of the 'Telecom Lab', item no. 29,30,63 in 'Agriculture' item no. 15, 21 in 'Retail' and item No. 21,22,23,24,26,42, in the specification of security. These specification were either lengthy or not common in market and are being

amended for E-tendering and the decision to cancel the tender was taken in public interest as there was a point in the complaint of some firms, who approached the Chief Minister/ DGP (Police), HP/Secretary Education, HP Government/ Anti-Corruption Bureau, HP/Finance Secretary, HP Government/ DGP Vigilance regarding infirmities in tendering process. After consulting different agencies it was decided to float the E-tender and rectify the discrepancies in the tendering process.

8. That, the petitioner firm has not been unfairly treated since tender was initially awarded to them and there was no malafied intention on the part of respondents. The reason for cancellation was mainly the discrepancies in tendering process.

9. That, the petition may be dismissed and the department may be allowed to float e-tender in the interest of justice. The respondent has no grudge or bad intention against the petitioner who has still the opportunity to complete in the e-tendering process."

10. Close scrutiny of the aforesaid averments contained in the reply suggests that since there were certain discrepancies in the items/specifications given in the Notice Inviting Tender, participant firms were unable to quote rates and apart from above, a few items /specifications were not common in market. Most importantly, decision to cancel the tender was taken at the level of Hon'ble Chief Minister specifically on the ground that procurement of specifications as quoted in the tender was required to be done through e-tendering. Accordingly, respondent Department after obtaining approval of the Minister in-charge i.e. Hon'ble Chief Minister, decided to adopt e-tendering by canceling the present tender.

11. Perusal of documents placed on record by the petitioner alongwith CMP No. 8780/2016, also suggests that the financial/commercial bids submitted by the petitioner qua all the specifications were found to be lowest. Accordingly, Committee proposed that L-1 (lowest bidder) identified for six vocational labs could be directed to establish sample lab for each sector so that same could be inspected by the Technical/Expert Committee of RMSA. Proceedings of the meeting conducted for opening financial/commercial bids dated 19.7.2016 i.e. annexure C (page 216) also suggests that letter of award/supply order to the lowest bidder could only be issued after inspection and satisfaction of Technical Committee. Similarly, perusal of meeting of Technical Committee suggests that five representations were received from different parties regarding discrepancy in the tender. Out of these five parties, four had participated in the bids. The Committee with a view to meet the objections having been raised by the representationists, gave point-wise reply. It would be apt to reproduce relevant paras of meeting of the Committee:

> "Keeping in view the above facts the committee has proposed that the L-1 i.e. lowest bidders identified for 6 Vocational Labs maybe directed to establish sample lab for each sector so that the same could be inspected by the technical/expert committee of RMSA. After the inspection & satisfaction of the technical committee we may issue letter of award/ supply order to the lowest bidder for 6 Vocational Sectors/Labs so that the Lab equipments could be procured by September 2016.
>
> Accordingly the proceeding of the meeting held for opening of financial bids alongwith comparative statements are being placed below approval/signature.
>
> However 5 representations have been received from different parties regarding discrepancy in these tenders. Out of these 5 parties 4 have participated as competitor in the bids. All these firms have raised different issues regarding the tendering process. In this regard it is submitted that the issues raised by the different firms seems to be biased and baseless because there has been complete transparency throughout the tendering process. The pre-bid meting was also conducted before the opening of the technical bids and all the bidders including 4 complainants were present in the pre-bid meeting also. The amendments suggestions given by the bidders regarding technical specifications

during pre-bid meeting were also incorporated and a corrigendum was issued to this effect.

The point wise reply is as under :-

I. Regarding opening of price bid without scrutiny of technical bid: -

There was thorough scrutiny of the documents in technical bid and it took nearly 25 days (23.06.2016 to 18.07.2016) to check the papers submitted in technical bid. There after the price bids were opened in the presence of the tenderers without any objection.

II. Regarding manual tender:-

The SPO Office is not yet on E-Tendering platform. Therefore manual tenders were invited. There was no objection regarding manual tender from any corner during the tendering process at all.

III. Regarding preponement of opening of price bid.

The opening of price bid was preponed to 10 AM on 19.07.2016, as SPD RMSA was to proceed on tour later in the day. All the parties were duly informed about the change of time through e mail as well as telephonically.

IV. Regarding manipulation in specifications/ terms & conditions: -

A pre bid meeting was held on 16.06.2016 to discuss about the specifications/ terms & conditions and a number of firms (7 out of 8) participated in the meting. The suggestions given by the participants were duly incorporated in the tender document by issuing a corrigendum on dated 16.06.2016."

12. Further, perusal of the noting placed on record by the petitioner itself available at page 225 suggests that representations were received by the Department and Secretary concerned approached the Hon'ble Chief Minister and informed him that their office did not have e-tendering platform and as such manual tendering process was followed. But careful perusal of noting given by the Secretary for the consideration of the Hon'ble Chief Minister i.e. Minister In-charge, itself suggests that there was a provision of e-procurement under the RMSA procurement manual for all purchases beyond Rs. 50.00 Lakh. The noting given by the Secretary (Education) is reproduced below:

"Regarding the representations on Tender Process, detailed replies have been made as per N-14 & 15. Also Hon'ble CM has called me in person and I had briefed him that our office does not have e-tendering platform. However, complete tendering process has been followed.

It is further brought in the notice of the Govt. that the proposed vocational labs are to be set up in 300 phase III Schools in which vocational classes have already commenced wef academic session 2015-16. If e-tendering process is to be followed, the same would take long time and result in inordinate delay in setting up vocational labs in The state. However, there is a provision of e-procurement as per RMSA procurement manual (Flag-A) for all purchases beyond 50 lacs. Submitted for further directions and order pl.

Sd/-
29/8

Pr. Sec(E)
For perusal pl.

Sd/-

Hon. C.M.
The … committee made for such purpose may take decision at its own level as per Rules.

Sd/-
Pr. Sec(Edu) SPD"

13. This Court, after carefully examining the aforesaid noting having been given by the Secretary, perused the original record produced by the Department to ascertain the views of the Hon'ble Chief Minister, who, in no uncertain terms, directed the concerned quarters to take decision as per Rules.

14. It is amply clear from the note given above by the Secretary, which was further approved by the Hon'ble Chief Minister that as per RMSA procurement manual, all purchases beyond Rs. 50.00 Lakh, especially under RMSA were to be done through e-procurement but in the instant case, as is evident from the records, procedure of e-procurement was not followed by the authorities while proposing purchase of items/ specifications contained in the tender document, rather same were proposed to be procured through open tender. It also emerges from the record that at the time of initiation of process of issuance of tender, Joint Controller(Finance) had noted in the concerned file that the process of e-tendering may be adopted for award of contract, but his objection was overruled and process for physical tender i.e. paper tender was adopted on the ground that the Department has no platform for e-tendering. However, it clearly emerges from the reply filed by the respondents that now the Department has the platform for e-tendering. Learned Advocate General specifically informed the Court that at present Department is well equipped with e-tendering platform and now procurement in question would be solely made through e-tendering process strictly in terms of procurement plan as suggested in the RMSA Manual.

15. This Court also perused Chapter-8 i.e. procurement under RMSA of FM&P Manual prepared in accordance with GFR-2005 which provides as under:

> "CH 8
>
> Procurement
>
> 8.1 Procurement in RMSA
>
> 8.1.1 The provision of the FM&P manual has been prepared in accordance with the provisions of GFR-2005 and as per latest CVC guidelines. However, in case of further changes in rules & regulations notified from time to time by said bodies, shall prevail and would be incorporated accordingly.
>
> 8.1.2. the cardinal principle of any public buying is to provide the Works /Goods/ services of the specified quality, at the most competitive prices, in a fair, just and transparent manner. To achieve this end, it is essential to have a uniform and well documented policy guidelines in RMSA scheme so, that this vital activity is executed in a well coordinated manner with least time and cost overruns.
>
> Procurement of all works, goods and consultancy services under the project would be carried out in accordance with principle, rules and procedures outlined in this chapter. These principles, rules and procedure need to be understood and followed by the central and State Governments so as to enable them to procure 'Works', 'Goods' and 'Consultant Services" under the project. Compliance with these procedures will ultimately result in efficiency, economy, fairness and transparency in procurement.
>
> 8.1.3 The implementation of the national programme of Rashtriya Madhyamik Shiksha Abhiyan (RMSA) entails procurement of teaching and learning equipment and materials, furniture, school equipment, materials required for ..

Table 6 Annexure XXV

S.No.	Procurement Type	Financial Limit
1.	No Tender or Direct Purchase (Certificate to be furnished as per rule under 145 of GFR 2005)	Up to Rs.15,000/-

2.	Three member committee (Certificate to be furnished as per rule 146 of GFR 2005)	Above Rs.15,000/- and upto Rs. 1.00 Lakh
3.	Limited Tender	Above Rs. 1 lakh and upto Rs. 10.00 Lakh
4.	Open tender	Above Rs.10.00 Lakh and below Rs.50.00 Lakh
5.	Open tender using e-procurement process for Civil works, goods and services	Rs.50.00 Lakh or above
6.	Service Contracts	
6(a)	Direct Contracting (with three quotations)	Upto Rs.1.00 Lakh
6(b)	Limited tender	Above Rs.1.00 Lakh and upto Rs.10.00 Lakh
6(c)	Open tender	Above 10.00 Lakh

For different methods of procurement, MHRD may change these limits by a separate communication as and when required from time to time.”

16. Aforesaid Chapter clearly suggests that any procurement under RMSA scheme for civil works, goods and services can only be by open tender by using e-tendering. It is undisputed that the procurement in the present case is more than Rs. 50.00 Lakh and respondent Department had floated the physical tender, for the supply of Tools and Equipments for Vocational Laboratories/Workshops of Vocational Trades/Subjects under National Skill Qualification Framework, in 300 GSSS in HP under RMSA.

17. Hence, in view of detailed discussion herein above, we see no illegality or infirmity in the decision taken by the respondent department for canceling the tender especially in view of the fact that no final decision, if any, was taken by the competent authority pursuant to recommendation of the Technical Evaluation Committee, which admittedly had found petitioner firm to be the lowest bidder. Since no final decision by the competent authority was taken in favour of the petitioner, no right could be stated to have accrued in its favour entitling it to the award of work. No doubt, there is substantial force in the contentions having been made by Mr. Maniktala that no complaint/representation could be entertained by the Department, made on behalf of those firms, which had participated in the tendering process, because they, after having failed to procure tender, had no right to point out discrepancy, if any, in the tender document. But in the present case, very basis of issuance of Notice Inviting Tender is in violation of procurement policy under RMSA and as such this Court sees no reason to interfere with the decision taken by the competent authority, which is in its wisdom and strictly in accordance with the policy framed by the Ministry of HRD, with regard to procurement, has decided to cancel the tender due to administrative reasons.

18. Further, by no stretch of imagination, court can assume the role of technical expert, who in their wisdom have cancelled the tender on account of technical /administrative reasons. Since respondents have already taken a conscious decision to recall the tender, this Court sees no occasion to grant relief as prayed for in the petition.

19. It is well settled by now that respondents can withdraw /recall tender at any time, if it is convinced that same is not in accordance with the requirements as indicated in Notice Inviting Tender. Though, in the present case, petitioner claimed himself to be lowest bidder on account of his financial bid but there is no document suggestive of the fact that pursuant to opening of his financial bid, he was awarded work, as such no right has accrued in his favour which would have entitled him to claim the relief as prayed for in the petition.

20. The Apex Court in **State of Jharkhand v. M/s. CWE-SOMA Consortium** reported in AIR 2016 SCW 3366, has held that:

> 13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-
>
> > "Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "...the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.
>
> 14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness.

21. That Apex Court in **Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd.** reported in AIR 2016 SCW 3385, has held that:

> 13. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format provided in Annexure 2 of the tender document. Annexure 2 which contains the format for the price bid makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/- which is way below the minimum wage fixed by the Government. Secondly, Shri Raval is also right in stating that the without prejudice offer of Rs.3,00,92,346/- is an offer which is not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same being liable to be rejected straightaway. Such condition is obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender.
>
> 14. Unfortunately, even though the High Court noticed the open ended nature of Respondent No.1's bid, it went on to add that the offer of Respondent No.1 shall be treated as matching with the revised minimum wage calculation and that it is nowhere envisaged by the tender conditions that rejection of an offer which may have the potential of causing loss to the tenderer is present. It is not for the High Court to revisit a condition contained in Annexure 2 read with 2.5.5 of the tender

in the manner aforesaid. Once the tender condition states that the tender must strictly conform to the format provided in Annexure 2, and Annexure 2 in turn clearly states that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected, and the High Court cannot hold otherwise. The High Court's further finding that Respondent No.1's offer was "clear" is wholly incorrect. It was a without prejudice offer which muddied the waters and rendered the price quoted by the bidder as variable and not fixed.

22. The Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)** reported in AIR 2016 SCW 3814, has further held that:

44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.

56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

23. Admittedly, Court can go into the question of mala fides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of mala fides are not sustainable and that mala fides must be specifically pleaded and proved and such allegations of mala fides should be made with all sense of responsibility, otherwise, the maker of such allegations should be ready to face consequences.

24. It is equally well settled that the burden of proving mala fides is on the person making the allegations and the burden is 'very heavy." Reliance is placed upon ***E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3***.

25. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fides are often more easily made than proved and proof of high degree is required to prove the same. Reliance is also placed on ***Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800*** wherein it is held, *"It (mala fides) is the last refuge of a losing litigant."*

26. Reliance is also placed on ***Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760***, whereby it is held by the Apex Court that seriousness of allegations of mala fides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office having high responsibility. It was held:

"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate

exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579)."

27. Courts can interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India.

28. Principles of judicial review under Article 226 of the Constitution of India would apply to the exercise of contractual powers by the Government only in case the process adopted or decision making process of the authorities is wrong and illegal and in order to prevent arbitrariness or favoritism.

29. Reliance is further placed on ***Tata Cellular*** versus ***Union of India (1994) 6 SCC 651***, whereby Apex Cout has laid down the limitations in relation to the scope of judicial review of administrative decisions in exercise of powers awarding contracts:(SCC pp 687-88, para 94)

30. In the instant case, the decision regarding cancellation of the tender is a bonafide one and is otherwise in the larger public interest because by not adhering to e-tendering, rules were violated and as such for a fair and transparent tendering, e-tendering is necessary. Further, e-tendering would increase healthy competition amongst the participants, thereby saving the public exchequer. It is not a fit case to exercise powers of judicial review as there is no violation of the provisions of law and further there is no procedural aberration or error in assessment. It is more than settled that power of judicial review will not be permitted to invoke to protect private interest at the cost of public interest and reliance is placed on a judgment delivered by the Apex Court in ***Jagdish Mandal*** *versus* ***State of Orissa and others(2007) 14 SCC 517*** wherein the Hon'ble Supreme Court has held that before interfering in tender or contractual matters in exercise of judicial review, Courts should ascertain whether process adopted or decision made by the authority is mala fide or intended to favour some and whether process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached, and also whether public interest is affected.

31. Applying the aforesaid test to the instant case, the writ petition merits to be dismissed and is accordingly dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Shri Neeraj Naiyar and others ....Petitioners.
Versus
State of H.P. and another. ......Respondents.

Cr.MMO No. 163 of 2009 &
Cr.M.P No. 1222 of 2016
Date of decision: 7th December, 2016

Code of Criminal Procedure, 1973- Section 482- An FIR was registered against the petitioners for the commission of offences punishable under Sections 447 and 506 read with Section 34 of I.P.C – petitioners have sought the quashing of FIR on the ground that the disputed land is located adjacent to the land of the petitioners – the land is in possession of the petitioners – held, that Civil Court had also found the petitioners to be in possession- continuation of criminal proceedings will be abuse of the process of the Court – petition allowed, FIR and consequential proceedings quashed. (Para-4 to 8)

For the petitioners:	Mr. K.D. Sood, Sr. Advocate with Mr. Rajeev Sood, Mr. Sanjeev Sood and Ms. Ranjana Chauhan, Advocates.
For the respondents:	Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs for respondent No. 1. Mr. Vikas Rathore, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral).

The petitioners are accused in FIR No. 245/08 registered under Section 447, 506 read with Section 34 of the Indian Penal Code, Police Station, Sadar, Chamba with the allegations that they entered upon the land belonging to Smt. Saristha Devi wife of complainant Madan Singh entered in Khasra No. 9422/9056 and 9422/9054 situated at mauza Chamba town-II, Tehsil and District Chamba, H.P. Not only this, they allegedly started construction of a tin shed thereon unlawfully. The accused-petitioners allegedly encroached upon the suit land to occupy the same by raising construction of tin shed thereon. The complainant and his wife when intervened and asked the accused-petitioners not to raise any construction over the land in question, they threatened them with dire consequences including to do away with their lives.

2. On the basis of the complaint made by Madan Singh aforesaid, FIR came to be registered and the investigation conducted by the police. The police has filed the challan in the Court of learned Chief Judicial Magistrate, Chamba. On perusal of challan and findings sufficient grounds to proceed further against the accused-petitioners, process was issued against them vide order dated 15.05.2009. The notice of accusation has also been put to the accused-petitioners under Section 447, 506 read with Section 34 of the Indian Penal Code. The case presently is at the stage of recording prosecution evidence.

3. The FIR and consequential criminal proceedings have been sought to be quashed on the grounds inter-alia that the land in dispute is adjoining to own land of the accused-petitioners bearing Khasra No. 10359/90/55/7211, Khata Khatauni No. 90/93 measuring 4426.07 square yards situated at Mauza Chamba town-II, Tehsil and District Chamba, H.P. The owner thereof to the extent of half share is Sagar Chand Naiyar, the predecessor-in-interest of the accused-petitioners. He has constructed road in the year 1966 over a portion of the land in dispute. The shed was constructed in the year 1970. No one objected to it. Smt. Sarishtha Devi wife of complainant after registration of sale deed got conducted the demarcation of her land on 04.10.2008. In the report, the revenue authorities have made

mention of existence of metalled road and one iron shed over the land allegedly entered upon by the accused-petitioners. Their predecessor Shri Sagar Chand Naiyar had filed Civil Suit No. 4/2008 along with an application under Order 39 Rule 1 and 2 of the Code of Civil Procedure. In the interim, learned District Judge, Chamba had directed the parties to maintain status quo qua the possession, nature and construction of the land in question till further orders. The interim order was made absolute on 27.11.2009 vide order, Annexure P-8. It has, therefore, been claimed that there is no question of the accused-petitioners having entered upon the land in question. The same rather was in their possession since time immemorial.

4. The civil suit which was instituted by deceased Sagar Chand Naiyar now stands decided vide judgment dated 29.09.2016. The certified copy thereof is annexed to the application, Cr.M.P No. 1222/2016 filed with a prayer to place the same on record. The application is allowed and the judgment is ordered to be taken on record. The perusal of the judgment reveals that learned Civil Judge (Senior Division), Chamba District at Chamba has held the plaintiffs (accused-petitioners herein) in possession of land in question, which is measuring 68.08 square yards. True it is that Smt. Srestha Devi, wife of complainant has been declared to be owner thereof, however, in view of the accused-petitioners are in possession of the land in dispute, she has been restrained from dispossessing them except in due process of law. Said Smt. Srestha Devi, wife of complainant may have preferred an appeal as argued by Mr. Rathore, learned counsel representing her, however, the fact remains that learned Civil Judge (Senior Division) on appreciation of the evidence available on record has arrived at a conclusion that it is the accused petitioners (plaintiffs in the suit) are in possession of the suit land.

5. Now if coming to the essential ingredients required to constitute the commission of an offence punishable under Section 447 of the Indian Penal Code, the provisions contained under Section 441 which defines criminal trespass reveals that in order to infer the commission of such an offence, the accused must have entered upon the property in the possession of another person (complainant) intentionally to commit an offence or to intimidate, insult or annoy such person in possession of the property. True it is that Smt. Srestha Devi has been held owner of the suit land may be on account of she having acquired the same from its previous owner by way of sale. The judgment passed in the civil suit by learned Civil Judge (Senior Division), Chamba, however, reveals that she is out of possession thereof. Learned Civil Jduge in para 20 and also 24 of the judgment has observed that metalled road is in existence over a portion of the land in question since the year 1970 to the notice and knowledge of the then owner of the suit land and retaining wall as well as one shed is already constructed by the plaintiff thereon.

6. Said Smt. Srestha Devi, the defendant in the civil suit may or may not succeed in the appeal, however, keeping in view the dispute civil in nature, allowing the criminal proceedings to go on further against the accused-petitioners would amount to abuse of process of law, when in view of the position discussed hereinabove, ingredients of commission of an offence punishable under Section 447 are not established. This Court has every doubt qua likelihood of the accused-petitioners to be ultimately held guilty for the commission of alleged offence. As a matter of fact, there is no likelihood of their's being convicted or sentenced in view of such material available on record and to the contrary, allowing the criminal proceedings to continue against them would amount to their harassment mentally and also financially. Therefore, there is no question of the accused-petitioners having entered upon the same within the meaning of Section 441 and thereby the commission of an offence punishable under Section 447 of the Indian Penal Code made out against them.

7. Now if coming to the offence the accused-petitioners allegedly committed under Section 506 of the Indian Penal Code, the allegations that the threatening to do away with the lives of complainant and his wife were held out at such a stage when the accused party requested not to raise any construction over the land in dispute also seems to be not genuine for the reason that as per the findings now recorded by the Civil Court on appreciation of the evidence not only the shed but the road was constructed over a portion thereof long back. The wife of complainant has acquired the land in dispute by way of sale on 07.01.2008. The previous owner thereof was

someone else. As per record the road and the shed were constructed by deceased Sagar Chand Naiyar in the year 1966 and 1970 respectively. Therefore, it is difficult to believe that the shed has been constructed recently by the accused-petitioners. Even if the evidence collected by the investigating agency is taken as it is i.e. without cross-examining the complainant and other witnesses, the present is a case where to allow the criminal proceedings to continue would not only amount to abuse of process of the law but also harassment of the accused-petitioners. The petition as such is allowed. Consequently, FIR No. 245/2008 and the consequential proceedings i.e. case No. 207-I/2009 titled State of H.P. versus Neeraj Nayyar and others in the Court of learned Chief Judicial Magistrate, Chamba are quashed and set aside. The record be returned to learned trial Court.

8. The petition is according allowed and stands disposed of. Pending application(s), if any, shall also stand disposed of.

Any observations made hereinabove shall not be construed to be a reflection on the merits of the appeal filed against the judgment and decree passed by learned Civil Judge (Senior Division), Chamba and shall remain confined to the disposal of this petition alone.

****

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Subhash Chand .....Respondent.

Cr. Appeal No. 288 of 2008
Decided on : 7.12.2016

Punjab Excise Act, 1914- Section 61(1)(a)- Accused was found in possession of 5 cartons of Indian made foreign liquor each containing 12 bottles and one carton of country liquor 'Patiala' brand- the accused was tried and acquitted by the Trial Court- held in appeal that independent witnesses were available but were not associated –the link evidence was missing – the case property was not bearing any seal when it was produced before the Court- the view taken by the Trial Court was reasonable- appeal dismissed.(Para-9 to 15)

For the Appellant: Mr. Vivek Singh Attri, Deputy Advocate General.
For the Respondent: Mr. N.S Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The instant appeal stands directed against the impugned judgment of 15.2.2008 rendered by the learned Judicial Magistrate, 1st Class, Barsar, District Hamirpur, in Excise Case No. 1-III-2007, whereby the learned trial Court acquitted the respondent (for short "accused") for the offences charged.

2. Brief facts of the case are that on 28.2.2006 at about 12.45 a.m. in the night HC Purshotam Dass No. 41 alongwith HHC Ajit Singh No. 149 and HHG Rakesh Kumar No. 10-5/101 was on patrolling duty at place Mehre vide Rapat Ex.PW-4/B. At the relevant time one Maruti car bearing No. HP-23A/2680 came from Dandru side at a high speed which was stopped by the police officials and on the basis of suspicion the aforesaid vehicle was checked. The police official recovered 5 cartons of Indian Made foreign liquor "Bagpiper whisky" each containing 12 bottles and one carton of country liquor "Patiala brand". The police extracted out 2 bottles from two cartons of "Bagpiper whisky" and 1 bottle of country liquor "Patiala brand", separately for sample purpose and thereafter sample bottles and remaining liquor were sealed and were taken

into possession vide recovery memo Ex.PW-1/B. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused challan was prepared and filed in the Court.

3. The accused stood charged by the learned trial Court qua his committing offence punishable under Section 61(1)(a) of Punjab Excise Act as applicable to the State of H.P, to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 4 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded in which he pleaded innocence and claimed false implication. However, he did not choose to lead any evidence in defence.

5. On an appraisal of evidence on record, the learned trial Court returned findings of acquittal qua the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsel appearing for the respondent/accused has with considerable force and vigor contended qua the findings of acquittal recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The seizure of liquor borne on the relevant seizure memo embodied in Ex. PW-1/B occurred at a place reflected in the site plan comprised in Ex. PW-3/B. The recovery of illicit liquor stood effectuated from vehicle bearing No.HP23A-2680 which at the relevant time stood driven by the respondent. The prosecution for proving the genesis of the occurrence embodied in the FIR depended upon the testimonies of official witnesses. All the official witnesses in their respective testifications occurring in their respective examinations-in-chief rendered a version qua the prosecution case bereft of any stain of any inter-se contradictions occurring therewithin vis-à-vis their respective communications articulated in their respective cross-examinations. Also their respective testifications are free from any taint of any intra-se contradictions, in sequel thereto their taint free testifications warranted imputation of credence thereto.

10. The learned trial Court had pronounced an order of acquittal upon the respondent merely for non-association by the investigating Officer concerned of independent witnesses who despite evident availability in proximity to the relevant site of occurrence remained omitted to be associated by him in the relevant proceedings. Though formidable evidence does exist on record qua availability of a thickly inhabited colony in close proximity to the site of occurrence yet the factum of a heavily populated colony occurring in close proximity to the relevant site of occurrence would not constrain an inference qua any omission on the part of the investigating Officer concerned to solicit their participation in the proceedings which occurred at the site of occurrence begetting a sequel of his thereupon concerting to smother the truth of the prosecution case or his inventing the effectuation of recovery of illicitly carried liquor bottles in the relevant car which at the relevant time stood driven by the respondent. Conspicuously also the aforesaid inference stands forbidden to be drawn by the evident factum of the relevant occurrence taking place in the morning at about 12.45 a.m. on 28.2.2006 whereat the inhabitants of homesteads occurring in close proximity thereof would not accede to any request of the investigating officer or of any official deputed by the investigating officer for soliciting their participation in the relevant proceedings. In sequel thereof the reason propounded by the learned trial Court qua non-association of independent witnesses in the relevant proceedings by the

Investigating Officer despite their evident availability in close proximity thereof ingraining the prosecution case with a pervasive stain of vitiation cannot warrant it standing accepted by this Court.

11. Even though on an incisive scanning of the evidence adduced by the prosecution, it is evident qua the aforesaid witnesses in their respective testifications voicing a taint free version qua the genesis of the prosecution case yet also when in their respective testifications they bespeak qua at the time contemporaneous to the relevant occurrence vehicles besides the vehicle wherefrom the relevant seizure occurred making their appearance at the relevant site of occurrence, nonetheless the afore-stated bespeakings occurring therewithin also cannot facilitate the defence to make any espousal qua non-association of their occupants by the Investigating Officer as independent witnesses qua the relevant proceedings making pervasive inroads qua the efficacy besides the tenacity of the prosecution case unless compatible suggestions unveiling the factum of the investigating officer in making the aforesaid omission(s) hence concerting to smother the factum of his despite effectuating the relevant recovery from the aforesaid vehicles, his proceeding to introduce the carton of liquor onto the vehicle driven at the relevant time by the accused. In absence of the aforesaid apposite suggestions the mere factum of vehicles arriving at the site of occurrence in contemporarnity to the relevant proceedings occurring thereat would not stain the vigor of the prosecution case.

12. The learned counsel for the accused has contended with force qua the prosecution standing enjoined with a solemn obligation under law to prove its case beyond reasonable doubt. He also submits qua the testifications of the official witnesses not holding any element of creditworthiness. However his submission holds no force as this Court has concluded qua the testimonies of the official witnesses while making echoings therein in proof of the genesis of the prosecution case their relevant articulations qua the relevant factum probandum when free from any taints aforesaid hence enjoining this Court to thereupon proceed to impute credence to their respective testimonies. In face thereof yet with the prosecution thereupon succeeding in proving the genesis of the prosecution case, the defence contrarily was under an obligation to belittle its creditworthiness or also was under an obligation to by putting apposite suggestion to the prosecution witnesses make a concerted attempt in portrayal of the entire genesis of the prosecution case voiced by the prosecution witnesses standing engulfed in a pervasive shroud of doubt whereupon this Court would stand facilitated to conclude of the prosecution failing to prove its case beyond reasonable doubt. However the defence has omitted to make the apposite endeavor. Significantly when the eminent principle of criminal jurisprudence though is held in the canon of the prosecution standing enjoined to prove its case to the hilt nonetheless for eroding the efficacy of propagations made by the PWs they are enjoined to be held to an exacting cross-examination for relevant unearthings therefrom standing elicited qua doubt hence seeping the genesis of the prosecution case whereupon alone on doubt standing reared qua the genesis or efficacy of the prosecution case would the apposite benefit accrue to the defence. Consequently when the aforesaid concerts are wholly amiss hereat nor any doubt qua the aforesaid facet hence is gripping the prosecution case, ensuing sequel wherefrom is qua its benefit being undrawable by the defence.

13. Though the defence had made a feeble attempt to by putting suggestions qua availability of a liquor vend in close proximity to the site of occurrence to unveil vaguely therefrom qua the investigating officer concerned after collecting the liquor therefrom his introducing it onto the vehicle driven at the relevant time by the respondent wherefrom the relevant seizure occurred. However the aforesaid feeble attempt is also bereft of any specificity especially when it does not hold therewithin any suggestion unveiling the aforesaid factum. Also with both PWs 1 and 3 wheretowhom the relevant suggestion stood put by the learned defence counsel while holding them to cross-examination qua the availability of a liquor vend in close proximity to the relevant site of occurrence though while meteing their respective answers thereto they acquiesced qua the relevant factum yet with both the aforesaid prosecution witnesses while meteing answers thereto also conveying qua its closing at 12.30 p.m. whereas the relevant seizure occurring 15 minutes thereafter whereupon the learned defence counsel was under an obligation to also put further

suggestions to them qua at the relevant time whereat the relevant seizure occurred the liquor shop also remaining open thereat yet he omitted to put the aforesaid suggestion to them wherefrom it has to be concluded qua at the relevant time, the liquor shop occurring in close proximity to the site of occurrence not being open thereat. In aftermath it has to be concluded qua the defence even if it has feebly attempted therefrom to convey of the Investigating Officer after making the relevant collection therefrom his introducing the liquor bottles onto the car of the respondent/accused yet its attempt also standing wholly enfeebled, corollary whereof is qua the concert made by the defence to belittle the creditworthiness of the prosecution case propagated through the un-tainted testimonies of the prosecution witnesses also its concert to prove qua a pervasive doubt seeping into the genesis of the prosecution case wherefrom it has concerted herebefore to constrain this Court to make a conclusion qua the prosecution failing to prove its case beyond reasonable doubt apparently has to suffer the ill fate of its suffering outright rejection from this court.

14. Be that as it may the entire vigor of the prosecution case was held in the relevant factum of it succeeding in proving qua the relevant seizure of the liquor bottles, seizure whereof stands embodied in Ex.PW-1/B, on their production before the Court for theirs standing shown to the relevant PWs theirs thereat standing invincibly connected with the seizure of liquor bottles embodied in the apposite recovery memo. Efficacious proof qua connectivity existing qua the seizure of liquor bottles held in the relevant seizure memo vis-à-vis the ones which stood produced in Court stood constituted in the trite factum of liquor bottles on standing produced in Court for theirs standing shown to the relevant PWs theirs standing held in sealed cartons/boxes. However with PW-1 in his cross-examination testifying qua on the case property on standing shown to him in Court it not holding seals thereon, constrains this Court to conclude qua efficacious proof qua existence of an imminent connectivity occurring inter-se the liquor bottles embodied in seizure memo comprised in Ex.PW-1/B vis-à-vis the ones which stood produced in Court standing not unflinchingly proven by the prosecution. In sequel thereof the ensuing deduction therefrom is qua the prosecution not thereby proving the factum of liquor bottles which stood produced in Court standing connected or related qua the bottles borne on Ex.PW-1/B or theirs standing related to the opinion of the FSL concerned. Concomitantly with the aforesaid link qua the relevant trite factum aforesaid standing not effectively proven obviously a doubt seeps qua the vigor of the prosecution case benefit whereof ought to go to the accused.

15. A wholesome analysis of evidence on record portrays that except qua the aforesaid parameters the appreciation of evidence as done by the learned trial Court not suffering from any perversity and absurdity nor it can be said that the learned trial Court in recording findings of acquittal has committed any legal misdemeanor, in as much, as, its mis-appreciating the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court merit any interference.

16. In view of the above discussion, I find no merit in this appeal, which is accordingly dismissed and the judgment of the learned trial Court is maintained and affirmed. Records be sent back.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh … Appellant

Versus

Ram Kishan … Respondent

Cr. Appeal No. 264 of 2012
Reserved on: 22.11.2016
Date of decision: 7.12.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1 kg. 550 grams charas- the accused was tried and acquitted by the Trial Court- held in appeal that the accused was travelling in the bus, however, no independent witness was associated- one police official was not examined – there are material contradictions in the testimonies of police witnesses – the testimonies of the police officials are not cogent or trustworthy and cannot be made basis for convicting the accused- appeal dismissed.(Para-9 to 21)

For the appellant: Mr. Vikram Thakur and Mr. Puneet Rajta, Deputy Advocate Generals.
For the respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, State has challenged judgment passed by the Court of learned Presiding Officer, Fast Track Court, Mandi, in Sessions Trial No. 54/2010 dated 29.09.2011, vide which, the accused has been acquitted for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act.

2. The case of the prosecution in brief was that on the intervening night of 26/27th December, 2009, ASI Satish Kumar, Investigating Officer, Police Station Jogindernagar alongwith other police officials had set up a Naka at Cinema Chowk, Jogindernagar. HHG Amar Singh and HHG Kali Dass, were on patrolling duty in beat No. 2. They were also associated in the Naka by the Investigating Officer. At around 12.45 A.M., one HRTC bus of Keylong Depot bearing registration No. HP-66-1307 came from Manali which was on its way to Dharamshala. This bus was stopped for checking. Accused was found sitting on Seat No. 37. As soon as he saw the police party, he got perplexed, as a result of which, the police party became suspicious. During his personal search, he was found to have tied some material with Cello Tapes to both his legs. He was alighted from the bus. The Cello Tapes tied to his legs were removed and some material of black colour in the shape of chapattis and sticks was recovered from the accused, which he had tied to his legs. On smelling, this material was found to be Charas and when weighed it was found weighing 1 kilogram 550 grams. Biri Chand was the driver of the bus and Duni Chand was conductor of the said bus. When asked, conductor Duni Chand disclosed that the accused had boarded the bus from Kullu to Baijnath. The bus ticket of the accused was attested by Duni Chand which was taken into possession by the police. Recovered Charas was packed in a cloth parcel which was sealed with six seals of 'S'. The socks of the accused and Cello Tape used for tying the Charas in legs, were put in another cloth parcel, which was also sealed with seal 'S'. NCB form was filled on the spot. The seal after its use was handed over to Constable Inder Dev. Recovered case property was taken into possession by the police vide seizure memo Ext.PW1/B. Constable Inder Dev and HHG Rvainder Kumar put their signatures on the seizure memo as witnesses and accused also put his signatures on it. Rukka Ext. PW-8/B was scribed and sent to the Police Station through HHG Amar Singh on the basis of which FIR Ext. PW-8/A was registered. Site plan etc. were prepared. Accused was arrested and after completion of formalities, the case property as well as the accused were taken to the Police Station. Case property was produced before the then S.H.O. Police Station Jogindernagar for resealing, which was resealed with three seals of 'N'. Case property was thereafter deposited with MHC Mangat Ram. The same was sent to the laboratory vide R.C. No. 213/09 through Constable Karam Singh. The recovered contraband on chemical examination was found to be Charas as per report of the Expert certificate Ext. PX.

3. After completion of the investigation, challan was filed in the Court and as a prima facie case was found against the accused, he was charged for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act, to which, he pleaded not guilty and claimed trial.

4. On the basis of evidence led both ocular as well as documentary, learned trial Court held that in view of non-association of independent witnesses coupled with the contradictions in the statements of the prosecution witnesses who were police officials, the alleged recovery of Charas from the possession of the accused from his personal search was doubtful. It further held that the evidence adduced by the prosecution could not be said to be sufficient to prove beyond reasonable doubt that 1 kilogram 550 grams Charas was recovered from the exclusive and conscious possession of the accused during his personal search. It was further held by learned trial Court that there was non-compliance of the mandatory provisions of Section 50 of Narcotic Drugs & Psychotropic Substances Act and as such, the prosecution could not be said to have proved the guilt of the accused. On these basis, learned trial Court acquitted the accused.

5. Feeling aggrieved by the said judgment passed by learned trial Court, the State has filed this appeal.

6. Mr. Vikram Thakur, learned Deputy Advocate General, has strenuously argued that the judgment of acquittal returned by learned trial Court is not sustainable in the eyes of law as learned trial Court erred in not appreciating that the prosecution had proved its case against the accused beyond reasonable doubt and learned trial Court had erred in discarding the well reasoned and consistent testimonies of the prosecution witnesses on material points. It was further argued by learned Deputy Advocate General that learned trial Court failed to appreciate and take into consideration the statements of PW-1 HC Inder Dev, PW-6 HHG Amar Singh and PW-10 ASI Satish Kumar in its correct perspective. According to Mr. Thakur, a perusal of the statements of these three witnesses clearly demonstrated that the prosecution had proved its case against the accused beyond reasonable doubt, however, learned trial Court had erred in returning the conclusion to the contrary. It was further argued by Mr. Thakur that learned trial Court had erred in not appreciating the testimony of the Investigating Officer to the effect that the statement of conductor could not be recorded for valid reasons that had been given by him. It was further argued by Mr. Thakur that the conclusion arrived at by learned trial Court that the mandatory provisions of Section 50 of Narcotic Drugs & Psychotropic Substances Act were not complied with was totally a wrong conclusion in the facts and circumstances of the case as it was a 'chance recovery'. On these grounds, it was urged by Mr. Thakur that the judgment of acquittal passed by learned trial Court was perverse and was liable to be set aside and the accused was liable to be convicted for commission of offence punishable under Section 20 of Narcotic Drugs & Psychotropic Substances Act.

7. Mr. Ajay Chandel, learned counsel for the respondent, on the other hand, argued that the judgment passed by learned trial Court was neither perverse nor the findings of acquittal returned by learned trial Court were incorrect. Mr. Chandel argued that learned trial Court after taking into consideration the entire evidence placed on record by the prosecution held that the prosecution had failed to prove its case against the accused. Mr. Chandel argued that in fact non-compliance of Section 50 of Narcotic Drugs & Psychotropic Substances Act was done by the prosecution because in fact no contraband was recovered from the accused by the prosecution and the accused had been framed in a false case. He further argued that no cogent explanation was there from the prosecution that as to why independent witnesses were not associated with search and seizure when it was the case of the prosecution that the alleged recovery of the Charas was made from the accused who was travelling in the bus. He further argued that contradictions and inconsistencies in the statements of the official witnesses were not minor but were major contradictions and they created serious doubt over the story of the prosecution and in this background, it could not be said that learned trial Court had erred in acquitting the accused. On these basis, it was argued that the judgment of acquittal returned by learned trial Court do not warrant any interference.

8. We have heard learned counsel for the parties and have also gone through the records of the case as well as judgment passed by learned trial Court.

9. As per the prosecution, the contraband was seized from the person of the accused on the intervening night of 26/27th December, 2009, while he was travelling in a bus which was proceeding from Manali to Dharamshala. The contraband was so seized when the said bus was stopped for checking at Jogindernagar at Cinema Chowk at around 12.45 A.M. Further, as per the prosecution, the accused was found sitting on Seat No. 37 and as he got perplexed when he saw police party. The police party became suspicious and during his search, it was found that he had tied some material with Cello Tapes in both of his legs. Taking the story of the prosecution as it is, we fail to understand as to when the police found that the accused had tied some material with Cello Tapes in both of his legs and he was alighted from the bus why no independent witness was associated with the search and seizure of the contraband. Not only this, admittedly, when the search and seizure was conducted by the prosecution on suspicion being raised by the conduct of the accused, no cogent explanation is there as to why the mandatory provisions of Section 50 of Narcotic Drugs & Psychotropic Substances Act were not complied with. Incidentally, it is not a case where the alleged recovery of the contraband was made by the prosecution from the accused either at an isolated place or secluded place. Though the prosecution has tried to explain non-joining of the independent witnesses and non-recording of the statement of the conductor on the ground that it was a cold night and the passengers were raising hue and cry, but according to us, the explanation which has been so given by the prosecution, does not seem to be creditworthy because it belies prudence that the police party did not record the statement of the conductor or the driver of the bus neither did it associate any independent witness from amongst other passengers present in the bus simply because it was a cold night or the passengers were raising hue and cry. It has come in evidence even otherwise that it is not as if immediately after the accused was nabbed by the police party, the bus was allowed to go. On the contrary, PW-6 has stated that bus remained at the spot during entire proceedings on the date in issue.

10. Besides this, even otherwise, story as has been put forth by the prosecution does not inspire confidence. The testimony of official witnesses is neither cogent or trustworthy nor does the same appear to be believable. The contradictions and inconsistencies in their statements have not been satisfactorily explained by the prosecution.

11. As per the prosecution, the Investigating Officer had associated Constable Inder Dev and HHC Ravinder Kumar as witnesses of search and seizure. HHC Ravinder Kumar was not examined by the prosecution and in fact he was given up by the prosecution on 13.06.2011 as being repetitive.

12. Inder Dev entered the witness box as PW-1 to corroborate the case of the prosecution and he has stated in his cross-examination that when the accused saw them (police party), he got frightened and they (police party) became suspicious that he must be possessing some contraband. He further stated that the search of the accused was carried out inside the bus. He also stated that the police officials did not give their personal search to the accused. He also stated that the Investigating Officer after having become suspicious that the accused was in possession of narcotic substance, did not give any option to the accused to be searched before Magistrate or Gazetted Officer. In our considered view, testimony of this witness creates a serious doubt over the version of the prosecution that it was a case of 'chance recovery'. It has come in his cross-examination that the bus was almost full except 3-4 seats and only three persons out of the police party went inside the bus.

13. HHG Amar Singh, who entered the witness box as PW-6 stated that when the police party entered the bus, accused who was sitting on seat No. 37 got frightened when he saw the police party and ASI Satish Kumar became suspicious. He further deposed that during checking, legs of accused were found to be swellon and when his pent was lifted, it was noticed that under the socks accused had tied something. He further deposed that thereafter the accused was taken out of the bus and on search, the tied material was found to be in shape of sticks and *chappati* of black colour which was *charas.* In his cross-examination, this witness stated that when accused became frightened, the police party became suspicious that he was possessing

some narcotic substance. He also stated that there were 2-3 passengers sitting on the same bench alongwith the accused. He also stated that on suspicion, accused was alighted from the bus by the police and thereafter, his search was taken. He also stated that HHG Ravinder Singh and Constable Inder Dev had brought weight and scale from nearby vegetable shop. He also stated that bus remained at the spot till the completion of entire proceedings and the entire proceedings were completed at about 1:45 a.m. He also stated that none of the passengers were associated as witness at the time of search and thereafter self stated that driver and conductor were associated as witnesses. He also stated that no file was taken by him from Police Station. He also stated that during the course of proceedings, he never visited the Police Station. Incidentally, in his examination-in-chief, PW-6 stated that Investigating Officer gave him ruqua which he gave to MHC and thereafter he handed over case file to Investigating Officer in the Police Station.

14. The Investigating Officer entered the witness box as PW-10. When we peruse the statement of PW-10 ASI Satish Kumar Investigating Officer, there is no mention in his examination-in-chief that while they were checking the bus in question, the accused was sitting on Seat No. 37 got perplexed when he saw the police party or raised a suspicion on account of his conduct. He has deposed in the Court as under:-

> "During the checking of the bus one person was found sitting on seat No. 37. During the checking of that person, it was found that he had tied some material in both his legs below knee. He was taken out of the bus. During the checking, it was found that he had wrapped a tape around his both legs."

15. It has further come in the testimony of PW10 that he brought weights and scale from a vegetable shop of Chota Walla alias Krishan from his servant Kripal Singh. While Kripal Singh has not been examined by the prosecution, the testimony of Investigating Officer that he brought weights and scale from a nearby shop is belied by the statement of PW-6 who has stated that the weights and scale were brought from the nearby shop by Ravinder and Inder Dev.

16. Moreover, while it has come in the cross-examination of PW-10 that the accused was sitting alone on the bench of Seat No. 37, whereas it has come in the statement of PW-6 that 2-3 persons were also sitting on the same bench.

17. Not only this, while as per PW-10 ASI Satish Kumar, there were 15-20 passengers in the bus, however, it has come in the statement of PW-1 that the bus was almost full except 3-4 seats.

18. Further, whereas in his cross-examination PW-10 has stated that the case file was brought from Police Station by HHG Amar Singh and handed over to him at around 03.00 A.M. Amar Singh (PW-6) on the contrary has stated that he did not bring any file from the Police Station to the spot. Not only this, whereas PW-10 has stated that the file was handed over to him at the spot at around 03.00 A.M. PW-6 has deposed that the entire police party had left the spot at around 01.45 A.M.

19. In our considered view, these are major contradictions and inconsistencies in the testimony of main prosecution witnesses on the strength of whose testimonies prosecution wants the conviction of the accused. Statements of these official witnesses are neither cogent nor trustworthy at all and these cannot be made basis for convicting the accused. The contradictions and inconsistencies in their statements cannot be terms as minor but are major and these contradictions create very serious doubt as to whether any contraband was in fact recovered from the accused by the police party on the date, time and place as the prosecution wants this Court to believe.

20. As we have already discussed above, apparently it does not seem to be a case of 'chance recovery' and the prosecution has made it a case of 'chance recovery' just to get out of the rigors of Section 50 of Narcotic Drugs & Psychotropic Substances Act, which are mandatory. Neither the driver of the bus nor the conductor of the bus has been examined by the prosecution

nor other passengers travelling in the bus has been examined by the prosecution to substantiate its case that the contraband was recovered from the accused in the mode and manner in which the prosecution wants this Court to believe. Non-joining of independent witnesses with the search and seizure on the pretext that it was a case of 'chance recovery' also does not seem to be believable. It has clearly come in the deposition of PW-1, PW-6 as well as in cross-examination of PW-10 that before the search of the accused, police party had become suspicious that he was possessing some narcotic substance. Whereas PW-1 has stated that the accused was searched inside the bus, it has come in the statements of PW1 and PW-10 that he was searched after being alighted from the bus.

21. Therefore, in our considered view, it cannot be said that on the basis of evidence both oral as well as documentary prosecution had proved its case against the accused beyond reasonable doubt. A perusal of the judgment passed by learned trial Court also demonstrates that it has exhaustively taken into consideration the entire evidence produced on record by the prosecution and after appreciation of the same has held that the prosecution was not able to prove its case against then accused on the strength of evidence placed on record. We concur with the findings so returned by learned trial Court. The findings so returned by learned trial Court are neither perverse nor it can be said that the same are not borne out from the records of the case.

22. Accordingly, in view of the above discussion, we do not have any reason to interfere with the well reasoned judgment passed by learned trial Court in favour of the accused and while upholding the judgment so passed by learned trial Court, we dismiss the present appeal being devoid of any merit. Bail bonds, if any, furnished by the accused are discharged.

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BEFORE HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

Ms. Anjali Devi. ....Petitioner
Versus
State of H.P. & others. .....Respondents

CWP No. 2497 of 2013
Date of decision: 8.12.2016

Constitution of India, 1950- Article 226- Petitioner applied for the post of Part Time Water Carrier on the ground that her father had donated land for the construction of the school in the year 1964 – respondent No.3 was selected by the Government under Rule 12 of Recruitment Scheme for the appointment of Part Time Water Carriers – held, that Rule 12 empowers the State to make the appointment on compassionate ground without following the selection process amongst widow, women deserted by their husbands, or otherwise destitute, handicapped persons, if such candidate falls below the poverty line - the petitioner had applied for recruitment under this Rule – the Rule was subsequently quashed but the appointment was made prior to the quashing – respondent No.3 falls within the criteria laid down in Rule 12 and her appointment cannot be said to be bad – writ petition dismissed.(Para-7 to 10)

Case referred:

Mangla Devi Vs. State of H.P. and others, Latest HLJ 2015 (HP) 902,

For the Petitioner:	Ms.Sheetal Kimta, Advocate.
For the Respondents:	Mr.Varun Chandel, Additional Advocate General with Mr.Pankaj Negi, Deputy Advocate General, for respondents No. 1 and 2. Mr.B.B. Vaid, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Vivek Singh Thakur J. (Oral).

By way of present petition, petitioner has challenged appointment of respondent No. 3 as Part Time Water Carrier (herein after referred to as PTWC) in Government Primary School, Baghthal Madhana, District Sirmour, H.P. on the ground that petitioner is more deserving candidate to be appointed on compassionate ground under Rule 12 of Recruitment Scheme for the appointment of Part Time Water Carriers in Schools of Education Department (herein after referred to as 'Scheme').

2. During course of arguments, learned counsel for respondent No. 3 has adopted reply filed by respondents No. 1 and 2. As per reply of respondents No. 1 and 2, appointment of respondent No. 3 was approved by Government under Rule 12 of the Scheme for the post of Part Time Water Carrier (PTWC) in Government Primary School, Baghthal Madhana and was sent to Deputy Director, Elementary Education, Sirmour on 8.4.2013 for further action and after completing all formalities, President School Management Committee, Government Primary School, Baghthal Madhana was directed to appoint respondent No. 3 on 16.4.2013 as PTWC in the said school and in pursuance to her appointment, she joined her duties on 18.4.2013. It is further stated in reply that approval of petitioner was also received under Rule 12 of the Scheme for the same post in the same school, but said approval was sent to Deputy Director, Elementary Education on 16.4.2013, who had referred back the case of petitioner with remarks that post of Part Time Water Carrier (PTWC) was not vacant in Government Primary School, Baghthal Madhana.

3. I have heard learned counsel for parties and perused the record.

4. Clause/Rule 12 of the Scheme empowers respondent-State to make appointments of PTWC on compassionate grounds without following the selection process amongst widows, women deserted by their husbands or otherwise destitute, handicapped persons if such candidate falls below the poverty line as defined by Rural Development Department from time to time. Copy of Scheme has been placed on record as Annexure P-8.

5. Petitioner claims that she is permanently disabled to the extent of 45%, having academic qualification of +2, belongs to below poverty line family with income of Rs. 6,000/- per annum from all sources and an unemployed person also registered with Employment Exchange. She further claims that she has lost her father and there is none to look after her and because of permanent disability, she is unable to do any kind of manual work. Being an eligible candidate, she had applied to respondent No. 2 for the post of PTWC vide application (Annexure P-6) on the ground that her father had donated land for construction of aforesaid school long back ago, somewhere in the year 1964. She has also placed copy of mutation dated 21.3.1964 on record as Annexure P-7. It is also averred that her village is situated at a shorter distance from the school premises in comparison to respondent No. 3. It is submitted by learned counsel for the petitioner that respondent No. 2 has not adopted procedure for appointment of respondent No. 3 and swayed only by the fact that she is a widow. Competence of respondent No. 2 to appoint any candidate on compassionate ground has also been disputed by stating that respondent No. 3 had been appointed by respondent No. 2 and not by Government, as power to appoint on compassionate ground vested only with the Government.

6. Respondents No. 1 and 2 have clarified in their reply that appointment of respondent No. 3 was approved by the Government and sent to respondent No. 2, who only completed the codal formalities in pursuance to approval of Government.

7. Petitioner has not rebutted averments of reply filed by respondents No. 1 and 2 and no rejoinder has been preferred to be filed. Learned counsel for the petitioner has relied upon judgment of Division Bench of this Court in ***Mangla Devi Vs. State of H.P. and others, Latest HLJ 2015 (HP) 902***, vide which Rule 12 of the Scheme has been quashed and set aside,

being ultra virus and thus she has prayed for quashing and setting aside of the appointment of respondent No. 3 made exercising powers under Clause/Rule 12 of the Scheme.

8. In judgment rendered by Division Bench in *Mangla Devi's* case (supra) Rule 12 of the Scheme has been struck down by declaring the said Rule ultra virus. In present case, petitioner herself is also harping upon Rule 12 of the Scheme and it is not case of the petitioner that appointment of respondent No. 3 made under Rule 12 of the Scheme is bad for unconstitutionality of Rule 12, but on the basis of her family circumstances, petitioner is also claiming appointment on the basis of power of the State under Rule 12 on compassionate ground. It is not case of the petitioner that post in question should have been advertised, rather she herself had applied vide Annexure P-6 for compassionate appointment by the Government. Moreover, Rule 12 of the Scheme was struck down on 15th May, 2015 without any direction with respect to appointment made before striking down of Rule 12 of the Scheme and rightly so, as appointments made prior to 15th May, 2015 under this Rule were neither in question nor the candidates appointed prior to that date were party in that petition. Therefore, candidates appointed under Rule 12 of the Scheme prior to striking down of the said Rule will not be liable to be ousted automatically on the basis of ratio laid down by Division Bench in the aforesaid judgment, unless their appointment is assailed on that ground.

9. In present case, petitioner herself is claiming right under Rule 12 of the Scheme, therefore, striking down of Rule 12 of the Scheme subsequent to the appointment of respondent No. 3 is not having any advantage to petitioner, rather it has adverse effect on her claim, as except claiming her entitlement for appointment under provisions of Rule 12 of the Scheme, there is no other ground for asserting her claim for appointment to the post of PTWC against which respondent No. 3 has been appointed.

10. At the time appointment of respondent No. 3, Rule 12 of the Scheme was in force and she was found within the criteria fixed for appointment under the said Rule and petitioner has not questioned the power of respondent-State to appoint candidate under Rule 12 of the Scheme at relevant point of time, but has claimed her right to be appointed in the same manner in exercise of powers under Rule 12.

11. In view of above discussion, I find no merit in this petition and the same is dismissed accordingly, along with pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Rajesh Jaswal and others ……….Appellants

Versus

State of Himachal Pradesh and others ……….Respondents

LPA No. 108 of 2010
Reserved on: November 23, 2016
Decided on: December 8, 2016

Constitution of India, 1950- Article 226- Petitioners were appointed as Inspectors Grade-I – a notification was issued on 1.6.1996 merging 147 posts of Inspector Grade-II in the cadre of Inspector Grade-I- the petitioners challenged the tentative seniority list – the writ petition was dismissed on the ground that petitioners were not in service on the date of integration of cadres and had no locus standi to challenge the same- held in appeal that cadres were merged w.e.f. 1.7.1995 but in view of pendency of litigation notification of mergers could be given effect on 9.3.1999 and 17.3.1999 – the date of merger was modified by Administrative Tribunal as 1.8.1995 – a working formula was evolved before the High Court, which was accepted – Rules do not prohibit the merger of the cadres – the petitioner were appointed subsequent to the issuance

of notification – retrospective seniority cannot be given to the employees from the date when they were not borne in the cadre- seniority needs to be counted against promotion/appointment from the date of issuance of order of substantive appointment – mere pendency of litigation will not assist the petitioner- merging of cadres is a matter of policy- writ petition dismissed.

(Para-10 to 28)

Cases referred:

P. Sudhakar Rao & Ors Vs U. Govinda Rao and Ors, (2013) 8 SCC 693
State of Uttaranchal and Another Vs Dinesh Kumar Sharma, (2007) 1 SCC 683
A.P. Manchanda Vs State of Haryana, 1994 Supp (2) SCC 44
State of Bihar Vs Akhouri Sachindra Nath & ors, 1991 Supp (1) SCC 334
National Agricultural Coop. Marketing Federation of India Vs Union of India, (2003) 5 SCC 23
Uttaranchal Forest Rangers' Assn (Direct Recruit) & Ors Vs State of U.P. & Ors, (2006) 10 SCC 346
Chairman, Railway Board Vs C.r. Rangadhamaiah, (1997) 6 SCC 623
S.P. Shivprasad Pipal Vs Union of India & Ors, (1998) 4 SCC 598

For the appellants : Mr. K.D. Shreedhar, Senior Advocate with Mr. Yudhbir Singh, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.
Mr. Dilip Sharma, Senior Advocate with Ms. Nishi Goel and Mr. Om Pal, Advocate, for respondents No. 11, 55, 69, 111, 115, 116 and 120.
Respondents No. 3 to 10, 12 to 54, 56 to 68, 70 to 110, 112 to 114, 117 to 119 and 121 to 157, ex parte.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Instant Letters Patent Appeal under clause 10 of the Letter Patents of Delhi High Court as applicable to the Himachal Pradesh High Court has been filed against judgment dated 23.6.2010 passed in CWP No. 1861 of 2009 by a learned Single Judge of this Court, with the following main relief:

> "It is, therefore, prayed that this appeal may kindly be accepted and the judgment dated 23.6.2010 passed in CWP No. 1861/2009 (sic 1861/2010) by Hon'ble Single Judge, whereby writ petition filed by the present appellants stand may kindly be set aside in the interest of law and justice."

2. Briefly stated the facts of the case, as emerge from the record are that the petitioners were appointed as Inspectors Grade-I in the year 1998, in accordance with Rules, Annexure P-1 of the writ petition. Mode of recruitment under Rule 10 of the relevant Rules, notified in 1986, is as under:

10% by direct recruitment,

50% by promotion from Sub Inspectors/ Sub Inspectors (Audit),

30% by promotion from amongst Clerks, and,

10% by promotion from amongst Gram Sewaks.

3. On 1.6.1996, a notification (Annexure P-2 of writ petition) was issued, merging 147 posts of Inspectors Grade-II in the Cooperation Department in the cadre of Inspector Grade-I (General and Audit), i.e. the cadre to which the appellants were appointed by direct recruitment in 1998. Consequently, respondents No. 3 to 156, who were working as Inspectors Grade-II, on

the date of issuance of that notification in the Cooperative Department, became Inspectors Grade-I. Aforesaid respondents were initially appointed as Sub Inspectors but later redesignated as Inspectors Grade-II. Annexure P-2 of the writ petition besides merging two cadres also provided for regulating the seniority of the incumbents of the posts of two cadres in the integrated cadre. It was provided that the persons already working as Inspectors Grade-I would rank senior, en bloc, to the persons, who became Inspector Grade-I, by virtue of the order of merger. Appellants, who were appointed in 1998 and 1999 challenged the tentative seniority list of Inspectors Grade-I, (Annexure P-5 of the writ petition), by filing CWP No. 1861 of 2009, seeking following main relief(s):-

> "(b) That the Hon'ble court may kindly be pleased to issue a writ of certiorari or any other appropriate writ, direction or order in favour of the petitioners and against the respondents to the effect that the provisional tentative seniority list, i.e. from Sr. No. 58 to 211, contained in **Annexure P-5**, be quashed and set aside as there is an error apparent on the face of record in drawing up the seniority list.
>
> (c) That the Hon'ble court may be pleased to issue a writ or mandamus or writ in the nature of mandamus to the effect that the respondents may kindly be directed to draw up seniority list as per the Recruitment and Promotion Rules and the Notifications, which have been issued by the respondents from time to time."

4. Respondents No.1 and 2 filed reply to the writ petition, which was also adopted by the private respondents. In the reply, locus standi of the appellants to assail Notification Annexure P-2, which was admittedly issued prior the date of their appointment to the cadre in question was questioned.

5. The writ Court, after hearing the arguments of both the sides, dismissed the petition mainly on the ground that the persons (appellants), who were not even in service on the date of integration of different cadres, can not seek seniority above the persons, who are/were already borne on the integrated cadre and as such they have no locus standi to assail the order of integration.

6. Now, feeling aggrieved by aforesaid judgment rendered by the writ Court, appellants-petitioners have approached this Court, by way of present appeal, seeking reliefs as have been reproduced above.

7. Crux of the arguments having been made by Mr. K.D. Shreedhar, learned Senior Advocate duly assisted by Mr. Yudhbir Singh, Advocate, is that notification, vide which two cadres were ordered to be merged deserves to be quashed and set aside being contrary to the Rules framed by the respondents. As per Mr. Shreedhar, there could not be any merger of cadres merely by issuance of a notification, without there being amendment in the Rules. Apart from above, Mr. Shreedhar also contended that learned Single Judge failed to appreciate that the mergerists could not claim status of promotees and as such in no situation, they could be placed above direct recruits in the seniority list, especially when it stands duly proved on record that the petitioners being direct recruits had joined as Inspector Grade-I in 1998/1999, whereas respondents, though became Inspector Grade-I pursuant to notification issued on 1.6.1996, for all intents and purposes, they assumed charge of the post of Inspector Grade-I in the year 1998/1999 i.e. after the appointment of the petitioners in the cadre of Inspector Grade-I. While inviting attention to the notification of merger issued by the respondents, Mr. Shreedhar further contended that the judgment passed by learned Single Judge is also vitiated because it failed to take note of the stipulation contained in the notification, wherein it was specifically provided that after merger, Inspector Grade-2 shall rank junior to the Inspector Grade-I i.e. General and Audit and after merger, they shall not claim seniority over and above the already appointed Inspectors Grade-I.

8. Mr. Shrawan Dogra, learned Advocate General, duly assisted by Mr. Anup Rattan, Additional Advocate General, supported the judgment passed by the learned Single Judge. As per Mr. Dogra, there is no illegality or infirmity in the judgment passed by the learned Single Judge and the same is based on correct appreciation of Rules as well as notification issued in this regard by the appropriate authority. While refuting arguments having been advanced by Mr. Shreedhar, Mr. Dogra while inviting attention to the Notification of merger issued by the respondents, stated that two cadres of Inspector Grade-I and Inspector Grade-2 were ordered to be merged with effect from 1.7.1995. Mr. Dogra, further contended that the State Government on 1.6.1996 vide notification No. Coop.A(1)-1/95 merged entire cadre of Inspector Grade-2 with existing cadre of Inspector Grade-I with effect from 1.7.1995 and thereby enhanced total sanctioned strength of the cadre of Inspector Grade-I from 388 to 535. Mr. Dogra also invited the attention of this Court to the subsequent orders passed by learned Single Judge in another set of cases i.e. CWP(T) No. 2162/2008, CWP(T) No. 3189/2008 and CWP(T) No. 4244/2008, filed by the Himachal Pradesh Cooperative Department Inspector Grade-2 Union, Roshan Lal and others and Association of Inspector Grade-2, Cooperative Societies, whereby placing reliance upon the supplementary affidavit of the Joint Secretary (Cooperation) dated 7.7.1997, petitions were disposed of on the basis of 'working formula', suggested as per supplementary affidavit. Mr. Dogra, further contended that in terms of aforesaid judgment passed by the learned Single Judge, aforesaid notification of merger dated 1.6.1996, merging Inspector Grade-2 with existing cadre of Inspector Grade-I, was made effective with effect from 1.8.1995 instead of 1.7.1995. While refuting the contentions raised on behalf of the learned counsel for the petitioners that as per Notification of merger dated 1.6.1996, Inspectors Grade-2 were to rank junior to the Inspector Grade-I, General and Audit, after merger, Mr. Dogra, strenuously argued that no benefit can be drawn by the appellants from para (iv) in the aforesaid notification, because same relates to the Inspector Grade-I, who were already working in the Department as such, at the time of issuance of notification i.e. 1.6.1996, appellants who were admittedly appointed as direct recruits in 1998-99 can not claim any benefit on the basis of aforesaid stipulation. While concluding his arguments, Mr. Dogra forcefully contended that after notification of merger, all the consequential benefits of pay scale and arrears of pay were given to both the employees, direct and merged with effect from 1.6.1996, as a result of which promotees and merged inspectors acquired status of Inspector Grade-I from that date and as such there is no illegality in the judgment passed by the learned Single Judge and same deserves to be upheld.

9. We have heard the learned counsel for the parties and also gone through the records.

10. Before proceeding to decide the present appeal, it would be appropriate to refer to order dated 31.8.2010 passed by this Court in the present appeal, which is reproduced below:

> "No notice needs to be issued to private respondents at this stage. There will be direction to second respondent to file an affidavit as to whether any person, who has been promoted to the cadre of Inspector Grade-I after the petitioners joining duty, have been given a place above the petitioners in the seniority list and if so what is the reason thereof. The affidavit, as above, shall be filed by the second respondent within a period of six weeks. There will also be a direction to respondents No.1 and 2 that in case any promotion is made during the pendency of LPA, it shall be made clear in the proceedings that promotion is subject to the outcome of the LPA. Post on 25.10.2010."

11. Pursuant to aforesaid direction issued by this Court, Additional Registrar Cooperative Societies, Himachal Pradesh filed affidavit stating therein as under:

> "2. That in compliance of the directions of the Hon'ble High Court referred in para 1 supra it is submitted that the Department had circulated the final seniority list of Inspector Cooperative Societies on 03-04-1998 showing the seniority position of Inspectors appointed/ promoted prior to 31-12-1995. It is further submitted that after the petitioners joining duty as Inspector Grade-I in

the Department, no seniority list of the cadre of Inspector Grade-I could be finalized till date due to the complications that arose on account of merger of the cadre of Inspector Grade-2 with the cadre of Inspector Grade-I on 01-06-1996 and the promotion orders of Inspector Grade-I issued on same date. The detail submissions with regard to merger and promotion order dated 01-06-1996 have been made in succeeding paras. However, this department has prepared a tentative/provisional seniority list of Inspector Cooperative Societies showing the seniority position as on 31-12-2007 and circulated vide this office letter No. 4-64/2003 Coop.(Estt.) dated 22-2-2008. In this tentative/provisional seniority list, no incumbent who has been promoted to the cadre of Inspector Grade-I after the petitioners joining duty has been given place over and above the petitioners.

3. That it is worth stating here that on 01.06.1996, 38 Inspector Grade-2 and 23 Junior Assistants/Senior Clerks were promoted as Inspector Grade-I vide this office order No. 4-91/87-Coop.(Estt.) dated 01.06.96. The State Government on the same date i.e. 01.06.96 vide Notification No. Coop.A(1)-1/95 dated 01.06.96 merged entire cadre of Inspector Grade-2 with existing cadre of Inspector Grade-I, w.e.f. 01.07.95 and thereby enhanced the total sanctioned posts of Inspectors (General/Audit) from 388 to 535.
4. That due to the retrospective effect of the merger notification dated 01.06.96 some administrative complications arose and O.A. No. 879/96 was filed in the Hon'ble Administrative Tribunal by the promoted Inspectors from amongst the cadre of Clerks against the Notification of merger with effect from 01.07.95. The erstwhile Tribunal clubbed above-mentioned O.A. with O.A. No. 1369/93 and O.A. No. 533/97 which were filed by the Association of the Inspector Grade-II for merger of cadre of Inspector Grade-II with Inspector Grade-I on Punjab pattern. Subsequently, the Government of Himachal Pradesh vide Notification No. Coop.A(1)-1/96 dated 09.03.99 modified the date of merger w.e.f. 01.06.96 instead of 01.07.95 with the condition that this decision as well as inter-se-seniority of all the parties to this dispute shall be subject to the decision in O.As No. 1369/93, 879/96 and 533/97 and promotions orders issued on 01.06.96 were also implemented w.e.f. 01.06.96 vide this office order No. 4-109/92-Coop.(Estt.) dated 17th March, 1999. As such the merger orders as well as the promotion orders issued on 01.06.96 could not be implemented till 9th March, 1999 and 17th March, 1999 respectively.
5. That after the modification of merger date i.e 01-6-1996 instead of 01-07-1995 all the consequential benefits of pay scale of Inspector and arrears of pay were given to both the set of employees i.e. the promoted and merged Inspectors w.e.f. 01-06-1996. Accordingly, the promotees and merged Inspectors have the status of Inspector Grade-I w.e.f. 01-06-1996. Therefore, 23 Clerks promoted on 01.06.96 and 147 Inspector Grade-II merged with the cadre of Inspector Grade-I on 01.06.96 have been placed above the petitioners in the tentative/provisional seniority list circulated on 22-02-2008.
6. That all the O.As No. 1369/93, 879/96 and 533/97 referred above were transferred to the Hon'ble High Court after scrapping of the erstwhile Tribunal and listed before the Hon'ble High Court as CWP(T) No. 2162/08 in O.A. No. 1369/93, CWP(T) No. 4244/2008 in O.A. No. 533/1997 and CWP(T) No. 3189/2008 in O.A. No. 879/96. The above referred CWPs have been disposed off by the Hon'ble High Court on 07.08.2009 by a common judgment. This Hon'ble High court in its judgment dated 07-08-2009 has relied upon the supplementary affidavit of Joint Secretary (Cooperation) to the Government of Himachal Pradesh filed in O.A. No. 879/96 on 07-07-1997. For the sake of brevity, operative portion of the affidavit is reproduced as under: -

"6(i) The Government notification No. Coo.A(1)-1/95, dated 01.06.96 merging the Inspector Grade-II with that of Inspector Grade-I shall be effective w.e.f. 01.08.95 instead of 01.07.95. In this way, the promotion orders issued on 24.07.95 whereby the services of 12 Inspectors were regularized shall remain intact.

(ii) The present applicants in O.A. No. 879/96 as well as other similarly situated persons promoted on 01.06.96 will not reverted and they will be entitled for benefits available under F.R. 22-C while fixing their pay.

(iii) That the inter-se- seniority of the applicants (Clerks) promoted on 01.06.96 and the merged Inspector cadre will be based on the length of service of the concerned Clerks and Inspectors. This will be done in relaxation of the exiting provision of the R&P Rules for the post of Inspector Grade-I.

(iv) That the State Government contemplates framing of new R&P Rules for the category of Inspector Grade-I wherein we are proposing to increase the promotion to a reasonable level of Clerks against 30% quota as available at present."

Consequently, the Hon'ble High Court has directed the respondent State to do the needful as per the supplementary affidavit in O.A. No. 879/1996 converted to CWP(T) 3189/2008. Copy of the judgment passed by the Hon'ble Court on 7.08.2009 is enclosed herewith as Annexure A-I.

7. That Sh. Roshan Lal and others have filed an LPA No. 10/2010 before this Hon'ble Court against the judgement dated 7.08-2009, which is pending adjudication."

12. Perusal of aforesaid affidavit having been filed on behalf of the respondent-State suggests that vide notification dated 1.6.1996, 38 Inspector Grade-II and 23 Junior Clerks/Senior Clerks were promoted as Inspector Grade-I. State Government on the same date merged entire cadre of Inspector Grade-II with that of existing cadre of Inspector Grade-I with effect from 1.7.1995. OA No. 1369/93 and OA No. 533/97 were filed for merger of cadre of Inspector Grade-II with Inspector Grade-I on Punjab Pattern and State Government issued notification merging cadre of Inspector Grade-II with Inspector Grade-I, with effect from 1.8.1995, on 1.6.1996. Another set of employees being aggrieved by issuance of notification dated 1.6.1996, also approached Himachal Pradesh Administrative Tribunal by filing OA No. 879/96. Aforesaid decision of the Government of merging cadre of Inspector Grade-II with Inspector Grade-I in the State of Himachal Pradesh, was stayed by the Himachal Pradesh Administrative Tribunal in OA No. 879/1996 at the stage of admission, as a result of which, merger order as well as promotion order issued on 1.6.1996 could not be implemented till 9.3.1999 and 17.3.1999, respectively. It also emerges from the record that the Himachal Pradesh Administrative Tribunal clubbed aforesaid Original Applications i.e. OA No. 879/1996 and 1369/1993. During the pendency of the aforesaid Original Applications, which later came to be heard by the learned Single Judge of this Court, after abolition of Himachal Pradesh Administrative Tribunal, Government of Himachal Pradesh, vide notification No. Coop.A(1)-1/95 dated 9.3.1999 modified the date of merger from 1.7.1995 to 1.8.1995, subject to the condition that this decision as well as inter-se seniority of all the parties to the petition shall be subject to decision of OA No. 1369/93, OA No. 533/1997 and OA No. 879/1996 and promotion orders issued on 1.6.1996 were also implemented from 1.6.1996 vide office order dated 17.3.1999.

13. At this stage, it may be noticed that later on aforesaid Original Applications (CWP(T)'s) came to be decided by the learned Single Judge of this Court on 7.8.2009, wherein learned Single Judge while placing reliance upon supplementary affidavit of Joint Secretary (Cooperation) filed on 7.7.1997, disposed of the petitions by recording the statement of the counsel for the parties, on the basis of working formula suggested in the supplementary affidavit.

It would be apt to reproduce herein the operative portion of judgment passed by the learned Single Judge:

> "The judgment was reserved by this Court on 10.7.2009. The learned counsel for the parties have failed to point out the supplementary affidavit dated 7.7.1997 in OA No. 879/1996 to the Court. It is in these circumstances the matters have been listed for speaking to the minutes to permit the learned counsel for the parties to assist the Court after the filing of this affidavit. The Court has ascertained from the learned counsel appearing on behalf of the parties whether these petitions can be disposed of on the basis of the working formula suggested as per the supplementary affidavit. The learned counsel appearing on behalf of the parties in all the three petitions have fairly submitted that the formula evolved by Mr. V.C. Katoch by way of his affidavit is acceptable to the parties.
>
> The learned counsel appearing on behalf of the petitioner in CWP (T) 2162/2008 and CWP (T) No. 4244/2008 have submitted that their clients are stagnating on the same post for more than two decades. It is settled law by now that there should be two to three promotional avenues available to every category of employees to remove the stagnation and to improve the efficiency in public service.
>
> Accordingly, the interest of justice will suffice by directing the respondent-State to consider this plea of the petitioners in accordance with law laid down by their Lordships in A. Satyanaryana and others versus S. Purushotham and others, (2008) 5 SCC 416 within a reasonable period.
>
> Consequently, the respondent-State is directed to do the needful as per the supplementary affidavit filed by Mr. V.C. Katoch in O.A. No. 879/1996 converted to CWP (T) No. 3189/2008.
>
> In view of the observations made hereinabove, the petitions are disposed of. No costs."

14. The working formula as mentioned in the aforesaid judgment is as under :

> "6(i) The Government notification No. Coo.A(1)-1/95, dated 01.06.96 merging the Inspector Grade-II with that of Inspector Grade-I shall be effective w.e.f. 01.08.95 instead of 01.07.95. In this way, the promotion orders issued on 24.07.95 whereby services of 12 Inspectors were regularized shall remain intact.
>
> (ii) The present applicants in O.A. No. 879/96 as well as other similarly situated persons promoted on 01.06.96 will not reverted and they will be entitled for benefits available under F.R. 22-C while fixing their pay.
>
> (iii) That the inter-se- seniority of the applicants (Clerks) promoted on 01.06.96 and the merged Inspector cadre will be based on the length of service of the concerned Clerks and Inspectors. This will be done in relaxation of the exiting provision of the R&P Rules for the post of Inspector Grade-I.
>
> (iv) That State Government contemplates framing of new R&P Rules for the category of Inspector Grade-I wherein we are proposing to increase the promotion to a reasonable level of Clerks against 30% quota as available at present."

15. This Court after carefully examining the affidavit filed by the Additional Registrar Cooperative Societies as well as judgment delivered by the learned Single Judge dated 7.8.2009, is of the view that cadre of Inspector Grade-II existing as on 1.6.1996 was actually merged with cadre of Inspector Grade-I with effect from 1.7.1995 but in view of pendency of litigation before the Himachal Pradesh Administrative Tribunal, notification of merger could be given effect on 9.3.1999 and 17.3.1999, respectively.

16. True it is that the learned Himachal Pradesh Administrative Tribunal while taking cognizance of the averments contained in OA No. 789/1996 (CWP(T) No. 3189/2008) filed by a set of employees aggrieved by notification dated 1.6.1996, stayed the operation of notification at the stage of admission but as has been discussed above the Original Application having been preferred by the affected parties including those employees, who were aggrieved by issuance of aforesaid notification, were later on disposed of by the learned Single Judge of this Court on 7.8.2009, on the basis of working formula suggested in the supplementary affidavit of Joint Secretary (Cooperation) on 7.7.1997, reproduced herein above. As per working formula, all the parties including those who were aggrieved by issuance of notification of merger, agreed that notification dated 1.6.1996 merging cadre of Inspector Grade-II with that of Inspector Grade-I shall be effective from 1.8.1995 instead of 1.7.1995, as a result of which, promotion orders dated 1.7.1995, whereby services of 12 Inspectors were regularized, were to remain intact.

17. Crux of the working formula suggests that all the parties, who had filed Original Application before the Court, agreed to abide by notification of merger, merging cadre of Inspector Grade-II with Inspector Grade-I with effect from 1.8.1995. Since, in the final adjudication of the Original Applications, wherein Himachal Pradesh Administrative Tribunal had stayed operation of notification of merger dated 1.6.1996, was upheld with minor modifications of date of application i.e. 1.8.1995 instead of 1.7.1995, it can be safely concluded that respondents, who were Inspector Grade-II had merged with the cadre of Inspector Grade-I with effect from 1.7.1995 in terms of notification of merger for all intents and purposes. Perusal of affidavit having been filed by Additional Registrar Cooperative Societies, clearly suggests that immediately after issuance of notification dated 1.6.1996, entire cadre of Inspector Grade-II had merged with that of existing cadre of Inspector Grade-I with effect from 1.7.1995, which was later on ordered to be modified with effect from 1.8.1995, in terms of judgment dated 7.8.2009 passed by the learned Single Judge in aforesaid Original Applications/CWP(T)'s. It may also be noticed at this stage that judgment dated 7.8.2009 passed by the learned Single Judge in CWP(T)'s No. 2162, 3189 and 4244 of 2008 was further upheld by this Court in LPA No. 10/2010, vide judgment dated 6.9.2016. Further perusal of appointment letters issued to the appellants at the time of their joining as Inspector Grade-I, which were made available to this Court, during the hearing by the learned Advocate General, clearly suggests that their appointment was subject to final decision of OA No. 1369/1993 filed by the State Cooperative Inspectors Grade-II Association. Appointment letter further suggests that in case offer of appointment, wherein aforesaid stipulation with regard to final decision of OA No. 1369/1993 was incorporated, was acceptable to the appointees, they were directed to report for duty to the Assistant Registrar Cooperative Societies Solan, on or before 21.9.1998, meaning thereby that present appellants were fully conscious about the pendency of OA No. 1369/1993, wherein issue of notification of merger was involved. Since appellants were fully aware that in terms of notification of merger dated 1.6.1996, Inspector Grade-II would be merged into cadre of Inspector Grade-I and they would be placed en bloc below Inspector Grade-I already working in the Department, on the basis of notification, in seniority, they can not be allowed to rake up the issue at this belated stage. But despite above, no steps were ever taken by the appellants to lay challenge to the notification of merger and as such there is no force in the contentions put forth by Mr. Shreedhar that respondents who were Inspector Grade-II, could not be placed above the appellant in seniority by virtue of notification of merger.

18. Perusal of writ petition preferred by the appellants nowhere suggests that the appellants laid any challenge to notification of merger which was effective from 1.6.1996 and as such they can not be allowed at this stage to state that respondents could not be placed over them in the seniority on the basis of notification of merger issued in 1996 i.e. prior to their direct recruitment. This Court, after perusing documents available on record has no hesitation to conclude that for all intents and purposes, respondents were merged with the existing cadre of Inspector Grade-I with effect from 1.7.1995 and during the pendency of the Original Applications having been filed by affected parties before Himachal Pradesh Administrative Tribunal, merger orders as well as promotion orders issued on 1.6.1996 were implemented on 9.3.1999 and

17.3.1999, respectively. Moreover, appointment of the appellants was subject to outcome of OA No. 1369/1993, wherein notification of merger dated 1.6.1996 was upheld vide judgment dated 7.8.2009, on the basis of working formula suggested by the Government, which was acceptable to all the parties.

19. There is no force in the contention of the appellants that merging of cadres could not take place by issuance of notification without there being any amendment in the rules, because perusal of Rules, Annexure P-1, nowhere prohibits merger of cadres. Apart from above, it is the prerogative of the State Government to merge two or more cadres into one cadre or to disintegrate cadres into different cadres or to abolish a cadre exercising powers under Article 162 of the Constitution of India. In the present case, though this Court is of the view that notification of merger was issued prior to the appointment of the present appellants as Inspector Grade-I and appellants had no occasion to lay challenge to aforesaid notification admittedly issued in 1996 i.e. prior to their appointment but as emerges from the record, matter with regard to notification of merger remained pending in the Himachal Pradesh Administrative Tribunal and thereafter in this Court, as noticed above, till August, 2009 yet, it is not understood that if appellants were aggrieved with the issuance of notification of merger, what prevented them to lay challenge to the same either by becoming party in the pending proceedings or by way of a substantive petition before the competent court of law, and as such this Court sees no force in the contention put forth on behalf of the appellants that there could be no merger of cadres.

20. It is amply clear from the facts and circumstances above that on the date of appointment of the appellants, as direct recruits (Inspector Grade-I), respondents were already borne on the integrated cadre of Inspector Grade-I in terms of notification of merger dated 1.6.1996 and as such this Court sees no illegality or infirmity in the judgment passed by the learned Single Judge which appears to be based on correct appreciation of facts as well as law and as such same deserves to be upheld.

21. Now, this Court would be dealing with case law referred by the learned counsel for the appellants, in support of his arguments. Learned counsel for the petitioner has relied upon the following case law in support of his contentions:

1. P. Sudhakar Rao & Ors Vs U. Govinda Rao and Ors reported in (2013) 8 SCC 693
2. State of Uttaranchal and Another Vs Dinesh Kumar Sharma reported in (2007) 1 SCC 683
3. A.P. Manchanda Vs State of Haryana reported in 1994 Supp (2) SCC 44
4. State of Bihar Vs Akhouri Sachindra Nath & ors reported in 1991 Supp (1) SCC 334
5. National Agricultural Coop. Marketing Federation of India Vs Union of India reported in (2003) 5 SCC 23
6. Uttaranchal Forest Rangers' Assn (Direct Recruit) & Ors Vs State of U.P. & Ors reported in (2006) 10 SCC 346
7. Chairman, Railway Board Vs C.r. Rangadhamaiah reported in (1997) 6 SCC 623
8. S.P. Shivprasad Pipal Vs Union of India & Ors reported in (1998) 4 SCC 598

22. This Court carefully perused aforesaid law having been cited by the learned Senior counsel for the appellants, perusal whereof clearly suggest that retrospective seniority can not be given to the employees from a date, when they were not borne on the cadre. Similarly, aforesaid judgments suggests that seniority needs to be counted against promotion/appointment in the cadre from the date of issuance of order of substantive appointment. Judgment passed by Apex Court in **National Agricultural Cooperative Marketing Federation of India vs. Union of India** (supra) further lays down that legislative power either to introduce enactment for the first

time or to amend the enacted law with retrospective effect is not only subject to the question of competence but is also subject to several judicially recognized limitations.

23. There can be no quarrel with the aforesaid law having been laid down by the Apex Court in aforesaid judgments that seniority can be given only from the date of substantive appointment. There can be no automatic promotion or appointment to a post on the recommendations of Public Service Commission unless the Government sanctions such promotion and appointment. Similarly, there can be no dispute that promotees not borne on the cadre at the time when direct recruits came to be appointed, can not be given seniority in service over direct appointees. This Court sees no dispute that retrospectivity while giving effect to any notification must not adversely trench upon the entitlement of seniority of others. Retrospective seniority can not be given to employee from the date when he was not even borne in the cadre.

24. This Court, with due respect to aforesaid judgments having been passed by Apex Court, is of the view that the same are not applicable in the present case, for the reasons detailed herein above. In the present case, all the respondents were Inspector Grade-II prior to issuance of notification dated 1.6.1996 and subsequent to issuance of notification of merger, they were merged with the cadre of Inspector Grade-I from 1.7.1995 for all intents and purposes and as such, by no stretch of imagination, it can be said that at the time of appointment of the appellants as direct recruits, against the posts of Inspector Grade-I, respondents were not even borne on the cadre of Inspector Grade-I. Rather, in the present case, after modification of notification dated 1.6.1996, all consequential benefits of pay scale and arrears of pay were given to the respondents with effect from 1.6.1996.

25. True it is that aforesaid notification of merger could not be implemented till 9.3.1999 and 17.3.1999 due to pendency of the Original Applications having been filed by affected parties before Himachal Pradesh Administrative Tribunal and thereafter before this Court, but the fact remains that in the aforesaid proceedings, notification of merger was upheld, as a result of which all the respondents stood merged with the cadre of Inspector Grade-I with effect from issuance of notification dated 1.6.1996.

26. As far as issue of retrospectivity is concerned, notification of merger dated 1.6.1996 was initially made applicable with effect from 1.7.1995, but later on respondent-State with a view to balance equities between the parties, took a conscious decision to make notification of merger effective from 1.8.1995 instead of 1.7.1995, that too with a view to protect promotion of 12 Inspectors ordered on 24.7.1995. Aforesaid decision was also taken by the respondent-State to avoid reversion of similarly situated persons, who were promoted on 1.6.1996, to ensure that they get benefit of FR-22 while fixing their pay. In the instant case, there is no question of retrospective operation of notification of merger but same was only made applicable from 1.8.1995 for the reasons stated above to protect interests of a few employees, who could be adversely affected by the issuance of notification of merger.

27. The Apex Court in **S.P. Shivprasad Pipal vs. Union of India and others** reported in (1998) 4 SCC 598, held that decision to merge cadres is essentially a matter of policy. The power to regulate recruitment and conditions of service is wide and includes the power to constitute a new cadre by merging the existing cadres. The Apex Court has held as under:

> "5. However, when different cadres are merged certain principles have to be borne in mind. These principles were enunciated in the case of State of Maharashtra and Anr. V. Chandrakant Anant Kulkarni & Ors. (1982 1 SCR 665 at page 678) while considering the question of integration of government servants allotted to the services of the new States when the different States of India were reorganised. This Court cited with approval the principles which had been formulated for effecting integration of services of different States. These principles are: In the matter of equation of posts, (1) where there were regularly constituted similar cadres in the different integrating units the cadres will ordinarily be integrated on that basis but (2) where there were no such similar cadres, the

following factors will be taken into consideration in determining the equation of posts:-

(a) Nature and duties of a post;

(b) Powers exercised by the officers holding a post the extent of territorial or other charge held or responsibilities discharged;

(c) The minimum qualifications, if any, prescribed for recruitment to the post and;

(d) the salary of the post.

This court further observed that it is not open to the court to consider whether the equation of posts made by the central Government is right or wrong. This was a matter exclusively within the province of the Central Government. Perhaps the only question the Court can enquire into is whether the four principles cited above had been properly taken into account. This is the narrow and limited field within which the supervisory jurisdiction of the Court can operate.

15. A decision to merge such cadres is essentially a matter of policy. Since the three cadres carried the same pay scale at the relevant time, merging of the three cadres cannot be said to have caused any prejudice to the members of any of the cadres. The total number of posts were also increased proportionately when the merger took place so that the percentage of posts available on promotion was not in any manner adversely affected by the merger of the cadres."

28. Viewed thus, the impugned judgment is upheld, accordingly, there is no merit in the present appeal, as such, same is dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J

Smt. Santosh w/o Sh. Tara Dutt & Another .....Petitioners/Plaintiffs

Versus

Sh. Sanjeev Kumar s/o Sh. Bal Krishan & Others

......Non-petitioners/Defendants

CMPMO No.426/2015
Order reserved on : 24.11.2016
Date of order: 8.12.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a suit for declaration and injunction- an application for interim relief was also filed, which was allowed and parties were directed to maintain status quo qua the nature, user, possession, construction and alienation – an appeal was filed, which was allowed and the application was dismissed – held, that the finding regarding the execution of the Will cannot be given while deciding the application for interim relief – both the parties are asserting their title and possession- hence, the status quo order is necessary to protect the rights of the parties – revision allowed, order of the Appellate Court set aside and the order of the Trial Court restored.(Para-9 to 16)

Cases referred:

Nawalshankar Ishwarlal Dave and another Vs. State of Gujarat, AIR 1994 Apex Court 1496
Jattu Ram Vs. Hakam Singh and others, SLJ 94(1) SC 68
Guru Amarjit Singh Vs. Rattan Chand, AIR 1994 Apex Court 227
H. Lakshmaiah Reddy Vs. L. Venkatesh Reddy, AIR 2015 SCW Apex Court 3482
Transport Corporation of India Ltd. Vs. Ganesh Polytex Ltd., AIR 2015 Apex Court 826

Biswas & Others Vs. Kalyan Kumar Kisku & Others, AIR 1994 Apex Court 1837 Satyabrata Maharwal Khewaji Trust Vs. Baldev Dass, AIR 2005 Apex Court 104

For Petitioner/Plaintiff : Ms. Tim Saran, Advocate
For Non-petitioners/Defendants : Mr. Shanti Swaroop, Advocate

The following order of the Court was delivered:

P. S. Rana, J.

Present petition is filed under Article 227 of Constitution of India against order dated 01.04.2015 passed by learned District Judge Solan Distt. Solan (H.P.) in Civil Misc. Appeal No.14-S/14 of 2014 wherein learned District Judge Solan set-aside order dated 01.07.2014 passed by learned Civil Judge (Jr. Division) Solan announced in CMA No.10/6 of 2012 filed under order XXXIX Rules 1 & 2 CPC in C.S. No.13/1/2012 title Smt. Santosh and others Vs. Sh. Sanjeev Kumar.

Brief facts of case:

2. Smt. Santosh and others plaintiffs filed civil suit for declaration to the effect that plaintiffs are co-owners in possession of suit land and house situated over suit land and co-defendant No.1 has no right, title and interest in and over suit land in any manner whatsoever and revenue entries showing co-defendant No.1 as absolute owner in possession of suit land are wrong, illegal and null and void. It is further pleaded that mutation No.746 dated 11.04.2002 sanctioned in favour of Smt. Kamlesh wife of co-defendant No.1 behind the back of plaintiffs and on the basis of oral Will is wrong, illegal and null and void and is not binding upon plaintiffs. It is further pleaded that mutation No.939 dated 29.09.2007 sanctioned in favour of co-defendant No.1 after demise of Smt. Kamlesh on the basis of Will dated 22.02.2007 is also wrong, illegal and null and void. It is further pleaded that revenue entries showing co-defendant No.1 as absolute owner in possession of suit land are wrong, illegal and inoperative qua right, title and interest of plaintiffs. Additional relief of permanent prohibitory injunction also sought restraining co-defendant No.1 from causing any interference in the ownership and peaceful possession of plaintiffs and from dispossessing the plaintiffs from suit land and from selling and alienating suit land and also from claiming any compensation from suit land either himself or through his agents servants or family members.

3. Per contra written statement filed on behalf of defendants pleaded therein that suit of plaintiffs is time barred as mutation No.746 was sanctioned on dated 11.04.2002 in favour of deceased Kamlesh. It is further pleaded that in mutation proceedings both plaintiffs have given their statements. It is further pleaded that present civil suit after ten years is not maintainable. It is further pleaded that plaintiffs are estopped to file present suit against defendants due to their act, conduct and acquiescence. It is further pleaded that plaintiffs did not approach civil Court with clean hands. It is further pleaded that plaintiffs have no cause of action against defendants. It is pleaded that suit of plaintiffs is not properly valued for the purpose of Court fee and jurisdiction. It is further pleaded that plaintiffs are guilty of suppressing the material facts from the Court. It is further pleaded that plaintiffs have no locus standi to file present suit. It is further pleaded that co-defendant No.1 is absolute owner in possession of suit land on the basis of Will dated 22.02.2007 executed by deceased Kamlesh in favour of co-defendant No.1. It is further pleaded that house over suit land is constructed by co-defendant No.1 and his deceased wife by obtaining loan from State Bank of Patiala Solan Branch. It is further pleaded that plaintiffs are not co-owners of suit property. It is further pleaded that on the basis of Will mutation No.939 dated 29.09.2007 was legally sanctioned in favour of co-defendant No.1. It is further pleaded that plaintiffs have knowledge about all the mutations and Wills from the beginning. It is further pleaded that plaintiffs have filed present suit without any cause of action. Prayer for dismissal of suit sought. Plaintiff filed replication to written statement and re-asserted the allegations mentioned in plaint.

4. Learned Trial Court framed following issues on dated 23.07.2014:

1) Whether plaintiffs are entitled to decree for declaration to the effect that plaintiffs are owners in possession of suit land and co-defendant No.1 has no right, title and interest over suit land? ....OPP.

2) Whether revenue entries of suit land are illegal and null and void? ....OPP.

3) Whether mutation No.746 dated 11.04.2002 sanctioned in favour of Smt. Kamlesh wife of co-defendant No.1 is illegal, null and void and not binding upon plaintiffs? ....OPP.

4) Whether mutation No.939 dated 29.09.2007 subsequently sanctioned in favour of co-defendant No.1 on the basis of Will dated 22.02.2007 is illegal, null and void? ....OPP.

5) Whether plaintiffs are entitled to decree for consequential relief of permanent prohibitory injunction as prayed for? ...OPP

6) Whether suit is time barred? ...OPD

7) Whether plaintiffs are estopped to file present suit due to their own act and conduct? ....OPD

8) Whether plaintiffs have no cause of action to file the present suit? ..OPD

9) Whether plaintiffs have not properly valued suit for the purpose of court fee and jurisdiction? ...OPD

10) Relief.

Learned Trial Court listed civil suit for plaintiffs witnesses for 14.03.2016.

5. During pendency of civil suit plaintiffs have filed application under order XXXIX Rules 1 & 2 CPC and sought interim relief of ad interim injunction restraining co-defendant No.1 from causing any interference in the ownership and peaceful possession of plaintiffs and sought ad interim injunction restraining co-defendant No.1 from selling and alienating suit land and claiming any compensation qua suit land till disposal of civil suit. Application under order XXXIX Rules 1 & 2 read with section 151 CPC was contested before learned Trial Court by co-defendant No.1. Learned Trial Court allowed the application filed under order XXXIX Rules 1 & 2 CPC by plaintiffs and directed parties to maintain status quo qua nature, user, possession, construction and alienation of suit land till disposal of main suit.

6. Feeling aggrieved against the order passed by learned Trial Courtco-defendant No.1 and proforma defendants No.2 & 3 filed Civil Misc. appeal No.14-S/14 of 2014 before learned District Judge Solan Distt. Solan (H.P.). Learned First Appellate Court allowed the appeal and set-aside the order of learned Trial Court dated 01.07.2014. Learned District Judge Solan dismissed the application filed under order XXXIX Rules 1 & 2 CPC by plaintiffs. Feeling aggrieved against the order of learned District Judge dated 01.04.2015 plaintiffs filed present petition under Article 227 of Constitution of India.

7. Court heard learned Advocate appearing on behalf of petitioners and non-petitioners and Court also perused the entire records carefully.

8. Following points arises for determination:

1) Whether petition filed under Article 227 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of petition?

2) Relief.

Findings upon point No.1 with reasons:

9. Submission of learned Advocate appearing on behalf of petitioners that petitioners namely Santosh and Sharda Devi are daughters of deceased Rattan Dass and Sh. Rattan Dass did not execute any oral Will in favour of Smt. Kamlesh and on this ground petition be allowed is decided accordingly. Judicial findings whether deceased Rattan Dass has executed

any oral Will in favour of Smt. Kamlesh or not cannot be given at this stage of case. Judicial findings will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

10. Submission of learned Advocate appearing on behalf of petitioners that even Smt. Kamlesh did not execute any Will on dated 22.02.2007 in favour of co-defendant No.1 and on this ground petition be allowed is decided accordingly. Judicial findings whether Smt. Kamlesh has executed any Will in favour of co-defendant No.1 or not cannot be given at this stage of case. Judicial findings will be given by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case.

11. Submission of learned Advocate appearing on behalf of petitioners that dispute inter se parties in civil suit is about legality of oral Will alleged to be executed by Sh. Rattan Dass in favour of deceased Kamlesh and further dispute inter se parties is about legality of Will dated 22.02.2007 executed by deceased Kamlesh in favour of co-defendant No.1 and both facts will be adjudicated by learned Trial Court during trial of case and till disposal of civil suit prima facie case, balance of convenience and irreparable loss are in favour of petitioners is decided accordingly. It is prima facie proved on record that Santosh, Sharda Devi and Kamlesh are daughters of deceased Rattan Dass and falls in Class-I heirs. It is also prima facie proved on record that deceased Rattan Dass did not execute any written testamentary document in favour of deceased Kamlesh qua suit property. Smt. Kamlesh one of the daughters of deceased Rattan Dass has claimed legal right over entire suit property on the basis of oral Will. It is well settled law that oral Will will be proved in accordance with law during trial of civil suit. It is also prima facie proved on record that co-defendant No.1 is brother-in-law of petitioners. It is also prima facie proved on record that co-defendants No.2 & 3 are daughter and son of co-defendant No.1. In the present case both parties have claimed ownership and possession rights over suit property as of today. Dispute inter se parties is about title. Adjudication about title will be decided by learned Trial Court after giving due opportunity to both parties to lead oral as well as documentary evidence in civil suit. As per section 46 of H.P. Land Revenue Act 1956 suit for declaratory decree by persons aggrieved by entries in record of rights prepared under H.P. Land Revenue Act 1956 can be filed.

12. Submission of learned Advocate appearing on behalf of non-petitioners that in revenue record entire property was recorded in the name of deceased Kamlesh on the basis of oral Will and thereafter recorded in the name of her husband namely Sanjeev Kumar co-defendant on the basis of Will and mutation No.746 dated 11.04.2002 and mutation No. 939 dated 29.09.2007 also sanctioned and on this ground petition be dismissed is decided accordingly. It is well settled law that mutation in revenue record is not evidence of title. It is also well settled law that jamabandi entries are only for fiscal purpose and they do not create or extinguish any title. **See AIR 1994 Apex Court 1496 Nawalshankar Ishwarlal Dave and another Vs. State of Gujarat,SeeSLJ 94(1) SC 68 Jattu Ram Vs. Hakam Singh and others,SeeAIR 1994 Apex Court 227 Guru Amarjit Singh Vs. Rattan Chand**. **SeeAIR 2015 SCW Apex Court 3482 H. Lakshmaiah Reddy Vs. L. Venkatesh Reddy.**

13. Submission of learned Advocate appearing on behalf of non-petitioners that civil suit is not filed within limitation and on this ground petition be dismissed is decided accordingly. It is well settled law that issue of limitation is mixed issue of fact and law. Learned Trial Court has framed issue No.6 relating to limitation in civil suit. It is not expedient in the ends of justice to give judicial findings upon issue No.6 at this stage of case. Learned Trial Court will give judicial findings upon issue of limitation after giving due opportunities to both parties to lead oral and documentary evidence upon issue of limitation.

14. In the present case both parties are asserting their title and possession over suit property. Dispute inter se parties would be resolved in civil suit. Complicated questions of rights, title and interest of parties in suit property are yet to be decided by learned Trial Court after giving due opportunity to both parties to lead evidence in support of their case. Court is of opinion that in order to avoid multiplicity of judicial proceedings inter se parties order of status

quo is essential in the ends of justice in the present case till disposal of civil suit. **See AIR 2015 Apex Court 826 Transport Corporation of India Ltd. Vs. Ganesh Polytex Ltd.,See AIR 1994 Apex Court 1837 Satyabrata Biswas & Others Vs. Kalyan Kumar Kisku & Others,See AIR 2005 Apex Court 104 Maharwal Khewaji Trust Vs. Baldev Dass.**

15. Submission of learned Advocate appearing on behalf of non-petitioners that mutation in the name of deceased Kamlesh qua suit property was sanctioned with the consent of Smt. Santosh and Smt. Sharda Devi and on this ground petition be dismissed is decided accordingly. Learned Trial Court has framed issue No.7 in civil suit relating to estoppel. It is not expedient in the ends of justice to give judicial findings upon issue of estoppel at this stage of case. Judicial findings relating to estoppel will be given by learned Trial Court after giving due opportunities to both parties to adduce oral and documentary evidence. In view of law that zamabandis entries and entries of mutations are not proof of title it is held that prima facie case and balance of convenience are in favour of petitioners. It is held that petitioners will suffer irreparable loss if ad interim injunction under order XXXIX Rules 1 & 2 CPC is not granted. It is held that in order to avoid multiplicity of judicial proceedings inter se parties grant of ad interim injunction under order XXXIX Rules 1 & 2 CPC is essential in the present case in the ends of justice. Point No.1 is decided accordingly.

Point No.2 (Relief).

16. In view of findings upon point No.1 present petition filed under Article 227 of Constitution of India is allowed. Order of learned District Judge Solan (H.P.) dated 1.4.2015 announced in Civil Misc. Appeal No.14-S/14 of 2014 title Sanjeev Kumar and others Vs. Smt. Santosh and others is set-aside and order of learned Trial Court dated 1.7.2014 affirmed. Parties are left to bear their own costs. Observations will not effect merits of case in any manner and will be strictly confined for disposal of present petition. Parties are directed to appear before learned Trial Court on **23.12.2016.** File(s) of learned First Appellate Court and learned Trial Court alongwith certified copy of order be sent back forthwith. CMPMO No.426/2015 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Cr.MP(M) No. 1465 of 2016 with Cr.M.P(M) No. 1466 & 1467 of 2016.

Decided on: 8th December, 2016

Cr.M.P(M) No. 1465 of 2016

Sohan Lal ....Petitioner

Versus

State of H.P. ....Respondent.

Cr.M.P(M) No. 1466 of 2016

Pardeep Sharma ......Petitioner

Versus

State of H.P. ....Respondent.

Cr.M.P(M) No. 1467 of 2016

Lalit Sharma ....Petitioner

Versus

State of H.P. ......Respondent.

Code of Criminal Procedure, 1973- Section 438- An FIR was registered for the commission of offences punishable under Sections 341, 323, 325, 307 and 506 of I.P.C – the petitioners sought bail – held, that there are two versions regarding the manner of incident- the injuries do not show that they could have been caused by stick, kicks or fist blows – petition allowed- petitioners ordered to be released on bail of Rs.25,000/-. (Para-3 to 7)

For the petitioners : Mr. I.S. Chandel and Mr. S.S. Rathore, Advocates.
For the respondent : Mr. Neeraj K. Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

This order shall dispose of all the three petitions arising out of FIR No. 188/2016 registered under Section 341, 323, 325, 307, 506 of the Indian Penal Code against the accused-petitioners in Police Station, Theog, District Shimla, with the allegations that on 5.11.2016 around 8.30 p.m. complainant Babloo (Narinder Kumar) met them at Kufri. They stopped him and administered beatings. The accused-petitioners allegedly beaten him with 'danda' whereas his co-accused Lalit and Pradeep with kicks and fisty cuffs. The complainant received injuries on his person. He also apprehended danger to his life at the hands of accused-petitioners.

2. The injured was taken to Civil Hospital, Theog for treatment. He was referred to I.G.M.C. Shimla and there remained hospitalized from 9.11.2016 to 23.11.2016 in Orthopedics Department under the supervision of Professor Orthopedics Dr. Manoj Thakur. Initially, the case was registered against the accused-petitioners only under Section 341, 323, 506 read with Section 34 of the Indian Penal Code. Later on, after obtaining the case summary from the department of Orthopedics I.G.M.C. Shimla and the opinion of the Medical Officer, Civil Hospital, Theog as well as keeping in view the hospitalization of the complainant during the period 9.11.2016 to 23.11.2016, the injury i.e. subluxation C5-C6 was found to be grievous in nature. In view of the opinion so obtained a case under Section 325 and 307 of the Indian Penal Code has also been registered against the accused-petitioners.

3. The investigation conducted at this stage is not suggestive of as to what was the cause of administering beatings to the complainant by the accused-petitioners. Now if coming to the contents of these petitions, the complainant allegedly teased the wife of accused-petitioner Sohan Lal. The said accused asked the complainant as to why he had teased his wife when she was in the 'Ghasani' (pasture). The reply of the complainant was that only a person who has muscle power can do such type of act. Not only this but he allegedly started pelting stones on accused-petitioner Sohan Lal. On noticing the quarrel at the place of occurrence other villagers attracted to it and on this the complainant ran away through 'Ghasani'. There being dark, he fell down on his person and received injuries.

4. Being so, at this stage, there are two version qua the manner in which the occurrence took place. The complainant has not disclosed the cause of administering beatings to him by the accused-petitioners, whereas, as per the explanation set-forth by the accused-petitioners, he was only asked as to why he had teased the wife of one of the accused-petitioners and it is on this he enraged. They had not administered beatings to him and rather the injuries were received by him by way of fall while fleeing away from the place of occurrence on seeing the other villagers coming there. Nothing, however, at this stage can be said about the manner in which the incident sparked off.

5. Much has been said about the nature of injuries on the person of complainant and the opinion obtained from the Medical Officer, Civil Hospital, Theog. That opinion cannot be treated to be conclusive proof, particularly when not obtained from the doctor incharge under whose supervision the complainant remained admitted in I.G.M.C. Shimla or from either of the associates of that doctor. Looking to the nature of injuries as reflected in the MLC, it cannot also be said that the same could have been caused by danda or kicks and fisty cuffs. The accused-petitioners are local residents and residing within the local limits of Police Station, Theog. There is no complaint that they were not available for the purpose of interrogation as and when called upon to do so. The apprehension of the investigating agency that they may hamper the investigation of the case and tamper with the prosecution evidence is also without any substance

as the accused-petitioners seem to be not such an influential person so as to indulge in such activities. Otherwise also, they may not hamper the investigation of the case and tamper with the prosecution evidence, this Court can impose suitable conditions upon them on their failure to do so, the investigating agency will be free to approach this Court for cancellation of the liberty of bail granted to them.

6. Learned counsel representing the accused-petitioners has produced the certified copy of order passed by learned Sessions Judge, Shimla in similar applications, which were filed by the accused-petitioners for grant of bail. Perusal thereof reveals that the said applications were not dismissed on account of accused-petitioners absconded from the Court premises as argued by learned Additional Advocate General and rather on merits.

7. In view of what has been said hereinabove, all the three petitions succeed and the same are accordingly allowed. Consequently, it is directed that in the event of arrest of the accused-petitioners in connection with FIR No. 188/2016 registered in Police Station, Theog, they shall be released on bail subject to their furnishing personal bond in the sum of Rs. 25,000/- each with one surety each in the like amount to the satisfaction of arresting Police Officer/Investigating Officer.They shall further abide by the following conditions:-

(a) make themselves available for interrogation as and when called upon to do so;

(b) not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever.

(c) not make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or the Police Officer.

(d) not leave the territory of India without the prior permission of the Court.

8. It is clarified that if the petitioners misuse their liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

9. Any observations made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of these petitions alone. Petitions stand disposed of accordingly. Dasti ***copy***.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Tek Chand .....Appellant-Defendant
Versus
Govind Kumar .....Respondent-Plaintiff.

RSA No. 557 of 2004.
Reserved on: 2nd December, 2016.
Date of Decision : 8th December, 2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- the defendant is stranger who is interfering with the suit land without any right to do so- the defendant pleaded that suit land was exchanged by father of plaintiff with G – G had given the suit land to the defendant – defendant had raised construction of three shops and one house over the suit land – the suit was decreed by the Trial Court- an appeal was preferred, which was dismissed – held in second appeal that the Courts had rejected the exchange deed on the ground that it was not registered and no specific area was mentioned in the same – father of the plaintiff had not raised any objection when the construction was raised by the defendant, which means

that he had agreed to the same – no objection was raised at the time of exhibition of deed of exchange – non-registration will not affect the part performance- the Courts had not properly appreciated the evidence – appeal allowed and suit of the plaintiff dismissed.(Para-8 to 14)

Cases referred:

Aghore Kumar Ganguli and others, AIR 1914 Privy Council 27
Dada Vaku Nikam v. Bahiru Hingu Nikam and others, AIR 1927 Bombay 627
Putta Chelamiah and another versus Venkata Kumara Mahipati Suryarao Bahadur Garu and another, AIR 1930 Madras 1

For the Appellant: Mr. Anand Sharma, Advocate.
For the Respondent: Mr. N.K. Thakur, Senior Advocate with Mr. Divya Raj Singh, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Regular Second Appeal stands directed by the defendant/appellant herein against the impugned rendition of the learned District Judge, Chamba, Himachal Pradesh, whereby he dismissed the appeal of the defendant/appellant herein and affirmed the judgment and decree rendered by the learned Civil Judge (Junior Division), Chmaba, District Chamba, H.P., whereby the latter Court decreed the suit of the plaintiff. The defendant/appellant herein stands aggrieved by the judgment and decree of the learned District Judge, Chamba. His standing aggrieved, he has therefrom preferred the instant appeal before this Court for seeking from this Court an order reversing the findings recorded therein.

2. Briefly stated the facts of the case are that the plaintiff has filed the suit for permanent prohibitory and mandatory injunction against the defendant from interfering and raising the construction over the land comprised in khasra No.2648/210, khata/khatauni No.172/226, measuring 0-9 biswa, situated in Mohal Rajnagar, Tehsil and District Chamba, H.P. The claim of the plaintiff is that he is owner in possession of the suit land. The defendant is stranger to the suit land, having no right, title or interest in it. The defendant has started collecting construction material with intent to raise the construction over the suit land. The defendant was requested to desist from his illegal designs, but of no avail. It has also been pleaded that in case the defendants succeeds to raise the construction over the suit land during the pendency of the suit, in that eventuality, the construction so raised be ordered to be demolished.

3. The defendant contested the suit and filed written statement, wherein, he has taken preliminary objections qua the plaintiff having not come to the Court with clean hands and has suppressed the material fact that the suit land was exchanged by the father of the plaintiff namely Raju with one late Smt. Gauri, who in lieu of it, parted with the land comprised in Khasra No.2114 in his favour in the year 1978, and thereafter Smt. Gauri Gave the suit land to the defendant, who got the electric meter installed in the year 1981. On merits it is pleaded that the plaintiff is not owner in possession of the suit land. The suit land was given in exchange by the father of the plaintiff to Smt. Gauri. Since, the said Gauri gave this land to the defendant, as such, he raised the construction of three shops and one house over the suit land in the presence of the father of the plaintiff. Mutation No.850 qua the exchange of the suit land with the land comprised in khasra No.2114 was entered but the same was rejected on 18.2.1986 due to non appearance of the parties. The possession of the defendant is adverse and hostile to the knowledge of the plaintiff, as such, the replying defendant has become owner of the suit land by way of adverse possession.

4. The plaintiff/respondent herein filed replication to the written statement of the defendant/appellant herein, wherein, he denied the contents of the written statement and re-affirmed and re-asserted the averments, made in the plaint.

5. On the pleadings of the parties, the learned trial Court struck following issues inter-se the parties in contest:-

1. Whether the plaintiff is owner in possession of the suit land, as alleged? OPP

2. Whether the defendant is raising illegal and unlawful construction over the suit land, as alleged? OPP

3. If issues No.1 and 2 are proved in affirmative, whether the plaintiff is entitled for the relief of mandatory injunction? OPP

4. Whether the plaintiff has not come to the court with clean hands? OPD

5. Whether there was any exchange of land between Smt. Gauri and Raju in respect of the suit land, as alleged? If so its effect? OPD.

6. Whether the plaintiff is debarred by his own act and conduct to file the present suit?OPD.

7. In the alternative, whether the defendant has become owner of the suit land by way of adverse possession, as alleged? OPD.

8. Relief.

6. On an appraisal of evidence, adduced before the learned trial Court, the learned trial Court decreed the suit of the respondent herein/plaintiff. In an appeal, preferred therefrom by the appellant/defendant before the learned first Appellate Court, the latter Court dismissed the appeal.

7. Now the defendant/appellant has instituted the instant Regular Second Appeal before this Court assailing the findings recorded in its impugned judgement and decree by the learned first Appellate Court. When the appeal came up for admission on 04.03.2005, this Court, admitted the appeal instituted herebefore by the defendant/appellant against the judgment and decree of the learned first Appellate Court, on the hereinafter extracted substantial questions of law:-

1. Whether a person in possession of exchanged land through a written document (Exhibit DA) can challenge the title of the mutually exchanged property of the other party and seek injunction?

2. Whether the learned Courts below could have discarded the document Exhibit DA only on the ground that it was not registered without taking into consideration that the said document could be relied upon for collateral purpose for proving the factum of possession as per Section 49 of the Registration Act?

Substantial Questions of Law No.1 and 2:

8. Jamabandis borne respectively on Ex. DB and on Ex.DD pertaining respectively to the years 1974-75 and 1979-80 make unequivocal depictions therein qua the father of the plaintiff standing recorded thereat as co-owner of the suit land. Under Ex. DA, executed inter se the father of the plaintiff with one Smt. Gauri, an exchange of their respective lands occurred inter se both, whereupon, Gauri acquired the interest in the suit land from Raju also thereupon the latter acquired the apposite interest in the land owned by Gauri. Also therein a recital is borne qua Gauri transferring her interests qua the suit land as stood acquired by her under the relevant exchange occurring with the father of the plaintiff vis-a-vis the defendant. In consonance therewith the defendant raised construction upon the suit land in the year 1978. Uncontrovertedly, the defendant/appellant herein holds possession of the suit land upon which he raised construction in the year 1978.

9. Both the learned Courts below had countervailed the vigour of Ex. DA on anvil of (a) it effecting alienation besides conveyance of title thereunder qua the father of the plaintiff and Smt. Gauri besides also upon the defendant/appellant whereupon its registration under the apposite statute was compulsory, whereas, it remaining unregistered no valid conveyance of title qua the suit land stood bestowed upon the defendant/appellant herein; (b) non occurrence of any depiction therein with specificity qua the specific area delineated to stand transferred vis-a-vis the defendant/appellant and (c) Ex. DA remaining unproven.

10. The efficacy of the aforesaid concurrently recorded pronouncements made by both the learned Courts for enfeebling the vigour of Ex.DA stands extinguished in the face of construction upon the suit land in pursuance to Ex. DA, standing raised by the defendant/appellant in the year 1978 whereat the father of the plaintiff stands displayed in the apposite jamabandi to hold its ownership. Also when thereon he did not protest the raising of construction upon the suit land by the defendant/appellant, he is to be construed to acquiesced to the factum of land whereon construction stood raised by the defendant/appellant in the year 1978 constituting the land qua which an exchange occurred inter se the executants of Ex.DA, whereupon, the non marking therein with specificity the area with respect whereto it occurred is wholly insignificant. Furthermore, the factum of the father of the plaintiff also accepting the valid execution of Ex.DA stands spurred by PW-2 in his cross-examination testifying qua the father of the plaintiff also raising construction upon a part of the land owned by Gauri in Village Rupani also his cultivating the other part thereto, significantly, when the apposite quid pro quo for the exchange which occurred inter se the executants of Ex. DA comprised in the father of the plaintiff therein alienating the suit land to Gauri, who thereunder alienated the suit land to the defendant/appellant, whereas, Gauri in lieu thereto alienating her property in village Rupani vis-a-vis the father of the plaintiff, stood hence fully consumated. In aftermath, with aplomb it can stand concluded qua the executants of Ex. DA acting upon the recitals manifested therein dehors any non marking therein with specificity of khasra numbers along with their dimensions where with respect whereto an exchange occurred also when the executants of Ex.DA without any remonstrance or demur raised at the earliest by each against the other respectively raising construction on the lands respectively brought to exchange under Ex. DA, spurs an inference qua the land(s) whereon they hold possession by raising construction thereon standing accepted by each of the executants of Ex. DA, embodying the corpus of the relevant exchange. Therefore, the conclusion recorded by both the learned Courts below qua for lack of enunciations with specificity in Ex.DA qua the area besides the dimensions of land(s) brought to exchange thereunder it hence lacking in efficacy warrants, its standing foundered.

11. The relevant document whereunder the relevant exchange occurred inter se the parties thereto stood tendered into evidence by the defendant /appellant whereat it stood exhibited as Ex. DA. At the stage contemporaneous to its tendering besides exhibition thereat no protest emanated from the plaintiff qua the recitals occurring therein standing ingrained with a vice of fictitiousness besides with a stain of falsity nor at the time of its standing tendered into evidence by the defendant whereupon it stood exhibited no protest stood evinced thereat at the instance of the plaintiff qua the occurrence of signatures thereon holding no authenticity, whereupon obviously, with the defendant discharging the onus of proving Ex.DA, corollary whereof is qua it being wholly inapt for both the learned Courts below to merely on anvil of DW-2 testifying qua his not knowing the name of the person who scribed Ex.DA, conclude qua, hence, the factum of, for the reasons aforesaid qua the onus of proving it standing discharged by the defendant, standing repelled. Moreover, at no stage it stands unraveled of the plaintiff making any concert to either challenge the occurrence of signatures thereon of the executants of Ex.DA nor obviously when no concert in pursuance thereto stood assayed by the plaintiff qua the occurrence of markings/signatures thereon of the executants thereto standing transmitted to the expert(s) concerned for his holding a comparison with the markings/signatures of the executants occurring thereon with their admitted markings/signatures, for thereupon his rendering an opinion qua their authenticity, fillips an inference qua Ex. DA standing proven to stand validly executed by its respective executants.

12. The effect of the aforesaid discussion holding unfoldments qua the father of the plaintiff, who stands displayed in the jamabandi(s) contemporaneous to the period whereat Ex.DA stood executed to hold exclusive title qua the suit property also thereupon his concomitantly holding an exclusive right to enter into an exchange qua the land(s) enumerated in Ex. DA besides when the aforesaid discussion brings to the fore qua the relevant exchange standing acted upon in the year 1978 by the respective executants of Ex. DA also since at the relevant stage especially when in quick succession to the execution of Ex. DA construction stood raised by the defendant/appellant on the suit land besides also stood raised by the father of the plaintiff upon the land of Gauri, renders the effect, if any of Ex.DA though standing enjoined by the apposite statute to be compulsorily registered whereas its evidently not coming to be registered to not either pale the effect of the aforesaid inference nor the factum of its non registration would render belittled the effect of the aforesaid acquiescence whereupon the concomitant effect is of the plaintiff standing estopped merely for want of registration of Ex. DA to assail qua no valid title thereunder standing conveyed vis-a-vis its executants. In making the aforesaid conclusion this Court anchors it on the statutory doctrine of part performance standing positioned on a pedestal of equity thereupon the sequel emanating therefrom is qua equity supporting transactions alike the one hereat though clothed imperfectly in those legal forms to which finality attaches conspicuously when the bargain has been for the reasons aforestated acted upon hereat, also this Court draws succor from a decision reported in Mohamed Musa and others versus ***Aghore Kumar Ganguli and others, AIR 1914 Privy Council 27***. The aforesaid decision of the Privy Council stands referred to in a subsequent decision reported in ***Dada Vaku Nikam v. Bahiru Hingu Nikam and others, AIR 1927 Bombay 627***, wherewithin the principle of equity postulated in the decision of the Privy Council reported in AIR 1914 Privy Council, 27 besides standing alluded to therein stood also followed, significantly when it stood pronounced therein qua it standing founded upon the principle of natural justice also it aborting perpetration of fraud in land transactions. The decision reported in AIR 1927, Bombay, 627 wherewithin the aforesaid principle stood propounded emanated from the Bomaby High Court on its standing seized with an oral exchange,whereupon, with evidently the contestants thereat acting thereupon, prodded the Bombay High Court to proceed to apply thereon the principle of part performance despite obviously no scribed exchange interse the contestants thereat stood executed nor obviously it stood registered, though contradistinctively hereat a statutory mandate is cast upon the executants of Ex. DA for it to hold completeness of legal form also for it to complete the vestment of title vis-a-vs its respective executants, to compulsorily register it, whereas, it standing evidently not registered may yet not denude its sanctity qua its thereunder vesting title respectively upon its executants, conspicuously, when in a pronouncement recorded by the Bombay High Court in ***Dada Vaku Nikam's case****supra* reported in AIR 1927, Bombay, 627, the latter Court therein invoking qua also an oral agreement of exchange the doctrine of part performance, in sequel whereof, this Court likewise when evidently hereat Ex. DA for reasons aforestated stands acted upon by the parties thereto, stands constrained to conclude qua the benefit of the doctrine of part performance standing available to be derived by the defendant/appellant.

13. Be that as it may, the Madras High Court in its decision reported in ***Putta Chelamiah and another versus Venkata Kumara Mahipati Suryarao Bahadur Garu and another, AIR 1930 Madras 1,*** had even attracted the applicability of the statutory doctrine of part performance vis-a-vis an oral exchange even when obviously the latter remained unscribed whereupon obviously the invincible conclusion is of the statutory doctrine of part performance when apposite evidence in consonance therewith stands adduced as for reasons aforestated stands adduced hereat, it warranting attraction vis-a-vis Ex, DA, rendering thereupon the want of registration of Ex. DA to be wholly inefficacious rather wholly insignificant.

14. The above discussion unfolds the fact that the conclusions as arrived by the learned first Appellate Court as also by the learned trial Court stand not based upon a proper and mature appreciation of evidence on record. While rendering the findings, the learned first Appellate Court as well as the learned trial Court have both excluded germane and apposite

material from consideration. Consequently, substantial questions of law are answered in favour of the appellant/defendant and against the respondent/plaintiff.

15. In view of above discussion, the present Regular Second Appeal is allowed and the suit of the plaintiff is dismissed. In sequel, the judgements and decrees rendered by both the learned Courts below are set aside. All pending applications also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

CWP No. 2082 of 2016 with CWP's No.2083, 2084, 2085 and 2086 of 2016
Reserved on: November 24, 2016
Decided on: December 8, 2016

1. **CWP No. 2082 of 2016**
Vinod Kumar ....Petitioner
Versus
State of H.P. and others ....Respondents

2. **CWP No. 2083 of 2016**
Thakur Singh ....Petitioner
Versus
State of H.P. and others ....Respondents

3. **CWP No. 2084 of 2016**
Puspa Lata ....Petitioner
Versus
State of H.P. and others ....Respondents

4. **CWP No. 2085 of 2016**
Sham Ved ....Petitioner
Versus
State of H.P. and others ....Respondents

5. **CWP No. 2086 of 2016**
Ajaib Singh ....Petitioner
Versus
State of H.P. and others ....Respondents

Constitution of India, 1950- Article 226- The trucks owned by the petitioners were ordered to be delisted by H.P. Ex-servicemen Corporation – a writ petition was filed by one B before High Court in which it was found that a few persons were permitted to attach more than one truck – the Court issued various directions – the judgment was accepted and bye-laws were amended – a special leave petition was filed before the Supreme Court, which was dismissed- show cause notices were issued to various persons – separate writ petitions were filed against the notices, which were permitted to be withdrawn – representations were filed, which were rejected- held, that the prayers made in the present petition have already been considered and rejected earlier- amendments were carried out in the bye-laws on the basis of the directions issued by the Court – writ petitioners have no right to seek attachment after the issuance of the direction- writ petition dismissed. (Para- 14 to 17)

For the petitioner(s)	:	Mr. Amit Singh Chandel, Advocate, in all the petitions.
For the respondents	:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K.

Verma, Deputy Advocate General, for respondent No.1, in all the petitions.
Mr. Mukul Sood, Advocate, for respondents No.2 to 4, in all the petitions.
Mr. K.D. Sood, Senior Advocate with Mr. Dhananjay Sharma, Advocate, for respondent No.5, in all the petitions.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Since common questions of law and facts are involved in all these petitions, and same and similar relief(s) has/have been sought, all were taken up together for disposal. The petitions have been filed on same and similar facts and circumstances. However, for the sake of clarity, facts of CWP No. 2082 of 2016 are being discussed herein below. Main relief(s) prayed for in CWP No. 2082 of 2016 (as also in other connected petitions), are as follows:

"(i) That impugned annexure P-12 dated 19-5-2016, regarding delisting the trucks number HP24-2617 & HP 24-6217 issued in view of the Division Bench Judgment passed in CWP No. 2402/2008 titled as Baldev Singh VS H.P. Ex-servicemen corporation and Others (as annexure P-4) may be quashed and set aside, by reconsidering the judgment passed in CWP No. 2402/2008 titled as Baldev Singh vs H.P. Ex-servicemen corporation and Others (as annexure P-4), in light of the scheme/ legislative intent of the H.P. Ex-servicemen Corporation Act, 1979, by referring the same to the larger Bench of this Hon'ble court, in the interest of law, equity, justice and fair play;

(ii) That regulations made in 102nd meeting of Board of Directors of respondent no. 2 on dated 27th April, 2011 vide issue no. 102/9 as well as clause 10 of the bye laws of H.P. Ex-Servicemen Truck Operators welfare Working Committee (as annexure P-5/B) may be held violative of Article 14 & Article 21 of the Constitution of India as well as in violation of Legislative intent of the H.P. Ex-servicemen Corporation Act, 1979 & Himachal Pradesh General Clauses Act, 1968, therefore, may kindly be quashed and set aside, in the interest of law equity and justice.

(iii) That the appropriate directions may kindly be given to the respondents to allow the petitioner the attachment of his truck with the respondent Nos. 2 and 5 in light of the scheme/ legislative intent of Himachal Pradesh Ex-servicemen corporation Act, 1979, in the interest of Law, Equity and Justice;"

2. Briefly stated the facts of the case, as emerge from the record are that the petitioners are aggrieved by the issuance of order dated 19.5.2016 passed by the respondent, Himachal Pradesh Ex-servicemen Corporation (for short, 'Corporation') pursuant to the representation submitted by the petitioner in terms of judgment dated 26.4.2016 passed by this Court in LPA No. 10 of 2016 and other connected petitions, whereby trucks owned by the petitioners were ordered to be de-listed as per directions issued by the learned Single Judge of this Court on 6.1.2011 in CWP No. 2402 of 2008 titled **Baldev Singh vs. Himachal Pradesh Ex-servicemen Corporation & ors**. Petitioner claiming himself to be Ex-serviceman in terms of Section 2 (f) of the Himachal Pradesh Ex-servicemen Corporation Act, 1979 (in short, 'Act'), applied in the year 2012 for the transfer of attachment of truck in his name being legal heir of his father, who was originally enlisted with the Corporation as Ex-serviceman for transporting cement from Associated Cement Company Limited (in short, 'ACC'). It also emerges from the record that respondent No.2-Corporation has entered into an agreement with ACC, wherein 40% of transportation work of cement is/was allocated to the Corporation. Under the Act, State Government established the Corporation. Chapter IV, "FUNCTIONS AND FUND OF THE

CORPORATION", of the Act provides for welfare and economic upliftment of the Ex-servicemen in the State. It would be apt to reproduce Chapter IV as under:

CHAPTER IV

FUNCTIONS AND FUND OF THE CORPORATION

15. **Function of the Corporation**. – (1) Subject to the provisions of this Act, the functions of the Corporation shall be to provide for the welfare and economic uplift of the ex-servicemen in the State.

(2) Without prejudice to the generality of the foregoing provisions the Corporation may take such steps, as it may think necessary, --

(i) to plan, promote and undertake on its own or in collaboration with or through such ex-servicemen organizations or other agencies as may be approved by the Corporation, programmes of agricultural development, marketing, processing supply and storage of agricultural produce, small scale industry, building construction, transport and such other business, trade or activity as may be approved in this behalf by the Government;

(ii) to provide financial assistance to ex-servicemen or their organisations by advancing to them in cash or in kind loans including loans under hire-purchase system and/or loan towards margin money for any of the purposes specified in clause (i) either directly or through such agency, organisation or institution as may be approved by it;

(iii) to give on hire agricultural or industrial machinery or equipment to ex-servicemen or their organisation;

(iv) to give grants and subsidies to and to guarantee loans taken by the ex-servicemen or their organisation;

(v) to discharge such other functions as may be prescribed or as are supplemental, incidental or consequential to any of the functions conferred on it under this Act.

(3) In discharging its functions, the Corporation shall have due regard to public interest, its solvency and welfare of ex-servicemen.

16. **Capital of the Corporation and its power to borrow or issue bonds and debentures, etc**.—(1) For the purpose of carrying out its functions under this Act, the Corporation may—

(a) be provided with capital by the Government on such terms and conditions as the Government may specify, or by any person, or association of persons or association of persons interested in or dealing with the welfare of ex-servicemen on such terms and conditions as may be mutually agreed, upon between the Corporation and such person or association of persons;

(b) with the previous approval of, and subject to the directions of the Government, borrow money from any bank or other financial institution or any other authority or organisation;

(c) issue bonds and debentures or draw, make, accept, endorse, discount, execute and issue promissory notes, bills of exchange, hundies, bills, warrants, debentures and other negotiable instruments.

(2) The Government may guarantee the repayment of the moneys borrowed by the Corporation under sub-section (1) and the payment of interest thereon.

17. **Ex-servicemen Corporation Fund. –** (1) The Corporation shall maintain a Fund called the Ex-servicemen Corporation Fund (hereinafter referred to as the Fund) to which shall be credited --

(a) all moneys received by it from the Government or from any person or association of persons interested in or dealing with the welfare of ex-servicemen;

(b) such sums of moneys as may from time to time, be realized by way of repayment of loans made from the fund or from interest on loans;

(c) all moneys borrowed under section 16; and

(d) all moneys received by it from any other source.

(2) The moneys in the Fund shall be applied by the Corporation for carrying out its functions under this Act.

(3) All moneys in the fund shall be deposited in the bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934), or in a government Treasury, as may be decided by the Corporation;

Provided that the Corporation may invest or deposit its surplus funds in the Government secureties or in such other manner as it may decide.

3. With a view to achieve aforesaid objectives as mentioned in clause 15 of aforesaid Chapter, Corporation entered into aforesaid agreement with the ACC and secured 40% of transportation work of cement. Since the Corporation did not have its own fleet of trucks, it entered into agreement with the individual ex-servicemen truck operators, for fulfilling the obligation regarding transportation of cement pursuant to the agreement entered between it and the cement company. It also emerges from the record that the Corporation with a view to provide better and transparent management to ex-servicemen truck operators of the State engaged by it through ex-servicemen Welfare Working Committee, for carrying cement to different destinations from Barmana cement factory, framed Bye-Laws providing therein that the Welfare Working Committee shall work under overall supervision and direction of Chairman-cum-Managing Director (for short, 'CMD'). The Welfare Working Committee (in short, 'Committee') comprises of Project Manager as President, one of the District Presidents as Vice President and all the District Presidents as Members of the Committee. In bye-law 4 of the Bye-Laws i.e. 'Detailment of Trucks for Cement Lifting' , following provisions were made: handle

"**Detailment of Trucks for Cement Lifting**

4. (a) It will be the sole responsibility of District Presidents to ensure that the trucks of Ex-Service are registered with H.P. Ex-Servicemen Corporation, Camp Office Barmana for transportation of cement. The trucks owned by civilians/unauthorized persons will not be attached.

(b) Trucks will be registered with the approval of CMD H.P. Ex-Servicemen Corporation and decision taken by CMD in this regard shall be final.

(c) The list of unauthorized trucks attached will be put up in the quarterly meeting of Welfare Working Committee, on which firm decision will be taken.

(d) District wise list of trucks attached will be prepared separately.

(e) District Presidents will ensure that trucks owned by re-employed ex-servicemen are not attached. One person cannot get double benefit at the cost of others who are on waiting list and awaiting their turn for attachment of trucks.

(f) The trucks will be detailed for lifting of cement according to the seniority and no preference will be given to any District in consideration of the location of the consignee. Impartial detailment of the trucks will be supervised by the President and he will ensure that demand of the trucks is correctly taken from the ACC Factory according to the Corporation share and if there is any variation

then he shall report this matter to the Distribution Manager of ACC Barmana under the information to the Chairman-cum-Managing Director.

(g) It will be mandatory for the Welfare Working Committee to implement the decision of Senior Sub Judge Bilaspur dated 19.05.2003 that the carriage work needs to be rationalized and the President Welfare Working Committee is directed to give due and proper work to all the truck operators of all the Districts. Every truck operator should be given work to carry cement to longer as well as shorter distance/destinations so that all truck operators earn almost equal profit."

4. Perusal of aforesaid bye-law suggests that trucks owned by ex-servicemen can only be registered with the Corporation at Barmana for transportation of cement. It further suggests that the most of them are owned by ex-servicemen can not be enlisted. Similarly, Bye-Laws provide that one ex-serviceman can not get double benefit at the cost of others, who are in the waiting list and awaiting their turn for attachment of trucks. It also emerges from the pleadings/records that aforesaid Bye-Laws were amended from time to time and even widows and legal heirs of deceased ex-servicemen were allowed to attach their trucks for transportation of cement.

5. In the year 2011, one ex-serviceman namely Baldev Singh approached this Court by way of CWP No. 2402/2008, with a prayer that the Corporation may be directed to attach his truck with it. Petitioner in that case claimed that since his truck was stolen as such he was entitled to get another truck attached with the Corporation in place of stolen truck. The Corporation instead of attaching his new truck, de-listed the truck which was originally enlisted with the Corporation earlier. Corporation informed the Court in those proceedings that in the year 2002, keeping in view larger interest of ex-servicemen, it was decided that only one truck of one ex-serviceman would be attached with the Corporation. Corporation further claimed that aforesaid resolution of the year 2002 was reiterated in the year 2005 and endeavour of the Corporation is/was to ensure that largest number of ex-servicemen gets the benefit of attachment of their trucks with the Corporation. But it appears that during the pendency of the aforesaid writ petition, petitioner submitted a list of few persons, who were permitted to attach more than one truck, even after passing of aforesaid resolutions in the years 2002 and 2005. In the aforesaid background, Division Bench of this Court vide order dated 7.8.2009 directed the CMD of the Corporation to file an affidavit specifically giving therein details of the members of the Corporation, who were permitted to attach more than one truck with the Corporation after the resolution passed in 2002. Court also asked for information, whether any truck of any member has been delisted on account of the fact that not more than one truck can be attached with the Corporation. Though respondent Corporation filed an affidavit in terms of aforesaid order passed by the Court annexing therewith complete list of members, who were permitted to attach more than one truck even after passing of resolutions dated 17.1.2002 and 6.1.2005 but the fact remains that the Court after noticing the plea of the learned counsel for the petitioner, further discovered that more than 185 ex-servicemen were permitted to attach more than one truck and in some cases as many as four trucks were allowed to be attached, after passing of aforesaid resolutions. Accordingly, Division Bench of this Court was constrained to observe as under:

"The Himachal Pradesh Ex-servicemen Corporation virtually has the monopoly of transporting cement from the A.C.C factory at Barmana in Bilaspur. In certain cases, as per the Policy, only one truck is being attached with the Corporation while in the cases of other persons as many as 4 to 5 trucks have been attached. Though in the affidavit of the Corporation, it is mentioned that there are 185 persons having more than one truck attached with the Corporation but in the counter-affidavit filed on behalf of the petitioner, it is mentioned that there are other persons such as Ex-Sipahi Roop Singh whose name is not in the list but has more than two trucks attached.

The Corporation has been formed by the State Government for the welfare of the ex-servicemen. The purpose is to provide some means of livelihood

to the ex-servicemen after their retirement from the Armed Forces at a young age. There is a massive scope for doing good work by the Corporation. But if the Corporation continues to act in the manner in which it has been acting till now, i.e., in a totally arbitrary and capricious manner, the entire purpose of setting up the Corporation will be set at naught. In such eventuality, we are of the considered opinion that it would be better to wind up the Corporation itself.

From the material placed on record, it is apparent that it is the office bearers of the Corporation who are deriving the maximum benefit of having more than one truck attached. When these District Presidents or other office bearers apply for attachment of trucks then the Corporation does not raise the objections that under the resolutions of 2002 and 2005, not more than one truck of an individual can be attached. Even as per the Corporation, there are 192 persons who were permitted to attach more than one truck after the resolution was passed in the year 2002. It is, therefore, apparent that no sanctity is attached by the Corporation to its own resolutions. However, we do not want to turn the clock back since people who have already made investments and spent huge money on purchase of trucks should not be put at loss all of a sudden.

To put an end to the entire dispute, we want to issue certain directions which must be obeyed in letter and spirit. While issuing these directions, we are taking into consideration the fact that the Himachal Pradesh Ex-servicemen Corporation has been constituted for the benefit of the ex-servicemen. The interest of the ex-servicemen will be served if each ex-serviceman is allowed to attach only on truck with the Corporation. This way, the maximum number of ex-serviceman can be accommodated. This does not in any way debar an ex-serviceman from purchasing or plying the second truck but he cannot get it attached with the Corporation but can ply it in his individual capacity. If the maximum number of ex-servicemen are to be helped and assisted in getting livelihood after retirement, it would be in the interest of justice, if each ex-serviceman is permitted to attach only one truck with the Corporation. We would like to make it clear that the right of the ex-serviceman to get his truck attached can be inherited only by his widow and not by his children unless there are minor children. We would also like to make it clear that in case an ex-serviceman is re-employed in a Government/public sector undertaking, he shall loose his right to have his truck attached with the Corporation."

6. In the aforesaid background, Division Bench of this Court vide judgment dated 6.1.2011 directed the respondent-State as well as Corporation to ensure that Bye-Laws, Rules and Regulations of the Corporation are amended in line with the directions issued by the Court. The Division Bench of this Court passed as many as 15 directions, which were required to be strictly followed by the Corporation for regulating transportation business amongst its members but in the facts and circumstances of present petition, directions No. 9 and 10 would be material, which are as under:

"9. In case an ex-serviceman dies, his widow shall be entitled to inherit the right to have a truck attached till her life time.

10. In case there is no widow or the widow voluntarily gives up her right, the attachment can be transferred to one son/daughter of the ex-serviceman but in such eventuality, the right to ply the truck shall only be for a period of 5 years. After the death of the widow or on expiry of 5 years, the attachment shall cease to exist and the slot shall be given on the basis of seniority."

7. Aforesaid judgment having been passed by the Division Bench of this Court was accepted in toto by the Corporation, because no further appeal was preferred before the Apex Court by it, rather the Corporation suitably amended its Bye-Laws in its 102nd meeting held on 27.4.2011 and incorporated following provisions: -

"10. **Inclusion of Directions /orders given by Hon'ble High court vide CPW -2402/2008 dated 06 Jan 2011.**

(a) In future only one truck of an ex-servicemen shall be attached with the Corporation.

(b) As far as the attachments already made are concerned, if there are more than two trucks of any ex-serviceman attached with the Corporation after 1.4.2011 only two trucks will be attached and the remaining trucks shall not be attached.

(c) The Corporation shall ensure that on and w.e.f. 1.4.2012, only one truck of each ex-servicemen shall be attached. Thus, an ex-servicemen will have a period of one year to either dispose of the excess trucks or to make alternate arrangement for their plying.

(d) The Corporation shall invite applications from all ex-servicemen of Himachal Pradesh by publishing advertisements in two English and two Hindi newspapers having wide circulation in the State. The advertisements be published on or before 31.1.2011 and last date for receipt of applications shall be 28.2.2011.

(e) The ex-servicemen who are desirous of plying and attaching their truck with the Corporation shall file their application latest by 28.2.2011.

(f) The Corporation shall draw up a list of candidates and seniority shall be given in order of retirement, i.e., a person who has retired earlier shall be placed senior in the seniority. If two candidates have retired on the same date then the candidate who has put in longer service in the Armed Forces shall rank higher in seniority. Henceforth all attachment shall be made strictly in accordance with the seniority list, so maintained. This list be drawn up latest by 25.3.2011. The list shall be displayed on the Notice Board of the respondent No.1-Corporation and shall be open for inspection to all ex servicemen. The ex-servicemen can file their objections with the Corporation to the said list.

(g) For the future every year, the respondent-Corporation shall invite applications from ex-servicemen for including their names in the list by issuing advertisement as aforesaid. These advertisements shall be published by 31st December of each year and applications shall be invited latest by 31st of January and the list shall be prepared by 28th of February of the subsequent years. These lists shall be applicable from 1st April of the subsequent years.

(h) The vacant positions for the trucks which are detached only after 1.4.2011 will be offered to the ex-servicemen who are next in the waiting list.

(i) In case an ex-servicemen dies, his widow shall be entitled to inherit the right to have a truck attached till her life time.

(j) In case there is no widow or the widow voluntarily gives up her right, the attachment can be transferred to one son/daughter of the ex-servicemen but in such eventuality, the right to ply the truck shall only be for a period of 5 years. After the death of the widow or on expiry of 5 years, the attachment shall cease to exist and the slot shall be given on the basis of seniority.

(k) No transfer of any attachment with the Corporation shall be permitted. Any ex-servicemen who does not want to ply the truck will have to surrender the attachment to the Corporation who shall offer it to the next person in the seniority list.

(l) In case the ex-serviceman is reemployed, his truck will not be attached and if his truck has been already attached and the Ex-servicemen re-employed in Government service/public sector undertakings, Banks etc. then he

shall have to surrender his right to get the truck attached and the vacant slot shall be given to the Ex-servicemen next in the waiting list.

(m) In case of truck of an Ex-servicemen is stolen or meets with an accident then the Ex-servicemen shall have a right to replace his stolen/ unserviceable truck and get it attached with the Corporation. However, only one truck shall be attached one time.

(n) That when a truck of any Ex-servicemen is attached with the Corporation, the Corporation shall give a distinctive year-wise number to every attached truck and on the body of the truck, the Ex-servicemen shall ensure that the following information is depicted:-

"This truck No.______ is attached with the H.P Ex-Servicemen Corporation vide attachment No._______ of the year _______."

(p) That if there are more than one Society for different cement plants, the Ex-servicemen shall have a right to attach one truck with only one Society and it shall not be open for an Ex-servicemen to become a member of more than one Society and thereby attach more than one truck."

8. At this stage, it may be noticed that a few members of the Corporation being aggrieved and dissatisfied with the aforesaid judgment, filed an SLP before the Apex Court i.e. **Y.K. Awasthi & Ors versus H.P. Ex-Servicemen Corp. & Ors**, which came be dismissed, in limine, on 10.10.2011.

9. Pursuant to aforesaid insertion of bye-law 10 in the Bye-laws of H.P. Ex-servicemen Truck Operator Welfare Working Committee, show cause notice was issued to those persons, who were not held entitled by the Court to attach their trucks with the Corporation. Being aggrieved and dissatisfied with the issuance of show cause notice by the Corporation, present petitioner alongwith others approached this Court by way of CWP's No. 4141/2015, 488/2016, 624/2016, 625/2016 and 626/2016. In the aforesaid petitions, having been filed by the present petitioners, they claimed that prior to passing of judgment dated 6.1.2011 in CWP No. 2402/2008, respondents No.2 and 3 had already issued permission to attach their trucks, which was valid upto 21.10.2017 and as such no show cause notice could be issued to them in terms of aforesaid judgment. Petitioners in those cases also claimed that in the aforesaid judgment since Section 2 (f) of the Act was not taken into consideration, judgment passed in that case can not be made applicable in their case, especially when under the Act, they have been held to be ex-servicemen for all intents and purposes. Petitioners in those cases, further claimed that they are deemed to be ex-servicemen under Section 2 (f) of the Act and a right in their favour accrued immediately after enactment of aforesaid Act and their right of attachment of truck could not have been taken away by subsequent amendment in the Rules, Regulations or Bye-Laws of Corporation, because that would be against the basic Act, which was enacted strictly for the welfare of the families of the ex-servicemen.

10. However, the fact remains that all the aforesaid petitions were dismissed as withdrawn on 26.4.2016 (Annexure P-10) with liberty reserved to the petitioners to file representations to the authority concerned seeking redressal of their grievances. Pursuant to dismissal of the aforesaid petitions, petitioner herein preferred representation (Annexure P-11) before the Corporation. The Corporation vide Annexure P-12, rejected the claim of the petitioner by stating that action of de-listing truck(s) was taken in compliance of directions passed by the Division Bench of this Court. In the aforesaid background, petitioner approached this Court by filing the instant petitions, laying therein challenge to communication dated 19.5.2016 (Annexure P-12). Petitioner in CWP No. 2082/2016 alongwith petitioners in connected matters is claiming attachment of his truck with the Corporation being the legal heir(s) of the deceased ex-serviceman, who prior to death was allowed/permitted to attach his truck with the Corporation for transportation of cement.

11. Mr. Amit Singh Chandel, Advocate, learned counsel for the petitioner(s), vehemently argued that order of de-listing of trucks issued by the Corporation deserves to be set aside being contrary to the provisions contained in the Act as well as Bye-Laws. He further contended that the Corporation has illegally issued notices for delisting the trucks of present petitioners by misreading and mis-interpreting the ratio decidendi of the judgment passed by Division Bench of this Court in CWP No. 2402/2008. He further contended that while passing certain directions in the aforesaid judgment, Division Bench had specifically directed respondents No.1 and 2 to ensure that Bye-Laws, Rules and Regulations are amended in line with the directions contained in judgment dated 6.1.2011 but the Corporation, without effecting any amendment in Bye-Laws, Rules and Regulations, directly incorporated the directions issued by the Court in their Bye-Laws. He further argued that since Division Bench, while passing aforesaid judgment had only issued certain directions and had actually not struck-down the legality or validity of Rules and Regulations already contained in the earlier Act and Bye-laws and it can not be stated that statutory provisions which govern vested rights of the petitioners in the Corporation, from where rights of the petitioners original were created, were declared to be illegal. While concluding his arguments, Mr. Chandel further argued that the observations made by the Court in CWP No. 2402/2008 are obiter observations and as such they are *per incuriam* and no law has been declared by way of such directions so as to take away the vested rights of the petitioners with retrospective effect, more particularly, when claim of Scheme of the Act is prospective. He further argued that while incorporating any amendment in the Bye-Laws in terms of judgment passed by Division Bench of this Court, it was incumbent upon the respondents to adhere to Sections 31 to 34 of the Act. He further contended that in order to further amend Rules, Bye-laws of the Corporation, respondents No.1 and 2 ought to have incorporated amendment by adhering to the provisions of the Act as well HP General Clauses Act, 1968, as amended from time to time, but since, in the present case, aforesaid provisions were not followed and amendments carried out in the Bye-Laws being in violation of the Scheme, deserve to be quashed and set aside. In the aforesaid background, Mr. Chandel, prayed that judgment passed in CWP No. 2402/2008 requires to be reconsidered by this Court and amendment in Bye-Laws deserves to be declared null and void.

12. Mr. Shrawan Dogra, learned Advocate General duly assisted by Mr. Anup Rattan, Additional Advocate General and Mr. Mukul Sood, Advocate, vehemently opposed the aforesaid prayer having been made on behalf of the petitioners by stating that there is no illegality or infirmity in the decision taken by the respondent-Corporation pursuant to the directions passed by this Court in CWP No. 2402/2008. They further argued that the aforesaid judgment has attained finality because the SLP filed by a member of the ex-servicemen Union, was dismissed *in limine*. Mr. Mukul Sood, learned counsel representing respondent-Corporation further contended that the directions passed in CWP No. 2402/2008 by this Court are in the interests of the ex-servicemen community and as such same were immediately accepted by the Corporation by effecting amendment in its Bye-laws.

13. We have heard the learned counsel for the parties and also gone through the record carefully.

14. After perusing pleadings as well as submissions having been made by the respective parties, this Court has no hesitation to conclude that the instant petitions are wholly misconceived and sheer abuse of process of law. Prayer(s) as made in the present petitions have already been considered and rejected by this Court in earlier set of petitions filed by the present petitioners {CWP's No. 4141 of 2015 (Ajaib Singh v. State of HP and others), 488 of 2016 (Puspa Lata versus State of H.P. & others), 624 of 2016 (Thakur Singh versus State of H.P. & others), 625 of 2016 (Vinod Kumar versus State of H.P. & others) and 626 of 2016 (Sham Ved Versus State of H.P. & others)}. In the instant petitions, petitioners, who are legal heirs of the deceased ex-servicemen, are aggrieved by the action of the Corporation, whereby their trucks have been de-listed, in terms of Bye law 10 inserted in the Bye-laws by way of amendment pursuant to directions passed by a Division Bench of this Court in CWP No. 2402/2008. The Division Bench of this Court has already held that in the event of death of ex-serviceman, his widow would be

entitled to inherit right to have attached till her life time. This Court has rightly held that in case there is no widow, or widow voluntarily gives up her right of attachment, said right could be transferred to one son/daughter of the ex-serviceman but in that eventuality, right to ply truck would be restricted to five years after the death of widow or on expiry of five years, attachment would cease to exist and slot would be given on the basis of seniority to other ex-servicemen in the list. On the basis of aforesaid direction, Corporation has carried out amendment in the Bye-laws in its general meeting by incorporating directions issued by this Court, in the Bye-laws and as such all the ex-servicemen are bound by the same. It can be taken note of that aforesaid directions issued by this Court in CWP No. 2402/2008, were accepted by the Corporation without any demur, because same were issued in larger interests of the ex-servicemen, more particularly, aforesaid judgment has attained finality after dismissal, in limine, of SLP, filed against the same.

15. Hence, this Court sees no occasion /reason to accept the contentions raised in the instant petitions. It is not understood how the judgment passed by Division Bench of this Court, which has attained finality, can be reconsidered by this Court, as has been prayed in the instant petitions.

16. Though this court, does not deem it proper to say over and above what has been observed in the judgment in CWP No. 2402/2008, but, definitely, sees no force in the contentions raised by the counsel for the petitioners that the Corporation had no authority to carry out amendment in the Bye-laws, on the basis of directions issued by the Division Bench of this Court. No reliefs, as have been prayed for in the present petitions, can be granted in the present proceedings by this Court, in view of the directions already issued in CWP No. 2402/2008, because that would amount to overreaching the judgment of this Court, which has been further affirmed by the Apex Court.

17. In light of the detailed discussion above, the petitions are without any merit and same are dismissed. Pending applications, if any are also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Bajaj Allianz General Insurance Company Ltd. .....Appellant
Versus
Shrimati Ram Kali and others .....Respondents.

FAO (MVA) No. 379 of 2012.
Date of decision: 9th December, 2016.

Motor Vehicles Act, 1988- Section 149- Claimants specifically pleaded that deceased was travelling in the vehicle after loading the goods – this fact was not denied in the reply- the plea taken by the insurer that the deceased was travelling in the vehicle as a gratuitous passenger was not proved- the insurer was rightly saddled with liability- appeal dismissed. (Para-3 to 5)

For the appellant: Mr. Aman Sood, Advocate.
For the respondents: Ms. Sheetal Kimta, Advocate, for respondents No. 1 and 2.
Ms. Kamlesh Shandil, Advocate, for respondent No.3.
Mr. O.P. Negi, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 29.3.2012, passed by the Motor Accident Claims Tribunal-I, Solan District Solan, H.P. hereinafter referred to as "the

Tribunal", for short, in MAC Petition No. 2-S/2 of 2009, titled *Shrimati Ram Kali and another versus Shri Bala Ram and others,* whereby compensation to the tune of Rs.2,66,000/- alongwith interest @ 7.5% per annum came to be awarded in favour of the claimants and insurer was saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimant, Owner and driver have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to them.

3. The positive case of the claimants before the Tribunal was that the deceased was travelling in the offending vehicle bearing registration No. HP-14-B-0567 Canter, after loading the goods. In paras 10 and 24 of the claim petition, the claimants have taken this specific plea, which has not been denied by the respondents-owner and driver. In reply to paras 10 and 24, owner and driver have admitted that the deceased was travelling in the offending vehicle as owner of the goods. The Tribunal has discussed in para 10 of the impugned award that the deceased was travelling in the offending vehicle as owner of the goods. Deceased being third party, the insurer has to satisfy the award.

4. The insurer has pleaded and taken the ground that the deceased was a gratuitous passenger, has not led any evidence. Thus the evidence led by the claimants has remained un-rebutted. Even the insurer has failed to discharge the onus. The factum of insurance as well as the validity of driving licence is not in dispute.

5. Learned counsel for the appellant-insurer argued that the son of the deceased was owner of the vehicle. It is immaterial for the reason that the deceased was third party and insurer has failed to lead any evidence to the effect that there was collusion between the owner and deceased or any willful breach was committed by the owner. Having said so, the Tribunal has rightly made the discussion.

6. Viewed thus, the Tribunal has rightly made the award, needs no interference.

7. Accordingly, the impugned award is upheld and the appeal is dismissed.

8.. The Registry is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification.

9. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Balwant Singh & others …Petitioners

Versus

State of Himachal Pradesh & others …Respondents

CWP No. 3503 of 2015-A

Date of Decision : December 9, 2016

Constitution of India, 1950- Article 226- A road was constructed by the State under PMGSY – acquisition proceedings were initiated but were allowed to lapse- State on its own took decision to initiate fresh proceedings for acquisition of the land but did not do anything- held, that no person can be deprived of his property save and except by following due process of law- right to property is not only constitutional or statutory right but also a human right- the petition allowed and the respondents directed to initiate proceedings for acquisition of the land.(Para-3 to 7)

Cases referred:

Tukaram Kana Joshi & others vs. Maharashtra Industrial Development Corporation & others, (2013) 1 SCC 353

K. B. Ramachandra Raje Urs (Dead) by Legal Representatives vs. State of Karnataka & others, (2016) 3 SCC 422

For the petitioner : Mr. C. N. Singh, Advocate, for the petitioners.
For the respondent : Mr. R. S. Verma, Addl. Advocate General for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J. (Oral)

It is rather unfortunate that after having taken a decision to initiate proceedings for acquisition of land over which Jhiknipul – Bhamta Road came to be constructed, now the respondents/State by taking a somersault are contesting the claim of the writ petitioners.

2. Record reveals, as is also evident from the response filed by the State, that the road in question came to be constructed by the State under the PMGSY Scheme. It is a Central Government sponsored Scheme and the road stands constructed by the State. It is not a case where the residents of the area themselves constructed the road or prior to its construction, land owners surrendered their rights therein. In fact, at some point in time, acquisition proceedings were initiated but for unexplained reasons, allowed to lapse. Even thereafter the State on its own, or may be on the asking of land owners, did take a decision to initiate fresh proceedings for acquisition of the land in question. Correspondence dated 30.10.2013 (Annexure P-4) and 19.07.2014 (Annexure P-5) is evidently clear in this regard. Yet it did not do anything, forcing the petitioners to approach this Court for redressal of their genuine grievances. Petitioners had been continuously pursuing their remedies before different authorities.

3. Right of property is enshrined in the Constitution. It is a settled principle of law that no person can be deprived of its property, save and except by following due process of law. Under these circumstances the writ petitioners legitimately canvass infringement of violation of such right.

4. Further right to property is now considered to be not only a constitutional or a statutory right but also a human right. Such principle stands fully reiterated and explained by Hon'ble the Supreme Curt of India in *Tukaram Kana Joshi & others vs. Maharashtra Industrial Development Corporation & others,* (2013) 1 SCC 353, as under:

> '8. The appellants were deprived of their immovable property in 1964, when Article 31 of the Constitution was still intact and the right to property was a part of fundamental rights under Article 19 of the Constitution. It is pertinent to note that even after the Right to Property seized to be a Fundamental Right, taking possession of or acquiring the property of a citizen most certainly tantamounts to deprivation and such deprivation can take place only in accordance with the "law", as the said word has specifically been used in Article 300-A of the Constitution. Such deprivation can be only by resorting to a procedure prescribed by a statute. The same cannot be done by way of executive fiat or order or administration caprice. In Jilubhai Nanbhai Khachar v. State of Gujarat & Anr., 1995 Supp (1) SCC 596: AIR 1995 SC 142, it has been held as follows: -
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> > "48. In other words, Article 300-A only limits the power of the State that no person shall be deprived of his property save by authority of law. There is no deprivation without due sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. In other words, if there is no law, there is no deprivation."
>
> 9. The right to property is now considered to be, not only a constitutional or a statutory right, but also a human right. Though, it is not a basic feature of the Constitution or a fundamental right. Human rights are considered to be in realm of individual rights, such as the right to health, the right to livelihood, the right to shelter

and employment etc. Now however, human rights are gaining an even greater multi faceted dimension. The right to property is considered, very much to be a part of such new dimension.

(Vide: Lachhman Dass v. Jagat Ram & Ors., (2007) 10 SCC 448; Amarjit Singh & Ors. v. State of Punjab & Ors., (2010) 10 SCC 43; State of Madhya Pradesh & Anr. v. Narmada Bachao Andolan, 2011 AIR (SC) 1989; State of Haryana v. Mukesh Kumar & Ors., 2012 AIR (SC) 559 and Delhi Airtech Services Pvt. Ltd. v. State of U.P & Anr., 2012 AIR (SC) 573)

10. In the case at hand, there has been no acquisition. The question that emerges for consideration is whether, in a democratic body polity, which is supposedly governed by the Rule of Law, the State should be allowed to deprive a citizen of his property, without adhering to the law. The matter would have been different had the State pleaded that it has right, title and interest over the said land. It however, concedes to the right, title and interest of the appellants over such land and pleads the doctrine of delay and laches as grounds for the dismissal of the petition/appeal.

11. There are authorities which state that delay and laches extinguish the right to put forth a claim. Most of these authorities pertain to service jurisprudence, grant of compensation for a wrong done to them decades ago, recovery of statutory dues, claim for educational facilities and other categories of similar cases, etc. Though, it is true that there are a few authorities that lay down that delay and laches debar a citizen from seeking remedy, even if his fundamental right has been violated, under Article 32 or 226 of the Constitution, the case at hand deals with a different scenario altogether. Functionaries of the State took over possession of the land belonging to the appellants without any sanction of law. The appellants had asked repeatedly for grant of the benefit of compensation. The State must either comply with the procedure laid down for acquisition, or requisition, or any other permissible statutory mode. There is a distinction, a true and concrete distinction, between the principle of "eminent domain" and "police power" of the State. Under certain circumstances, the police power of the State may be used temporarily, to take possession of property but the present case clearly shows that neither of the said powers have been exercised. A question then arises with respect to the authority or power under which the State entered upon the land. It is evident that the act of the State amounts to encroachment, in exercise of "absolute power" which in common parlance is also called abuse of power or use of muscle power. To further clarify this position, it must be noted that the authorities have treated the land owner as a 'subject' of medieval India, but not as a 'citizen' under our Constitution."

5. Significantly in the very same decision, Court has dealt with the concept of delay and laches and the manner in which Court has to exercise discretion under Article 226 of the Constitution of India.

6. Contention that the petition is delayed by laches needs to be rejected not only on account of factual matrix as noticed hereinabove but also in view of latest decision rendered by the apex Court in *K. B. Ramachandra Raje Urs (Dead) by Legal Representatives vs. State of Karnataka & others,* (2016) 3 SCC 422, wherein it came to be observed as under:

"28. It has been vehemently argued on behalf of the respondents that the writ petition ought not to have been entertained and any order thereon could not have been passed as it is inordinately delayed and the appellant has made certain false statements in the pleadings before the High Court details of which have been mentioned hereinabove. This issue need not detain the Court. Time and again it has been said that while exercising the jurisdiction under Article 226 of the Constitution of India the High Court is not bound by any strict rule of limitation. If substantial issues of public importance touching upon the fairness of governmental action do arise, the delayed approach to reach the Court will not stand in the way of the exercise of jurisdiction by

the Court. Insofar as the knowledge of the appellant-writ petition with regard to the allotment of the land to Respondent 28 Society is concerned, what was claimed in the writ petition is that it is only in the year 1994 when Respondent 28 Society had attempted to raise construction on the land that the fact of allotment of such land came to be known to the appellant-writ petitioner."

7. Under these circumstances, petition is allowed and the respondents directed to initiate proceedings for acquisition of the land in terms of communications dated 27.7.2005 (Annexure P-1), dated 30.10.2013 (Annexure P-4) and dated 19.7.2014 (Annexure P-5). Steps shall positively be taken within a period of twelve weeks from today.

Petition stands disposed of accordingly, as also pending applications, if any. Copy dasti.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No.168 of 2012 a/w FAO No.334 of 2012
Date of decision: 09.12.2016

1. FAO No.168 of 2012

Dolma Devi and others .....Appellants
Versus
Mohinder Kumar Goel and others ......Respondents

2. FAO No.334 of 2012

Oriental Insurance Co. Ltd. .....Appellant
Versus
Dolma Devi and others .....Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was drawing Rs.13,064/- per month as salary- he was 37 years of age at the time of accident – multiplier of 15 was rightly applied – claimants are four in numbers and 1/4th amount was rightly deducted from the monthly income the deceased- the driver had a valid driving licence and insurer was rightly saddled with liability- appeal dismissed. (Para-4 to 7)

FAO No.168 of 2012

For the appellants: Mr.Pardeep Kumar Gupta, Advocate.
For the respondents: Mr.Vikrant Chandel, Proxy Counsel, for respondents No.1 and 2.
Nemo for respondents No.3.
Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate, for respondent No.4.

FAO No.334 of 2012

For the appellants: Mr.G.C. Gupta, Senior Advocate, with Ms.Meera Devi, Advocate, for the appellant.
For the respondents: Mr.Pardeep Kumar Gupta, Advocate, for respondents No.1 to 4.
Mr.Vikrant Chandel, Proxy Counsel, for respondents No.5 and 6.
Nemo for respondent No.7.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Both these appeals are directed against the common award, dated 15th September, 2011, passed by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P., (for short, the Tribunal), in case MAC No.70 of 2007, titled Dolma Devi and others vs. Mohinder Kumar Goel and others, whereby the claim petition was allowed and compensation to

the tune of Rs.17,83,640/- was awarded in favour of the claimants and the insurer was saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the claimants have filed appeal i.e. FAO No.168 of 2012 for enhancement of compensation and the insurer has challenged the impugned award by the medium of FAO No.334 of 2012 on the ground that the Tribunal has wrongly saddled it with the liability.

3. Heard learned counsel for the parties and gone through the record.

4. Admittedly, the deceased was a Constable in the Police Department and was drawing Rs.13,064/- per month as salary. Salary certificate of the deceased was proved on record as Ext.PW-4/A. The deceased was 37 years of age at the time of accident. The Tribunal has rightly applied the multiplier of 15. Keeping in view the number of claimants i.e. 4, the Tribunal has rightly deducted 1/4th from the monthly income of the deceased towards his personal expenses.

5. Having said so, the Tribunal has rightly made discussion in paragraphs 16 and 17 of the impugned award and awarded compensation, which, by no stretch of imagination, can be said to be meager or excessive.

6. The insurer has questioned the impugned award by the medium of FAO No.334 of 2012 on the ground that the driver was not having a valid and effective driving licence and that the owner had committed willful breach. Copy of the driving licence has been proved on record as Ext.R-2, which does disclose that the driver was having a valid and effective driving licence at the time of accident. The insurer has not led any evidence to prove that the owner had committed willful breach or violation of the terms and conditions contained in the insurance policy. The Tribunal, while determining issues No.3 and 4, has made detailed discussion and has rightly decided the said issues against the insurer.

7. In view of the above discussion, there is no merit in both the appeals and the same are dismissed. Consequently, the impugned award is upheld. Pending CMPs, if any, also stand disposed of.

8. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award, through their respective bank accounts, after proper verification.

CMP No.10100 of 2016 in FAO No.334 of 2012

9. This application has been moved by respondents/claimants No.2 and 3 with the prayer that they may be proceeded in the appeal in their individual capacity, since, during the pendency of the appeal, they attained the age of majority. The application is allowed and the factum of claimants No.2 and 3 of their having attained majority is taken on record.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Krishna Sanitation Society Jatroon, ...Petitioner
Versus
State of Himachal Pradesh and another ....Respondents

CWP No. 2642 of 2016
Decided on: December 9, 2016

Constitution of India, 1950- Article 226- Petitioner submitted a tender, which was the lowest – however, work was not allotted to the petitioner – the petitioner filed the present petition – held, that the petitioner was found to be lowest tenderer – the petitioner had submitted experience

certificate along with PAN and EPF number - a complaint was received against the petitioner that the experience certificate was fictitious and cannot be taken into consideration- the experience certificate shows that the same was not in favor of the petitioner but in the name of K – there was over writing in the same- since the bidder had failed to fulfill the condition of tender notice; hence, a decision was rightly taken to cancel the tender- the Court cannot sit as an expert – writ petition dismissed. (Para-7 to 26)

Cases referred:

State of Jharkhand v. M/s. CWE-SOMA Consortium, AIR 2016 SCW 3366
Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd. AIR 2016 SCW 3385
Central Coalfields Limited v. SLL-SML (Joint Venture Consortium), AIR 2016 SCW 3814
E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3
Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800
Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760
Tata Cellular versus Union of India (1994) 6 SCC 651
Jagdish Mandal versus State of Orissa and others (2007) 14 SCC 517

For the petitioner : Mr. Nipun Sharma, Advocate.
For the respondents : Mr. Rupinder Singh Thakur and Mr. Varun Chandel, Additional Advocate Generals, for respondent No.1.
Mr. Anup Rattan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge

Instant petition under Article 226 of the Constitution of India has been filed seeking following main reliefs:

"i) That the impugned order dated 26.9.2016 may kindly be quashed and set-aside.

ii) That the respondents may kindly be directed to issue award letter in favour of the petitioner within time bound period as he fulfill all the conditions including the experience certificate as one o the condition.

iii) That the respondents may kindly be restrained from inviting fresh tender in the matter."

2. Briefly stated the facts of the case are that the petitioner-society i.e. Krishna Sanitation Society Jatroon, which is registered under Societies Registration Act, 2006, pursuant to Short Tender Notice (Annexure P-2) issued by the Secretary, Nagar Panchayat, Chowari, submitted its tender for the following works:

Sl. No.	Name Of Work	Man Power Required	Earnest Money	Time Limits
1.	Cleanliness area Ward No-01 Sudali Chownk to Hanuman Chownk, , Hanuman Chownk to Puran Chand Secretary House , Hanuman Chownk to Referral Hospital Chowari , Main Nazar alongwith All Drains and Roads. Ward No-05:- Sadwan Raipur Road to Senior Secondary School.	10 Nos + 01 Supervisor	22000-00	One year

	Ward No-07:-Sh. Surnder Sharma Shop to Saran Dass Verma House , Vidya Sagar Shop to Mahila Mandal, Chharmari area. Ward No-06:-Complete Ward The Drains/Path and Street of above said wards alongwith Loading and unloading of Garbage. Rehan Basera and Office Building			
2.	Door to Door Garbage collection in Ward No-01 and Ward No-07	02 Nos	5000-00	One year

3. Petitioner claimed that its tender being the lowest was accepted by the respondents on 29.6.2016 and as such it was expecting that award letter would be issued to it immediately, but when it was not issued, petitioner made inquiries from the respondents. On inquiry, petitioner was informed that one M/s J.S. Constructions had filed a complaint to the respondents (Annexure P-4) alleging therein that the tender submitted by the, Krishan Pal Singh, President of the petitioner-Society was faulty because the experience certificate submitted by it prima facie appeared to be fictitious and as such work in terms of Short Tender Notice could not be awarded to the petitioner-Society. In the complaint, complainant alleged that Sulabh International had actually issued certificate of experience of work till 2008 but there is over-writing. Similarly, complainant alleged that there is contradiction in the PAN card and experience certificate having been furnished by the petitioner society. On the basis of aforesaid complaint, respondents decided not to award work in favour of the petitioner-society. Petitioner being aggrieved of the aforesaid action of not awarding tender in its favour, despite its being lowest bidder approached this Court by way of CWP no. 2492 of 2016, which came to be listed before this Court on 26.9.2016. This Court, on the basis of averments contained in the petition, directed the respondents to seek instructions on 27.9.2016. On 27.9.2016, this Court was informed that the respondents have already passed order dated 26.9.2016 (Annexure P-6), whereby decision has been taken to cancel the tenders on administrative and technical grounds. Perusal of letter dated 26.9.2016 further suggests that decision was taken to invite tender through e-tendering process in terms of instructions issued by the Government. In view of aforesaid, petitioner sought permission to withdraw the petition with liberty to file afresh laying therein challenge to order dated 26.9.2016. In the aforesaid background, present petitioner approached this Court by way of present petition, praying therein for the reliefs as reproduced above.

4. Mr. Nipun Sharma, learned counsel representing the petitioner, vehemently argued that cancellation order issued by the respondents is not tenable as it does not disclose any reason, much less sufficient reason, to cancel the tender on administrative/ technical grounds. Mr. Nipun Sharma, while inviting attention of this Court to the experience certificates purportedly annexed by the petitioner alongwith tender document, (pages-22 and 23 of the paper-book) vehemently argued that reasons cited in the cancellation order (Annexure P-6) are not tenable, rather tender has been cancelled by the respondents to favour other contractors, who were unable to succeed in the bidding process.

5. Mr. Rupinder Singh Thakur, Additional Advocate General appearing for the State and Mr. Anup Rattan, Advocate appearing for respondent No.2, supported the cancellation order (Annexure P-6) and stated that in view of reasons cited in the cancellation order, petitioner has no right to claim work in terms of tender notice because it stands duly proved on record that petitioner had failed to submit experience certificate in sanitation work for the last two years, in the name of the firm alongwith PAN and EPF number. Mr. Rupinder Singh, Additional Advocate General and Mr. Anup Rattan, Advocate, with a view to refute the contentions having been put forth by Mr. Nipun Sharma, Advocate, specifically referred to the experience certificate allegedly annexed with tender documents by the petitioner (page 23) to demonstrate that same was not issued in favour of the petitioner, rather same was issued individually in favour of Shri Krishan Pal Singh son of Shri Sagar Singh, resident of Chowari, District Chamba, who, undisputedly,

happens to be the President of the petitioner-society. Mr. Thakur further argued that bare perusal of experience certificate issued by International Institute of Sulabh System Delhi clearly establishes the allegations of the complainant M/s J.S. Constructions that the same is fictitious because perusal of same clearly suggests that there is over-writing on date. While concluding his arguments, Mr. Thakur stated that since decision has been taken to cancel the tender, present petition deserves to be dismissed having been rendered infructuous.

6. We have heard the learned counsel for the parties and also gone through the records.

7. It is undisputed that pursuant to Short Tender Notice admittedly issued by the respondents i.e. Nagar Panchayat, Chowari, petitioner society applied for work in question and it was found to be the lowest bidder. Similarly, terms and conditions as contained in Short Tender Notice are reproduced herein below:

"TERM AND CONDITIONS FOR CLEANLINESS OF TOWN FOR 2016-17

9. The contractor will ensure to cleanliness of town i.e. Cleanliness of Town Ward No.1, 05, 06, 7, alognwith all drains and streets, Rehan Basera and N.P. office.

10. The contactor has to submit experience Certificate in sanitation work at least 2 years. Alongwith PAN Number, EPF Number.

11. The whole area will be inspected by the Sanitary Supervisor with the contractor/Supervisor daily.

12. No negligence regarding cleanliness of the town will accept. If the cleanliness work of the area affected the tenders will be cancelled within 24 hours without any notice.

13. No gagbage should be visible in the area slop area if visible the area will be cleaned by the workers, f the contractor.

14. The conservancy material viz. shawls, Brooms, Wheel Barrows, Buckets, Phynile, Acid and other material which will be essential for cleanliness will be provided by the contractor.

15. Polythene bags of the area should be collected by the contractors staff and no polythene bags should be visible any where.

16. Since the sanitation work is essential services as such the garbage/refuse removed through Municipal agency. In case of emergency will be done at the cost of the contractor.

17. The contractor will supply the detail of employees i.e. Name of employee, Complete address Identy of employee and location of work place alongwith their Mobile numbers.

18. The next month payment will only be release on the receipt of previous month EPF return and on the basis of daily attendance of workers after the satisfaction /verification of the Sanitary Supervisor."

8. The aforesaid conditions suggest that contractor was required to submit experience certificate for two year in sanitation work alongwith PAN and EPF number. In the instant case, as has emerged from the record, respondents, after completion of bidding process, received complaint from M/s J.S. Contructions and Maharishi Enterprises (Annexure P-4) that the experience certificate submitted by the petitioner-society are fictitious and same can not be taken into consideration while considering the bid of the petitioner-society.

9. True, it is that aforesaid complainants also participated in the tendering process and as such there can be every possibility of lodging false complaint by it against petitioner being competitor but perusal of reply having been filed by the respondents clearly suggests that the petitioner failed to submit two years experience certificate in the name of petitioner-society as was

required in terms of Short Tender Notice. Perusal of experience certificate tendered by the petitioner with the tender document clearly suggests that one of the certificate was not in the name of the petitioner-society, which had actually applied in terms of Short Tender Notice, rather the experience certificate purportedly issued by International Institute of Sulabh System Delhi is/was in favour of Krishan Pal singh son of Sagar Singh, in his individual capacity and not in the name of petitioner-Society i.e. Krishna Sanitation Society. Since tender was submitted in the name of petitioner-Society, it was incumbent upon the petitioner society to place on record certificate, if any, in its favour and not in the name of Shri Krishan Pal singh, who happens to be the President of the Society. Moreover, perusal of experience certificate (page 23) shows that there is over-writing on date as such this Court sees no illegality and infirmity in the action of the respondents in rejecting the tender of petitioner for non-compliance of terms and conditions of Short Tender Notice.

10. Similarly, perusal of certificate (Annexure P-7), which has been issued by Senior Medical Officer, Chowari suggests that same has been issued in the name of Sh. Krishan Pal Singh and not in the name of petitioner-society and same is of no help to the petitioner-society.

11. Apart from above, perusal of impugned order dated 26.9.2016 (Annexure P-6) clearly suggests that tender in question was opened on 29.6.2016 in the office of Nagar Panchayat, Chowari in the presence of applicants i.e. contractors. Five contractors submitted tenders and out of five, three contractors failed to produce the experience certificate as such their bids were not considered. So far as remaining two contractors are concerned, though the petitioner-society was found to be lowest but since it did not furnish certificate as per terms and conditions of tender notice, same was also rejected. Impugned order clearly suggests that petitioner-society had submitted experience certificate of only one year, which was issued by Secretary, Nagar Panchayat, Chowari available at page 22, perusal where suggests that M/s Krishna Sanitation Soceity worked with Nagar Panchayat for one year i.e. November, 2013 to October, 2014 for cleaning and sweeping of Nagar Panchayat area. Since aforesaid certificate in the name of petitioner-society was only for one year, no fault can be found with the decision of respondents in rejecting tender of the petitioner-society for violation of terms and conditions of Short Tender Notice.

12. Similarly, since another tenderer M/s J.S. Constructions though was second lowest but it also did not furnish experience certificate, as such its tender was also rejected. Perusal of aforesaid communication clearly suggests that none of the contractors, who had actually submitted bids in terms of tender notice fulfilled the terms and conditions, accordingly, respondents decided to cancel the tender on administrative and technical grounds and decided to initiate tender process through e-tendering system, in terms of instructions issued by the Government.

13. This Court, after carefully examining the impugned order passed by the respondents, sees no force in the contentions having been raised on behalf of the petitioner that action of the respondents is discriminatory and is the result of colourable exercise of power. Rather, this Court after perusing impugned order, is satisfied and convinced that since all the bidders failed to fulfill the conditions of tender notice, respondents rightly decided to cancel the tender. As such, there is no merit in the petition.

14. Further, by no stretch of imagination, court can assume the role of technical expert, who in their wisdom have cancelled the tender on account of technical /administrative reasons. Since respondents have already taken a conscious decision to recall the tender, this Court sees no occasion to grant relief as prayed for in the petition.

15. It is well settled by now that respondents can withdraw /recall tender at any time, if it is convinced that same is not in accordance with the requirements as indicated in Notice Inviting Tender. Though, in the present case, petitioner claimed himself to be lowest bidder but there is no document suggestive of the fact that pursuant to opening of his tender, he was

awarded work, as such no right has accrued in his favour which would have entitled him to claim the relief as prayed for in the petition.

16. The Apex Court in **State of Jharkhand v. M/s. CWE-SOMA Consortium** reported in AIR 2016 SCW 3366, has held that:

> 13. The appellant-state was well within its rights to reject the bid without assigning any reason thereof. This is apparent from clause 24 of NIT and clause 32.1 of SBD which reads as under:-
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> > "Clause 24 of NIT: "Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof." Clause 32.1 of SBD: "…the Employer reserves the right to accept or reject any Bid to cancel the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer's action." In terms of the above clause 24 of NIT and clause 32.1 of SBD, though Government has the right to cancel the tender without assigning any reason, appellant-state did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the government to cancel the tender.
>
> 14. The State derives its power to enter into a contract under Article 298 of the Constitution of India and has the right to decide whether to enter into a contract with a person or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, in view of lack of real competition, the state found it advisable not to proceed with the tender with only one responsive bid available before it. When there was only one tenderer, in order to make the tender more competitive, the tender committee decided to cancel the tender and invited a fresh tender and the decision of the appellant did not suffer from any arbitrariness or unreasonableness.

17. That Apex Court in **Bakshi Security & Personnel Services Pvt. Ltd. V. Devkishan Computed P. Ltd.** reported in AIR 2016 SCW 3385, has held that:

> 13. First and foremost, under tender condition 2.5.5, commercial bids have to strictly conform to the format provided in Annexure 2 of the tender document. Annexure 2 which contains the format for the price bid makes it clear that the salary paid to deployed manpower should not be less than the minimum wage. It further goes on to state in paragraph 3 thereof that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected. On this ground alone, Respondent No.1's bid is liable to be rejected inasmuch as, vide its letter dated 3.9.2015, Respondent No.1 stuck to its original figure of Rs.2,77,68,000/- which is way below the minimum wage fixed by the Government. Secondly, Shri Raval is also right in stating that the without prejudice offer of Rs.3,00,92,346/- is an offer which is not fixed, but open ended. This is clear from the fact that it was up to the Government then to pick up either figure by way of acceptance. This is clearly interdicted by clause 2.5.6 of the tender which states that prices quoted by the bidder have to be fixed, and no open ended bid can be entertained, the same being liable to be rejected straightaway. Such condition is obviously an essential condition of the tender which goes to the eligibility of persons who make offers under the tender.
>
> 14. Unfortunately, even though the High Court noticed the open ended nature of Respondent No.1's bid, it went on to add that the offer of Respondent No.1 shall be treated as matching with the revised minimum wage calculation and that it is nowhere envisaged by the tender conditions that rejection of an offer which may

have the potential of causing loss to the tenderer is present. It is not for the High Court to revisit a condition contained in Annexure 2 read with 2.5.5 of the tender in the manner aforesaid. Once the tender condition states that the tender must strictly conform to the format provided in Annexure 2, and Annexure 2 in turn clearly states that if the component of salary quoted is less than the minimum wage prescribed, the bid is liable to be rejected, and the High Court cannot hold otherwise. The High Court's further finding that Respondent No.1's offer was "clear" is wholly incorrect. It was a without prejudice offer which muddied the waters and rendered the price quoted by the bidder as variable and not fixed.

18. The Apex Court in **Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)** reported in AIR 2016 SCW 3814, has further held that:

44. On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of the NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid.

56. There is nothing to indicate that the process by which the decision was taken by CCL that the bank guarantee furnished by JVC ought to be rejected was flawed in any manner whatsoever. Similarly, there is nothing to indicate that the decision taken by CCL to reject the bank guarantee furnished by JVC and to adhere to the requirements of the NIT and the GTC was arbitrary or unreasonable or perverse in any manner whatsoever."

19. Admittedly, Court can go into the question of mala fides raised by a litigant, but in order to succeed, much more than a mere allegation is required. Bald and unfounded allegations of mala fides are not sustainable and that mala fides must be specifically pleaded and proved and such allegations of mala fides should be made with all sense of responsibility, otherwise, the maker of such allegations should be ready to face consequences.

20. It is equally well settled that the burden of proving mala fides is on the person making the allegations and the burden is 'very heavy." Reliance is placed upon ***E.P. Royappa Vs. State of Tamil Nadu (1974) 4 SCC 3***.

21. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fides are often more easily made than proved and proof of high degree is required to prove the same. Reliance is also placed on ***Gulam Mustafa Vs. State of Maharashtra (1976) 1 SCC 800*** wherein it is held, *"It (mala fides) is the last refuge of a losing litigant."*

22. Reliance is also placed on ***Union of India and others Vs. Ashok Kumar and others, (2005) 8 SCC 760***, whereby it is held by the Apex Court that seriousness of allegations of mala fides demands proof of high order of credibility and the Courts should be slow to draw dubious inferences from incomplete facts placed before them by a party, particularly when the imputations are grave and they are made against the holder of an office having high responsibility. It was held:

"21. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill- will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the

employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not the law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts. (S. Pratap Singh v. State of Punjab AIR 1964 SC 72). It cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. As noted by this Court in E. P. Royappa v. State of Tamil Nadu and Another (AIR 1974 SC 555), Courts would be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar (2003) 4 SCC 579)."

23. Courts can interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India.

24. Principles of judicial review under Article 226 of the Constitution of India would apply to the exercise of contractual powers by the Government only in case the process adopted or decision making process of the authorities is wrong and illegal and in order to prevent arbitrariness or favoritism.

25. Reliance is further placed on ***Tata Cellular*** versus ***Union of India (1994) 6 SCC 651***, whereby Apex Cout has laid down the limitations in relation to the scope of judicial review of administrative decisions in exercise of powers awarding contracts:(SCC pp 687-88, para 94)

26. In the instant case, the decision regarding cancellation of the tender is a bonafide one and is otherwise in the larger public interest because none of the bidders including the petitioner fulfilled the tender condition and as such for a fair and transparent tendering, Department cancelled the tender and decided to resort to e-tendering. Further, e-tendering would increase healthy competition amongst the participants, thereby saving the public exchequer. It is not a fit case to exercise powers of judicial review as there is no violation of the provisions of law and further there is no procedural aberration or error in assessment. It is more than settled that power of judicial review will not be permitted to invoke to protect private interest at the cost of public interest and reliance is placed on a judgment delivered by the Apex Court in ***Jagdish Mandal*** *versus* ***State of Orissa and others(2007) 14 SCC 517*** wherein the Hon'ble Supreme Court has held that before interfering in tender or contractual matters in exercise of judicial review, Courts should ascertain whether process adopted or decision made by the authority is mala fide or intended to favour some and whether process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached, and also whether public interest is affected.

27. Applying the aforesaid test to the instant case, the writ petition merits to be dismissed and is accordingly dismissed. Pending applications, if any, are also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Mahesh …Appellant.
Versus
Prince and others …Respondents.

FAO No. 126 of 2012
Decided on: 09.12.2016

Motor Vehicles Act, 1988- Section 166- Claimant sustained 40% disability qua his left leg- he remained admitted in the hospital w.e.f. 30.9.2008 till 20.11.2008 – claimant was 10 years of age at the time of incident – he will not be able to seek appointment in the Armed Forces or get the job of his choice after attaining the age of majority – the claimant would have been earning not less than Rs.5,000/- per month after attaining majority- considering the disability, the claimant had suffered Rs.2,000/- per month as loss of income – multiplier of 18 will be applicable – thus, compensation of Rs.2000 x 12 x 18= Rs.4,32,000/- awarded towards loss of future income – Rs.42,805/- awarded under the head medical expenses and Rs.12,000/- awarded under the head transportation charges- compensation of Rs.1 lac each awarded under the heads pain and suffering and loss of amenities of life- thus, total compensation of Rs. 6,86,805/- awarded with interest @ 7.5% per annum.(Para-9 to 27)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
Jakir Hussein versus Sabir and others, (2015) 7 SCC 252
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant: Mr. Dalip K. Sharma, Advocate.
For the respondents: Mr. Sanjeev Rana, Advocate, for respondent No. 1.
Mr. Ashwani Sharma, Advocate, for respondent No. 2.
Ms. Shilpa Sood, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 27th December, 2011, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, Himachal Pradesh (for short "the

Tribunal") in M.A.C.T. Petition No. 36-S/2 of 2009, titled as Mahesh versus Prince and others, whereby compensation to the tune of ₹ 2,98,805/- with interest @ 9% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimant-injured and the insurer was saddled with liability (for short "the impugned award").

2. The respondents in the claim petition, i.e. the insurer, owner-insured and driver of the offending vehicle, have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The claimant-injured has questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is – whether the amount awarded is inadequate? The answer is in the affirmative for the reasons to be recorded hereinafter.

5. The claimant-injured invoked the jurisdiction of the Tribunal for grant of compensation, as per the break-ups given in the claim petition, on the ground that he became the victim of the motor vehicular accident, which was caused by the driver, namely Shri Rajinder Kumar, while driving vehicle, bearing registration No. HP-01B-0320, rashly and negligently, on 30th September, 2008, at about 5.00 P.M. near Shalaghat, Tehsil Arki, in which the claimant-injured sustained injuries.

6. The claim petition was resisted by the owner-insured and the insurer of the offending vehicle on the grounds taken in the respective memo of objections. It is apt to record herein that the driver of the offending vehicle was proceeded against ex-parte.

7. The entire controversy involved in this appeal relates to adequacy of compensation, thus, there is no need to reproduce the issues framed by the Tribunal herein.

8. The Tribunal has made discussions to this effect in paras 13 to 19 of the impugned award.

9. The perusal of the record does disclose that the claimant-injured remained admitted at IGMC, Shimla, with effect from 30th September, 2008 to 20th November, 2008. The disability certificate is also on the record as Ext. PW-4/A, in terms of which the claimant-injured has suffered 40% permanent disability qua left leg.

10. The claimant-injured has examined Dr. Sandeep Kashyap as PW-4, who was one of the members of the Medical Board, which has issued the disability certificate, has specifically stated that the injury suffered by the claimant-injured, which is permanent in nature, has resulted in shortening his left leg.

11. It is beaten law of land that in an injury case, the compensation is to be awarded under pecuniary and non-pecuniary heads by making guess work.

12. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,**reported in **AIR 1995 SC 755,Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,**reported in **2010 AIR SCW 6085,Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,**reported in **2011 AIR SCW 4787,**and **Kavita versus Deepak and others,** reported in**2012 AIR SCW 4771**.

13. This Court has also laid down the same principle in a series of cases.

14. Admittedly, the claimant-injured was ten years of age at the time of the accident and was a student. Because of the disability, he will not be able to seek appointment in armed forces or get the job of his choice after attaining the age of majority. The Tribunal has assessed his income to be ₹ 40,000/- per annum, which is not legally and factually correct.

15. By guess work, it can be safely held that the claimant-injured would have been earning not less than ₹ 5,000/- per month even as a labourer after attaining the age of majority. The claimant-injured has suffered 40% permanent disability. Thus, it is held that he has suffered loss of income to the tune of ₹ 2,000/- per month.

16. The Tribunal has applied the multiplier of '18', which is just and appropriate in view of the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the law laid down by the Apex Court in the case titled as **Sarla Verma and others versus Delhi Transport Corporationand another** reported in **AIR 2009 SC 3104,** and upheld in **Reshma Kumari and others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

17. Having said so, the claimant-injured has lost source of future income to the tune of ₹ 2,000/- x 12 x 18 = ₹ 4,32,000/-.

18. The Tribunal has rightly awarded compensation to the tune of ₹ 42,805/- under the head 'medical expenses' and ₹ 12,000/- under the head 'transportation charges', is maintained.

19. The Tribunal has fallen in an error in awarding compensation under the heads 'future pain and suffering' to the tune of ₹ 50,000/- and 'permanent disability' to the tune of ₹ 50,000/-.

20. The Apex Court in its latest decision in the case titled as **Jakir Hussein versus Sabir and others,** reported in **(2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the judgment herein:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
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> *...........*
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to*

move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."

21. In view of the ratio laid down by the apex Court in the judgment (supra), I am of the considered view that the claimant-injured is entitled to compensation to the tune of ₹ 1,00,000/- under the head 'pain and sufferings' and ₹ 1,00,000/- under the head 'loss of amenities of life'.

22. Having glance of the above discussions, the claimant-injured is held entitled to total compensation to the tune of ₹ 4,32,000/- + ₹ 42,805/- + ₹ 12,000/- + ₹ 1,00,000/- + ₹ 1,00,000/- = ₹ 6,86,805/-.

23. The Tribunal has also fallen in an error in awarding interest at the rate of 9% per annum, which was to be awarded as per the prevailing rates.

24. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in **(2002) 6 SCC 281;Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738;Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053;Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982;Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

25. Having said so, I deem it proper to reduce the rate of interest from 9% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

26. In view of the discussions made hereinabove, the amount of compensation is enhanced, impugned award is modified and the appeal is disposed of, as indicated hereinabove.

27. The insurer is directed to deposit the enhanced awarded amount before the Registry within eight weeks. On deposition, the same be released in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account after proper identification.

28. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

M/s. Dr. Reddy's Laboratories Ltd. …Petitioner.
Versus
State of Himachal Pradesh and another. …Respondents.

CWP No. 2358/2011
Decided on: 9.12. 2016

Constitution of India, 1950- Article 226- Petitioner is a registered dealer for manufacturing and treading of drugs and medicines – the petitioner has set up a factory for manufacturing drugs at Baddi – a notice was issued to the petitioner – penalty of Rs.84,44,838/- was imposed – an appeal was filed, which was dismissed- the matter was carried before H.P. Tax Tribunal, which set aside the orders passed by assessee and Appellate Authority but imposed a cost of Rs. 20 lacs for the reason that petitioner could not be permitted to take the benefit of technicalities of law and wrong

committed by the Assessing Authority- held, that statutory Tribunals must function within their bound and their decisions should not be arbitrary, fanciful or based on irrelevant consideration- fiscal statute must be strictly interpreted – there is no equity in tax matter – once it was concluded that the orders passed by Assessing and Appellate Authority were not sustainable in the eyes of law, costs could not have been imposed- the purpose of imposing the cost is to indemnify the party for the expenses incurred – writ petition allowed and the order passed by the Tribunal set aside.(Para-10 to 21)

Cases referred:
Rajasthan and others vs. Basant Agrotech (India) Limited, (2013) 15 SCC 1
Vinod Seth vs. Devinder Bajaj, (2010) 8 SCC 1

For the Petitioner: Mr. Goverdhan Sharma, Advocate.
For the Respondents: Mr. Rupinder Thakur, Addl. A.G. with Mr. Pushpinder Jaswal, Dy. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral):

The instant case is rather an unusual one where the Himachal Pradesh Tax Tribunal (for short 'Tribunal') though had quashed all the proceedings against the petitioner but then proceeded to burden it with Rs. 20 lakhs, as costs, that too, only on the ground that *"it should not be allowed to get the benefit of technicalities of law and the wrongs committed by the Assessing Authority*".

2. However, before we proceed to determine the question on merit, it would be necessary to recapitulate few facts, which are as under:

3. The petitioner is a registered dealer under the Himachal PradeshValue Added Tax Act, 2005 (for short 'VAT Act, 2005') and also under the Central Sales Tax Act, 1956) for manufacturing and trading of drugs and medicines in the State of Himachal Pradesh. The petitioner in the year 2005 has set up a factory for manufacturing of drugs at Baddi.

4. The assessment for the year 2005-06 framed by the Assessing Authority was reopened under the VAT Act, 2005 and the petitioner was issued notice in Form Vat-XXXIX.

5. These proceedings culminated in the imposition of penalty upon the petitioner to the tune of Rs. 84,44,838/-. Though an appeal against the same was filed before the Appellate Authority, however, the same was dismissed vide order dated 7.5.2009.

6. The petitioner thereafter filed second appeal before the Tribunal, which was registered as Appeal No. 70/2009 and came up for consideration on 18.9.2010, and as already observed earlier, the Tribunal though set aside the order passed by the Assessing Authority as also the Appellate Authority, however, at the same time proceeded to impose costs of Rs. 20 lakhs on the petitioner only for the reason that it could not be permitted to take the benefit of technicalities of law and the wrongs committed by the Assessing Authority.

7. This would be clearly evident from the operative portion of the order, which reads thus:

> "Therefore, keeping in view the above circumstances it is not necessary to discuss each and every item and attending circumstances of all the items. This court comes to the conclusion that the penalty imposed is in violation of statutory provisions and liable to be quashed and is hereby quashed alongwith order of Appellate Authority but the dealer should not be allowed to get the benefit of technicalities of law and wrongs committed by the Assessing Authority and, therefore, I feel it necessary in the interest of justice and as well as in the

interest of revenue also that the dealer must be burdened with heavy cost while allowing its appeal and costs are quantified as Rs. 20,00,000/- (Rupees twenty lakhs) which I feel is necessary and expedient and the appeal is accordingly disposed of and records of the lower authorities be sent back."

8. We have heard the learned counsel for the parties and have gone through the material placed on record.

9. We are appalled to see the manner in which the appeal has been disposed of.

10. It is more than settled that the statutory Tribunals must function within their bound and their decisions should not be arbitrary, fanciful or based on irrelevant consideration.

11. It is equally settled that fiscal statutes must be strictly interpreted and in determining liability of a subject to tax one must have regard to the strict letter of law and not merely spirit of the statute or the subsistence of the law. If the Revenue satisfies the Court that the case falls strictly within the provision of the law, the subject can be taxed. On the other hand, if the case is not covered within the four corners of the provisions of the taxing statutes, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter.

12. Apart from the above, there is no equity on either side in tax matters and nothing can be read which is not provided for in the statute.

13. The fundamental principle that serves as guidance to understand the fiscal legislations and the duty of the Court while dwelling upon the interpretation of the taxing statute has been construed by the Hon'ble Supreme Court in State of ***Rajasthan and others*** vs. ***Basant Agrotech (India) Limited***, (2013) 15 SCC 1, and it shall be apt to reproduce the relevant paras as under:

> "[12] Before we appreciate the controversy that has travelled to this Court, we think it necessary to state the fundamental principles that serve as guidance to understand the fiscal legislations and the duty of the Court while dwelling upon the interpretation of taxing statutes.
>
> [13] In A.V. Fernandez v. The State of Kerala, 1957 AIR(SC) 657, Bhagwati, J. referred to a passage from Partington v. The Attorney General,1869 4 HL 100 at p. 122(B) which is as follows: -
>
> "As I understand the principle of all fiscal legislation it is this : if the person sought to be taxed, comes within the letter of the law he must be taxed however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."
>
> [14] The said passage, as has been stated in the said pronouncement, was quoted with approval by the Privy Council in Bank of Chettinad v. Income-tax Commr., 1940 AIR(PC) 183 and the Privy Council had registered its protest against the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position. Proceeding further the learned Judge stated that:
>
> "It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the provision of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter."

[15] In Commissioner of Salex-tax, U.P. v. Modi Sugar Mills Ltd., 1961 AIR(SC) 1047, Shah, J., speaking for the majority in the Constitution Bench, has observed thus: -

"In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The Court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed : if cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."

[16] In Commissioner of Income-tax, Madras v. Kasturi and Sons Ltd., 1999 AIR(SC) 1275, a two-Judge Bench has approvingly quoted a passage from the book "Principles of Statutory Interpretation" by Justice G.P. Singh, Sixth Edition 1966, which is as follows: -

"The well established rule in the familiar words of LORD WENSLEYDALE, reaffirmed by LORD HALSBURY and LORD SIMONDS, means :

"The subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words". In a classic passage LORD CAIRNS stated that the principle thus: "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute." VISCOUNT SIMON quoted with approval a passage from Rowlatt, J. expressing the principle in the following words:

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." Relying upon this passage Lord Upjohn said : "Fiscal measures are not built upon any theory of taxation".This passage presently finds place at page 826, Twelfth Edition 2012 of "Principle of Statutory Interpretation" by G.P. Singh."

14. Adverting to the facts, what we find more intriguing is that once the Tribunal had come to the conclusion that the orders passed by both the authorities below, i.e. Assessing Authority and Appellate Authority, were not sustainable in the eyes of law and there was merit in the appeal filed by the petitioner, then how it still proceeded to not only impose costs but exorbitant costs.

15. As regards costs, the accepted principle is that the costs shall follow the event. Unless the successful party is guilty of misconduct or there is any other good cause or reason for depriving the party of it.

16. However, imposing costs upon the successful party, that too, only on the ground of it being legally entitled to benefit of a statute is totally unheard of. After all, the object of awarding costs is to indemnify a party against the expenses of the successful party incurred during the process of vindicating its rights before the Court.

17. In ***Vinod Seth*** vs. ***Devinder Bajaj***, (2010) 8 SCC 1, the Hon'ble Supreme Court laid down the following goals, which were intended to be achieved by imposing costs:

(a) expenditure incurred for the giving of any notice required to be given by law before the institution of the suit;

(b) expenditure incurred on any notice which, though not required to be given by law, has been given by any party to the suit to any other party before the institution of the suit;

(c) expenditure incurred on the typing, writing or printing of pleadings filed by any party;

(d) charges paid by a party for inspection of the records of the court for the purposes of the suit;

(e) expenditure incurred by a party for producing witnesses, even though not summoned through courts; and

(f) in the case of appeals, charges incurred by a party for obtaining any copies of judgments and decrees which are required to be filed along with the memorandum of appeal."

18. It is a trite if a person had not been brought within the ambit of charging section of a taxing statute by clear words; he could not be taxed at all, directly or indirectly. What the learned Tribunal in fact has done is virtually nullify the provisions of the statute by indirectly taxing the petitioner by imposing exorbitant costs of Rs. 20 lakhs.

19. It needs no emphasis that no person can be persecuted only for having resorted to a legal remedy, that too, which has ultimately concluded in his favour.

20. In view of the reasons stated hereinabove, we find merit in this petition and the same is allowed and order passed by the Tribunal on 18.9.2010 is quashed and set aside.

21. Normally, in such like cases, matter would be required to be remitted back to the Authority whose order has been set aside, however, in this case, there is no necessity of doing so for the simple reason that the State has not chosen to assail the order passed by the Tribunal whereby the orders passed by the Assessing Authority and thereafter Appellate Authority have been ordered to be set aside. It is only the petitioner, who is aggrieved by the impugned order and has approached this Court by filing the instant petition, whereas, the respondent has remained contended with the order passed by the Tribunal, and the same insofar as the State is concerned, has attained finality.

22. The petition is allowed in the aforesaid terms leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. …Appellant
Versus
Sh. Nand Lal & another …Respondents

FAO No. 26 of 2012
Decided on : 09.12.2016.

Motor Vehicles Act, 1988- Section 166- Tribunal awarded compensation of Rs.86,000/- with interest – claimant had stated in the claim petition that he was sitting in the tractor as Labourer with the contractor but it was stated in the affidavit that the claimant was hit by the Tractor on the road – hence, the award set aside – however, Rs.25,000/- awarded under no fault liability.(Para-6 to 9)

For the Appellant : Ms. Shilpa Sood, Advocate.
For the Respondents: Mr. Ramakant Sharma, Senior Advocate with Ms. Soma Thakur, Advocate, for respondent No. 1.
Mr. Maan Singh, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award dated 20th August, 2011, made by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P., Camp at Nalagarh (hereinafter referred to as 'the Tribunal') in Claim Petition No. 6NL/2 of 2008, titled as **Nand Lal** versus **Nanak Chand & another,**whereby compensation to the tune of Rs. 86,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimant and the insurer was saddled with liability (for short, "the impugned award").

2. The claimant and insured-owner have not questioned the impugned award, on any count. Thus, it has attained finality, so far the same relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

4. Learned Counsel for the appellant-insurer argued that the pleadings and proof on the file are at variance and the claim petition ought to have been dismissed. Further argued that the driver was not having a valid and effective driving licence at the time of accident and the offending vehicle, i.e Tractor-Trolley bearing registration No. HP-12A-5274 was meant for agriculture purpose.

5. I have gone through the impugned award and the entire record.

6. In para-8 of the claim petition, claimant has specifically pleaded that he was sitting in the offending tractor as Labourer with the Contractor. But in his affidavit (Ext. PW-1/A) tendered before the Tribunal, he has stated that he was hit by the said tractor on the road, while he was working with the Contractor.

7. The factum of insurance and permanent disability suffered by the claimant is admitted, but the factum of accident is in dispute.

8. Having glance of the aforesaid discussion, I am of the considered view that it is a case of remand, but keeping all the facts in view, I deem it proper to award compensation to the tune of Rs. 25,000/- under the head 'no fault liability', as per the mandate of Section 140 of the Motor Vehicles Act, 1988, with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

9. Accordingly, the claimant is held entitled to Rs. 25,000/- under the head 'no fault liability', with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

10. The Registry is directed to release the award amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in his account.

11 The excess amount, if any, be refunded in favour of the appellant-insurer through payees' account cheque.

12. Accordingly, the impugned award is modified and the appeal is disposed of.

13. Send down the records after placing a copy of the judgment on the file of the claim petition.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAOs (MVA) No. 459 of 2012 a/w FAO No. 127 of 2013.
Date of decision: 9th December, 2016.

FAO No. 459 of 2012.

Sh. Navdeep Singh and another .....Appellants
Versus
Inder Singh and another .....Respondents.

FAO No. 127 of 2013.

Inder Singh .....Appellant
Versus
Navdeep Singh and others .....Respondents.

Motor Vehicles Act, 1988- Section 149- Tribunal saddled the owner with liability – held, that the driver was having a valid and effective driving licence, which was also renewed- even otherwise, it was for the insurer to plead and prove the the driver was not having a valid licence and the owner had committed willful breach – the insurance was admitted and the insurer has to satisfy the award- appeal allowed. (Para- 6 to 13)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant(s): Mr. G.S. Rathore, Advocate, for the appellants in FAO No. 459 of 2012 and Mr. Vipan Rajta, Advocate, for the appellant in FAO No. 127 of 2013.

For the respondent(s): Mr.Vipan Rajta, Advocate, for respondent No.1 in FAO No. 459 of 2012.
Mr. Aman Sood, Advocate, for respondent No. 2 in FAO No. 459 of 2012 and for respondent No. 3 in FAO No. 127 of 2013.
Mr. G.S. Rathore, Advocate, for respondent No. 2 in FAO No. 127 of 2013.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

These appeals are directed against the judgment and award dated 28.5.2012, passed by the Motor Accident Claims Tribunal-II, Shimla H.P. hereinafter referred to as "the Tribunal", for short, in MAC No.53-S/2 of 2008, titled *Inder Singh versus Sh. Navdeep Singh and others,* whereby compensation to the tune of Rs.53000/- alongwith interest @ 7.5% per annum with cost assessed at Rs.5000/- came to be awarded in favour of the claimant and owner and driver were saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Both these appeals are outcome of a common award thus, I deem it proper to determine both these appeals by this common judgment.

3. Owner Navdeep Singh and driver Jagdish Kumar, by the medium of FAO No. 459 of 2012 has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling him with the liability and exonerating the insurer and claimant Inder Singh, by the medium of FAO No. 127 of 2013, has questioned the impugned award on the ground of adequacy of compensation, on the grounds taken in their memo of appeals.

4. The factum of accident, rashness and negligence is not in dispute. Thus two points arise for determination in these appeals.

(i) Whether the Tribunal has rightly discharged the insurer from the liability?

(ii) Whether the amount awarded is adequate?

5. Both these points are to be answered against the insurer for the following reasons.

6. The driver of the offending vehicle was having a valid and effective driving licence which was also renewed. The Tribunal has fallen in an error in making discussion in paras 25 and 26 of the impugned award. This Court has already determined the issue in FAO No.172 of 2006 decided on 7.3.2014 titled ***Oriental Insurance Company versus Smt. Shakuntla Devi and others***.

7. Ext. RW1/A is driving licence, perusal of which does disclose that it was renewed on 13.6.2006 up to 11.6.2009 thus, was valid one.

8. Even otherwise, if a licence was not valid or was otherwise not effective, it was for the appellant-insurer to plead and prove that the driver was not having a valid licence and the owner has committed willful breach.

9. My this view is fortified by the Apex Court judgment in the case of **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

> *"105. ....*
>
> *(i) ....*
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> *(ii) ....*
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> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).........................*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

10. It is also profitable to reproduce para 10 of the judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

11. Having said so, the driver was having a valid and effective driving licence at the time of accident.

12. The factum of insurance is admitted. Thus, the insurer has to satisfy the award.

13. Accordingly, the appeal filed by the owner and driver being FAO No. 459 of 2012 is allowed and the impugned award is modified as indicated hereinabove.

FAO No. 127 of 2013.

14. Adverting to the appeal filed by the claimant, the amount though appears to be adequate and just but the Tribunal has fallen in an error in not awarding compensation for three months during which the claimant remained for bed rest. The income of the claimant has been assessed at Rs.3000/- per month by the Tribunal and thus is entitled to Rs.9000/- in addition to the amount already awarded. Thus, the claimant in all is held entitled to compensation to the tune of Rs.53,000/-+Rs.9,000/-= Rs.62000/- alongwith costs of Rs.5000/-as awarded by the Tribunal.

15. Accordingly, the appeals are allowed, compensation is enhanced and impugned award is modified, as indicated hereinabove.

16. The insurer is directed to deposit the amount within eight weeks from today in the Registry alongwith interest as awarded by the Tribunal. The Registry, on deposit, is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in his bank account, after proper verification.

17. The statutory amount of Rs.25,000/- stands deposited by the appellant-owner in the Registry. Out of Rs.25,000/- a sum of Rs.10,000/- is also awarded as costs in favour of the claimant, be released to the claimant as and rest of the amount be refunded to the appellant/owner.

18. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Neelam Sharma .....Appellant.
Versus
Ved Prakash .....Respondent.

Cr.Revision No. 104 of 2013.
Reserved on: 24.11.2016.
Decided on : 09/12/2016.

Negotiable Instruments Act, 1881- Section 138- Accused issued two cheques of Rs.4 lacs and Rs.3 lacs for carrying out construction of a set on the slab purchased by the accused- cheques were dishonoured with the remarks 'insufficient funds' – the accused failed to make payment despite the receipt of the notice – the accused was tried and convicted by the Trial Court- an appeal was preferred, which was also dismissed- held in revision that the complainant had not produced the earlier cheques issued by the accused and had not given their serial numbers- he had not produced the bills of the material used by him to complete the construction of the flat- statement of wife of the complainant also made the version of the complainant doubtful - revision allowed- judgments of the trial Court and Appellate Court set aside and the accused acquitted of the commission of offence punishable under Section 138 of N.I. Act. (Para-9 to 12)

For the Appellant: Mr. Satyen Vaidya, Sr. Advocate with Mr. Varun Chauhan, Advocate.
For the Respondent: Mr. Amrender Singh Rana, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The accused revisionist stands concurrently convicted by both the learned Courts below for hers committing an offence punishable under Section 138 of the Negotiable Instruments Act, in sequel whereof a sentence of simple imprisonment of one year besides qua hers defraying compensation to the complainant in an amount of Rs.4,00,000/- stood imposed upon her. The accused standing aggrieved by the concurrently recorded findings of conviction by both the Courts below has concerted through instituting the instant revision herebefore beget its reversal.

2. The brief facts of the case are that the accused executed cheque comprised in Ext.CW-1/B in favour of the complainant in the sum of Rs.4,00,000/-. The said cheque was drawn on the State Bank of India, Shimla. The accused executed and advanced the aforesaid cheque in favour of the complainant for carrying out the construction of a set on the slab purchased by the accused. The accused had also issued another cheque worth Rs.three lacs in favour of the complainant for the aforesaid purpose of construction to be carried out by the complainant. Both of these cheques got dishonoured and another complaint regarding the second cheque was also filed by the complainant. The cheque was drawn by the accused in favour of the complainant for discharge of the legally enforceable debt and liability outstanding against the accused in favour of the complainant. The cheque was dishonoured by the banker of the accused with the remarks of insufficient funds. The information of the dishonour of the cheque was given to the banker of the complainant by the banker of the accused and the complainant sent a notice of demand of the amount intimating the accused in the event of her failure to pay the cheque amount within 15 days of the receipt of the notice, legal action for her criminal prosecution under Section 138 of the Negotiable Instruments Act shall be taken by the complainant. The notice was received by the accused on 15.08.2007 but till date she failed to make the payment. Hence, this complaint.

3. Notice of accusation stood put to the accused by the learned trial Court for hers committing offences punishable under Sections 138 of the Negotiable Instruments Act to which she pleaded not guilty and claimed trial.

4. In order to prove its case, the complainant examined 5 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded in which she pleaded innocence and claimed false implication. She herself appeared as witness in her defence.

5. On an appraisal of the evidence on record, both the Courts below returned findings of conviction against the accused/petitioner herein.

6. The accused stands aggrieved by the judgement of conviction recorded by both the Courts below. The learned counsel for the petitioner/accused has concertedly and vigorously contended qua the findings of conviction recorded by both the Courts below standing not based on a proper appreciation by it of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of the material on record. Hence, he contends qua the findings of conviction being reversed by this Court, in the exercise of its revisional jurisdiction and being replaced by findings of acquittal.

7. On the other hand, the learned counsel for the complainant has with considerable force and vigour, contended that the findings of conviction, recorded by the Courts below, standing based on a mature and balanced appreciation of evidence on record and hence theirs not necessitating interference rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has with studied care and incision, evaluated the entire evidence on record.

9. Cheque comprised in Ext.CW-1/B stood issued by the convict/revisionist to the respondent/complainant. It holds therewithin an amount of Rs.4,00,000/-. On its presentation before the bank concerned whereupon it stood drawn it suffered the ill fate of its refusal qua encashment by the bank concerned, refusal whereof sprouted from non occurrence of sufficient funds thereat in the account of the convict/revisionist.

10. The mere factum of its issuance by the petitioner, though arouses a statutory presumption qua thereupon the petitioner/convict acquiescing qua its standing issued vis-à-vis the complainant in discharge of her apposite liability qua the complainant yet the aforesaid statutory presumption garnerable from the mere factum of its issuance is rebutable by cogent evidence in dislodgement thereof standing adduced by the petitioner/convict, holding unfoldments therein qua in the issuance of Ext.CW-1/B by the petitioner vis-à-vis the respondent/ complainant, she in the amount embodied therein not concerting to discharge any liability vis-à-vis the respondent complainant whereupon the respondent complainant would not be construable to its lawful drawee, contrarily the statutory presumption marshable from its issuance qua its thereupon begetting an inference qua its standing issued by the petitioner convict vis-à-vis the respondent complainant in discharge of her contractual liability qua its drawee would stand dislodged, corollary whereof would be the penal inculpability fastened upon the petitioner/convict arising from its on its presentation before the bank concerned its begetting the ill fate of its for lack of sufficient funds in the accounts of the convict suffering refusal qua its encashment, would stand negated.

11. The petitioner/convict had under a sale deed comprised in Ext.CX/II borne on the file Com.Case No. 169/3 of 2007 purchased properties as stand displayed therein from the wife of the complainant. In sequel to the registered deed of conveyance comprised in Ext.CX/II standing executed inter se the wife of the complainant with the petitioner herein, a civil suit embodied in Ext.DW-1/A stood subsequently instituted by the vendor of Ext.CX/II before the Civil Court concerned wherewithin a declaratory relief qua Ext.CX/II being quashed and set-aside stood ventilated. When the aforesaid factum stands conjunctively construed with the factum of the respondent complainant throughout in his complaint also in his testification espousing qua

the RCC slab purchased thereunder by the petitioner convict from his wife standing completed by him under an agreement arrived at inter se him with the petitioner convict whereas the amount expended thereon by him remaining not fully liquidated by the petitioner convict, the latter in liquidation of her apposite contractual liability towards him thereupon issuing cheque Ext.CW-1/B qua him whereupon he espoused qua the issuance of cheque comprised in Ext.CW-1/B standing issued to him by the convict in discharge of her apposite liability aforesaid. In the aforesaid backdrop, the relevant best evidence is enjoined to emanate qua in the issuance of cheque Ext.CW-1/B by the petitioner/convict purportedly vis-à-vis the respondent complainant, its issuance standing generated by hers thereupon concerting to discharge her liability towards the wife of the complainant arising from hers purchasing property from the vendor of sale deed Ext.CX/II or evidence was enjoined to surface to succor the espousal of the respondent qua its standing issued by the petitioner/convict vis.a.vis him in discharge of her liability qua him arising from hers not liquidating qua him the entire expenditure incurred by him for completing the construction of a flat which hitherto stood purchased from his wife in an incomplete condition. Only an advertence to the apposite evidence qua the aforesaid factum would clinch the trite factum qua whether the respondent was a lawful drawee of Ext.CW-1/B also would clinch the factum qua the statutory presumption arousable from its mere issuance by the petitioner convict vis.a.vis. the respondent complainant qua hers thereupon acquiescing qua hers in issuing it hence assaying to liquidate her contractual liability vis.a.vis the respondent complainant, hence standing strengthened or standing dislodged.

12. The testification of the respondent complainant manifested in his cross-examination wherewithin he has made an assay to propagate therein qua previous to issuance of Ext.CW-1/B by the petitioner qua him the latter also issuing 5 to 6 cheques to him, cheques whereof stood encashed, some whereof being account payees whereas others being payee cheques yet he has been unable to adduce before the learned trial Magistrate the serial numbers borne by the cheques which previous to issuance of each stood issued by the petitioner accused to him, cheques whereof begot encashment. His omission to produce the details or serial number of cheques which stood previous to the issuance of each stood issued by the petitioner convict qua him, cheques whereof stood purportedly encashed begets a sequel of his smothering the best evidence for succoring his testification qua earlier to issuance of Ext.CW-1/B, the petitioner/convict also issuing cheques which stood purportedly encashed whereupon the inevitable inference warranting erection is qua his strategizing the factum of issuance of Ext.CW-1/B by the accused qua him arising from discharge of the afore-echoed purported contractual liability of the petitioner convict towards him. Furthermore, during the course of recording of his testification embodied in his cross-examination his not adducing before the learned Magistrate concerned the apposite bills personifying the material purchased by him to complete the construction of the incomplete flat purchased from his wife by the petitioner convict, is a vivid display of his in the garb of holding cheque bearing Ext.CW-1/B contriving the factum of its issuance spurring from the petitioner convict thereupon concerting to liquidate her liability towards him arising from his completing the construction of an incomplete RCC slab purchased by her from his wife. Now, hereat with the wife of the complainant who alienated RCC slab qua the petitioner convict under Ext.CX-II, subsequently thereto instituting a suit before the civil Court concerned wherein she made a prayer for quashing of sale deed embodied in Ext.CX-II also assumes significance whereform an inference stands aroused qua the issuance of cheques comprised in Ext.CW-1/B spurring from the petitioner convict thereby discharging or liquidating her liability towards the wife of the complainant qua the sale consideration of the property which she purchased from the vendor of Ext.C-2 whereupon it would be inapt to conclude qua in its issuance the petitioner convict concerting to discharge her liability qua the respondent complainant arising from his purportedly completing construction of an incomplete slab purchased by her from his wife. It also appears from a perusal of Ext.D-2 existing on file of Com.Case No. 169/3 of 2007 qua the entire financial liability arising from sale of property by the wife of the respondent complainant to the petitioner convict standing discharged. The date whereon the relevant discharge occurred stands displayed therein to be 11.4.2007 whereas Ext. CW-1/B stood issued in close proximity thereof on15.7.2007. Though Ext.D-2 is a photocopy yet

the signature of the respondent complainant occur therein also the signatures of his wife occur therein besides when on the document aforesaid making the aforesaid disclosures standing tendered into evidence its exhibition remaining un-protested by the respondent complainant also the respondent complainant not disputing the occurrence of his signatures thereon nor is disputing the occurrence of signatures of his wife thereon wherefrom it is to be concluded qua the manifestations held therein holding probative sinew. It appears qua in the issuance of Ext.CW-1/B by the petitioner convict especially when it bears a date holding close proximity, to Ext.D-2 it not standing issued in discharge of any purported contractual liability of the petitioner/convict qua the respondent/complainant. The aforesaid inference garners immense formidability from a statement recorded by the wife of the complainant in Civil Suit Ext.DW-1/A existing on file Com.Case No. 169/3 of 2007 wherein in her cross-examination to which she stood subjected to by the learned counsel for the convict she despite stating in her pleadings qua an incomplete slab standing purchased by the petitioner from her she yet feigning ignorance qua the person who completed its construction wherefrom the espousal of the respondent complainant qua his completing construction of the incomplete RCC slab purchased by the petitioner convict from his wife gets fully blunted, conspicuously also when the property purchased by the accused from the vendor of sale deed embodied in Ext.CX/2 exists in the same building the apposite portion whereof is in the occupation of the wife of the complainant.In aftermath, when the testification of the respondent complainant occurring in his cross-examination wherewithin he has omitted to portray the best evidence comprised in bills/receipts displaying the expenditure incurred by him for completing the construction of the incomplete RCC slab purchased by the petitioner from his wife, for his thereupon sustaining his espousal qua the petitioner convict not defraying to him the expenditure incurred thereon non adduction whereof when stands coagulated with an inference standing erected by this Court on a reading of the testification of his wife occurring in her cross-examination, ensuing sequel therefrom is qua in his holding Ext.CW-1/B his being not its lawful drawee nor also it can be concluded qua in its issuance the petitioner convict acquiescing qua hers thereupon concerting to liquidate her liability vis.a.vis. the respondent complainant. In aftermath, the respondent complainant does not become a lawful drawee of Ext.CW-1/B nor also on its standing dishonoured any penal inculpability stands attracted qua her, contrarily the statutory presumption arousable from its issuance qua thereupon the petitioner convict acquiescing qua hers concerting to liquidate her contractual liability qua the respondent/complainant, stands wholly effaced.

13. In view of the above, I find merit in this revision, which is accordingly allowed. In sequel, the impugned judgement is set-aside. Fine amount be refunded to the petitioner. Personal and surety bonds stand cancelled and discharged. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO No. 489 of 2012 alongwith connected matters.

Decided on : 09.12.2016

FAO No. 489 of 2012

New India Assurance Company Limited …..Appellant

Versus

Fata Chand & others …..Respondents

FAO No. 490 of 2012

New India Assurance Company Limited …..Appellant

Versus

Smt. Dilu Devi & others ….Respondents

FAO No. 491 of 2012
New India Assurance Company Limited .....Appellant
Versus
Ms. Geeta Devi & others .....Respondents
FAO No. 492 of 2012
New India Assurance Company Limited .....Appellant
Versus
Smt. Anjula Devi & others .....Respondents
FAO No. 493 of 2012
New India Assurance Company Limited .....Appellant
Versus
Ved Prabhat & others .....Respondents
FAO No. 494 of 2012
New India Assurance Company Limited .....Appellant
Versus
Tej Ram & others .....Respondents
FAO No. 495 of 2012
New India Assurance Company Limited .....Appellant
Versus
Alami Devi & others .....Respondents
FAO No. 496 of 2012
New India Assurance Company Limited .....Appellant
Versus
Parbati Devi Mahara & others ......Respondents
FAO No. 14 of 2013
New India Assurance Company Limited .....Appellant
Versus
Suman Kumari & others ...Respondents
FAO No. 15 of 2013
New India Assurance Company Limited .....Appellant
Versus
Dharmender Gharti & others .....Respondents
FAO No. 16 of 2013
New India Assurance Company Limited .....Appellant
Versus
Mohinder Singh & others .....Respondents
FAO No. 17 of 2013
New India Assurance Company Limited .....Appellant
Versus
Lata Devi & others .....Respondents
FAO No. 18 of 2013
New India Assurance Company Limited .....Appellant
Versus
Satpal Sharma & others .....Respondents
FAO No. 19 of 2013
New India Assurance Company Limited .....Appellant
Versus
Meharu Devi & others .....Respondents

FAO No. 20 of 2013
New India Assurance Company Limited .....Appellant
Versus
Charry @ Manya & others .....Respondents
FAO No. 21 of 2013
New India Assurance Company Limited .....Appellant
Versus
Rajat @ Hareenav Raj & others .....Respondents
FAO No. 22 of 2013
New India Assurance Company Limited .....Appellant
Versus
Shakuntala & others .....Respondents
FAO No. 109 of 2013
New India Assurance Company Limited .....Appellant
Versus
Rakesh Kumar Sood & others .....Respondents
FAO No. 110 of 2013
New India Assurance Company Limited .....Appellant
Versus
Bishnu Bahadur & others .....Respondents
FAO No. 111 of 2013
New India Assurance Company Limited .....Appellant
Versus
Kumari Priya & others .....Respondents
FAO No. 112 of 2013
New India Assurance Company Limited .....Appellant
Versus
Mahender Singh & others .....Respondents
FAO No. 113 of 2013
New India Assurance Company Limited .....Appellant
Versus
Naresh Kumar & others .....Respondents
FAO No. 114 of 2013
New India Assurance Company Limited .....Appellant
Versus
Shanta Devi & others .....Respondents
FAO No. 115 of 2013
New India Assurance Company Limited .....Appellant
Versus
Jagdish Chand & others .....Respondents
FAO No. 64 of 2014
New India Assurance Company Limited .....Appellant
Versus
Daulat Ram & others .....Respondents
FAO No. 66 of 2014
New India Assurance Company Limited .....Appellant
Versus
Prakash Chand & others .....Respondents

FAO No. 67 of 2014
New India Assurance Company Limited .....Appellant
Versus
Jhalu Devi & others .....Respondents
FAO No. 68 of 2014
New India Assurance Company Limited .....Appellant
Versus
Bharevti Devi & others .....Respondents
FAO No. 69 of 2014
New India Assurance Company Limited .....Appellant
Versus
Kamla Devi @ Dhuri & others .....Respondents
FAO No. 350 of 2014
New India Assurance Company Limited .....Appellant
Versus
Indra Devi & others .....Respondents
FAO No. 4119 of 2013
Fata Chand & others .....Appellant
Versus
Pratap Singh & others .....Respondents

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that driver Sunil Kumar was driving the vehicle rashly and negligently- Tribunals held that Sunil Kumar had caused the accident while driving the vehicle rashly and negligently – Rajesh Kumar was convicted by the Criminal Court for driving the vehicle in a rash and negligent manner – this judgment was set aside in appeal and it was held that Sunil Kumar was driving the vehicle - the judgment of the Appellate Court has attained finality – Tribunals had rightly held that accident was caused by the rash and the negligent driving of Sunil Kumar – seating capacity of the vehicle is 42 and 30 claim petitions were filed - the risk of all the claimants is covered – the insurer was rightly saddled with liability- appeals dismissed.(Para-7 to18)

Cases referred:
United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917
National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237
National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others, I L R 2015 (II) HP 825
Hem Ram & another versus Krishan Chand & another, I L R 2015 (III) HP 796

FAO No. 489 of 2012
For the Appellant: Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Ashwani Pathak, Senior Advocate with Mr. Bhim Raj Sharma, Advocate, for respondents No. 1 to 7.
Ms. Ritta Goswami, Advocate, for respondents No. 8 to 14.
Mr. Sameer Thakur, Advocate, for respondent No. 15.
FAO No. 490 of 2012
For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Bhim Raj Sharma, Advocate, vice Mr. Y.P.S. Dhaulta, Advocate, for respondents No. 1 to 4.
Ms. Ritta Goswami, Advocate, for respondents No. 5 to 11.
Mr. Sameer Thakur, Advocate, for respondent No. 12.
FAO No. 491 of 2012
For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Sanjeev Kumar Suri, Advocate, for respondents No. 1 to 7.
Ms. Ritta Goswami, Advocate, for respondents No. 8 to 13 & 15.
Mr. Sameer Thakur, Advocate, for respondent No. 14.

FAO No. 492 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: M/s Bhupender Ahuja Chaman Negi, Advocates, for respondents No. 1 to 4.
Ms. Ritta Goswami, Advocate, for respondents No. 5 to 11.
Mr. Sameer Thakur, Advocate, for respondent No. 12.

FAO No. 493 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 7.
Mr. Sameer Thakur, Advocate, for respondent No. 8.

FAO No. 494 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Sanjeev Kumar Suri, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 6 & 8.
Mr. Sameer Thakur, Advocate, for respondent No. 7.

FAO No. 495 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 to 5.
Ms. Ritta Goswami, Advocate, for respondents No. 6 to 12.
Mr. Sameer Thakur, Advocate, for respondent No. 13.

FAO No. 496 of 2012

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 1 & 2.
Ms. Ritta Goswami, Advocate, for respondents No. 4 to 10.
Mr. Sameer Thakur, Advocate, for respondent No. 11.

FAO No. 14 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Ms. Ritta Goswami, Advocate, for respondents No. 2, 5 & 6.
Mr. Sameer Thakur, Advocate, for respondent No. 7.
Nemo for the other respondents.

FAO No. 15 to 22, of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Ms. Ritta Goswami, Advocate, for LRs of respondent No. 2.
Mr. Sameer Thakur, Advocate, for respondent No. 4.
Nemo for other respondents.

FAO No. 109 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Ms. Ritta Goswami, Advocate, for LRs of respondents No. 3, 4, 5, 8 & 9.
Mr. Sameer Thakur, Advocate, for respondent No. 10.
Nemo for other respondents.

FAO No. 110 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.
For the Respondents: Mr. C.S. Thakur, Advocate for respondent No. 1.
Mr. Sameer Thakur, Advocate, for respondent No. 2.

Ms. Ritta Goswami, Advocate, for respondents No. 3 to 8.

FAO No. 111 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Bimal Gupta, Senior Advocate with Ms. Kusum Chaudhary, Advocate, for respondents No. 1 & 2.
Mr. G.R. Palsra, Advocate, for respondents No. 3 & 4.
Ms. Ritta Goswami, Advocate, for respondents No. 5 to 10 & 12.
Mr. Sameer Thakur, Advocate, for respondent No. 11.

FAO No. 112 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 7 & 9.
Mr. Sameer Thakur, Advocate, for respondent No. 8.

FAO No. 113 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 7.
Mr. Sameer Thakur, Advocate, for respondent No. 8.

FAO No. 114 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Maan Singh, Advocate, for respondents No. 1 to 3.
Ms. Ritta Goswami, Advocate, for respondents No. 4 to 10.
Mr. Sameer Thakur, Advocate, for respondent No. 11.

FAO No. 115 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Arvind Sharma, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 8.
Mr. Sameer Thakur, Advocate, for respondent No. 9.

FAO No. 64 of 2014

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. G.R. Palsra, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 8.
Mr. Sameer Thakur, Advocate, for respondent No. 9.

FAO No. 66 of 2013

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Devender K. Sharma, Advocate, for respondent No. 1.
Ms. Ritta Goswami, Advocate, for respondents No. 2 to 8.
Mr. Sameer Thakur, Advocate, for respondent No. 9.

FAO No. 67 of 2014

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. H.S. Rangra, Advocate, for respondents No. 1 & 2.
Ms. Ritta Goswami, Advocate, for respondents No. 3 to 9.
Mr. Sameer Thakur, Advocate, for respondent No. 10.

FAO No. 68 of 2014

For the Appellant : Mr. Ratish Sharma, Advocate.

For the Respondents: Mr. Surender Saklani, Advocate, for respondents No. 1 to 3.
Ms. Ritta Goswami, Advocate, for respondents No. 4 to 10.
Mr. Sameer Thakur, Advocate, for respondent No. 11.

FAO No. 69 of 2014

For the Appellant :	Mr. Ratish Sharma, Advocate.
For the Respondents:	Mr. Surender Saklani, Advocate, for respondents No. 1 to 6.
	Ms. Ritta Goswami, Advocate, for respondents No. 7 to 10 & 13.
	Mr. Sameer Thakur, Advocate, for respondent No. 14.

FAO No. 350 of 2014

For the Appellant :	Mr. Ratish Sharma, Advocate.
For the Respondents:	Mr. H.S. Rangra, Advocate, for respondents No. 1 to 4.
	Mr. Sameer Thakur, Advocate, for respondent No. 12.
	Nemo for the other respondents.

FAO No. 4119 of 2013

For the Appellant :	Mr. Ashwani Pathak, Senior Advocate with Mr. Bhim Raj, Advocate.
For the Respondents:	Ms. Ritta Goswami, Advocate, for respondents No. 1 to 7 & 9.
	Mr. Sameer Thakur, Advocate, for respondent No. 8.
	Mr. Ratish Sharma, Advocate, for respondent No. 10.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

All these appeals are outcome of a motor vehicular accident, thus are being clubbled and disposed of by this common judgment and order.

2. 30 claim petitions were filed before various Motor Accident Claims Tribunals, for short 'the Tribunals' and separate awards came to be passed, whereby compensation was granted to the claimants and insurer came to be saddled with liability.

3. The owner and driver have not questioned the impugned awards on any count, thus, all the impugned awards have attained finality, so far the same relate to them.

4. The insurer has questioned the impugned awards on the grounds taken in the memo of appeals.

5. Some of the claimants, by the medium of FAO No. 4119 of 2013, Cross-Objections No. 183 of 2013 in FAO No. 493 of 2012, Cross Objections No. 4001 of 2013 in FAO No. 115 of 2013 and Cross Objections No. 29 of 2014 in FAO No. 67 of 2014, have sought enhancement of the compensation.

6. Three questions arise for determination in these appeals:

(i) *Whether the Tribunals have rightly held that Driver Sunil Kumar was driving the offending vehicle, rashly and negligently, at the time of accident?*

(ii) *Whether the risk was covered?*

(iii) *Whether the amount awarded is adequate?.*

7. All the claimants in their claim petitions have pleaded and proved that driver-Sunil Kumar was driving the offending vehicle rashly and negligently and caused the accident.

8. The Tribunals after scanning the evidence, oral as well as documentary, held that driver-Sunil Kumar has caused the accident, while driving the offending vehicle, rashly and negligently.

9. On the last date of hearing, learned Counsel for the insurer stated that one Rajesh Kumar was convicted by the Chief Judicial Magistrate, Lahaul-Spiti at Kullu, H.P., vide judgment dated 30.12.2014, passed in Criminal Case No. 17-1/2007, whereby it was held that

Rajesh Kumar was driving the offending vehicle, rashly and negligently, at the relevant time. He has produced photocopy of the said judgment, made part of the file.

10. Learned Counsel for the owner and driver stated that the aforesaid judgment was set aside by the Additional Sessions Judge, Kullu, vide judgment dated 05.10.2016, passed in Criminal Appeal No. 9 of 2015, whereby Rajesh Kumar was acquitted and it was held that Sunil Kumar had driven the offending vehicle at the time of accident. He has also produced photocopy of the said judgment, made part of the file.

11. I have gone through both the aforesaid judgments. Learned Additional Sessions Judge in the judgment dated 05.10.2016, passed in Criminal Appeal No. 9 of 2015, has held that Sunil Kumar was driving the offending vehicle at the relevant point of time. It is apt to reproduce 32 of the aforesaid judgment herein:-

> *"32. From the perusal of statement of PW-28, Dr. Paljore that in the prescription slip the name of driver of the bus in question was written as Sunil Kumar and the same was written after due inquiry since he was the driver of the vehicle in question and was mentioned in the MLC by the doctor.*

12. Learned Counsel for the insurer was asked whether any appeal has been filed against the judgment passed in Criminal Appeal No. 9 of 2015, *supra?* He answered the said question in negative.

13. The Tribunals have rightly made the discussion and returned the findings in all the impugned awards that Sunil Kumar had driven the offending vehicle, rashly and negligently, are accordingly upheld.

14. Admittedly, the seating capacity of the offending vehicle is 42 and 30 claim petitions have been filed. Thus, the risk of all the claimants was covered.

15. It is beaten law of land that the insurer has to satisfy the award to the extent of the risk covered and if the claim petitions are more than the risk covered, then it is for the insured-owner to satisfy the same.

16. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce para 24 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."*

17. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

18. This Court in batches of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, and **FAO No. 224 of 2008,** titled as **Hem Ram & another versus Krishan Chand & another,** being the lead case, decided on 29.05.2015, has laid down the same principle.

19. By the medium of FAO No. 4119 of 2013, the claimants have questioned the award passed in M.A.C Petition No. 32 of 2008, titled as Fata Chand & others versus Shri Gauri Dutt & others**,**whereby compensation to the tune of Rs. 3,99,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimants on the ground of adequacy of compensation and sought for enhancement of compensation.

20. Cross-Objections No. 183 of 2013 in FAO No. 493 of 2012, Cross Objections No. 4001 of 2013 in FAO No. 115 of 2013 and Cross Objections No. 29 of 2014 in FAO No. 67 of 2014, have also been filed for enhancement of compensation.

21. In Claim Petition No. 58 of 2008, titled as Shri Ved Prabhat versus Shri Gauri Dutt & others, subject mater of FAO 493 of 2012, the claimants have been granted compensation to the tune of Rs. 15,62,022/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

22. In Claim Petition No. 43 of 2008, titled as Shri Jagdish Chand versus Shri Gauri Dutt & others, subject mater of FAO 115 of 2015, the claimants have been granted compensation to the tune of Rs. 5,15,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

23. In Claim Petition No. 40 of 2011/2007, titled as Jhalu Devi & another versus Gauri Dutt & others, subject mater of FAO 67 of 2014, the claimants have been granted compensation to the tune of Rs. 4,52,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition.

24. I have gone through the record and the impugned awards and am of the considered view that the Tribunal has rightly made the assessment and it cannot be said that the compensation is excessive or meager, in any way. Accordingly, it is held that the just and appropriate compensation has been granted by the Tribunals in the aforesaid claim petitions.

25. Having glance of the above discussions, all the appeals and the cross-objections are dismissed and the impugned awards are upheld.

26. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards through payees' cheque amount or by depositing the same in their respective accounts.

27. Send down the record after placing copy of the judgment on each of the Tribunal's files.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Limited …Appellant.
Versus
Smt. Krishna Kumari and others …Respondents.

FAO No. 384 of 2012
Reserved on: 02.12.2016
Decided on: 09.12.2016

Motor Vehicles Act, 1988- Section 173- Insurer had not sought permission under Section 170 and it cannot question the award on the ground of adequacy of compensation- however, the Appellate Court can pass an order, which should have been passed by the Tribunal, even without any appeal/cross-objections- the age of the deceased was 47 years at the time of accident- monthly income of the deceased was Rs.31,510/- as per the salary certificate – after deducting the contribution towards income tax the annual income of the deceased is Rs.3,50,000/- - claimants are seven in numbers and $1/5^{th}$ amount was to be deducted towards personal expenses – thus, the claimants have lost Rs.2,80,000/- towards source of income – multiplier of 11 is applicable and claimants have lost Rs.2,80,000 x 11= Rs.30,80,000/- towards the source of the income- compensation of Rs.20,000/- awarded under the heads funeral expenses, loss of love and affection and loss of consortium - the claimants are entitled to the compensation of Rs.30,80,000 + 20,000= Rs.31,00,000/- with interest @ 7.5% per annum.(Para-22 to 54)

Cases referred:

U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 Supreme Court 948
Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation, (2013) 11 SCC 517
Giani Ram vs. Ramjilal, 1969 (1) SCC 813
Narayanarao (dead) through LRs and others vs. Sudarshan, 1995 Supp.(4) SCC 463
Mahant Dhangir and another vs. Madan Mohan and others, 1987 (Supp.) SCC 528
T.N. Rajasekar vs. N. Kasiviswanathan and others, AIR 2005 SC 3794
Delhi Electric Supply Undertaking vs. Basanti Devi and another, JT 1999 (7) SC 486
H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc., AIR 1980 Himachal Pradesh 16
United India Insurance Co. Ltd. vs. Dama Ram and others, 1994 ACJ 692
M. Adu Ama vs. Inja Bangaru Raja and another, 1995 ACJ 670
Himachal Road Transport Corporation vs. Saroj Devi and others, 2002 ACJ 1146
National Insurance Co. Ltd. vs. Mast Ram and others, 2004 ACJ 1039
LAC Solan and another vs. Bhoop Ram, 1997(2) Sim.L.C. 229
State Bank of India vs. M/s Sharma Provision Store and another, AIR 1999 J&K 128
Nati Devi and another versus Maya Devi and others, I L R 2016 (III) HP 1074
Sarita Devi & others versus Ashok Kumar Nagar & others, I L R 2016 (III) HP 1958
Raj Pal Yadav and another versus Smt. Jamna Devi and another, I L R 2016 (III) HP 2318

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Adarsh Sharma, Advocate, for respondents No. 1 to 7.
	Mr. Vinod Thakur, Advocate, for respondent No. 8.
	Mr. Vijay Chaudhary, Advocate, for respondent No. 9.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Subject matter of this appeal is award, dated 29th May, 2012, made by the Motor Accident Claims Tribunal, Chamba Division, Chamba (HP) (for short "the Tribunal") in M.A.C. Petition No. 16 of 2011, titled as Krishna Kumari and others versus Oriental Insurance Company Ltd. and others, whereby compensation to the tune of ₹ 34,00,000/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 40,00,000/-, as per the break-ups given in the claim petition on the ground that they became the victims of the vehicular accident, which was caused by the motorcyclist, namely Shri Subhash Kumar, on 29th May, 2011, at about 1.30 P.M., at place Rath near Ballu, Tehsil and District Chamba, while riding motorcycle No. HP-48-6520, in a rash and negligent manner, in which deceased-Bensu Ram, who was the pillion rider, sustained injuries and succumbed to the said injuries.

4. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

5. On the pleadings of the parties, following issues came to be framed by the Tribunal on 20th October, 2011:

> *"1. Whether deceased Bensu Ram died because of rash or negligent driving of vehicle bearing registration No. HP-48-6520 by respondent No. 3 Subhash Kumar on 29th May, 2011 at place Rath as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled to compensation. If so, how much and from whom? OPP*
>
> *3. Whether the petition is not maintainable? OPR*
>
> *4. Whether the driver of the vehicle in question was not holding a valid and effective driving licence to drive the vehicle in question, if so, its effect? OPR-1*
>
> *5. Whether the vehicle in question was being driven against the terms and conditions of Insurance Policy, if so, its effect? OPR-1*
>
> *6. Relief."*

6. In support of their claim, the claimants examined Dr. Dushyant Thakur as PW-1, MHC Pawan Kumar as PW-2, Sh. Somesh Kumar as PW-3, Shri Khem Raj as PW-5 and one of the claimants, namely Smt. Krishna Kumari, stepped into the witness box as PW-4. The motorcyclist has examined HC Ashok Kumar as RW-1. The owner-insured and the insurer of the offending vehicle have not led any evidence.

7. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of ₹ 34,00,000/- with interest @ 7.5% per annum from the date of filing of the petition till its realization in favour of the claimants and saddled the insurer with liability in terms of the impugned award.

8. The claimants, motorcyclist and owner-insured of the offending vehicle have not questioned the impugned award on any ground, thus, has attained finality so far it relates to them.

9. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

10. Learned Senior Counsel appearing on behalf of the appellant-insurer argued that the accident had not occurred due to the rash and negligent driving of the motorcyclist, was due to falling of the stones from hillside, thus, the Tribunal has fallen in an error in saddling the insurer with liability.

11. The argument of the learned Senior Counsel is not tenable for the reasons to be recorded hereinafter.

Issue No. 1:

12. The claimants have specifically pleaded in para 24 of the claim petition that the motorcyclist was driving the offending vehicle in a rash and negligent manner, could not keep control over the vehicle while negotiating the curve due to which the vehicle skidded and deceased-Bensu Ram was thrown into River Ravi.

13. The owner-insured of the offending vehicle has evasively denied the averments contained in para 24 of the claim petition. But, the motorcyclist, while filing reply to para 24 of the claim petition, has admitted the factum of the accident and has averred that he was not driving the vehicle in a rash and negligent manner.

14. It is apt to reproduce para 24 of the reply filed by the motorcyclist, i.e. respondent No. 3 in the claim petition, herein:

> *"24. That para No. 24 of the petition is incorrect hence denied. It is incorrect that driver was driving the vehicle in a rash and negligent manner. It is submitted that driver of the vehicle was driving the vehicle very cautiously and in a safe manner and all of sudden stones fell from uphill which hit the deceased and as a result of which deceased fell in the Ravi River."*

15. The owner-insured of the offending vehicle has not led any evidence. The motorcyclist has denied the rash and negligent driving on his part and has examined HC Ashok Kumar as RW-1, to prove the said factum. He himself has not stepped into the witness box to prove the said factum, thus, adverse inference has to be drawn against him. Viewed thus, the Tribunal, while deciding issue No. 1, has rightly held that the motorcyclist was driving the offending vehicle rashly and negligently at the relevant point of time and caused the accident in which deceased-Bensu Ram lost his life.

16. It was for the motorcyclist to question the said findings, has not questioned the same, meaning thereby, has accepted the findings returned by the Tribunal. Thus, it cannot lie in the mouth of the insurer that the accident was not outcome of the rash and negligent driving of the offending vehicle by the motorcyclist.

17. Even otherwise, the factum of accident is not in dispute. It was for the motorcyclist to take all precautions and exercise due care and caution while riding the offending vehicle, which he has not done. FIR was also lodged against the motorcyclist. Thus, the Tribunal has rightly made the discussions in paras 19 to 21 of the impugned award, need no interference. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

18. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 5.

Issue No. 3:

19. It was for the respondents to prove how the claim petition was not maintainable, have not led any evidence to this effect, thus, have failed to discharge the onus. Even otherwise, the claimants are the victims of the vehicular accident in which they lost their sole bread earner, thus, were well within their rights to maintain the claim petition and the claim petition was maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issues No. 4 and 5:

20. It was for the insurer to prove that the motorcyclist was not having a valid and effective driving licence to drive the offending vehicle and the same was being driven in violation of the terms and conditions of the insurance policy, has not led any evidence, thus, has failed to discharge the onus.

21. However, I have gone through the record. The driving licence of the motorcyclist is on the record as Ext. R-3, the perusal of which does disclose that the motorcyclist was having a valid and effective driving licence. The factum of insurance is not in dispute. Thus, the Tribunal has rightly decided issues No. 4 and 5 against the insurer. Accordingly, the findings returned by the Tribunal on issues No. 4 and 5 are upheld.

Issue No. 2:

22. Admittedly, the insurer has not sought permission in terms of Section 170 of the Motor Vehicles Act, 1988 (for short "MV Act"), thus, is precluded from questioning the adequacy of the compensation.

23. I deem it proper to record herein that the appeal under Section 173 of the MV Act is alike the appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, "CPC"). Therefore, the Court is under obligation to decide all issues arising in a case both on facts and law after appreciating the entire evidence.

24. The Apex Court in **U.P.S.R.T.C. vs. Km. Mamta and others,** reported in **AIR 2016 Supreme Court 948**, held that Section 173 of the MV Act and the first appeal under Section 96 CPC are alike and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case. It is profitable to reproduce paragraph 24 of the said judgment hereunder:

> *"24. An appeal under Section 173 of the M.V.Act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence."*

25. It is apt to record herein that Part VII of the CPC provides for filing of appeals arising out of decrees and orders. Section 96 CPC provides for appeals from original decree. It is apt to reproduce Section 96 CPC hereunder:

> *"**96. Appeal from original decree.** - 1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.*
>
> *(2) An appeal may lie from an original decree passed ex parte.*
>
> *(3) No appeal shall lie from a decree passed by the Court with the consent of parties.*
>
> *(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees."*

26. Section 107 CPC deals with the "Powers of the Appellate Court" and sub-section (2) thereof, provides specifically that the Appellate Court shall have the same powers and shall

perform as nearly as may be the same duties as are conferred and imposed on the trial Court. It is apt to reproduce Section 107(2) CPC as under:

> ***"107. Powers of appellate court.-***
>
> *(1) ....*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."*

27. Section 176 of the MV Act empowers the State Government to make rules for the purpose of implementing the provisions contained in Sections 165 to 174 of the MV Act. It is apt to reproduce Section 176 of the Act, hereunder:

> ***"176. Power of State Government to make rules.***
>
> *A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:--*
>
> *a) The form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;*
>
> *b) The procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;*
>
> *c) The powers vested in a Civil Court which may be exercised by a Claims Tribunal;*
>
> *d) The form and the manner in which and the fees (if any) on payment of which an appeal may be preferred against an award of a Claims Tribunal; and*
>
> e) *Any other matter which is to be, or may be, prescribed."*

28. In terms of the mandate of Section 176(c) of the MV Act, the Claims Tribunals are vested with the powers of Civil Court.

29. In a Claim Petition, summary procedure is to be adopted and all provisions of Civil Procedure Code are not applicable, rather only some provisions have been made applicable in terms of Section 169 of the MV Act read with Rule 232 of the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "MV Rules"). It is apt to reproduce Rule 232 of the MV Rules herein:

> ***"232. The Code of Civil Procedure to apply in certain cases:-***
>
> *The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."*

30. Now, the question is - whether the Appellate Court while hearing an appeal under Section 173 of the MV Act can pass such an order which ought to have been passed by the Tribunal, without there being any appeal/challenge or cross objections from the person against whom the order has been made? The answer is in the affirmative for the reasons given hereinabove read with the mandate of law laid down by the Apex Court and the High Courts.

31. Part VII and Order 41 CPC deals with the powers and the scope of the Appellate Court in appeal proceedings.

32. The Apex Court in **Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation,** reported in **(2013) 11 SCC 517,** has held that there are no fetters on the powers of the appellate Court to consider the entire case on facts and law, while hearing an appeal under Section 173 of the MV Act. It is apt to reproduce paragraphs 10, 11 and 12 of the said decision hereunder:

> *"10. When an Appeal is filed under Section 173 of the Motor Vehicles Act, 1939 (hereinafter shall be referred to as the 'Act'), before the High Court, the normal Rules which apply to Appeals before the High Court are applicable to such an Appeal also. Even otherwise, it is well settled position of law that when an Appeal is provided for, the whole case is open before the Appellate Court and by necessary implication, it can exercise all powers incidental thereto in order to exercise that power effectively. A bare reading of Section 173 of the Act also reflects that there is no curtailment or limitations on the powers of the Appellate Court to consider the entire case on facts and law.*
>
> *11. It is well settled that the right of Appeal is a substantive right and the questions of fact and law are at large and are open to Review by the Appellate Court. Thus, such powers and duties are necessarily to be exercised so as to make the provision of law effective.*
>
> *12. Generally, finding of fact recorded by Tribunal should not be interfered with in an Appeal until and unless it is proved that glaring discrepancy or mistake has taken place. If the assessment of compensation by the Tribunal was fair and reasonable and the award of the Tribunal was neither contrary nor inconsistent with the relevant facts as per the evidence available on record then as mentioned hereinabove, the High Court would not interfere in the Appeal. In the case in hand, nothing could be pointed out to us as to what were the glaring discrepancies or mistakes in the impugned Award of the Tribunal, which necessitated the Appellate Court to take a different view in the matter."*

33. The Apex Court in the case titled as **Giani Ram vs. Ramjilal,** reported in **1969 (1) SCC 813,** held that Order 41 Rule 33 CPC empowers the appellate Court to pass any decree which justice may require. It is apt to reproduce paragraphs 8 and 9 of the judgment herein:

> *"8. Order 41, Rule 33 of the CPC was enacted to meet a situation of the nature arising in this case. In so far as it is material, the rule provides:*
>
> > *"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.*
> >
> > *The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.*
>
> *9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived, it would, be perpetrating gave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, CPC ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed."*

34. The Apex Court inthe cases titled as **Narayanarao (dead) through LRs and others vs. Sudarshan,** reported in **1995 Supp.(4) SCC 463; Mahant Dhangir and another vs. Madan Mohan and others,** reported in **1987 (Supp.) SCC 528,** and **T.N. Rajasekar vs. N. Kasiviswanathan and others,** reported in **AIR 2005 SC 3794** held that the High Court, in order to do complete justice to the parties, can invoke the powers under Order 41 Rule 33 CPC and pass orders accordingly.

35. The Apex Court in another case titled as **Delhi Electric Supply Undertaking vs. Basanti Devi and another,** reported in **JT 1999 (7) SC 486,** while relying upon its earlier decision in Mahant Dhangir (supra), held in paragraph 19 as under:

> *"19. Conditions as laid in provision of Order 41, Rule 33 are satisfied in the present case. When circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the Court cannot be found wanting when it comes to exercise its powers."*

36. This Court in **H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc.,** reported in **AIR 1980 Himachal Pradesh 16,** held that under Order 41 Rule 33 CPC, wide powers have been given to the appellate Court and once it is seized of a matter in its appellate jurisdiction, it is within its power to do complete justice between all the concerned parties. It is apt to reproduce relevant portion of paras 39 and para 40 of the judgment herein:

> *"39. …………..Moreover, theme of Order 41 and especially the wide powers given to the Court under Rule 33 of Order 41 suggests that the intention of the Legislature is to see that 'once the Court is seized of a matter in its appellate jurisdiction, it is able to do complete justice between all the concerned parties. To us, therefore, it is very clear that the provision enabling a respondent to file cross-objections made in Rule 22 is a procedural provision under which even if a respondent has not preferred any appeal, the Court is enabled to do complete justice to the parties by allowing the respondent concerned to prefer cross-objections within the period of limitation. Under these circumstances, with great respect to the learned Judges of the Allahabad High Court, we find ourselves unable to accept their view that provision enabling a respondent to file cross-objections is a substantive provision and not a procedural one.*
>
> *40. In view of our finding that provision for filing cross-objections contemplated by Order 41, Rule 22 is a procedural provision, the ratio of the above referred two decisions of the Supreme Court would at once be attracted, and this Court being seized of an appellate jurisdiction conferred by Section 110-D of the Motor Vehicles Act, It has to exercise that jurisdiction in the same manner in which it exercises its other appellate jurisdiction allowing the respondents in such appeals to prefer cross-objections."*

37. Keeping in view the ratio of the judgment supra, it can safely be held that the appellate Court is competent to pass any order in the interest of justice.

38. The High Court of Rajasthan, while dilating upon the powers of the Appellate Court under Order 41 Rule 33 CPC, in the case titled as **United India Insurance Co. Ltd. vs. Dama Ram and others,** reported in **1994 ACJ 692,** held that the appellate Court can rectify the error invoking Order 41 Rule 33 CPC even in the absence of Cross Objections or appeal by the claimants. It is apt to reproduce paragraph 7 of the said decision hereunder:

> *"7. The Tribunal has not passed award in any case against the owner (insured) of the vehicle. It has passed awards against the appellant insurance company only. It is not in dispute that the Tribunal has categorically held that the said accident took place due to rash and negligent driving of the truck by its driver. As such his employer, namely, Mohd. Rafiq, owner of the said truck, was liable for his negligent act. Thus the Tribunal committed a serious error in not making liable the owner and driver of the offending truck to pay the said amounts of compensation. This error can well be corrected by this court by invoking the provisions of Order 41, Rule 33, Civil Procedure Code, even if no cross-objection or appeal has been filed by the claimants-respondents. It has been observed in Kok Singh v. Deokabai AIR 1976 SC 634, paras 6 and 7, as follows:*
>
> > *(6) In Giani Ram v. Ramji Lal AIR 1969 SC 1144, the court said that in Order 41, Rule 33, the expression 'which ought to have been passed' means 'what*

ought in law to have been passed' and if an appellate court is of the view that any decree which ought in law to have been passed was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

(7) Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge. Reference of Murari Lal v. Gomati Devi 1986 ACJ 316 (Rajasthan), may also be made here. Similar view has been taken by me while deciding United India Ins. Co. Ltd. v. Dhali 1992 ACJ 1057 (Rajasthan)."

39. The High Court of Orissa at Cuttack in the case titled as **M. Adu Ama vs. Inja Bangaru Raja and another,** reported in **1995 ACJ 670,** has laid down the same principle of law.

40. This High Court in **Himachal Road Transport Corporation vs. Saroj Devi and others,** reported in **2002 ACJ 1146,** held that appellate Court is not precluded from passing order which it considers just in the facts of the case, without there being any cross objection or cross appeal. It is profitable to reproduce paragraph 15 of the said decision hereunder:

"15. Keeping in view the aforesaid decisions of Supreme Court and different High Courts including this Court , we feel that there being no prohibition in law, i.e., either under Motor Vehicles Act or under the provisions of Civil Procedure Code, this Court is not precluded from passing order which it considers just in the circumstances of a case without there being either cross-objection or cross-appeal. As such we are further of the view that Order 41, Rule 33 is fully applicable to the appeals under the Motor Vehicles Act."

41. In the case titled as **National Insurance Co. Ltd. vs. Mast Ram and others,** reported in **2004 ACJ 1039,** the question arose before this High Court was – whether the appellate Court can modify the award in the absence of cross-appeal. This High Court answered in the affirmative. It is apt to reproduce paragraph 13 of the said judgment hereunder:

"13. Because of what has been held in this judgment, it is felt necessary to exercise power vested in this court under Order 41, Rule 33 of the Civil Procedure Code to set aside the findings in the operative portion of the award requiring the appellant to pay the amount and then to recover it from the 'insurer' (it should have been 'insured'?). This is a direction in the impugned award that needs to be set aside. On this aspect, Mr. Sharma had argued that there is no cross-appeal by the owner of the vehicle. To meet such a situation, legislature had enacted Order 41, Rule 33 in the Civil Procedure Code even in cases where an appeal is not filed by a party, like the owner in the present appeal. As such, this plea cannot be accepted."

42. This High Court in another case titled as **LAC Solan and another vs. Bhoop Ram,** reported in **1997(2) Sim.L.C. 229,** modified the awards in exercise of powers under Order 41 Rule 33 CPC.

43. Faced with the similar situation, the Jammu and Kashmir High Court, in a case titled as **State Bank of India vs. M/s Sharma Provision Store and another,** reported in **AIR 1999 J&K 128,** held that a High Court can pass a decree which ought to have been passed by the trial Court. It is apt to reproduce relevant portion of paragraph 7 of the said decision hereunder:

"7. …….This is an exceptional situation which authorises this Court in the present appeal to pass such decree as ought to have been passed or as the nature of the case demands. Similarly discretion vested in this Court under the aforesaid provision of law will not be refused to be exercised simply because respondents have not either filed an appeal or cross-objections."

44. This Court in **FAO No.203 of 2010,** titled as **Nati Devi and another versus Maya Devi and others,** decided on **20th May, 2016, FAO No. 448 of 2011,** titled as **Sarita Devi & others versus Ashok Kumar Nagar & others,** decided on **17th June, 2016,** and **FAO (MVA) No. 599 of 2008,** titled as **Shri Raj Pal Yadav and another versus Smt. Jamna Devi and another,** decided on 24th June, 2016,has taken the similar view.

45. Thus, it can easily be deduced that the mandate of Section 96, Section 107(2) and order 41 Rule 33 CPC is just to rectify the errors and achieve the aim and object of the legislation. The purpose of Order 41 CPC, as discussed hereinabove, is to enable the appellate Court to do complete justice between the parties and to pass order which ought to have been passed while keeping in view the facts and circumstances of the case.

46. Admittedly, the age of the deceased was 47 years at the time of the accident. The monthly income of the deceased assessed by the Tribunal at ₹ 31,510/-, as per the salary certificate, Ext. PW-3/A, is also not in dispute. After making deductions towards the income tax, the Tribunal has rightly assessed the annual income of the deceased to be ₹ 3,50,000/-.

47. The claimants are seven in number. Thus, the Tribunal has also fallen in an error in deducting one-fourth towards the personal expenses of the deceased, one-fifth was to be deducted in terms of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,**. Thus, the claimants have lost source of income to the tune of ₹ 2,80,000/- per annum.

48. The Tribunal has wrongly applied the multiplier of '13'. In view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma's case** and **Reshma Kumari's case (supra)** read with the Second Schedule appended with the Motor Vehicles Act, multiplier of '11' is just and proper.

49. Viewed thus, it is held that the claimants have lost source of income/dependency to the tune of ₹ 2,80,000/- x 11 = ₹ 30,80,000/-.

50. The amount of compensation to the tune of ₹ 20,000/- awarded under other heads, i.e. 'funeral expenses', 'loss of love and affection' and 'loss of consortium' is maintained.

51. Having said so, the claimants are held entitled to compensation to the tune of ₹ 30,80,000/- + ₹ 20,000/- = ₹ 31,00,000/- with interest as awarded by the Tribunal.

52. The factum of insurance is admitted, thus, the Tribunal has rightly saddled the insurer with liability.

53. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of.

54. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts after proper identification.

55. Excess amount, if any, be refunded to the appellant-insurer through payee's account cheque.

56. Send down the record after placing copy of thejudgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Punnu Ram & ors. ......Appellants.
Versus
State of Himachal Pradesh. ......Respondent.

Cr. Appeal No. 69 of 2007
Date of decision:December 9, 2016.

Indian Penal Code, 1860- Section 353 and 333 read with Section 34- Accused assaulted and used criminal force to deter the informant posted as AddaIncharge, HRTC from discharging his duties - they were convicted by the Trial Court- held in appeal that the genesis of the occurrence is change of route of bus- it can be believed that accused being Pardhan of Gram Panchayat may have questioned working of HRTC functionary – the accused P had also sustained injuries- the possibility of informant and other staff members being assailants cannot be ruled out- there is contradiction regarding the name of accused who inflicted injuries – the witnesses had contradicted themselves regarding other aspects of prosecution case – appeal allowed and accused acquitted.(Para-8 to 13)

For the appellants Mr. Rajendra Kishore Sharma, Senior Advocate with Ms. Anita Parmar, Advocate.
For the respondent Mr.Neeraj K. Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

Appellants herein are accused in a case registered against them in Police Station, Chamba vide FIR No. 333 of 2002, under Sections 353 and 333 read with Section 34 of the Indian Penal Code with the allegations that on 19.12.2002 around 3:30 P.M. at Chamba Bus Stand they in furtherance of their common intention assaulted and used criminal force to deter the complainant Krishan Chand (PW10), the then Adda Incharge HRTC Region Chamba, a public servant from discharging his duty as such public servant. They allegedly caused grievous hurt to said Shri Krishan Chand.

2. Learned Sessions Judge, Chamba has tried the appellants and convicted them under Section 353 and 333 read with Section 34 of the Indian Penal Code. They all have been sentenced to undergo rigorous imprisonment for one year and pay Rs. 5000/- each as fine under Section 353 read with Section 34 of the Indian Penal Code, whereas to undergo rigorous imprisonment for three years and to pay Rs. 10,000/- each as fine under section 333 read with Section 34 of the Indian Penal Code.

3. The legality and validity of the impugned judgment has been questioned on the grounds, inter-alia, that irrespective of no case for the commission of the alleged offence is made out against either of the convicts they have erroneously been convicted. The contradictions in the prosecution evidence which materially affects its case have been wrongly ignored. The testimony of PW2 Jaiwant Ram that the injury in the hand was caused to the complainant by convict Raj Kumar, whereas as per that of the complainant by convict Punnu Ram, however, such contradictions have not been taken into consideration in its right perspective. The contradictions in the statements of PW2 and complainant i.e. as per the version of PW2 convict Punnu Ram who had made the utterances that "BUS ADDA INCHARGE USKE JUTE KE BRABAR NAHI HAIN" whereas as per that of the complainant "YOU ARE EQUAL TO MY SHOE" have also not been considered by learned trial Judge. It has also been pointed out that the statement of PW2 Jaiwant Ram was not recorded on the day of occurrence rather on the next day. The testimony of PW12 Daulat Ram, the Investigating Officer, however, reveals that the statement of the said

witness was recorded on the same day. Therefore, this aspect of the prosecution case is also contradictory in nature.

4. According to PW2, he was conductor on duty with the bus enroute Chamba to Gagla, however, as per the version of PW10 the complainant it is one Bhupinder who was the conductor of the bus bound for Gagla from Chamba. As per the testimony of PW2 convict Punnu Ram, had caught hold the complainant from his shirt, however, the complainant has not said so while in the witness box as PW10. While as per the testimony of the complainant, the scuffle continued for about 5-6 minutes, whereas as per the version of PW2 for about ten minutes. According to PW1 Surinder Kumar he asked Shiv Kumar Conductor to inform the police, however, the complainant while in the witness box has stated that it is Surinder Kumar who was asked to do so. PW8 Dr. Vinod Sharma being a resident of Bharmour, the native place of PW10 was also interested witness. Therefore, according to the appellants/convicts his testimony could have not been relied upon. Being so, the findings are stated to be recorded on the basis of the evidence highly contradictory in nature and as such the impugned judgment has been sought to be quashed and set aside.

5. Mr. Rajender Kishore Sharma, learned Senior Advocate assisted by Ms. Anita Parmar, Advocate has argued that nothing of the sort as alleged by the prosecution happened on the spot. According to Mr. Sharma, convict Punnu Ram the Pradhan of Gram Pachayat at the relevant time simply asked the complainant Krishan Chand as to how the route of a bus bound to a particular place could have been changed like this. Neither the said accused nor his co-accused assaulted the complainant and it is rather the later who himself scuffled with them and also administered beatings to them. It has also been urged that the material prosecution witnesses are the employees of HRTC and as such, they being interested witnesses, their testimony could have not been relied upon. It is also pointed out that place of occurrence, the bus stand and the drivers-conductors working there in HRTC always present at a bus stand, how the convicts could have dared to assault the complainant or prevent him from discharging his duties as a public servant.

6. On the other hand, Mr. Neeraj K. Sharma, learned Deputy Advocate General while repelling the arguments addressed on behalf of the accused persons has pointed out from the evidence that the accused had consumed liquor and accused Punnu Ram being Pradhan of the Gram Panchayat at that time scolded the complainant for changing the route of the bus bound to Gagla and his co-accused joined hand to beat the complainant and prevent him from discharging his official duties.

7. Learned trial Judge while recording the findings of conviction against all the accused seems to have swayed with passion and has take into consideration the one side version of the episode. Learned trial Judge has not made any effort to find out from the evidence available on record the manner in which the incident sparked off.

8. Admittedly, the genesis of occurrence is change of route of the bus which initially was detailed for Sach from Chamba. Before the departure of the bus to Sach, the bus had to depart for Gagla, however, the bus detailed for Gagla was got struck-up somewhere and the complainant may have taken a decision to detail the bus bound for Sach to Gagla. In this bus the passengers who had to travel to Sach were already sitting. On announcement of change of its route the passengers who had to travel to Gagla had also boarded the same. Accused Punnu Ram and his co-accused had to travel to Gagla, therefore, they had also boarded the said bus. In this manner the passengers going to Sach and towards Gagla side seems to have boarded the same bus. The complainant deployed at that time as Adda Incharge seems to have intervened to see that the passengers of Sach side occupying the bus are made to alight therefrom. The incident as such had sparked off at the spur of moment. It can reasonably be believed that convict Punnu Ram being Pradhan of Gram Panchayat at that time and in public life may have questioned such type of working of HRTC functionaries. It is on this the occurrence seems to have taken place.

9. The medical evidence as has come on record by way of the testimony of PW8 Dr. Vinod Sharma that not only the complainant had received injuries on his person in the occurrence but injuries were also there on the nose left side and lip of accused Punnu Ram. This witness has even noticed swelling in left cheek of accused Raj Kumar. No injury, however, could be detected on the person of accused Surinder Kumar. The place of occurrence being bus stand which generally remained over crowded that too in the evening time because the incident had occurred 3:30 P.M. the accused would have not dared to assault the complainant none else but Adda Incharge for the reasons that there was every likelihood of they being beaten up by the HRTC staff, drivers, conductors and for that matter the passengers also on their indulging in an activity of this nature. As already noticed, accused Punnu Ram being in public life may have put question mark on the working of the HRTC and others and this has enraged complainant Krishan Chand. The possibility of Krishan Chand and other staff members including the drivers/conductors present there being the assailants cannot be ruled out.

10. Cogent and reliable evidence as to which of the accused had inflicted the injuries on the person of the complainant is lacking on record. On the other hand, the so called independent witness Jaiwant PW2 while in the witness box has stated that the injury in the hand of complainant was inflicted by accused Raj Kumar. However, as per own version of the complainant such injury inflicted to him by accused Punnu Ram. In view of such evidence, no liability can be fastened upon either of the accused qua causing such injury in the hand of the complainant. It cannot also be believed to be true that accused Punnu Ram made utterances that ""BUS ADDA INCHARGE USKE JUTE KE BRABAR NAHI HAIN" for the reasons that as per the own testimony of the complainant said accused had not made any such utterances but made utterances that "HE WAS EQUAL TO HIS SHOE". Therefore, very foundation of the genesis pressed in service by the prosecution turns highly doubtful. Though the statement under Section 161 Cr.P.C. of PW2 Jaiwant Ram is shown to have been recorded on the day of occurrence itself i.e. 19.12.2016 however, as per his version while in the witness box the same was recorded on the next day. Though it is not an important circumstance, however, such contradiction casts cloud qua the manner in which the investigation has been conducted in this case. Even there are contradictions as to who was the conductor deployed with the bus in question and the duration of the occurrence continued on the spot. The other contradictions pointed out by Mr. Sharma, learned Senior Advocate though are minor in nature, however, when the prosecution story not inspire confidence also falsify the prosecution case against the accused.

11. True it is, that all the three accused had consumed alcohol. However, as per the medical evidence they were not under the influence thereof. On this score also, it cannot be believed by any stretch of imagination that being under the influence of alcohol they assaulted the complainant and prevented him from discharging his duties as a public servant.

12. For all the reasons hereinabove, and also the inconsistencies and contradictions occurred in the prosecution evidence, no findings of conviction could have been recorded against the accused persons. The present rather is a case where the prosecution has failed to prove its case against the accused beyond all reasonable doubts. The reappraisal of the evidence available on record reveals that on the basis thereof two views emerges on record and as per the settled legal principles in the criminal administration of justice the view favouring the convicts has to be accepted and the benefit of doubt given to them. This Court, therefore, finds the present a fit case where the accused are entitled to the benefit of doubt and consequently acquittal of the charges framed against each of them.

13. In view of the findings as recorded hereinabove, this appeal succeeds and the same is accordingly accepted. Consequently, the impugned judgment is quashed and set aside and the accused acquitted of the charge framed against each of them. The personal bonds executed by each of them shall stand cancelled and the surety bonds discharged. The appeal is accordingly disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Sh. Ram Lal …Appellant.
Versus
Sh. Bishan Singh and others …Respondents.

FAO No. 135 of 2012
Decided on: 09.12.2016

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that accident was caused by the negligence of the driver of the vehicle – FIR was registered against the claimant – acquittal was recorded on the ground that case was not proved beyond reasonable doubt and not on the ground that the accident was caused by the negligence of other driver- the statement of PW-1 was shattered in the cross-examination – negligence was not proved and the claim petition was rightly dismissed- appeal dismissed.(Para-6 to 11)

For the appellant: Mr. Ashok K. Tyagi, Advocate.
For the respondents: Mr. Rajesh Verma, Advocate, for respondents No. 1 and 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to award, dated 25th February, 2012, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 62-N/2 of 2008, titled as Shri Ram Lal versus Shri Bishan Singh and others, whereby the claim petition filed by the appellant-claimant-injured came to be dismissed (for short "the impugned award").

2. The Tribunal has specifically held that the appellant-claimant-injured was himself driving the scooter rashly and negligently at the time of the accident and dismissed the claim petition in terms of the impugned award.

3. The appellant-claimant-injured has called in question the impugned award on the ground that the Tribunal has fallen in an error in dismissing the claim petition.

4. Thus, the sole question to be determined in this appeal is – whether the Tribunal has fallen in an error in dismissing the claim petition? The answer is in the negative for the following reasons:

5. It was for the appellant-claimant-injured to prove that the accident was caused by the driver, namely Shri Dharmatam Singh, who was driving vehicle bearing registration No. HP-18 A-1368 rashly and negligently, has failed to do so.

6. Admittedly, FIR No. 5/2007, Ext. RW-1/A, was lodged against appellant-claimant-injured, which culminated into final report in terms of Section 173 of the Code of Criminal Procedure (for short "Cr.P.C"), was presented before the Court of competent jurisdiction. The trial was conducted by the Judicial Magistrate 1st Class, Rajgarh, Camp at Sarahan, District Sirmaur, H.P. (for short "the trial Court"). During trial, the statement of the accused, i.e. appellant-claimant-injured, was recorded under Section 313 CrPC. In the said statement, he pleaded not guilty, but had not led any evidence to prove that the FIR was wrongly lodged against him and the accident was caused by the driver of another vehicle.

7. The trial Court, vide judgment, dated 17th July, 2010 in Criminal Case No. 21/2 of 2009/07, titled as The State of Himachal Pradesh versus Ram Lal (Annexure PX) has acquitted the accused, i.e. the appellant-claimant-injured, while holding that the prosecution had failed to prove the case beyond the reasonable doubt and not on the basis that the accident was not

caused by the appellant-claimant-injured, but, by the driver of the another vehicle, namely Shri Dharmatam Singh.

8. It is apt to record herein that the accused, i.e. the appellant-claimant-injured, has not moved an application during the trial before the trial Court for re-investigation or further investigation in terms of Section 173 (8) Cr.P.C. in order to establish that the accident was caused by the driver of the another vehicle, namely Shri Dharmatam Singh and not by him. He contested the case, undergone the trial and earned acquittal from the trial Court, as discussed hereinabove, on the ground that the prosecution had failed to prove its case beyond reasonable doubt.

9. The appellant-claimant-injured filed the claim petition much later before the Tribunal for grant of compensation, as per the break-ups given in the claim petition, was resisted by the respondents and the issues were framed.

10. It was for the appellant-claimant-injured to plead and prove, *prima facie,* that Shri Dharmatam Singh, i.e. the driver of another vehicle involved in the accident, had driven the same rashly and negligently and caused the accident, in which he sustained injuries, has not led any evidence to that extent except PW-4, Shri Hari Mohan. But, the statement of the said witness has been shattered during his own cross-examination and also by HC Jaswant Singh (RW-1), who had conducted the investigation of the case. Thus, the Tribunal has rightly made the discussion right from paras 9 to 21 of the impugned award.

11. Having said so, the impugned award is well reasoned and legal one, needs no interference.

12. Viewed thus, the impugned award is upheld and the appeal is dismissed.

13. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Ashwani Kumar .....Respondent.

Cr. Appeal No. 220 of 2007.

Date of Decision: 9th December, 2016.

Indian Penal Code, 1860- Section 279 and 337- **Motor Vehicles Act, 1988-** Section 187- Accused was driving a vehicle in a rash and negligent manner- the vehicle hit the informant and caused injuries to him- the accused was tried and acquitted by the Trial Court- held in appeal that testimonies of the prosecution witnesses corroborated each other – medical evidence also corroborated their version – the identity of the accused was also established – minor contradictions in the testimonies of witnesses are not sufficient to doubt them- appeal allowed- accused convicted of the commission of offences punishable under Sections 279 and 337 of I.P.C. and 187 of M.V. Act.(Para-9 to 16)

For the Appellant: Mr. Vivek Singh Attri, Dy. .A.G.

For the Respondent: Mr. Ramakant Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the State of H.P. against the judgment of the learned Judicial Magistrate 1st Class, Nadaun, District Hamirpur, H.P. rendered on

15.07.2006 in Crl. Case No. 36-I-2003, RBT No. 381-II-2003, whereby, she acquitted the accused/respondent herein for his allegedly committing offences punishable under Sections 279, 337 of the IPC and under Section 187 of the Motor Vehicles Act.

2. The facts relevant to decide the instant case are that the injured/complainant was standing near Inder Pal Chowk on 3.4.2000 at about 9.30 a.m. along with Rajinder Kumar and Mohan Singh. In the meantime, a Van bearing NO. HP-02-6265 came from Hoshiarpur side which was being driven by the accused in a rash and negligent manner as a result of which he struck it with the complainant and caused injuries to him. On the aforesaid facts, FIR was registered in the police station concerned. The police started the investigations in the case and completed all the codel formalities.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 279 and 337 of the IPC and under Section 187 of the Motor Vehicles Act. In proof of the prosecution case, the prosecution examined 10 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which he claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of acquittal in favour of the accused/respondent herein.

6. The State of H.P. is aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of the evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned defence counsel has with considerable force and vigour, contended qua the findings of acquittal recorded by the learned Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. PW-1 Hoshiar Singh besides PW-5 Rajinder Kumar and PW-6 Mohan Singh, all of whom at the relevant time were standing at the relevant site of occurrence, all depose in unison bereft of any intra se inconsistency qua the genesis of the prosecution case embodied in the relevant FIR borne on Ex.PW1/A. A close circumspect reading of their respective testifications unveil qua therein not occurring any inter se contradictions vis-a-vis their narrations qua the occurrence embodied in their respective examinations-in-chief vis-a-vis the apposite communications qua it articulated in their respective cross-examinations nor also their respective testifications convey qua theirs testifying with any vice of any intra se contradictions. Significantly, the learned trial Court was enjoined to mete deference to their unstained testifications qua the relevant occurrence, whereas, it has for grossly perverse or absurd reasons emanating from it grossly mis-appraising the creditworthy testifications of PW-1, PW5 and PW-6, proceeded to record an order of acquittal vis-a-vis the accused.

10. The MLC qua the victim borne on Ex.PW8/A underscores qua the doctor concerned, who held the victim/complainant to medical examination, noticing occurrence of injuries on his left foot, mouth, right shoulder and on his right hand.

11. The injuries as stand borne therein unfold qua not only the left foot holding injuries but injuries on other portion of the body of the victim also standing begotten thereon, in sequel to a collision occurring inter se the vehicle driven by the accused with PW-1. With PW-8 disclosing in the apposite MLC qua the victim qua there occurring bruises on his left foot weighed with the learned trial Court to underscore the worth of his testification qua the vehicle colliding with his person arousable from the factum qua with the victim evidently standing by the side of the road, thereupon the position occupied thereat by him warranting his suffering an injury on his right foot, injury whereof yet remained omitted to stand underscored in the apposite MLC. However, the aforesaid reasoning as stands propounded by the learned trial Court to belittle the creditworthiness of the testification of PW-1 besides the testifications of other ocular witnesses, who deposed as PW-5 and PW-6 is bereft of any tenacity given the learned trial Court omitting to revere the factum qua injuries other than the one(s) occurring on the left foot of the victim also standing pronounced in the apposite MLC borne on Ex.PW8/A also with the sanctity of the testifications rendered by PW-1 besides by other ocular witnesses to the relevant occurrence, who testified as PW-5 and PW-6 as occurring in their respective examinations-in-chief remaining for reasons aforestated uneroded thereupon they warranted imputation of credence thereon significantly when on theirs standing subjected to the ordeal of a rigorous cross-examination by the learned defence counsel they remained unscathed in the ordeal nor any communications occur therewithin in portrayal qua theirs at the relevant time not eye witnessing the occurrence, thereupon contrarily it was inapt for the learned trial Court to dis-impute credence to their relevant testifications qua the occurrence.

12. Furthermore, PW-4, the owner of the relevant vehicle in his examination-in-chief deposed qua since 2000, the accused/respondent his brother manning the driver's seat of the relevant vehicle. With the aforesaid manifestations occurring in the testification of the owner of the relevant vehicle besides with the learned defence counsel while holding him to cross-examination, his not putting apposite suggestions to him to rip his aforesaid testification of its tenacity wherefrom the inevitable sequel is qua the accused/respondent herein at the relevant time manning the driver's seat of the relevant vehicle also with the accused in his statement recorded under Section 313 of the Cr.P.C., his not making communications therein qua his at the relevant time not manning the driver's seat of the relevant vehicle rather some other person, specifically named by him driving the relevant vehicle at the relevant time, wherefrom, a conclusion can stand erected qua the defence acquiescing qua the accused manning the driver's seat of the relevant vehicle at the relevant time.

13. Be that as it may, delay, if any, occurring in the lodging of the FIR at the instance of the complainant/victim, who stood at the relevant time accompanied by his collegiates PW-5 and PW-6 stands sufficiently explained conspicuously arising from the defence counsel while holding PW-1 to cross-examination his putting an affirmative suggestion to him holding echoings therein qua the college whereto the aforesaid were to proceed standing located at a distance of 10 kilometers from the relevant site of occurrence whereto an affirmative answer stood purveyed by PW-1 besides with the defence counsel while holding PW-5 to cross-examination, putting an affirmative suggestion to him qua on the relevant day PW-1, PW-5 and PW6 standing enjoined to appear in the English paper scheduled to commence from 10 a.m. and lasting upto 1.00 pm., whereto an affirmative answer stood purveyed by PW-5, is an evident disclosure qua the defence thereupon acquiescing qua given the relevant accident occurring at 9.30 a.m., whereas, when for reasons aforesaid PW1 besides PW-5 and PW6 stood enjoined to take their examination scheduled from 10 a.m. to 1.00 p.m. at a place located at a distance of 10-12 kilometer from the site of occurrence qua theirs thereupon standing constrained to not promptly lodge an FIR qua the occurrence with the police station concerned, wherefrom a conclusion can stand drawn qua the delay in the lodging of the FIR standing satisfactorily explained. In sequel, it was inapt for the learned trial Court to conclude qua the delay as has occurred in the lodging of the FIR standing not satisfactorily explained by the prosecution.

14. The contention of the learned counsel appearing for the accused/respondent herein qua with the Investigating Officer in the site plan borne on Ex.PW8/A describing the site

of occurrence to be triangular whereas in his testification his contradicting the aforesaid factum by voicing qua it being circular, would not erode the efficacy nor the credibility of the testifications of PW-1, PW-5 and PW-6, as it appears to arise only for want of inapposite geometrical knowledge of the investigating officer concerned.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a gross perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

16. Consequently, for the foregoing reasons, the the instant appeal is allowed and judgment of the learned trial Court is set aside. Accordingly, the accused/respondent is convicted for his committing offences punishable under Sections 279 and 337 of the IPC and under Section 187 of the Motor Vehicles Act. Accused/respondent be produced before this Court on 28th December, 2016 for his being heard on the quantum of sentence.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. …..Appellant.

Versus

Maharaj Kumar and others …..Respondents.

Cr. Appeal No. 434 of 2007
Reserved on: 22.11.2016
Decided on : 09/12/2016.

Prevention of Food Adulteration Act, 1954- Section 16(1)(a)(i)- Sample of Vanaspati was taken, which was found to be adulterated on analysis- the accused was tried and acquitted by the trial Court- held in appeal that the sample was analyzed by Central Food Laboratory after three years- mere failure to pass Baudouin test is not sufficient to convict a person – appeal dismissed.

(Para-10 to 13)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.

For the Respondents: Mr. Nimish Gupta, counsel, for respondent No.2.
Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate, for respondent No.3.
Mr. K.D.Sood, Sr. Advocate with Mr.Sanjeev Sood & Mr.Ankit Aggarwal, Advocates for respondent No.4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed by the State of Himachal Pradesh against the impugned judgment rendered on 25.07.2007 by the learned Chief Judicial Magistrate, Chamba, District Chamba, Himachal Pradesh, in Complaint No. 80(A)-III of 2000, whereby he acquitted the respondents (for short 'accused') for the offences charged.

2. The brief facts of the case are that Food Inspector went to village Sahoo and purchased three packets of Bhoj Vanaspati on 25.2.2000 from accused Maharaj Kumar after disclosing her identity and showing her intention to take the sample for the purpose of analysis. The Food Inspector has paid Rs.45/- to the accused in the presence of witnesses. The sample of Bhoj Vanaspati packets so purchased were wrapped in three wrapping papers and thereafter pasted with gum and paper slip bearing code No.1334. The signatures of accused and witnesses

were taken in such a manner that paper slip and wrapping paper both carried the part of the signatures according to the procedure. One sealed packet of the sample of the Bhoj Vanaspati was sent to the public/chemical analyst for analysis in a sealed wooden box with Form-VII under registered parcel. A copy of Form VII alongwith the specimen impression of the seal used to seal the packets of the sample was sent separately to the Public Analyst vide separate registered letter and remaining two parts of the sample alongwith two copies of Form-VII with seal impression were also handed over to the Local Heath Authority, Chamba. The Public Analyst, Kandaghat found the sample to be adulterated vide report No. 80 dated 6.4.2000. The Food Inspector submitted all the documents concerned of the case in the office of Chief Medical Officer, Chamba and obtained written consent to launch the prosecution against the accused under the Act. The Chief Medical Officer accorded the sanction. The Local Health Authority was informed separately regarding the launching of prosecution and accused was informed through registered post alongwith the copy of Public Analyst Report. The accused persons were summoned and supplied the copy of complaint and documents in compliance of Section 207 Cr.P.C. Upon consideration of complaint and documents there existed a prima facie case against accused No.1. So notice of accusation was put to the accused under Section 16(1)(a)(i) read with Section 7(1) of the Prevention of Food Adulteration Act (hereinafter for short referred to as 'the Act') and also read over and explained to the accused in Hindi, to which the accused person pleaded not guilty and claimed trial. The accused No.1 moved an application under Section 20A of the Act for impleading M/s K.V.Trading Company, Damtal as co-accused. The application of the accused was allowed by the Court on 7.10.2002 and M/s K.V.Trading Company Damtal was impleaded as co-accused in the present case to whom notice of accusation under Section 16(1)(a)(i) was put and this accused has also moved an application under Section 20-A of the Act to implead M/s Suraj Industries Sansarpur Terrace as co-accused who has moved an application as co-accused and the application was duly allowed on 30.04.2003 and accused No. 3 and 4 were impleaded as co-accused in the present case to whom notice of accusation was put on 7.4.2004, under Section 16(1)(a)(i) read with Section 7(i) of the Act to which they pleaded not guilty and claimed trial. The nominee of Suraj Industries Shri S.K.Uppadhaye moved an application under Section 13(2) of the Act for sending the second sample for analysis to Central Food Laboratory on 26.6.2003 which was duly allowed and the second sample was sent to Director Central Food Laboratory, Mysore along with a memorandum containing specimen seal impression and the report of the Central Food Laboratory, Mysore was received by the Court on 28.10.2003. After completing all codal formalities and on conclusion of the investigation into the offence, allegedly committed by the accused a complaint was prepared and filed in the Court.

3. Notice of accusation stood put to the accused by the learned trial Court for theirs committing offences punishable under Section 16(1)(a)(i) of the Act to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 4 witnesses. On closure of prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure, were recorded in which they pleaded innocence and claimed false implication. They chose to lead evidence and examined two witnesses in their defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of acquittal in favour of the accused.

6. The learned Deputy Advocate General has concertedly and vigorously contended qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather theirs standing sequelled by gross mis-appreciation by it of the relevant material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. The learned counsels appearing for the respondents have with considerable force and vigour contended qua the findings of acquittal recorded by the Court below standing based

on a mature and balanced appreciation of evidence on record by it hence theirs not necessitating any interference, rather theirs meriting vindication.

8. This Court with the able assistance of the learned counsel on either side has with studied care and incision, evaluated the entire evidence on record.

9. The accused respondent No.1 Maharaj Kumar died during the pendency of the appeal before this Court. Hence, the prosecution case against him stands abated.

10. Sample of Bhoj Vanaspati comprised in Ext.PW-3/A stood collected by the Food Inspector concerned from the premises of accused/respondent No.1. On its standing dispatched for analysis to the public analyst concerned whereat it stood subjected to analysis, the public analyst concerned in his opinion comprised in Ext.PW-1/A recorded therein the hereinafter extracted conclusions:-

> "Examination of label:- All the required particulars are mentioned.
>
> 2. Appearance on melting: Clear, free from suspended and other foreign matter.
> 3. Taste and smell unobjectionable.
> 4. Staleness or rancidity absent.
> 5. Added colouring matter- Absent.
> 6. Moisture=0.024%
> 7. Melting point=38
> 8. Butro refractometer reading at 60=40.5.
> 9. Unsaponifiable matter =0.99% by weight.
> 10. Free fatty acids (calculated as oleic acid)=0.11%
> 11. Test for argemone oil= Negative.
> 12. Baudouin test for sesame oil= negative
> 13. Test for mineral oil= negative. And I am of the opinion that the contents of the sample give negative baudouin test for sesame oil whereas it should be positive. The vanaspati should contain seasame oil in sufficient guantity to produce at least 2 red unit in a 1 cm. cell on a Lovibond scale as tested by the prescribed procedure. The sample of vanaspati is therefore adulterated."

11. Thereafter the relevant sample stood also dispatched to the Central Food Laboratory, Mysore, whereat on its standing subjected to analysis, its apposite opinion embedded in its apposite report encapsulated in Ext.PA displays qua its standing positive for rancidity besides negative for baudouin test also therewithin a portrayal exists of its holding therewithin fatty acids beyond the permissible limits. Significantly, the retailer besides the manufacturer on the latters' subsequent impleadment alongwith the retailer stood acquitted for the charges whereagainst they stood subjected to face trial before the learned CJM concerned. The legality of the findings recorded by the learned Chief Judicial Magistrate qua the sample of the relevant Food Item on its initially standing subjected to analysis before the Public Analyst, Himachal Pradesh, Kandaghat besides subsequently to analysis before the Central Food Laboratory, Mysore, at the latter laboratory whereat on its standing subjected to analysis, an opinion emanated therefrom qua its standing tested positive for rancidity besides its holding fatty contents beyond the permissible limits do not entail upon this Court for pronouncing their reversal, significantly when the aforesaid demerits occurring in the relevant sample as stand unveiled in the opinion embedded in Ext.PA stood noticed to exist therein after three years elapsing since the collection of the sample of the relevant food item by the Food Inspector concerned from the retail outlet of respondent No.1 besides when the relevant demeritorious occurrence therein or the occurrence therein of fatty acids beyond the permissible limit(s) remained unmanifested in the previous report of the public analyst concerned, opinion whereof embodied in Ext.PW-1/A stood pronounced in prompt sequel to its collection by the Food

Inspector concerned from the retail outlet of respondent No.1 also when therewithin no presence therein of fatty acids beyond permissible limit(s) stands displayed therein whereupon obviously it stood aptly concluded by the learned Chief Judicial Magistrate qua its occurrence therein hence spurring from a delay of three years occurring on its analysis standing made by the Central Food Laboratory, Mysore. The learned Deputy Advocate General has yet with much force and vigour contended qua with the report of the public analyst concerned also the subsequent report of the Central Food Laboratory, Mysore consistently besides with inter se harmony spelling therein qua the sample of the relevant food item on standing subjected to baudouin test begetting the sequel of the relevant sample of the relevant food item displaying negativity qua its reaction vis.a.vis. baudouin test to which it stood subjected to whereupon on anvil of Section 2 sub section (l) and (m) of the Act, which stands extracted hereinafter:

> (l) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which renders it injurious to health;
>
> (m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injuries to health;

He canvasses qua even if penal culpability on invocation of clause (l) thereof is unfastenable qua the accused/respondents arousable from the factum qua the presence of an imperative food ingredient standing detected therein to hold its presence therein in a quantum beyond permissible limits also thereupon it rendering the relevant food item to be injurious to health, significantly when hereat the relevant presence beyond permissible limits of fatty acids in the relevant food item stands pronounced by this Court for reasons aforestated to not invite the inculpability of the accused/respondents qua infraction standing begotten qua the mandate of Section 2(l) of the Act yet dehors the aforesaid penal inculpability constituted in Clause (l) of Section 2 of the Act not warranting attraction vis.a.vis the accused/respondents, nonetheless the apt penal inculpability encapsulated in clause (m) of Section 2, provisions whereof arouse penal inculpability qua the accused/respondents dehors want of presence therein beyond permissible limits of a prohibited food item besides dehors its presence therein not being injurious to health rather conspicuously when the factum of it's occurrence therein spurs from its being a statutory imperative constituent therein also when thereupon the quality or purity of the relevant food item besides its not falling upto the prescribed standards gets substantially affected, thereupon also the relevant statutory penal inculpability of the accused/respondents stands attracted. Nowat when hereat with 'sesame' specifically standing displayed in Appendix A.19(x) of the Prevention of Food Adulteration Rules, (hereinafter referred to as 'the Rules') provisions whereof stand extracted hereinafter:-

> "It shall contain raw or refined sesame (til) oil in sufficient quantity so that when the Vanaspati is mixed with refined groundnut oil in the proportion of 20:80, the colour produced by the Baudouin test shall not be lighter than 2.0 red unit in a 1 cm cell on a Lovibond scale."

to imperatively mark its presence therein i.e. in 'Vansapati' in a quantity sufficient for facilitating the holding of an efficacious/affirmative 'baudouin test' thereon whereupon the sample of 'Vanaspati' on standing tested would portray qua its quality or purity not falling below the prescribed standards enjoins its manufacturer to add 'sesame' in 'Vanaspati' within the mandate of the afore extracted provisions. Before proceeding to adjudicate the aforesaid submission addressed herebefore by the learned Deputy Advocate General, reliance as stands placed by the learned Chief Judicial Magistrate upon the mandate recorded by the Punjab and Haryana High Court in a judgment reported in Municipal Committee Amritsar Vs. Mehar Singh 1972 page 604 wherein the Punjab and Haryana High Court, has on anvil of the statement of the public analyst concerned which existed therebefore unraveling therein qua 'sesame' imported from the mediterranean region evincing no reaction to baudouin test, whereupon it blindfoldedly straightaway bereft of any evidence for sustaining the aforesaid factum recorded a conclusion qua the 'baudouin test' as stood carried hereat upon the relevant food item by the public analyst

concerned in sequel whereto he opined qua its begetting the sequel of its standing tested negative qua yet thereupon no penal culpability standing attracted qua the accused herein. Consequently, the aforesaid reason meted by the learned Chief Judicial Magistrate to hold of the relevant food item on standing subjected to baudouin test its begetting the sequel of its testing negative thereto by merely anvilling it qua hence with 'sesame' occurring in the sample of 'Vanaspati' hereat also standing imported from the mediterranean region by its relevant manufacturer hereat thereupon it too on facing the relevant baudouin test, a result in the negative ensuing therefrom is palpably *per se* highly surmisal, conspicuously when hereat neither any articulation stood bespoken by the accused/respondents in their respective statements recorded under Section 313 Cr.P.C qua the manufacturer hereat importing 'sesame' from the mediterranean region nor also any suggestion in consonance therewith stood put to the prosecution witnesses.

12. Apparently the reasons recorded by the Punjab and Haryana High Court in Municipal Committee, Amritsar (supra) while making an interpretation of clauses (l) and (m) of Section 2 of the 'Act' qua with sesame merely being a facilitator for holding the baudouin test upon the relevant sample of 'Vanaspati' whereas it not evidently standing displayed by the echoings made therebefore by the expert concerned thereat qua it being injurious to health thereupon it concomitantly concluded qua the sample of 'Vanaspati' would hence stand unrendered to be an adulterated food item reiteratedly merely on the holding of 'baudouin test' on the sample of 'Vanaspati' bespeakings emanating therefrom qua its begetting the sequel of its testing negative thereto also visibly stand generated from its misconstruing the import of Appendix A.19(x) of the Rules whereupon the aforesaid reason propounded therein does not constitute a binding adhereable rule nor a ratio decidendi contrarily its overlooking the provisions engrafted in Appendix A.19(x) of the Rules, renders hence the verdict of the Punjab & Haryana High Court (supra) holding therewithin the aforestated reasons for nullifying qua sample of 'Vanaspati' failing the 'baudouin test' being visibly *per incuriam.*

13. The aforestated Appendix A.19(x) of the Rules casts a statutory obligation upon the manufacturer to while manufacturing 'Vanaspati' to add therein 'sesame' in a quantity sufficient for thereupon its efficaciously/affirmatively facilitating the holding of "baudouin test" thereon for thereupon within the ambit of clause (m) of Section 2 of the Act, the purity besides quality of 'Vanaspati' standing efficaciously/affirmatively tested, reiteratedly when thereunder besides in the afore extracted relevant portion of the Rules 'sesame' stands statutorily constituted to be an apt facilitator for the public analyst concerned for an apt determination standing recorded by him qua the quality or purity of Vanaspati also thereupon the mere factum of its presence therein in a quantum defacilitating an efficacious/affirmative holding of baudouin test upon the relevant sample of 'Vanaspati' dehors its minimal inapt statutorily prescribed presence therein not begetting any injury to the health of the consumers would yet invite penal inculpability vis.a.vis. the accused respondents.

14. Be that as it may, the prosecution stood enjoined to adduce cogent evidence in display of the relevant manufacturer in his manufacturing 'Vanaspati' his prior thereto eliciting an opinion from the expert qua the quantum of presence of 'sesame' therein also evidence stood enjoined to be adduced by the prosecution qua the manufacturer of 'Vanaspati' despite eliciting the report of the expert concerned qua the quantum of sesame standing added therein besides its addition therein being construable to be in a quantity sufficient for its hence facilitating the holding of "baudouin test" thereon for thereupon its quality besides purity standing tested, his yet infracting the mandate of the apposite expert besides the prosecution stood enjoined to adduce material comprised in its placing on record the 'label' borne on the relevant parcel of 'Vanaspati' displaying therein the quantum of presence of 'sesame' therein also thereupon it would prove the trite factum qua the quantum of presence of sesame therein holding a quantity insufficient whereupon obviously the holding of an efficacious/affirmative 'baudouin test' thereon stood defacilitated. However, the prosecution has abysmally failed to adduce the aforesaid relevant best evidence. In aftermath, the effect of the aforesaid omission(s) is qua an inference standing enjoined to be erected by this Court qua the manufacturer hereat of 'Vanaspati' not infracting the opinion obtained by him from the expert concerned qua the quantum of sesame to be added to

'Vanaspati' nor also if on the holding of baudouin test on the relevant sample of 'Vanaspati' it sequelled the fate of its testing negative thereupon marking the factum qua quantum of its presence therein being a quantity insufficient for thereupon its facilitating the holding of an efficacious affirmative 'baudouin test' thereon also thereupon if the 'baudouin test' has failed vis.a.vis. the sample of Vanaspati hereat, failure thereof not on anvil of clause (m) of Section 2 attracting penal inculpability vis.a.vis. the accused respondents, even if concomitantly thereupon the relevant sample of 'Vanaspati' stood rendered to not conform to the apposite standards of its quality or purity. Significantly reiteratedly when this Court has erected the aforesaid inference qua the manufacturer not infracting the mandate of the expert concerned comprised in his not in conformity therewith adding the prescribed quantum of 'sesame' therein unless evidence stood adduced comprised in the prosecution also proceeding to prosecute the expert concerned who purveyed an opinion to the manufacturer marking therein the quantum of presence of 'sesame' in 'Vanaspati' or qua the quantum of its addition therein by its manufacturer whereas his apposite prescriptions qua the quantum of its presence therein or its addition therein being in a quantum sufficient or insufficient for respectively efficaciously facilitating the holding of an affirmative 'baudouin test' thereon or defacilitating its holding thereon alone constituted the bench mark for underscoring qua its holding tandem with the apposite regulatory mechanism qua the quantum of 'sesame' to be added in the sample of 'Vanaspati' hereat. The prosecution was also enjoined to with the apposite facilitations of the Court concerned make the relevant collections from the apposite record maintained by the manufacturer holding pronouncements therein qua the manufacturer infracting the apposite mandate of the expert concerned or his not obtaining the opinion of the expert concerned qua the quantum of 'sesame' to be added in the relevant food item besides qua the opinion purveyed by the expert to the manufacturer qua the quantum of sesame to occur in Vanaspati not conforming to the standardized norms qua its standing construed to efficaciously promote the holding of an affirmative 'baudouin test' thereon whereas the aforesaid constituted the germane best evidence qua the relevant facet. In addition, since the manufacturer is evidently not an expert qua quantum of presence or addition of sesame in 'Vanaspati' besides obviously qua the quantum of sufficiency or insufficiency of its presence therein hence reiteratedly enjoined the prosecution to collect the opinion of the expert concerned. However, the prosecution has failed in the aforesaid endeavour. In aftermath, the quantum of addition of 'sesame' in 'Vanaspati' by its manufacturer hereat even if is in an insufficient quantity thereupon, the manufacturer cannot be rendered penally inculpable. Corollary thereof is when the entire responsibility stands cast upon the expert concerned who purveyed an opinion to the manufacturer of 'Vanaspati' for ensuring qua quantum of presence therein of sesame being in a quantity sufficient for thereupon it efficaciously facilitating the holding of an affirmative baudouin test thereon whereas the relevant elicitations qua the factum aforesaid remain uncollected by the prosecution. In sequel therefrom it would be unbefitting to conclude of the manufacturer of Vanaspati intentionally adding sesame in Vanaspati in an insufficient quantity nor it would be befitting to conclude of his thereupon intentionally defacilitating the holding an apposite affirmative 'baudouin test' thereon contrarily it is to be concluded of his not possessing the relevant *mens rea* for any liability qua any penal inculpation standing fastened upon him.

15. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court apart from the facets afore-stated has appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

16. In view of the above, I find no merit in this appeal, which is accordingly dismissed. In sequel, the impugned judgment is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh ……Appellant.
Versus
Krishna. ……Respondent(s).

Cr. Appeal No. 362 of 2010
Reserved on 15.9.2016.
Date of decision: 9.12.2016.

N.D.P.S. Act, 1985-Section 18 and 20- A motorcycle being driven by accused M and occupied by accused K was intercepted by the police- accused K was found in the possession of 800 grams charas and 150 grams opium- accused M was found to be driving the motorcycle without any permit – the accused were tried and acquitted by the Trial Court- held in appeal that independent witnesses have not supported the prosecution version – timing in the ruqua was changed from 18.30 hours (6:30 P.M.) to 10:00 P.M. - no explanation for the same was given – there was contradiction regarding the person, who had carried out the search and seizure- the testimonies of the prosecution witnesses are contradictory – the Trial Court had rightly refused to place reliance on their testimonies – appeal dismissed.(Para-11 to 21)

Case referred:
Noor Aga V. State of Punjab, (2008) 16 SCC 417

For the appellant Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs.
For the respondent(s) Mr. G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Challenge herein is to the judgment dated 2.3.2010, passed by learned Special Judge, Mandi, Division at Mandi, H.P. in Sessions Trial No. 5 of 2008, whereby both the accused-respondents (hereinafter referred to as the accused) were acquitted of the charge under Sections 18 & 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the NDPS Act' in short), framed against each of them. Accused Mahender Pal Singh was acquitted of the charge framed under Section 181 of the M.V. Act, also. Accused Mahender Pal Singh has expired during the pendency of this appeal. The appeal as such stands abated against the said accused.

2. The learned trial Court on the basis of the evidence available on record while discarding the plea raised in defence by the accused that Section 50 of the NDPS Act has not been complied with has concluded that in view of recovery of charas from the bag being carried by accused Krishna, the compliance of Section 50 of the Act was not required to be made. However, on taking into consideration the contradictions, inconsistencies and improvements in the prosecution evidence, both the accused were given benefit of doubt. In the opinion of learned trial Judge, the recovery of charas weighing 800 grams and opium weighing 150 grams from physical and conscious possession of accused Krishna is not proved beyond all reasonable doubt. The discrepancies qua time of preparation of rukka Ext. PW-4/A, the time when FIR Ext. PW-9/A/1 was registered and the prosecution case that parcels containing recovered charas and opium and sample parcels when produced by the I.O. before PW-4 Amar Nath MHC, Police Station were already sealed with seals "A" & "C" whereas as per the testimony of PW-4 MHC Amar Nath, seal "C" was used by him for resealing the parcels when produced before him, were also taken into consideration by learned trial Court. The cuttings in the date (7 adjusted to 8 by way

of overwriting) on reseal memo Ext. PW-4/C also weighed with learned trial Judge while acquitting both the accused. The prosecution case that the search of lady accused Krishna was conducted by a lady Constable is also not proved on record. Learned trial Judge has also noted that the independent witnesses PW-1 Sher Singh and PW-8 Roshan Lal associated by the I.O. PW-9 Ami Chand have also not supported the prosecution case. The findings that there is no mention about the preparation of NCB form in rukka Ext. PW-4/A are, however, without any substance as reference thereto is very much there in this document. The another ground that as per the report of Chemical Examiner Ext. PW-9/F, the resin contents in the sample of charas being 20.950 grams and in that of opium 15.488 grams, the weight of recovered charas was only 167.600 grams whereas that of opium 23.232 grams and as such even if the same is held to be recovered from accused Krishna, in that event also, it was a case of recovery of small quantity, however, is not available to the accused because a Larger Bench of this Court in State of Himachal Pradesh vs. Mahboob Khan has held that the entire bulk is to be treated as charas unless and until it is proved that some foreign material was found to be mixed therein. As per further ratio of this judgment, the other part of cannabis plaint i.e. leaves, branches and stem etc. if mixed in the recovered mass is also charas.

3. It is, in the above backdrop, the fate of this appeal has to be decided or before that it is desirable to take note of the facts in a nut shell.

4. On 7.9.2007 around 6:00 PM, PW-9 SI Ami Chand along with Constables Gopal Singh and Lekh Ram was conducting traffic checking at Slapper bridge near the gate of Dehar Power House. One motor cycle bearing registration No. HR-36F-0146 TVS Fiero being driven by accused Mahender Pal Singh (since dead) and occupied by lady accused Krishna as pillion rider was stopped for checking by the police. The antecedents of both the accused were ascertained. The documents of the motor cycle were checked. During the course of checking of bag being carried by accused Krishna with her, charas weighing 800 grams and opium weighing 150 grams was recovered from two different polythene carry bags which were kept therein. After resorting to sealing and sampling process, the recovered charas was taken into possession vide memo Ext. PW-7/A. Specimen of seal "A" Ext. PW-7/B was drawn. The NCB form Ext. PW-4/F was also updated in triplicate. The seal after its use was handed over to Roshan Lal (PW-8). The rukka Ext. PW-4/A was sent to Police Station through Const. Lekh Ram (PW-7), on the basis whereof FIR Ext. PW-9/A/1 was registered by the Police. The I.O. prepared the spot map Ext. PW-9/A. The accused were arrested vide arrest memos Ext. PW-9/D and PW-9/E, respectively. They were apprized about the grounds of arrest i.e. the offence they committed and the provision of sentence prescribed therefor. The accused and parcel containing the recovered contraband were produced before PW-4 MHC Amar Nath, Police Station Sundernagar and the officiating SHO who re-sealed the same with seal "C". The motor cycle was taken into possession vide memo Ext. PW-7/A. Accused Mahender Pal Singh was found driving the motor cycle without driving licence. Special report Ext. PW-3/A was prepared and sent to DSP (Headquarters), Mandi through Const. Lekh Ram (PW-7). The samples of recovered charas and opium were sent to FSL Junga. As per the report Ext. PW-9/F, the same after analysis were found to be the sample of charas and opium.

5. The Investigating Agency, on completion of the investigation has filed the Challan against the accused. Learned trial Judge, has framed charge against both of them under Sections 18 & 20 of the ND & PS Act. Accused Mahender Pal Singh was additionally charged with the offence punishable under Section 181 of the M.V. Act, also. They, however, pleaded not guilty and claimed trial.

6. The material witnesses examined by the prosecution in order to sustain charge against the accused are PW-1 Sher Singh, PW-4 Amar Nath, PW-5 Gopal Singh, PW-7 Lekh Ram, PW-8 Roshan Lal and PW-9 SI Ami Chand, the Investigating Officer. The remaining prosecution witnesses are formal, being police officials.

7. Learned trial Court, on appreciation of the evidence has, however, acquitted both the accused for the reasons recorded in the impugned judgment and discussed in para supra also.

8. The State of Himachal Pradesh, aggrieved by the impugned judgment has questioned the legality and validity thereof on the grounds, inter alia, that learned trial Court has failed to appreciate the evidence available on record in its right perspective. The same rather is stated to be appreciated in slipshod and perfunctory manner. The Court below is stated to have based its findings on hypothesis, surmises and conjectures. The reasoning as given by the Court below is stated to be manifestly wrong and unsustainable. The cogent and reliable evidence produced by the prosecution has erroneously been brushed aside. The minor contradictions in the statements of the prosecution witnesses have weighed heavily with learned trial Court while recording the findings of acquittal against the accused. There being overwhelming, cogent and reliable evidence suggesting the involvement of both the accused in the commission of offence, the factum of independent witnesses having turned hostile to the prosecution should have not been given undue weightage. The recovery of charas weighing 800 grams and opium 150 grams from the exclusive and conscious possession of the accused is satisfactorily proved, however, the accused have been acquitted erroneously.

9. Mr. D.S.Nainta, learned Addl. Advocate General while taking us to the evidence available on record has strenuously contended that the trial Court has failed to appreciate the evidence available on record in its right perspective. The impugned judgment, as such, has been sought to be quashed and set aside.

10. On the other hand, Sh. G.R.Palsra, Advocate, learned counsel representing the accused respondent Krishna has urged that for want of cogent and reliable evidence to prove the recovery of contraband allegedly charas and opium from the conscious and exclusive possession of the said accused renders the entire prosecution case highly doubtful. The improvements, contradictions as occurred in the evidence are stated to be fatal to the prosecution case. It has thus been urged that learned trial Court has not committed any illegality or irregularity while acquitting the accused of the charge framed against each of them.

11. At the out set, it is deemed appropriate to observe that the recovery of narcotic drug or psychotropic substance from the conscious and physical possession of the accused is *sine qua non* for recording the findings of conviction against him. We have drawn the support from the judgment of a Division Bench of this Court in Criminal Appeal No. 71 of 2013, titled State of Himachal Pradesh V. Karnail Singh @ Kaila, decided on 8th September, 2016, in which judgment of Bombay High Court in Rubyana alias Smita Sanjib Bali V. State of Maharashtra and others, 1996 Crl. L.J. 148 to conclude that the possession must be conscious and intelligent and mere physical presence of the accused in proximity or even close to something incriminating is not sufficient.

12. Now if coming to the rival contentions in the light of the given facts and circumstances and the evidence available on record, rapat rojnamacha Ext. PW-5/A reveals that the police party headed by Sub Inspector Ami Chand (PW-9), incharge of Police Post, Slapper left for village Slapper for conducting traffic checking at 5.00 p.m. on national highway. As per the prosecution case, when PW-9 along with other police officials were present at Slapper bridge at 6.00 p.m. near the gate of Dehar Power House, both accused arrived there on a motorcycle bearing registration No. HR-36F-0146. The motorcycle was being driven by accused Mohinder Pal Singh (since dead) and the pillion rider was his co-accused Krishna. Admittedly, nothing incriminating was recovered from either of them or from the dicky etc., of the motorcycle. The contraband allegedly charas was recovered from a military coloured bag being carried by accused Krishna with her. The independent witnesses PW-1 Sher Singh and PW-8 Roshan Lal though have admitted their signatures on all the documents put to them while in the witness box, however, they have not supported the prosecution case qua the recovery of charas weighing 800grams and opium weighing 150grams from the bag allegedly being carried by accused Krishna with her in their presence at all. The present as such is a case, which is not supported by the independent witnesses allegedly associated by the I.O at the time of conducting search and seizure on the spot.

13. Learned Additional Advocate General has heavily relied upon the own statement of the I.O and that of Constable Gopal Singh, PW-5 and Constable Lekh Ram, PW-7, none else but two Constables, who as per rapat Rojnamcha Ext. PW-5/A were accompanying the I.O. for conducting traffic checking on the national highway at Slapper. True it is that the official witnesses can be relied upon, however, with all circumspection and caution i.e. their testimony needs to be closely scrutinized. It is held by a Division Bench of this Court in Criminal Appeal No. 3 of 2013 titled Joga Singh V. State of Himachal Pradesh, decided on 7th July, 2016 while placing reliance on the judgment of the Apex Court in Makhan Singh V. State of Haryana, (2015) 12 SCC 247. The relevant extract of the same reads as follows:

> "……In peculiar circumstances of the case, it may not be possible to find out independent witnesses at all places and at all times. Independent witnesses who live in the same village or nearby villages of the accused are at times afraid of to come and depose in favour of the prosecution. Though it is well settled that a conviction can be based solely on the testimony of official witnesses, condition precedent is that the evidence of such official witnesses must inspire confidence. In the present case, it is not as if independent witnesses were not available….."

14. Whether in the given facts and circumstances, the evidence as has come on record by way of testimony of I.O. PW-9, Constable Gopal Singh, PW-5 and Constable Lekh Ram, PW-7 can be relied upon or not, the answer to this poser in all fairness and also in the ends of justice would be in negative for the reason that the recovery of contraband allegedly charas and opium in the manner as claimed in the police report filed under Section 173 of the Code of Criminal Procedure and the documents annexed thereto is highly doubtful. The accused were nabbed at Slapper bridge allegedly at 6.00 p.m. Had the investigation been taken place on the spot in the manner as claimed, it was likely to take only 2-3 hours for completion. The rukka Ext. PW-4/B if seen amply demonstrates that the time of reducing the same into writing was initially at 18.30 hours (6.30.p.m). However, there is cutting in time, which by way of overwriting was changed to 10.00 p.m. The I.O. PW-9 and the witness Lekh Ram, PW-7 have admitted such cutting in this document, however failed to explain the same. Meaning thereby that the accused were not nabbed at 6.00 p.m. at Slapper bridge, however, before that during day time and may be at 1.00-1.30 p.m. as deposed by the independent witness Roshan Lal or 2.00-2.30 p.m. as deposed by PW-8 Roshan Lal while in the witness box. They both have not been cross-examined to elicit something contrary that they were not called at 1.00-1.30 p.m. or 2.00-2.30 p.m. but 6.00 p.m in the evening. The accused, therefore, seems to have been apprehended during day time i.e. around 1.00-1.30 p.m. or 2.00-2.30 p.m. and being so, the rukka was rightly prepared at 18.30 hours (6.30 p.m). The time of prepration of this document, however, has been changed as 10.00 p.m. to the reasons best known to the I.O., which according to us for filling up the lacuna left in the investigation of the case.

15. The updation of NCB forms on the spot is also doubtful for the reason that in the rukka reference qua updation thereof has been added later on and in different ink. Similarly, if coming to the recovery memo Ext. PW-7/B, the reference qua updation of this document is not in continuity and in sequence of the recitals made therein and rather in the end of this document.

16. Interestingly enough, according to PW-7, the personal search of accused Krishna was conducted by him, however, to the contrary, as per version of the I.O. PW-9, her search was conducted by a Lady Constable, who was called from Police Station, Sundernagar by him at sometime in between 6.00 p.m. to 10.00 p.m. His ignorance as to when she reached on the spot belies his testimony that the search of accused Krishna was conducted by a Lady Constable. The story to this effect has also been fabricated and engineered.

17. When the search and seizure seems to be not taken place at 6.00 p.m and rather during day time itself, therefore, it is not known as to why the registration of the case was delayed till 23.40 hours (11.40 p.m.). Otherwise also, had the search and seizure been taken place at 6.00 p.m., as claimed by the prosecution, six hours time was not required to deliver the rukka in

the Police Station at Sundernagar, which as a matter of fact, is connected by Chandigarh-Manali-Leh national highway one of the busiest roads.

18. Interestingly enough, as per re-seal memo Ext. PW-4/C, the parcel containing the recovered charas and opium along with sample parcels were produced before Head Constable Amar Nath, PW-4 and the then MHC, Police Station, Sundernagar as well as officiating SHO. As per this document, the said witness has re-sealed all the parcels with seal 'C', however, if coming to his statement Ext. D-X recorded under Section 161 of the Code of Criminal Procedure, the I.O. PW-9 when produced before him the parcel containing the case property and also the sample parcels, the same were already sealed with seal 'A' and 'C'. Although, when statement Ext. D-X was put to him in his cross-examination, he has denied portion A to A, B to B and C to C thereof being incorrect, however, without any reasonable and plausible explanation as to how his statement under Section 161 of the Code of Criminal Procedure came to be recorded in such a manner and fashion. Meaning thereby that the parcels containing the case property and samples were not re-sealed in the manner as claimed by the prosecution.

19. The contradictions, discrepancies and improvements as discussed hereinabove and occurred in the prosecution evidence renders the testimony of I.O. PW-9 and also Constable Gopal Singh, PW-5 as well as that of Constable Lekh Ram, PW-7 highly doubtful and it would not be appropriate to place reliance on the same in order to record the findings of conviction against the accused.

20. The independent witnesses have turned hostile to the prosecution as according to them, search and seizure have took place on the spot in their presence. As per testimony of PW-1 Sher Singh, a meat seller at Slapper, he admits that the police had come to his shop around 2.00-230 p.m and had taken the scale and weights therefrom. True it is that when put to cross-examination, he has admitted his signatures on the documents and also on the parcels containing the recovered charas and opium as well as on sample parcels, however, as per his testimony, he had signed the same at the instance of police. His education is only up to 2nd or 3rd standard, therefore, it can reasonably be believed that he could have not understood the contents of the documents even if readover and explained to him by the police. Therefore, he seems to have signed these documents at the instance of police without knowing the consequences thereof. Now if coming to the testimony of another independent witness Shri Roshan Lal, PW-8, he has also denied the search and seizure having taken place in his presence, however, according to him he was made to sign the documents by the police. He is matriculate and seems to have deposed falsely, however, when the prosecution case right from the beginning till end hardly inspires any confidence, even if it is believed that this witness has deposed falsely, the final outcome shall remain the same as in the trial Court. The testimony of PW-1 and PW-8 rather leads to the only conclusion that the accused were not apprehended on Slapper bridge at 6.00 p.m and rather during day time i.e. as per testimony of PW-1 1.00-1.30 p.m., whereas, as per that of PW-8 at 2.00-2.30 p.m. Furthermore, as per testimony of PW-8, he was called to the office of CID police near Slapper bridge where many police officials including three Lady Constables were present. Otherwise also, the degree of proof in a case of this nature should be high because there is provision of deterrent punishment against an offender, if otherwise held guilty after holding full trial. We can draw support in this regard from the judgment of apex Court in Noor Aga V. State of Punjab, (2008) 16 SCC 417, wherein it has been held as under:

> *"56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissins, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs. 2,00,000/- as also the presumption of guilt emering from possession of Narcotic Drugs and Psychotropic Substances, the extent of burden to prove the foundational facts on the prosecution, i.e.,"proof beyond all reasonable doubt" would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is also so because whereas, on the one hand,*

the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concent of "wider civilization". The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev singh, it was stated: (SCC p. 199, para 28)

"28.…It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

[See also Ritesh Chakravarti v. State of M.P.)

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however, high may be, can under no circumstances, be held to be a substitute for legal evidence."

21. In view of what has been said hereinabove, we find no illegality or infirmity with the impugned judgment. The same, as such, calls for no interference by this Court. Consequently, the appeal being devoid of any merits is dismissed. The personal bond furnished by accused Krishna stand cancelled and surety discharged.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Tej Singh ….Appellant.
Versus
State of H.P. ….Respondent.

Cr. Appeal No. 153 of 2007.
Date of Decision: 9th December, 2016.

Indian Penal Code, 1860- Section 436 and 427- Informant was watching television – he heard murmuring of the persons on the backside – he came out and saw G and accused T – informant went inside – his wife came and noticed that cow shed was put on fire – domestic bitch died in the fire – the accused was tried and convicted by the Trial Court- held in appeal that the witnesses had improved upon their versions making their testimonies doubtful – G was not cited as a witness and adverse inference has to be drawn against the prosecution- the prosecution version was not proved beyond reasonable doubt and the Court had wrongly convicted the accused- appeal allowed- judgment passed by the Trial Court set aside.(Para-9 to 13)

For the Appellant: Mr. Atul Jhingan, Advocate.
For the Respondent: Mr. Vivek Singh Attri, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral).

The instant appeal stands directed by the appellant/convict against judgment recorded by the learned Sessions Judge, Mandi, H.P. in Sessions Trial No.4 of 2005 on 7.5.2007, whereby, he convicted the accused/appellant herein for his committing offences punishable

under Sections 436 and 427 besides sentenced him to suffer imprisonment for the aforesaid offences as under:

Sections	Sentenced imposed
436 of the IPC	Accused stands sentenced to suffer rigorous imprisonment for five years with fine of Rs.10,000/-, in case of default in the payment of fine amount the accused shall further undergo imprisonment for one years.
427 of the IPC	Sentenced to suffer imprisonment for six months and to pay a fine of Rs.1,000/- and in default to undergo imprisonment for 1 month.

2. The facts relevant to decide the instant case are that on the intervening night of 13th and 14th October, 2003, complainant Narotam Ram was watching television at 1045 p.m. in his house. Then he heard murmuring of persons on the back side of his house and the complainant came out and noticed that Ghanshayam and accused Tej Singh were going on the path by the side of the house of the complainant in tipsy condition. The complainant thereafter went to sleep and in the meantime his wife Kala Devi came outside the house to urinate. She raised cries and complainant immediately came outside and noticed that his cowshed has been set on fire and the complainant immediately untethered/untied the cow, buffalo and calf and brought them outside the cowshed. However, a domestic bitch could not be saved and was burnt in the house fire which has spread on all the sides. All the family members tried to extinguish the fire but the same could not be controlled. The complainant incurred loss of 3000 bundles of grass. In the meanwhile other persons from the village, on seeing the fire also tried to extinguish the fire. There were other articles in the cowshed which were also burnt. Tej Singh and Ghanshayam has put his house on fire because of previous enmity. Thereafter complainant Narotam made a telephone call in police post Rewalsar and the same was entered in the daily diary. Thereafter H.C. Joginder Pal rushed to the spot and found that the cowshed of Narotam was completely burnt by fire. Joinderpal recorded the statement of Narotam Ram and the same was sent through constable Subhash Chand to police station Balh for registration of the case. On the basis of which the FIR was registered in the police station concerned. The police started the investigations in the case and completed all the codel formalities.

3. On conclusion of the investigations, into the offences, allegedly committed by the accused, a report under Section 173 of the Code of Criminal Procedure was prepared and filed in the competent Court.

4. The accused was charged by the learned trial Court for his committing offences punishable under Sections 436 and 427 of the IPC. In proof of the prosecution case, the prosecution examined 8 witnesses. On conclusion of recording of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the trial Court, in which he claimed innocence and pleaded false implication. However, he did not lead any defence evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

6. The convict/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned defence counsel has concertedly and vigorously contended that the findings of conviction recorded by the learned trial Court are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the

material on record. Hence, he contends that the findings of conviction be reversed by this Court in the exercise of its appellate jurisdiction and be replaced by findings of acquittal.

7. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended that the findings of conviction recorded by the Court below are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

8. This Court with the able assistance of the learned counsel on either side, has, with studied care and incision, evaluated the entire evidence on record.

9. The entire fulcrum for testing the veracity of the genesis of the prosecution case rests upon the FIR qua the occurrence recorded before the Police Station concerned by the informant/complainant (PW1). The FIR qua the relevant occurrence stands borne on Ex.PC. It stood recorded on anvil of a statement comprised in Ex.PA made before the Investigating Officer concerned by the complainant/informant (PW1). For the prosecution to succeed in its endeavour of proving the charge against the accused/convict it was under an imperative obligation to obtain apposite elicitations from the prosecution witnesses holding bespeakings qua thereupon consonance besides corroboration standing meted by them vis-a-vis the revelations manifested in Ex.PA besides in Ex.PC. The effect, if any, of any contradictions or improvements occurring therefrom in the respective testifications of material prosecution witnesses would belittle the creditworthiness of the genesis of the prosecution case.

10. For making the relevant unearthings qua the prosecution witnesses while testifying qua the embodiments occurring in Ex.PA besides in Ex.PC, theirs making any departure therefrom, an allusion to their respective testifications is imperative. An allusion to the testification of PW-1, on whose previous statement comprised in Ex. PA, FIR comprised in Ex.PC stood registered before the police station concerned underscores the factum of his though in Ex.PA besides in Ex.PC unearthing therein qua accused Tej Singh along with Ghanshayam standing noticed by him from his window to proceed towards their house whereafter he echoes therein qua his closing the window of his house and thereupon his proceeding to his bedroom to sleep, whereupon his wife who had hitherto proceeded outside for easing herself on returning to her homestead apprised him qua their cowshed standing set ablaze. Both in Ex.PA besides in Ex.PC there is no narration by PW-1 qua his wife PW-2 on returning to her homestead after easing herself outside hers thereupon apprising him qua accused Tej Singh setting ablaze their cowshed. Even when the aforesaid articulations remained uncommunicated in both Ex. PA besides in Ex.PC by PW-1, the complainant/informant, he yet proceeded to while testifying in Court make disclosures therein qua his wife who had hitherto proceeded outside for easing herself on returning to her homestead hers apprising him qua their cowshed standing set ablaze by Tej Singh. The effect of the factum probandum aforesaid remaining unnarrated by the informant both in Ex.PA besides in Ex.PC renders his testification qua it to stand stained with a vice of gross improvement besides a vice of a stark embellishment surfacing vis-a-vis his previous statement recorded in writing whereform an inference is erectable qua his testimony qua the aforesaid testified factum qua his wife who had hitherto proceeded outside for easing herself on returning to her homestead hers apprising him qua their cowshed standing set ablaze by the accused being unamenable for credence standing placed thereupon. Furthermore the effect thereof is qua the entire genesis of the prosecution case standing jettisoned.

11. PW-2, the wife of the complainant/informant (PW-1) , who had conveyed the necessary awakenings qua the aforesaid factum to PW-1, though in her testification has also rendered a version ascribing a penally inculpable role to the accused/convict/appellant herein also therein she has made communications qua hers sighting the accused/respondent to set ablaze her cowshed yet the aforesaid testified factum also warrants its standing disimputed credence arousable from the factum qua when the necessary awakenings stood purveyed at the earliest to PW-1, the informant by PW-2, his wife, the entire gamut of the awakenings holding there within also the factum of hers sighting Tej Singh to set ablaze her cowshed stood enjoined to stand communicated by her to the informant for facilitating the latter to make apposite

concurrent communications in Ex.PA besides in Ex.PC, yet with his omitting to do so, constrains an inference qua the aforesaid echoings not standing communicated at the apposite stage by PW-2 to PW-1. Significantly, also thereupon when the aforesaid factum remained unembodied in Ex.PA besides in Ex.PC the necessary sequel therefrom is qua PW 2, his wife who had hitherto proceeded outside for easing herself on hers returning to her homestead hers not apprising him qua their cowshed standing set ablaze by the accused/appellant. Moreover, conspicuously, when both are to be concluded to preceding the lodging of the FIR naturally holding inter se confabulations qua the factum aforesaid also when the aforesaid factum was enjoined to stand narrated thereat by PW-2 to PW-1, its remaining unembodied in Ex.PA, stems an inference qua the aforesaid factum remaining uncommunicated at the earliest by PW-2 to PW-1 wherefrom it is obvious to conclude qua PW-2 subsequent to the lodging of the FIR qua the occurrence hers both in collusion with PW-1 besides in collusion with the Investigating Officer concerned engineering and contriving the factum aforesaid merely for, as evident from record with hers holding enmity with the accused/respondent, hers hence, conjuring to wreak vendetta upon him.

12. Be that as it may, PW-1 had noticed from the window of his house one Ghanshayam accompanying Tej Singh. However, there is no ascription of any incriminatory role to Ghanshayam nor also despite Ghanshayam purportedly accompanying Tej Singh at the relevant juncture, the prosecution though by its joining him as a prosecution witness could unearth from him the truth qua the relevant occurrence, yet it omitted to join Ghanshayam either as a prosecution witness nor obviously Ghanshyam stepped into the witnesses box. Since, the testification of the aforesaid Ghanshayam constituted the best independent evidence for giving succor to the charge significantly when he though may have rendered an uninterested or unbiased version qua the occurrence vis-a-vis the interested inimical version qua it communicated by PW-1 and PW-2 also when for the reasons aforesaid the version of the prosecution witnesses stands stained with a pervasive vice of improvements besides embellishments vis-a-vis the prosecution case especially vis-a-vis the previous statement(s) recorded in writing of PW-1 constrains a conclusion qua the Investigating Officer by colluding with PW-1 and PW-2 his smothering the truth qua the genesis of the occurrence.

13. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below has not appraised the entire evidence on record in a wholesome and harmonious manner apart therefrom the analysis of the material on record by the learned trial Court suffers from a perversity or absurdity of mis-appreciation and non appreciation of evidence on record.

14. Consequently, the instant appeal is allowed and the judgment impugned hereat is set aside. Accordingly, the appellant herein/convict is acquitted of the charge. The fine amount, if any, deposited by the appellant herein before the learned trial Court be refunded to him forthwith. The personal and surety bonds of the appellant stands canceled. Records be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Tek Chand and another …..Petitioners.
Versus
Karam Singh & others. ……Respondents.

Civil Revision No. 52 of 2016
Decided on : 9.12.2016

Code of Civil Procedure, 1908- Order 21 Rule 32- A decree for permanent prohibitory injunction was passed for restraining the defendants from causing any obstruction upon the path existing in the suit land- an application for execution was filed, which was dismissed by the Court- held, that the decree had obtained finality – an oral prayer was made during the pendency of suit and

appeal that the defendant had encroached upon the suit land and a decree of mandatory injunction be passed – however, the prayer was declined in absence of the pleadings – a fresh suit would be barred by the principle of res-judicata- the Executing Court had wrongly dismissed the Execution Petition and the decree holder was deprived of the fruits of the decree obtained by him- petition allowed and order of Executing Court set aside – Executing Court directed to decide the same afresh.(Para-5 to 7)

For the Petitioners: Mr. Devender K Sharma, Advocate.
For the Respondents: Mr. G.R Palsara, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition stands directed against the impugned order recorded by the learned executing Court upon a petition constituted therebefore under Order 21 Rule 32 of CPC by the DHs/petitioners herein (for short "the plaintiffs) whereby the aforesaid petition stood dismissed by it.

2. The learned trial Court pronounced qua the petitioners/plaintiffs (for short "the plaintiffs) an apposite decree of permanent prohibitory injunction whereupon the defendants stood restrained from causing any obstruction upon a path existing on the suit land depicted in Tatima Ex.PW-1/A.

3. During the pendency of the suit before the learned trial Court the defendants purportedly caused obstruction upon the path existing on the aforesaid suit land whereupon the plaintiffs made an oral request before the learned trial Court qua a relief of mandatory injunction standing pronounced by it for directing the defendants to remove the obstruction raised by them upon the path existing upon the suit land. The learned trial Court declined the aforesaid relief to the plaintiffs. The declining of the aforesaid relief to the plaintiffs by the learned trial Court is not ridden with any inherent procedural fallacy given the plaintiffs without begetting apposite amendments in the plaint by instituting therebefore an application under Order 6 Rule 17 CPC theirs merely making therebefore an oral submission for the according of the apposite relief to them, oral relief whereof naturally warranted its standing declined as tenably declined by the learned trial Court. Also evidence, if any, in consonance therewith for hence a decree of mandatory injunction standing pronounced upon the defendants was wholly discardable it naturally being beyond pleadings.

4. The defendants' omitted to assail the decree of permanent prohibitory injunction pronounced vis-à-vis the plaintiffs by theirs carrying an appeal therefrom before the learned first Appellate Court. Consequently the decree of permanent prohibitory injunction pronounced by the learned trial Court attained finality besides conclusivity.

5. Be that as it may despite the defendants' not assailing the decree of the learned trial Court whereby they stood injuncted against causing any obstruction upon the path borne on tatima Ex.PW-1/A reflected in the operative portion of the judgment and decree pronounced by the learned trial Court, the plaintiffs' though carried an appeal therefrom before the learned first Appellate Court whereby they assailed the rendition recorded by the learned trial Court whereby relief of mandatory injunction stood refused vis-à-vis them yet therebefore also they orally submitted qua the defendants' during the pendency of the suit before the learned trial Court causing obstruction upon the path comprised in the aforesaid Khasra Number whereupon they had staked a claim qua an an easementary right of its user for facilitating theirs accessing their house besides made an oral prayer therebefore qua an apposite decree of mandatory injunction standing pronounced against the defendants. The aforesaid oral prayer made by the plaintiffs before the learned trial Court besides before the learned appellate Court stood aptly declined to them for theirs before either of the Courts omitting to beget an apposite amendment in the plaint

by moving an appropriate application constituted under Order 6 Rule 17 CPC. Also the plaintiffs did not concert to assail the relevant findings qua the facet aforesaid embodied in paragraph 22 of the judgment of the First appellate Court, paragraph whereof stands extracted hereinafter by theirs preferring an appeal therefrom before this Court. In sequel thereto finality besides conclusivity stands imputed to the findings recorded by the learned first Appellate Court qua the relevant factum probandum of the defendants' not warranting vis-à-vis them any rendition of any decree of mandatory injunction arising from theirs during the pendency of the suit before the learned trial Court or during the pendency of the suit before the learned First Appellate Court raising obstructions on the path by stacking material thereupon whereby the user of path by the plaintiffs depicted in the decree of permanent prohibitory injunction besides embodied in tatima Ex.PW-1/A stood fully forestalled besides thwarted.

> *"22. Keeping in view the aforesaid evidence led by the plaintiffs, this Court is of the opinion that the aforesaid evidence led by the plaintiff failed to prove on record that during the pendency of the suit the defendants obstructed the said path with cut stones and wood etc. This evidence further reveals that the matter in controversy with the obstruction of the part and granting of mandatory injunction in favour of the plaintiffs was not within the knowledge of the parties. Since, the matter was not in the knowledge of the parties especially the defendants, as such the defendants was having no opportunity to lead evidence in respect of it and in these circumstances in doing justice to one party, the court can not do injustice to another party and the trial court after dealing the matter elaborately and discussing the statements of the parties, rightly did not grant the relief of mandatory injunction in favour of the plaintiffs, such, being the situation, I have no hesitation to conclude that the plaintiffs have in fact failed to prove on record by leading cogent and satisfactory evidence that the defendants during the pendency of the suit obstructed the use of said party and in the absence of any specific pleadings and specific evidence the plaintiffs were not entitled for the relief of mandatory injunction and hence, the judgment and decree under challenge are legal and valid and the same do not require any modification or interference at the hands of this court. As such, this point is decided against the plaintiffs."*

6. Hereat is to be adjudged the compatible worth qua the conclusivity of the findings recorded by the learned First appellate Court qua a decree of mandatory injunction being un-renderable against the defendants vis-à-vis the conclusivity of the apposite verdict rendered by the learned trial Court besides affirmed by the learned First appellate Court arising from the factum of the defendants' not carrying an appeal thereagainst before the learned first Appellate Court wherefrom an inference stands engendered qua the defendants acquiescing to the findings besides qua the conclusivity of the decree pronounced upon them whereupon they stood restrained from obstructing the path depicted in tatima Ex. PW-1/A.

7. For pronouncing an efficacious decision upon the aforesaid facet imperatively when obviously the bar of res judicata besets the plaintiffs against theirs instituting a fresh suit against the defendants vis-à-vis the aforesaid relief preponderantly when it accrued earlier whereat it stood un-ventilated by the plaintiffs significantly when they omitted to avail the apposite statutory mechanism whereupon they stand forestalled besides interdicted to in a freshly constituted suit canvass a relief for its removal by the defendants comprised in the latters standing mandatorily injuncted to remove it whereupon the act of the defendants comprised in theirs obstructing the path decreed for user by the plaintiffs would hence stand rendered un-redeemed, ought to not be necessarily borne in mind. Given the factum aforesaid qua a statutory bar of res judicata forbidding the plaintiffs to institute a fresh suit for redeeming the prohibited act of the defendants comprised in theirs obstructing the path embodied in the apposite tatima also when for reasons aforesaid the defendants acquiesce to the conclusivity of the decree of permanent prohibitory injunction pronounced upon them it is deemed both just and befitting, significantly also for facilitating the plaintiffs to reap the benefit of a conclusively recorded decree of permanent prohibitory injunction dehors any omission on their part to beget an apposite amendment in the plaint seeking embodying therein a relief of mandatory injunction, to record a

finding qua the plaintiffs qua their omissions aforesaid not standing in the way of an efficacious affirmative rendition standing pronounced by the learned Executing Court concerned upon an apposite petition constituted therebefore for execution of the aforesaid decree of permanent prohibitory injunction pronounced against the defendants. In case finality is attached to the findings occurring in paragraph 22 of the judgment of the learned first Appellate Court it would frustrate the working of the binding decree pronounced upon the defendants qua the user by the plaintiffs of a path existing on the suit land. Throughout since the rendition of a conclusively rendered decree of permanent prohibitory injunction pronounced against the defendants upto its efficacious affirmative execution standing ordered by the learned Executing Court comprised in its directing qua appropriate consummatory coercive steps standing taken, its mandate hold full sway besides both the plaintiffs and the defendants are bound to revere its mandate. Even if assumingly no efficacious evidence nor any evidence of cogent worth may stand adduced qua the defendants raising any obstruction upon the suit land yet the decree of permanent prohibitory injunction dehors any obstructive act done by the defendants during the pendency of the suit before the learned trial Court or during the pendency of the appeal before the first appellate Court also dehors no scribed relief in consonance therewith standings prayed for by the plaintiffs would not estop this court to permit the executing court to carry the mandate of the conclusively recorded decree of permanent prohibitory injunction pronounced qua the plaintiffs, conspicuously when thereupon the mandate of the conclusively recorded decree pronounced qua the suit land would beget consummation besides would obviate its frustration. For facilitating its consummation, though the learned executing Court stood enjoined to pronounce an appropriate order, contrarily it by relegating the impact of the aforesaid germane factum probandum comprised in the enforceable executable conclusive decree, has inaptly dismissed the execution petition.

In view of the above there is merit in this petition and the same is allowed. The impugned order stands quashed and set aside. The Execution Petition be decided afresh within three months by the learned Executing Court. All pending applications stand disposed of accordingly. Records be sent back.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Vikas Kapila & another …..Petitioners

Versus

Ashok Sood & another …..Respondents.

CMPMO No. 231 of 2014
Reserved on : 23.11.2016.
Decided on: 9.12.2016

Code of Civil Procedure, 1908- Order 21 Rule 97 read with Section 151- An order of eviction was passed – an application for its execution was filed –the objector filed objections, which were dismissed- held, that the order was passed against the brother of the objector – no application for impleadment was filed by the objector during the main petition, which means that the objector had acquiesced in the passing of the order- the objections were filed to delay the execution – there was no requirement of framing the issues and recording the evidence- petition dismissed.

(Para- 3 to 9)

Cases referred:

Rajinder Singh and others versus Sadhu Ram, Latest HLJ 2014(2)928
Silverline Forum Pvt. Ltd versus Rajiv Trust & another, (1998) 3 Supreme Court Cases 723

For the petitioners: Mr. G.C Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the Respondents: Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj K Vashishta, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

The instant petition stands directed against the impugned order recorded on 17.7.2014 by the learned Court below upon the objections constituted therefore under Order 21 Rule 97 readwith Section 151 of Code of Civil procedure by the petitioners herein wherewithin they resisted the execution of the conclusively recorded rendition pronounced qua JD/non-objector B.M Kapila impleaded herein as respondent No.2. The verdict of dismissal of the apposite objections constituted therebefore by the petitioners herein under the afore-stated provisions of the Code of Civil Procedure whereunder they purveyed their resistance qua execution of a conclusively recorded verdict of eviction of the non-objector/ respondent No.2 herein from the demised premises stands canvassed by the counsel for the petitioners to stand founded upon an inherent procedural fallacy arouse-able from the factum of the learned Court below in blatant transgression of the mandate of a judgment reported in Latest HLJ 2014(2)928 titled as *Rajinder Singh and others* versus *Sadhu Ram* wherewithin this Court had recorded a conclusion qua objections constituted under Order 21 Rule 97 of CPC before the learned Executing Court by the objectors/resisters to the execution of a conclusively recorded decree of eviction pronounced upon the JD warranting trial thereon analogous to trial of a Civil Suit whereupon the executing Court stood enjoined to strike issues on the contentious pleadings of the parties at lis also thereupon it stood enjoined to permit them to adduce their respective evidence thereon whereas apparently with the impugned rendition making a vivid disclosure qua the aforesaid compliance(s) remaining un-begotten renders the impugned rendition to suffer the ill fate of it standing quashed and set aside.

2. The aforesaid submission addressed herebefore by the learned counsel for the objectors/petitioners herein is bereft of his remaining attentive to all the attendant material which exists on record. Initially the conclusively recorded rendition pronounced qua eviction of JD/respondent No.2 herein from the demised premises occurred on 14.9.2004 also the pronouncement aforesaid attained finality whereafter it stood put to execution before the learned Executing Court, only in course whereof objectors/petitioners herein (Successors-in-interest of late Sh. D.N Kapila, brother of the JD) constituted therebefore objections purveying their resistance qua the execution of a conclusively recorded rendition of eviction of the JD/respondent No.2 herein from the relevant demised premises,objections whereof stood anvilled qua his/theirs continuing to hold tenancy qua the relevant premises under the landlord/DH also his/theirs holding possession thereof whereupon they espoused qua the decree in execution not holding any binding effect upon their rights as tenants in the relevant demised premises.

3. The DH/non-objector/respondent No.1 herein repudiated the objections preferred by the objectors/petitioners herein before the learned Executing Court wherein the DH canvassed qua Mr. D.N Kapila surrendering his tenancy in the year 1990 qua the relevant premises whereafter he espoused qua Mr. D.N Kapila thereafter departing for his native place at Nadaun, in sequel whereto JD/respondent No.2 herein stood inducted by him as a tenant in the relevant premises.However the objectors before the learned Executing Court alongwith their apposite objections appended receipts in personification of the DH/landlord receiving rent from Mr. D.N Kapila subsequent to the latter purportedly surrendering his tenancy in the year 1990. However a close perusal thereof underscores the factum of none of the receipts which exist on record subsequent to 1990 displaying thereinqua the landlord/DH receiving therein from the predecessor-in-interest of the petitioners herein the amount of money constituted therein as rent qua the relevant premises. Also a photocopy of the receipt issued by the Physician who attended upon the predecessor-in-interest of the petitioners herein with a disclosure therein of the latter holding his residence in the tenanted premises whereupon the petitioners' assayed qua theirs

predecessor-in-interest thereat holding possession of the tenanted premiseswould not foreclose any inference qua thereupon the predecessor-in-interest of the petitioners herein holding possession of the demised premises, as it merely appears to be a suo moto unilateral display by the predecessor-in-interest of the petitioners herein whereby it acquires a taint of invention besides concoction rendering it to be discardable, nor also any electricity bills appended therewith holding therewithin reflections qua the relevant tariff displayed therein qua consumption of electricity qua the demised premises standing demanded from the predecessor-in-interest of the petitioners herein would hold any tenacity for concluding qua the brother of the JD predecessor-in-interest of the petitioners herein thereupon belying the factum of the JD/respondent No.2 herein holding tenancy of the demised premises, significantly when the demand of tariff qua the relevant premises as stand displayed therein may be a sequel to the JD/respondent No.2 herein not obtaining from the authorities concerned alteration of the electricity connection in his name.

4. The aforesaid discussion though prima-facie unveils an inference qua the impugned rendition pronounced by the learned Court below not suffering from any gross taint yet the counsel for the petitioners herein vehemently insists qua omission of striking of an apposite issue(s) by the learned Court below on the contentious pleadings of the parties at contest also its omission to permit them to adduce their respective evidence thereon prejudicing the espousal therebefore of the petitioners whereupon he contends qua the tenacity of the impugned verdict hereat standing belittled.

5. The insistence made by the learned counsel for the petitioners herein upon the mandate of this Court encapsulated in the verdict relied upon by him supra though holds therewithin the afore-referred legal expostulation of exacting inflexible rigor whereas its mandate standing evidently infracted when may hence entail the inevitable sequel qua the impugned rendition suffering the misfortune of its standing invalidated, yet its sharpness besides gravity stands bluntedby a rendition recorded by the Hon'ble Apex Court in (1998) 3 Supreme Court Cases 723 in a case titled as *Silverline Forum Pvt. Ltd* versus *Rajiv Trust & another,* relevant paragraphs whereof occurring at Sr. No. 12,13 and 14 which stand extracted hereinafter, contrarily therewithin holding qua the learned Executing Court, on standing seized with objections constituted therebefore by the resister or objector to the conclusively recorded rendition of eviction pronounced upon a person holding possession/occupying the relevant premises as a tenant under the DH wherein they ventilate qua theirs thereat holding its possession also thereupon theirs concerting to escape the effect upon them of the conclusively recorded rendition of eviction pronounced upon a person impleaded as a JD therein, the learned executing Court holding the discretion to or its may directing the contesting parties to adduce evidence on the apposite issue(s) as arise(s) for determination on the apposite contentious pleadings of the parties whereupon the ensuing sequel is there being no omnibus fetter nor any preemptory obligation upon the learned Executing Court to always in all eventualities proceed to strike issues on the contentious pleadings reared therebefore by the DH besides by the apposite objector/resister by the latter constituting therebefore a petition under Order 21 Rule 97 sub rule 2 of CPC nor also there being a perennial peremptory dictate upon the learned executing Court to permit adduction of evidence thereon by the relevant combatants thereat.

> "*12. The words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop only such questions as would legally arise for determination between those parties. In other words, the Court is not obliged to determine a question merely because the resistor raised it. The questions which executing Court is obliged to determine under Rule 101, must possess two adjuncts. First is that such questions should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties, e.g. if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided*

during execution proceedings. Hence, it is necessary that the questions raised by the resistor or the obstructor must legally arise between him and the decree-holder. In the adjudication process envisaged in Order 21, Rule 97(2) of the Code, execution Court can decide whether the question raised by a resistor or obstructor legally arises between the parties. An answer to the said question also would be the result of the adjudication contemplated in the sub-section.

13. *In the above context we may refer to Order 21, Rule 35(1) which reads thus :*

" 35 "Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property."

14. *It is clear that executing Court can decide whether the resistor or obstructor is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on admitted facts or even on the averments made by the resistor. Of course the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary."*

6. Now hereat it has to be determined whether the aforesaid condition constituted therein in exception to the general principle qua the learned Executing Court striking issues on the contentious pleadings of the parties at contest thereat besides permitting them to adduce their evidence thereon, stands hereat satiated. For making the aforesaid unearthings the factum of an evident close relationship of brothers existing inter-se the JD/respondent No.2 herein vis-à-vis Mr. D.N Kapila, the predecessor-in-interest of the petitioners herein does inevitably warrant a conclusion qua the apposite objections standing seeped in a vice of a deep collusion occurring inter-se both also theirs being contrived besides engineered merely for preempting the DH to obtain issuance of warrants of possession qua the demised premises from the Executing Court.

7. Aggravated momentum to the aforesaid inference stands evinced from the factum of a legal notice making a disclosure therein qua the counsel representing the petitioners herein issuing/serving upon the DH, a notice, ventilating therein a grievance qua the JD alongwith the predecessor-in-interest of the petitioners herein standing inducted as a tenant in the relevant premises by the DH. The aforesaid disclosure occurring therein makes a palpable display qua the petitioners acquiescing to the factum of joint tenancy existing qua the relevant premises inter-se D.N Kapila and B.M Kapila. The notice aforesaid stood issued on 8.5.2014 hence subsequent to the conclusively recorded pronouncement made on 14.9.2004 by the learned Rent Controller concerned against the JD/respondent No.2 herein.

8. In the afore-stated backdrop the effect of an omission by the respondent No.2 herein to discharge the apposite onus on the relevant issue(s) qua the petition suffering from a vice of non-joinder and mis-joinder of parties when stands coagulated with the afore-stated communications occurring in the notice at hand appended with the petition hereat holding echoings therein qua the respondent No.2 herein/JD alongwith the predecessor-in-interest of the petitioners herein jointly holding tenancy qua the demised premises also when the counsel who served the legal notice upon the DH is also the counsel who represented the JD before the Rent Controller concerned is qua thereupon a graphic display emanating qua the espousal made in the objections reared by the objectors/petitioners herein being an invention besides a concoction merely for preempting the execution of the conclusively recorded renditions of both the learned Courts below. Moreover, the effect of the aforesaid inference is qua with Mr. D.N Kapila residing alongwith Mr. B.M Kapila in the relevant premises his throughout holding awareness qua the pendency of the apposite petition constituted by the DH before the learned Court concerned against Mr. B.M Kapila (his brother) whereupon he was enjoined to seek his impleadment therein

whereas his afore-stated omission begets a sequel of his acquiescing to the apposite conclusive pronouncements made qua his brother Mr. B.M Kapila whereupon the relevant liability of eviction pronounced upon Mr. B.M Kapila is alike the latter binding upon him also.

9. The summon bonum of the above discussion qua the principle held in the pronouncement of the Hon'ble Apex Court (supra), relevant paragraphs whereof stand extracted hereinabove qua there being no rigid fiat upon the learned executing Court to strike apposite issue(s) on the contentious pleadings of the parties in a petition constituted therebefore by the Objectors/resisters under Order 21 Rule 97 (2) of CPC nor it concomitantly being under an inflexible obligation to permit them to adduce their respective evidence thereon unless it is deemed necessary besides expedient for facilitating it to record its pronouncement, when stands applied hereat especially when the afore-stated material makesa loud pronouncement qua the apposite objections as stood preferred therebefore standing engineered besides concocted contrarily when only the apposite objections hold a prima-facie tinge of tenacity besides creditworthiness thereupon alone the learned Executing Court prima-facie standing enjoined to strike issues on the contentious pleadings of the parties besides stood enjoined to permit them to adduce their respective evidence thereonsignificantly when throughout it would be facilitative for recording an effective determination. For reiteration when the aforesaid principle whereupon the learned Executing Court stood enjoined to strike issues upon the contentious pleadings constituted therefore by the combatants therefore stands hinged upon the aforesaid endeavor facilitating it to pronounce an efficacious rendition upon the apposite concert existing therebefore remains unsatiated, thereupon the espousal made by the learned counsel for the petitioners qua for omission(s) thereof the verdict impugned hereat warranting interference necessitates its standing discountenanced. There is no merit in this petition the same is accordingly dismissed. All pending applications stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Shri Madan Mohan son of Shri Kailash Chand ….Revisionist/Tenant

Versus

Smt. Pushpa Devi wife of Shri Amar Chand ….Non-Revisionist/Landlady

Civil Revision No. 52 of 2014
Order Reserved on 24th November 2016
Date of Order 12th December 2016

H.P. Urban Rent Control Act, 1987- Section 14- Landlady filed an eviction petition on the ground that tenant had ceased to occupy the premises – eviction petition was dismissed by the Rent Controller – an appeal was filed and the Appellate Authority remanded the case for afresh decision after framing additional issues – held in revision Appellate Authority can make an inquiry either itself or through the Rent Controller – there is no power of remand with the Appellate Authority – revision allowed and the case remanded to the Appellate Authority for afresh decision.(Para-13 to 17)

Cases referred:

Braham Dass and others vs. Satya Wati and others, 1997(1) SLJ 484 (HP)
Surinder Kaur vs. Mohinder Pal Singh, ILR 1976 HP 620
Krishan Lal Seth vs. Smt. Pritam Kumar, 1961 PLR 865

For the Revisionist:	Mr. Anil Jaswal Advocate.
For the Non-Revisionist:	Mr. Bhuvnesh Sharma Advocate with Mr.Ashok Kumar Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 24(5) of H.P. Urban Rent Control Act 1987 by tenant against order dated 03.05.2014 passed by learned Appellate Authority in Rent Appeal No. 1 of 2011 title Smt. Pushpa Devi vs. Shri Madan Mohan.

Brief facts of the case

2. Smt. Pushpa Devi landlady filed eviction petition against tenant namely Shri Madan Mohan under Section 14 (2) (v) of H.P. Urban Rent Control Act 1987. It is pleaded that demised premises is non-residential and monthly rent of demised premises is Rs. 770/- (Rupees seven hundred seventy) per month. It is pleaded that demised premises was rented out by original owner Smt. Gayatri Devi vide agreement dated 2.4.1993. It is pleaded that demised premises was purchased by Smt. Pushpa Devi from Gayatri Devi and thereafter Pushpa Devi became landlady of tenant. It is further pleaded that demised premises is situated in ward No. 6 MC area Satya Narain temple street Hamirpur (H.P.) It is pleaded that tenant has ceased to occupy the demised premises since 4/5 years and has started his another business style as Madan Sweet shop in Housing Board colony Ward No. 7 Hamirpur H.P. near the shop of Hans Raj. It is pleaded that tenant has ceased to occupy the demised premises continuously for twelve months preceding the institution of eviction petition. It is pleaded that notice was issued to the tenant. Prayer for eviction of tenant from demised premises sought.

3. Per contra response filed on behalf of tenant pleaded therein that petition is not maintainable. It is pleaded that petition No. 4 of 2002 is pending inter se parties before learned Rent Controller Hamirpur H.P. regarding same demised premises. It is admitted that demised premises was rented out by Smt. Gayatri Devi previous owner at the rate of Rs.770/- (Rupees seven hundred seventy) per month. It is pleaded that tenant is continuously performing the business and using the demised premises as shop-cum-store. It is pleaded that tenant did not cease the possession of demised premises at any point of time. Prayer for dismissal of eviction petition sought.

4. Landlady also filed rejoinder and re-asserted allegations mentioned in petition.

5. As per pleadings of parties learned Rent Controller framed following issues on 11.6.2007:-

1. Whether petitioner is entitled for vacant possession of the premises/shop since the respondent has ceased to occupy the demised premises/shop from the last 4/5 years? OPP

2. Whether petition is not maintainable? ….OPR

3. Whether petition No. RP No. 4 of 2002 is pending between the parties before Rent Controller (II) Hamirpur regarding the same premises? ….OPR

4. Whether respondent is continuously doing the business of the premises/shop and paying the rent regularly? ….OPR

5. Relief.

6. Learned Rent Controller decided eviction petition on 19.5.2011. Learned Rent Controller decided issues Nos. 1, 2 and 4 in negative. Learned Rent Controller decided issue No. 3 partly in yes and partly in no. Learned Rent Controller dismissed eviction petition filed by landlady.

7. Feeling aggrieved against order of learned Rent Controller landlady Smt. Pushpa Devi filed Rent Appeal No. 1 of 2011 under section 24 of H.P. Urban Rent Controler Act 1987 against order dated 19.5.2011 passed by learned Rent Controller. Learned Appellate Authority allowed appeal filed by Smt. Pushpa Devi. Learned Appellate Authority set aside the impugned order dated 19.5.2011 passed by learned Rent Controller and learned Appellate Authority

remanded back the case to the court of learned Rent Controller to decide the same afresh after framing additional issue.

8. Feeling aggrieved against order of learned Appellate Authority revisionist filed present revision petition before H.P. High Court.

9. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and Court also perused entire record carefuly.

10. Following points arises for determination in civil revision petition:-

1. Whether revision petition filed by tenant is liable to be accepted as per grounds mentioned in revision petition?

2. Relief.

11. Findings upon point No.1 with reasons

11.1 PW1 Tapai Parshad posted as Junior Assistant in Excise and Taxation office Hamirpur has stated that he has brought the summoned record. He has stated that return filed w.e.f. 1983 to 30.6.2007. He has stated that nil tax return has been filed by tenant w.e.f. 2003 to 30.6.2007. He has stated that tenant has filed the affidavit. He has stated that there is recital in affidavit dated 30.7.2005 that tenant is running Madan Hardware store since 22.9.1983. He has stated that there is recital in affidavit that tenant is not doing any type of business of sale under sales tax for last two years. He has stated that there is recital in affidavit given by tenant that tenant has no plan to continue business in future. He has stated that there is recital in affidavit given by tenant that if tenant would not continue business within six months then tenant would cancel his sales tax number. He has stated that affidavit is attested by oath commissioner and signed by tenant. He has stated that affidavit was submitted by tenant. He has admitted that sales tax number of tenant is still continue and not cancelled till date.

11.2. PW2 Rajinder Singh posted as Clerk in office of MC Hamirpur has stated that he has brought the summoned record of tenant relating to licence. He has stated that no licence has been issued in the name of tenant relating to hardware sale. He has stated that he could not state whether any hardware shop licence was issued in favour of tenant or not.

11.3 PW3 Pushpa Devi landlady has stated that Madan Mohan is tenant in demised premises. She has stated that she purchased the demised premises from Gayatri Devi in the year 1991. She has stated that she is owner of demised premises after purchase of demised premises. She has stated that tenant has closed the demised premises since five years. She has stated that tenant is not running the business of hardware in demised premises. She has stated that tenant is running sweet shop in Housing Board colony. She has stated that she issued notice to tenant Ext.PW3/A. She has stated that postal receipt is Ext.PW3/B and acknowledgment receipt is Ext.PW3/C. She has admitted that tenant also filed reply to her notice. She has stated that she has received the rent of demised premises till September 2007. She has admitted that tenant has two shops near Satya Narain temple. She has denied suggestion that tenant is running demised premises as store. She has admitted that she has also filed another case before learned Rent Controller relating to demised premises. Self stated that another case is relating to enhancement of rent. She has admitted that electricity meter is not installed in demised premises. She has admitted that no written contractual agreement was executed between her and tenant. She has denied suggestion that tenant is running business from demised premises. She has denied suggestion that she has filed present eviction petition just to evict the tenant in illegal manner.

11.4 PW4 Amar Chand has stated that he is general attorney of landlady and has further stated that copy of general power of attorney is Ext.PW4/A. He has stated that site plan of demised premises is Ext.PW4/B which was prepared by him as per factual position. He has stated that site plan Ext.PW4/B is signed by him. He has stated that demised premises is closed since four years. In cross examination he has admitted that site plan Ext.PW4/B is without scale. He has denied suggestion that site plan is not in accordance with factual position. He has denied suggestion that demised premises is not closed since four years. He has denied suggestion that

demised premises is in running condition. He has denied suggestion that demised premises used as a store by tenant.

11.5 PW5 Kewal Singh has stated that parties are known to him and he has seen demised premises. He has stated that tenant used to run hardware shop in demised premises. He has stated that demised premises is closed since 3-4 years. He has denied suggestion that tenant is running the demised premises as store.

11.6 PW6 Suresh Kumar Assistant Taxation and Sales Officer Hamirpur has stated that tenant has filed assessment for the year 2003-04, 2004-05. He has stated that as per record sale for the year 2003-04 is Rs.37500/- (Rupees thirty seven thousand five hundred) and tax to the tune of Rs.3000/- (Rupees three thousand) was deposited. He has stated that as per record no sale was conducted in the year 2004-05 and further stated that nil return was filed. He has stated that in the year 2005-06 nil return was filed. He has stated that in the year 2006-07 sale of Rs.80000/- (Rupees eighty thousand) shown and tax to the tune of Rs.10000/- (Rupees ten thousand) deposited. He has stated that in the year 2007-08 sale to the tune of Rs.56000/- (Rupees fifty six thousand) shown and tax to the tune of Rs.7000/- (Rupees seven thousand) deposited. He has stated that in the year 2006-07 sale to the tune of Rs.20000/- (Rupees twenty thousand) shown and tax to the tune of Rs.2500/- (Rupees two thousand five hundred) deposited. He has stated that as per record tenant is running business of hardware.

11.7 PW7 Rajesh has stated that parties are known to him. He has stated that tenant is running another shop of sweets in Housing Board colony and further stated that demised premises is closed. He has stated that tenant used to run hardware shop in demised premises earlier. He has stated that his house is situated at a distance of 300 metres where tenant is runing sweet shop. He has stated that tenant is running the sweet shop since 4/5 years. He has stated that landlady is known to him since 10-12 years. He has stated that demised premises is shop and not store.

11.8 PW8 Dinu Ram Shop Inspector has stated that he is posted as shop inspector since 2007 and he has brought the summoned record. He has stated that as per record tenant used to run hardware shop. He has stated that as per record RC was renewed in the year 2004-05. He has stated that after 2005 RC was not renewed. He has admitted that complaint is filed if RC is not renewed under Shop Act. He has stated that for running store RC is required. He has stated that as per record RC is not renewed after 2004.

11.9 RW1 Madan Mohan tenant has stated that he is running shop of hardware since 1983. He has stated that he is using the demised premises as store. He has stated that he did not stop business from 1983 till date. He has stated that landlady has purchased the demised premises from Gayatri Devi. He has stated that electricity connection is not provided in demised premises. He has stated that he did not stop his business in the year 2006-07. He has stated that he is paying tax return. He has stated that sales tax return is Ext.D5 which is signed by him. He has stated that documents Ext.D6 to Ext.D11 are also signed by him. He has stated that he is regularly paying the rent to landlady. He has stated that in addition he is also running sweet shop in Housing Board colony since 2003. He has stated that he has employed servant in sweet shop situated in Housing Board colony. He has stated that present eviction petition filed just to harass him. He has stated that he does not sit in demised premises because same is used as store only. He has admitted that he has executed the agreement of tenancy with Gayatri Devi. He has admitted that there is recital in agreement that he would run the business of hardware in demised premises. He has admitted that Pushpa Devi has purchased the demised premises. He has denied suggestion that demised premises is closed since 2003 when he started running sweet shop in Housing Board colony. He has denied suggestion that demised premises is closed since 6/7 years.

11.10 RW2 Vijay Kumar has stated that he is salesman in sweet shop of tenant situated in Housing Board colony. He has stated that he is salesman since 2002. He has stated that tenant used to sit in hardware shop. He has stated that tenant has two shops and one shop

is used as a store and in another shop tenant used to sit personally. He has stated that tenant did not stop the business of hardware at any point of time. He has denied suggestion that tenant used to sit in counter of sweet shop situated in Housing Board colony. He has denied suggestion that demised premises is closed for the last 5/6 years.

11.11 RW3 Purshottam has stated that he is performing the work of painter since 20-25 years and he has seen the demised premises. He has stated that he is purchasing the articles of hardware from tenant. He has stated that he purchased the articles of hardware in the year 2006-07. He has stated that hardware shop did not remain closed. He has admitted that there are 100-250 hardware shops in Hamirpur. He has denied suggestion that he did not purchase any hardware article from tenant. He has denied suggestion that demised premises is closed since 7/8 years.

11.12 RW4 Raghunath has stated that he has seen hardware shop of tenant. He has stated that he has seen both shops under possession of tenant. He has stated that in the year 1984 he constructed his house and he purchased the entire hardware articles from shop of tenant. He has stated that in the year 2006 and 2008 he purchased Shalimar paint from shop of tenant. He has stated that shops did not remain closed. He has stated that tenant is selling hardware articles as of today. He has denied suggestion that tenant is running the sweet shop since 6/7 years in Housing Board colony. Self stated that his servants are running the sweet shop in Housing Board colony.

11.13 PW9 Tilak Raj in rebuttal has stated that he has brought the summoned record. He has stated that documents Ext.PW9/A to Ext.PW9/C are correct as per original record. He has denied suggestion that tenant is running the sweet shop in Housing Board colony through his servant.

12. Following documentaries evidence adduced by parties. (1) Ext.PW3/A is legal notice issued by landlady to tenant. (2) Ext.PW3/B is postal receipt of notice issued to tenant. (3) Ext.PW3/C is acknowledgment. (4) Ext.PW4/A is copy of general power of attorney executed by landlady in favour of PW4 Amar Chand. (5) Ext.PW4/B is map of demised premises. (6) Ext.PW9/A is application filed under Right to Information Act by Smt. Pushpa Devi landlady. (7) Ext.PW9/B is application filed under Right to Information Act by Smt.Pushpa Devi landlady. (8) Ext.PW9/C is allotment letter by Divisional Forest Officer to Vijay Kumar relating to Van Vihar (café). (9) Ext.P1 is copy of jambandi for the year 2003-04. (10) Ext.RW1/A is response by tenant regarding increase of 10% rent. (11) Ext.RW1/B is acknowledgment receipt. (12) Ext.RW1/C is copy of rent petition No. 4 of 2002 title Smt. Pushpa vs. Shri Madan Mohan. (13) Ext.RW1/D is copy of reply to rent petition No. 4 of 2002. (14) Ext.RW1/E is copy of rent petition No. 1 of 2008 title Smt. Pushpa Devi vs. Shri Madan Mohan. (15) Ext.RW1/F is copy of order dated 24.5.2008 wherein Rent Petition No. 1 of 2008 is dismissed as withdrawn. (16) Ext.RW1/G is legal notice given by landlady to tenant. (17) Ext.RW1/H is legal notice given by landlady to tenant. (18) Ext.RW1/K is registered AD sent to tenant. (19) Ext.RW1/J is response given by landlady relating to notice. (20) Ext.RW1/L is registered AD. (21) Ext.D-1 is reply to legal notice given by tenant. (22) Ext.D2 is legal notice given by landlady to tenant. (23) Ext.D3 is reply to legal notice given by tenant. (24) Ext.D4 is form S.T. challan. (25) Ext.D5 is form Vat-XV. (26) Ext.D6 is challan form. (27) Ext.D7 is form Vat-XV. (28) Ext.D8 is form Vat-II. (29) Ext.D9 is form Vat. (30) Ext.D10 is challan. (31) Ext.D11 is form Vat.

13. Submission of learned Advocate appearing on behalf of tenant/revisionist that learned Appellate Authority under section 24(3) of H.P. Urban Rent Control Act 1987 is not legally competent to remand back whole case to learned Rent Controller to decide the same afresh is decided accordingly. Power of learned Appellate Authority under H.P. Urban Rent Control Act 1987 is defined under Section 24 (3) which is quoted in toto:-

> 24(3) The Appellate Authority shall decide the appeal after sending for the records of case from Controller and after giving the parties an opportunity of

being heard and if necessary after making such further inquiry as it thinks fit either personally or through Controller."

14. It is well settled law that H.P. Urban Rent Control Act 1987 is special act. It is also well settled law that when there is conflict between special act and general act then special act always prevails. It is held that power of appellate authority is defined in a positive manner under section 24(3) of H.P. Urban Rent Control Act 1987. It is held that learned Appellate Authority under H.P. Urban Rent Control Act 1987 can make further inquiry as it thinks fit either personally or through Controller during pendency of appeal. It is held that words "further inquiry" means inquiry for deciding the appeal only. ***See 1997(1) SLJ 484 (HP) Braham Dass and others vs. Satya Wati and others. See ILR 1976 HP 620 Smt. Surinder Kaur vs. Mohinder Pal Singh. See 1961 PLR 865 Shri Krishan Lal Seth vs. Smt. Pritam Kumari.***

15. In the present case learned Appellate Authority framed additional issue to the effect that "whether tenant has ceased to occupy premises in question continuously for a period of twelve months preceding the date of filing eviction petition without reasonable cause. Onus placed upon landlady. Thereafter learned Appellate Authority remanded back case to learned Rent Controller to decide case afresh and dispose of appeal finally.

16. Submission of learned Advocate appearing on behalf of non-revisionist that learned Appellate Authority undersection 24(3) H.P. Urban Rent Control Act 1987 is legally competent to remand whole case to learned Rent Controller for deciding afresh is rejected being devoid of any force in view of rulings cited supra. It is held that there is no power of whole case remand to appellate authority under section 24(3) of H.P. Urban Rent Control Act 1987. It is held that learned Appellate Authority was legally competent to frame additional issue and it is held that learned Appellate Authority was legally competent to make further inquiry relating to additional issue either personally or through Controller during pendency of appeal. It is held that learned Appellate Authority was not competent to remand case as whole to learned Rent Controller for fresh decision in view of rulings cited supra. It is held that learned Appellate Authority has committed procedural illegality in present case. Point No.1 is decided accordingly.

<u>Point No. 2 (Relief)</u>

17. In view of findings upon point No.1 civil revision petition is partly allowed. Order of remand passed by learned Appellate Authority under section 24(3) of H.P. Urban Rent Control Act 1987 dated 03.05.2014 is set aside. Learned Appellate Authority Hamirpur H.P. is directed to dispose of Rent Appeal No. 1 of 2011 afresh in accordance with law. It is further held that learned Appellate Authority during pendency of appeal will be legally competent to make further inquiry as it thinks fit either personally or through Controller relating to additional issue framed by learned Appellate Authority in para No. 15 of order dated 03.05.2014 and thereafter learned Appellate Authority shall dispose of appeal No. 1 of 2011 afresh in accordance with law. Parties are left to bear their own costs. Files of learned Appellate Authority and learned Rent Controller be sent back forthwith along with certified copy of order. Since rent petition is pending since 2007 learned Appellate Authority shall dispose of appeal No. 1 of 2011 within three months after receipt of file. Parties are directed to appear before learned Appellate Authority on ***27.12.2016.*** Revision petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

NTPC Limited. ...Appellant.
Versus
Shri Amar Singh & another. ...Respondents.

RFA No. 325 of 2010
Date of Decision: December 13, 2016.

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam- Reference Court re-determined the market value @ Rs.5 lacs per bigha after relying upon exemplar sale deed and exemplar award –held in appeal that claimants had claimed compensation @ Rs.15 lacs per bigha category/classification wise- the Reference Court is bound to determine market value, which is just fair and reasonable- Collector determined the market value at different rates – exemplar sale deeds were duly proved- similarity of the acquired land with exemplar sale deeds was established- the market value in exemplar sale deeds worked out to be Rs.7,50,000/- per bigha but allowing deduction up to 33.13%, the fair market value was found to be 5 lacs per bigha – similarity of the land in previous award was established with the acquired land – award has attained finality –sale deeds relied upon by the respondents could not form the basis for determining market value as the similarity between the lands was not established – appeal dismissed. (Para-7 to 31)

Cases referred:

Chimanlal Hargonvinddas Versus Special Land Acquisition Officer, Poona and another, AIR 1988 SC 1652; (1988) 3 SCC 751

Special Land Acquisition Officer Versus Karigowda and others, (2010) 5 SCC 708

Viluben Jhalejar Contractor (Dead) by LRs Versus State of Gujarat, (2005) 4 SCC 789

Himmat Singh and others Versus State of Madhya Pradesh and another, (2013) 16 SCC 392

Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others Versus State of Karnataka and another, (2015) 10 SCC 469

Land Acquisition Collector & another Versus Jatinder Singh, decided on 01.06.2016

NTPC Ltd. Versus Kirpa and others, Latest HLJ 2016 (HP) 253

Trishala Jain and another Versus State of Uttranchal and another, (2011) 6 SCC 47

For the Appellant: Mr. Neeraj Gupta, Advocate, for the appellant-NTPC.

For the Respondents: Mr.Naresh K. Sood, Sr. Advocate with M/s Aman Sood and Varun Rana, Advocates, for respondent No.1.
Mr. Shrawan Dogra, Advocate General with Mr.Puneet Rajta, Dy. AG., for respondent No.2-State.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

If the claimant(s) are held legally entitled for rates, on uniform basis, irrespective of classification and category, then the increase in the amount of re-determination of the market value of the acquired land is only marginal. The rates stand increased from Rs. 4,35,447.26 to Rs. 5,00,000/- per bigha. The Collector himself observed that though the market value of the acquired land situate in Village Kayan, the village in question, could be Rs. 4,90,000/-, but required to be scaled down to Rs. 3,54,244/-, but however, in terms of award No.2 of 2002, Collector Land Acquisition, determined the market value of the acquired land awarding different rates, classification/category wise, ranging from Rs. 90,718.82 to Rs. 4,35,447.26 per bigha.

2. In terms of the impugned award dated 30.07.2010, passed by District Judge, Mandi, H.P., in Reference Petition No.163 of 2003, titled as *Amar Singh Versus LAC, Kol Dam Project, Sunder Nagar, District Mandi and another,* the Reference Court re-determined the market value of the entire acquired land, irrespective of its category/classification, by uniformly awarding a sum of Rs. 5,00,000/- per bigha and while doing so, it referred to and relied upon ten exemplar sale deeds, produced by the claimants as also exemplar award dated 17.01.2009 (Ex.PX), so passed by its Predecessor, whereby market value with respect to land acquired in Village Ropa, came to be determined @ Rs. 5,00,000/- per bigha. Undisputedly villages Ropa and Kayan are adjoining to each other.

3. Certain facts are not in dispute: (i) 252-12-09 bighas of land came to be acquired in Mauja Kayan, Tehsil Sunder Nagar, District Mandi, H.P., with the publication of notification in the official gazette on 19.12.2000, so issued under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act); (ii) The acquisition proceedings concluded with the passing of Collector's award No. 2 of 2002 dated 19.07.2002, under Section 11 of the Act and the State taking over possession of the land; (iii) The purpose of acquisition being construction of Dam, commonly known as Kol Dam; (iv) Dissatisfied with the offer made by the Collector, claimants filed petitions under Section 18 of the Act, which came to be clubbed with Reference Petition No.163 of 2003, and on the basis of common evidence led by the parties, disposed of in terms of impugned award; (v) While the claimants accepted the award, only the beneficiary preferred the present appeal(s) under Section 54 of the Act; (vi) It is the common case of parties that the entire acquired land came to be submerged with the construction of Dam by the beneficiary. Also there is no evidence on record of either any requirement or any developmental activity carried out on the spot.

4. It is contended on behalf of the claimants that since they have not assailed the impugned award, as such, they are satisfied with the market value, so determined by the Reference Court.

5. It be only observed that out of the acquired land, maximum land is of a superior quality.

6. With these admitted/undisputed facts, material placed on record by the parties is being appreciated for just decision of the case.

7. It is a settled principle of law that onus of establishing true market value of the acquired land, higher than the one which stands determined by the Collector, is always upon the claimants.

8. Perusal of the Collector's award reveals that claimants themselves claimed compensation @ Rs. 15,00,000/- per bigha. But then it was category/classification wise.

9. It is a settled principle of law that Collector's award is a mere offer and in the proceedings under Section 18 of the Act, Court is duty bound to determine the market value, which is just, fair and reasonable, on the basis of material placed on record by the parties. The conclusion with respect to re-determination of the market value, in the instant case, is clearly based on the evidence led by the claimants, which cannot be said to have been appreciated erroneously. Material, in its entirety, stands considered by the Court below.

10. With vehemence, Mr. Neeraj Gupta, learned counsel, contends that Reference Court erred in considering the fact that before the Collector, claimants had themselves elected for award of compensation on the basis of classification/category, hence they were precluded from seeking re-determination of the market value of the acquired land on uniform basis.

11. To rebut the same, Mr. Naresh K. Sood, learned Senior Counsel, seeks reliance on the decision rendered by the Apex Court in *Chimanlal Hargonvinddas Versus Special Land Acquisition Officer, Poona and another,* AIR 1988 SC 1652; (1988) 3 SCC 751, wherein the Court made the following observations:-

> "4 The following factors must be etched on the mental screen :
>
> (1) A reference under Section 18 of the Land Acquisition Act is not an appeal against the award and the Court cannot take into account the material relied upon by the Land Acquisition Officer in his Award unless the same material is produced and proved before the Court.
>
> (2) So also the Award of the Land Acquisition Officer is not to be treated as a judgment of the trial Court open or exposed to challenge before the court hearing the Reference. It is merely an offer made by the Land Acquisition Officer and the material utilised by him for making his valuation cannot be utilised by the Court

unless produced and proved before it. It is not the function of the court to sit in appeal against the Award, approve or disapprove its reasoning, or correct its error or affirm, modify or reverse the conclusion reached by the Land Acquisition Officer, as if it were an appellate Court.

(3) The Court has to treat the reference as an original proceeding before it and determine the market value afresh on the basis of the material produced before it.

(4) The claimant is in the position of a plaintiff who has to show that the price offered for his land in the award is inadequate on the basis of the materials produced in the Court. Of course the materials placed and proved by the other side can also be taken into account for this purpose.

(5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under S. 4 of the Land Acquisition Act (dates of Notifications under Ss. 6 and 9 are irrelevant).

(6) The determination has to be made standing on the date line of valuation (date of publication of notification under S. 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

(7) In doing so by the instances method, the Court has to correlate the market value reflected in the most comparable instance which provides the index of market value.

(8) Only genuine instances have to be taken into account. (Sometimes instances are rigged up in anticipation of Acquisition of land.)

(9) Even post-notification instances can be taken into account (1) if they are very proximate, (2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.

(10) The most comparable instances out of the genuine instances have to be identified on the following considerations :

(i) proximity from time angle

(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-a-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may beevaluated interms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has thereafter to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors :-

(For table see below)

Plus factors	Minus factors
1. Smallness of size.	1. largeness of area.

2. Proximity to a road.	2. situation in the interior at a distance from the road.
3. frontage on a road.	3. narrow strip of land with very small frontage compared to depth.
4. nearness to developed area.	4. lower level requiring the depressed portion to be filled up.
5. regular shape.	5. remoteness from developed locality.
6. level vis-a-vis land under acquisition.	6. some special disadvantageous factor which would deter a purchaser.
7. special value for an owner of an adjoining property to whom it may have some very special advantage.	

(15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds cannot be compared with a large tract or block of land of say 10000 eq. yds. or more. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a deduction byway of an allowance at an appropriate rate ranging approx. between 20% to 50% to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards.

(16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the Judge must place himself.

(17) These are general guidelines to be applied with understanding informed with common sense." (Emphasis supplied)

Reliance is also sought on the decision rendered by the Apex Court in *Special Land Acquisition Officer Versus Karigowda and others,* (2010) 5 SCC 708.

12. Significantly while responding to the reference petition or at the time of recording evidence, such objection never came to be taken by the beneficiary. Even before this Court, it is not a pleaded ground in the memo of appeal. In fact, as is evident from the reference petition, claimants had claimed rates @ Rs. 25,00,000/- per bigha, on uniform basis.

13. In any event, Reference Court is duty bound to determine such market value, which is just, fair and reasonable.

14. The law for award of compensation at uniform rates, when the purpose of acquisition is common and no developmental activity is required to be carried out is no longer *res integra* and stands settled by Hon'ble the Supreme Court in *Viluben Jhalejar Contractor (Dead) by*

LRs Versus State of Gujarat, (2005) 4 SCC 789 (paras 22 and 23); *Himmat Singh and others Versus State of Madhya Pradesh and another,* (2013) 16 SCC 392 (para 34); *Peerappa Hanmantha Harijan (Dead) By Legal Representatives and others Versus State of Karnataka and another,* (2015) 10 SCC 469 (paras 80 and 81); as also this Court in RFA No. 953 of 2012, titled as *Land Acquisition Collector & another Versus Jatinder Singh,* decided on 01.06.2016 and other connected matters. As such, at this point in time, in view of admitted/undisputed factual matrix, as noticed earlier, it would not be permissible for the beneficiary to raise such objections.

15. While determining the market value, Collector accounted for certain sale transactions with respect to the village in question and formed an opinion that even though the market value, irrespective of its classification, would be Rs. 4,90,455.85 per bigha, but however, it did not "appear" to be true representative of the market value for if sale transactions pertaining to a contiguous village i.e. Ahan, were considered then the market value of the acquired land could be Rs. 3,54,244/- per bigha. But then significantly and eventually, the Collector himself determined the market value to be as under:-

Market value determined as per the classification of land

Class of land	Area	LR per bigha	Total LR	Rate per bigha
Barani Abbal	=117-1-2	0.72 p	84.279	435447.26
Barani Doyam	=77-17-15	0.62p	48.290	374969.20
Bagicha Barani	=14-10-11	0.62p	9.007	374969.06
Banjar Kable Kasht	=16-6-15	0.15p	2.450	90695.68
Khadyatar	=3-19-10	0.13p	0.516	78508.87
Gair Mumkin	=22-16-16	0.15p	3.426	90718.82
Grand Total	=252-12-09		147.968	3,54,243.54

16. Record reveals that for establishing their claims, claimants have proved on record the following ten sale transactions (Ex.P-1 to Ex.P-10), through sixteen witnesses, namely, Harender Sen (PW.1), Amar Singh (PW.2), Gandhi Ram (PW.3), Ghamira (PW.4), Bajiru (PW.5), Briju (PW.6), Babu Ram son of Sunder Ram (PW.7), Babu Ram son of Bansi Ram (PW.8), Ranjit (PW.9), Roop Lal (PW.10), Khazana Ram (PW.11), Sohan Singh (PW.12), Sunder (PW.13), Smt. Revatu (PW.14), Smt. Neelam Thakur (PW.15) and Yadvinder (PW.16):-

Exts.	Documents	Date of sale	Area in Bigha	Mauja	Sale price
Ex.P1	Sale deed	20.12.1988	0-3-0	Kayan	Rs. 10,000/-
Ex.P2	Sale deed	5.5.2000	0-2-6	Kayan	Rs. 1,10,000/-
Ex.P3	Sale deed	7.4.2000	0-1-10	Kayan	Rs. 60,000/-
Ex.P4	Sale deed	4.4.2000	0-2-0	Kayan	Rs. 80,000
Ex.P5	Sale deed	7.4.2000	0-2-0	Kayan	Rs. 80,000/-
Ex.P6	Sale deed	26.7.2000	0-2-0	Kayan	Rs. 1,00,000/-
Ex.P7	Sale deed	12.5.2000	0-1-0	Kayan	Rs. 50,000/-
Ex.P8	Sale deed	4.4.2000	0-1-10	Kayan	Rs. 60,000/-
Ex.P9	Sale deed	1.5.2000	0-3-0	Kayan	Rs. 1,20,000/-
Ex.P10	Sale deed	5.5.2000	0-2-6	Kayan	Rs. 1,10,000/-

17. Close examination of testimonies of the aforesaid witnesses would only establish: (i) the sale transactions to have been proven on record, in accordance with law, for the vendor and vendee stepped into the witness box; (ii) Similarity of the exemplar sale deed with that of acquired land vis-a-vis its potential, use and nature stands proved; (iii) the beneficiary never doubted veracity of the witnesses and their testimony about the authenticity and genuineness of the sale transactions; and (iv) the land situate in village Kayan is similar to the land situate in adjoining village Ropa, Tehsil Sunder Nagar, District Mandi, Mohal Tatapani in Tehsil Karsog, District Mandi and Mohal Bahot Kasol in District Bilaspur.

18. There is also no evidence, establishing the fact that the said sale transactions were either speculative or fictitious in nature. There is no evidence establishing that these sale transactions came to be effected in anticipation and vain hope of the claimants of their land being acquired for this very same public purpose. As such, this Court is of the view that the said sale transactions are genuine.

19. Noticeably the District Judge has returned contradictory findings on this issue. In paragraphs 32, 33 and 34, it expressed doubts about the transactions being genuine. But however in the following paragraph 35 itself, itself considered these very sale transactions for justifying re-determination of the market value. While rendering its opinion in paragraphs 32, 33 and 34 of the impugned award, Court below ventured into adventurism and formed its opinion without any basis. Though the market value in terms of these exemplar transactions works out to be Rs. 7,50,000/- per bigha, but by allowing deductions up to the extent of 33.13 %, the Reference Court found the fair market value of the acquired land to be Rs. 5,00,000/- per bigha.

20. An endeavour was made to justify such conclusion by also relying upon award dated 17.01.2009, passed by the Presiding Officer, Fast Track Court Mandi, District Mandi, in Reference Petition No.78/2002/74 of 2005, titled as *Kirpa and others versus LAC, N.T.P.C. (Kol Dam) and another* (Ex.PX).

21. Now if one were to peruse the testimonies of the claimants' witnesses, one would find even this award to have been proven, in accordance with law. In one voice, the witnesses have categorically deposed, which fact stands unrebutted, that "The market value of the land of mohal Ropa, irrespective of classification has been determined at Rs.5 lacs per bigha". Under these circumstances, Reference Court, was right in relying upon the said award (Ex.PX).

22. Apparently, contention that award (Ex.PX) could not be relied upon, also merits rejection for the reason that witnesses themselves have deposed about the similarity of the acquired land with that of exemplar award, on which there is no cross-examination. Their testimony goes unrebutted.

23. Also, and most significantly, in the award (Ex.PX), the Reference Court took into account fourteen sale transactions, pertaining to Village Kayan, which also stand proved by the claimants in the proceedings in question. Hence very same transactions stand commonly proved in both the reference petitions.

24. Also award (Ex.PX), has now attained finality. Decision rendered by this Court in *NTPC Ltd. Versus Kirpa and others,* Latest HLJ 2016 (HP) 253, subject matter of award (Ex.PX), stands affirmed by Hon'ble the Supreme Court of India. In the said decision this Court observed that:-

> "18.Mr. N.K. Sood, Sr. Advocate, has drawn the attention of the Court to Award No.2 of 2002 vide Ext. P-15. Award No. 2 of 2002 pertains to the acquisition of land in village Kyan for Kol Dam Hydel Project. The compensation was awarded at the rate of Rs. 4,35,447.26 paise per bigha. The notification under Section 4 of the Act, as noticed hereinabove, by acquiring the land of Village Ropa, was also published on 11.12.2000. Mohal Kyan is adjoining to Mohal Ropa. It has also come on record that village Ropa is having better quality of land, since it is irrigated vis-a-vis Mohal Kyan. The HP PWD has already purchased land at

village Ropa for a consideration of Rs. 4,62,000/- per bigha. The land of Mohal Kyan was though sold in small plots, in the year 2000, but for approximate price of Rs.40,000/- Rs 50,000/- per biswa. The learned Reference Court has correctly taken into consideration the sale transactions made vide sale deeds Ext. P-1 and Ext. PW-5/A and award No.2 of 2002 Ext. P-15, while determining the market value of the acquired land of the claimants."

25. Noticeably it was award No.2 of 2002, so passed by the Collector, subject matter of the present appeal, was relied upon by this Court while affirming findings returned by the Reference Court in award (Ex.PX).

26. Specific attention is invited to sale transactions dated 17.12.1988 (Ex.RA), 10.08.1989 (Ex.RB) and 17.11.1999 (Ex. RC), so placed on record by the beneficiary. Sale transactions (Ex.RA and Ex.RB) pertain to the adjoining Mohal, whereas, sale transaction (Ex.RC) pertains to the Mohal in question. Record reveals that only certified copies of the sale deeds were tendered in evidence. No doubt, in view of the statutory provisions (Section 51-A of the Act) and the law laid down by the Apex Court in *Cement Corpn. of India Ltd. Versus Purya and others,* (2004) 8 SCC 270, these sale transactions cannot be ignored, but however, there is no evidence on record, establishing comparability of the acquired land with these exemplar sale transactions. No ocular evidence was led by the beneficiary. In this view of the matter, these sale transactions cannot be accounted for, for just determination of a fair market value of the acquired land.

27. Reliance by the beneficiary on the decision rendered by the Apex Court in *Trishala Jain and another Versus State of Uttranchal and another,* (2011) 6 SCC 47, is also misplaced for the decision is rendered in the attending facts and circumstances totally different from the one in hand. Also this Court has otherwise dealt with the issue in the earlier part of the judgment.

28. No other point urged or proved.

29. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Reference Court are perverse, illegal or erroneous. As such, present appeal stands dismissed, so also pending application(s), if any.

30. Cross-objection, if any, shall also stand disposed of.

31. Quite evidently, in terms of award No.2 of 2002, so passed by the Collector, several land reference petitions came to be clubbed and disposed of by the common impugned award dated 30.07.2010, passed by District Judge, Mandi, in Reference Petition No.163 of 2003, titled as *Amar Singh Versus LAC, Kol Dam Project and another*. Common evidence was led by the parties in land Reference Petition No.163 of 2003, subject matter of the present appeal. Learned counsel for the parties jointly submit that decision rendered in the present appeal would have an automatic bearing on the other connected appeals, arising out of the very same impugned award, pending before this Court. Registrar (Judicial) to take appropriate instructions from Hon'ble the Chief Justice for listing of such connected appeals, before the appropriate Court, particulars whereof shall also be supplied by learned counsel for the parties.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. …Appellant.

Versus

Narender Kumar …Respondent.

Criminal Appeal No.4186 of 2013
Date of Decision : December 13, 2016

Indian Penal Code, 1860- Section 302 and 201- A dead body was found on which FIR was registered – it was found on investigation that accused had consumed liquor with the deceased and had murdered him- the accused was tried and acquitted by the Trial Court- held in appeal that PW-1 (brother of the deceased) had not suspected the involvement of the accused and had stated that deceased was crushed under the vehicle by someone – motive for crime was also not established – K was present in the company of the deceased – the disclosure statement was not made in the presence of independent witnesses- the deceased was heavily intoxicated and possibility of sustaining injuries under the influence of alcohol cannot be ruled out- report of FSL did not connect the accused with the commission of crime- chain of circumstances does not lead to the guilt of the accused- accused was rightly acquitted by the Trial Court- appeal dismissed.(Para-7 to 22)

Cases referred:

Prandas v. The State, AIR 1954 SC 36

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant	:	Mr. Vikram Thakur, Deputy Advocate General.
For the Respondents	:	Mr. Manoj Pathak, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

On 13.1.2012, Yashwant Singh (PW-5) noticed dead body of a male, lying below a Car bearing No.DL-2C-5286, somewhere between Newti and Kalara, information whereof, was telephonically given to Police Station, Nerwa. Police Party, headed by SI Hari Ram (PW-23), reached the spot and conducted necessary investigation. Statement of Dinesh Chauhan (PW-1), under the provisions of Section 154 of the Code of Criminal Procedure (Ex.PW-1/A) was recorded, which led to registration of FIR No.4/2012, dated 14.1.2012 (Ex.PW-17/A), under Section 302 of the Indian Penal Code at Police Station, Nerwa. On the request the of Investigating Officer, a team of Experts from the State Forensic Science Laboratory, Junga, District Shimla, Himachal Pradesh, inspected the spot on 14.1.2012. They took samples of fingerprint, paint/blood from the vehicle and the blood stained soil. Inquest Report (Ex.PW-10/B) was prepared and dead body sent for postmortem, so conducted by Dr. A.K. Sharma (PW-10), who issued report (Ex.PW-10/C). Investigation revealed the accused to be involved in the crime. Hence, the accused, who was arrested on 28.1.2012, made a disclosure statement on 4.2.2012 (Ex.PW-11/A), to the effect that he could get identified the place where he had consumed liquor with the deceased as also the spot of crime, and pursuant thereto, he got such fact discovered. Investigation further revealed that the accused intentionally and voluntarily caused disappearance of evidence of murder. Police took on record several incriminating articles and with the completion of investigation, which prima revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

2. Accused was charged for having committed offences, punishable under the provisions of Sections 302 and 201 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

3. In order to establish its case, prosecution examined as many as 26 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took plea of innocence and false implication. However, he did not lead any evidence in defence.

4. Finding the testimonies of prosecution witnesses not to be inspiring in confidence, accused stands acquitted on all counts, in terms of impugned judgment dated

29.6.2013, passed by learned Sessions Judge, Shimla, Himachal Pradesh, in Sessions Trial No.16-S/7 of 2012, titled as *State of Himachal Pradesh v. Narender Kumar*.

5. We have heard Mr. Vikram Thakur, learned Deputy Advocate General, on behalf of the State as also Mr. Manoj Pathak, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

6. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish the essential ingredients so required to constitute the charged offence.

7. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance with rules and principles well known and recognized in the administration of justice." "

8. Undisputedly, there is no eye-witness to the occurrence of the incident.

9. Prosecution wants the Court to believe that in the night of 13.1.2012, accused Narender Kumar, deceased Suresh Chauhan and Kahan Chand (PW-2), together consumed alcohol, and thereafter accused murdered the deceased and by concealing his blood stained clothes, destroyed the evidence.

10. From the testimony of Dinesh Chauhan (PW-1), brother of the deceased, it is evidently clear that after identifying the dead body, he lodged the report with the police. He suspected that his brother was crushed under the vehicle by someone. Further, only suspicion led him believe it to be an act of murder and not accident. Significantly, save and except for the incriminating material, which allegedly came to be recovered in his presence, he does not disclose

complicity of the accused in the crime. Neither he nor has anyone else deposed about the motive of crime. Also, it is not the case of prosecution that accused harboured any animosity or had reason to murder the deceased.

11. Kahan Chand himself was a suspect, as has also come in the testimony of Investigating Officer. He himself admits to have been in the company of the deceased and the accused. And this was prior to the occurrence of the alleged incident. Deposition of this witness is a lengthy one, but then he does not disclose any circumstance with regard to involvement of the accused in the alleged crime. The theory of 'last seen' holds good qua this witness, as much as it would against the accused. In fact, involvement of this witness in the alleged crime has not been ruled out at all. But none else has deposed against the accused and the deceased lastly seen together.

12. At this juncture, we may observe that even the conduct of the accused cannot be taken as a circumstance, suspecting his involvement in the crime. It is not that he had disappeared or was not available for interrogation. In fact, as and when called for by the police, he made himself available and visited the Police Station, immediately after the occurrence of the incident, and more specifically on 16th, 17th& 18th January, 2012. Accused came to be arrested only on 28.1.2012. But then, there is nothing on record to establish, more specifically from the testimony of the Investigating Officer, as to what prompted arrest of the accused. Other than Kahan Chand, none came forward to disclose that the accused was lastly seen in the company of the deceased. Prosecution wants the Court to believe that accused surrendered on 28.1.2012, but then why would he do that, for there was nothing incriminating against him. It is not the case of prosecution that very same day police recorded his confessional statement. It came to be recorded only on 4.2.2012.

13. Significantly, police wants the Court to believe that involvement of the accused surfaced with the conduct of Test Identification Parade, so held on 31.1.2012, in the presence of Shri Nikhil Aggarwal (PW-21). Surprisingly, it was Kahan Chand, who identified the accused. What was the purpose of conducting such an exercise is not evident from the record, particularly when identity of the accused or Kahan Chand was never in dispute or doubt, which fact is evident from the admission made by the police officials, of both of them having visited the Police Station on previous occasions, i.e. 16th, 17th& 18th January, 2012. In this backdrop, the circumstance of Test Identification Parade loses significance.

14. Identity of the deceased is not in doubt. As per medical opinion (Ex.PW-10/D), he died as a result of ante-mortem traumatic asphyxia. Significantly, the doctor found the deceased to have consumed alcohol, contents whereof, as per opinion of the expert, were found to the extent of 297.02 mg%. This as per medical science is very high, rendering the person be in a state of drunkenness. Possibility of the deceased having died, after sustaining injuries under the influence of alcohol, has not been ruled out by the Investigating Officer.

15. Next circumstance, which is brought to our notice, is the disclosure statement (Ex. PW-11/A), allegedly made by the accused in the presence of police officials. Why no independent witness was associated? remains unexplained. In any event, we do not find version of Constable Naresh Kumar (PW-11) to be inspiring in confidence, more so for the reason that his testimony in Court, is bordering falsehood. He states that prior to 4.2.2012, he never visited Kalara, which fact is contradicted, in fact belied by Constable Kuldeep Singh (PW-12), according to whom, he took photographs of the spot on 14.1.2012 and from the photograph (Ex.PW-12/A-28) so taken by him, we notice that in fact, Constable Naresh Kumar was present on the spot. There is yet another reason for discarding the disclosure statement. Police was already aware of the spot of crime and no new fact came to be discovered, pursuant to the alleged disclosure statement made by the accused.

16. In support of his case, Mr. Vikram Thakur, learned Deputy Advocate General, presses reports (Ex.PW-22/A & 22/B) of the Experts of the State Forensic Science Laboratory, Junga. In our considered view, even these reports do not advance the case of the prosecution any

further. These reports are inconclusive with regard to the fingerprints and samples of blood, allegedly taken from the vehicle. Also, they do not, in any manner, link the accused to the crime. In fact, we find the Investigating Officer to be extremely impartial towards the accused. Why is it that he did not have the fingerprints so taken from the vehicle, matched with that of Kahan Chand (PW-2).

17. Police has established the record of Mobile phone allegedly used by the accused, but then, it does not advance the case of prosecution any further, for it is not disputed that accused is a local resident.

18. From the material placed on record, prosecution has failed to establish that the accused is guilty of having committed the offences, he was charged for. The circumstances cannot be said to have been proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused does not stand proved beyond reasonable doubt to the hilt.

19. The chain of events does not stand conclusively established, leading only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered do not fully establish completion of chain of events, indicating to the guilt of the accused and no other hypothesis other than the same.

20. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused committed murder of Suresh Chauhan and also intentionally and voluntarily caused disappearance of evidence.

21. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

22. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Dhani Ram. …Appellant.

Versus

Divisional Manager, Forest Working Division. …Respondent.

Arbitration Appeal No. 3/2015
Decided on: 14.12.2016

Arbitration and Conciliation Act, 1996- Section 34- Objections were filed against the award of the arbitrator in the Court of Civil Judge (Senior Division), which were dismissed as not maintainable – held, that the proceedings were initiated in the year 1986, when Arbitration Act, 1940 was in force – the Act was replaced in the year 1996, when the proceedings were initiated under the Act of 1940, its provisions would regulate the subsequent proceedings notwithstanding the commencement of 1996 Act- the award was not filed before the Court and the objections could not have been filed directly – the order passed by Civil Judge (Senior Division) set aside- objection were ordered to be returned for presentation before appropriate Court. (Para-2 to 14)

Cases referred:
Milkfood Limited vs. GMC Ice Cream (P) Ltd. (2004) 7 SCC 288
Hasham Abbas Sayyad vs. Usman Abbas Sayyad and others, AIR 2007 (SC) 1077

For the Appellant: Mr. Suneet Goel, Advocate.
For the Respondent: Mr. Bhupinder Pathania, Advocate.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral)**:**

The question posed in this petition is purely a legal one and, therefore, it is not at all necessary to refer to the facts, save and except that the appellant filed objections against the award passed by the Arbitrator in the Court of learned Civil Judge (Senior Division), which were dismissed on the ground that the same were not maintainable, under section 34 of the Arbitration and Conciliation Act, 1996 (for short "Act of 1940"), as the award has been passed under the Arbitration Act, 1940.

2. The moot question, however, is whether the learned Civil Judge (Senior Division) at the first place had the jurisdiction to entertain such objections or the order passed by him is without jurisdiction and is thus *coram non judis*.

3. It is not in dispute that the proceedings, which have ultimately culminated into an award under challenge, had been initiated in the year 1986 and it is for the fourth time that an award has come to be passed on 10.2.2009 by the Arbitrator-cum-Managing Director of the respondent-corporation.

4. A notice of the commencement of the arbitration is the first essential step towards the making of default appointment in terms of Chapter-II of the Arbitration Act, 1940 (for short "Act of 1940").

5. In the instant case, evidently, this notice was issued somewhere in the year 1986 when the provisions of the Act of 1940 alone were in vogue wherein section 8 of the Act conferred the power upon the Court to appoint Arbitrator on an application made in this behalf. Section 20 conferred wide jurisdiction on the Court for directing the filing of the arbitration and appointment of Arbitrator. Section 21 conferred powers on the Court in a pending suit on an agreement of the party to refer the differences between them for arbitration in terms of the Act. The Act provided for filing of the award in the Court on making of a motion by either of the party to make award rule of the Court to have the award set aside on the grounds specified in the award and for an appeal against the decision of such a motion. This Act was replaced by the Act of 1996, which by virtue of section 85 repealed the earlier enactment.

6. Therefore, seminal issue, which arises for consideration at this stage is whether the proceedings would be governed by the Act of 1940 or the Act of 1996.

7. This question is no more *res integra* in view of the judgment rendered by the Hon'ble Supreme Court in ***Milkfood Limited*** vs. ***GMC Ice Cream (P) Ltd***. (2004) 7 SCC 288, wherein it has been clearly held that where the notice of arbitration has been issued under the Arbitration Act, 1940, then the proceedings thereafter would be governed by the Act of 1940 irrespective of the Act of 1996 having come into force. It shall be apt to reproduce the relevant observations as under:

> "[45] 'Commencement of an arbitration proceeding' and 'commencement of a proceeding before an arbitrator' are two different expressions and carry different meanings.
>
> [46] A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for

> commencement of arbitration for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons charged with any authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose including the purpose of following statutory procedure required therefor. If the provisions of the 1940 Act applies, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common parlance meaning is given to the expression 'commencement of an arbitration' which admittedly for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regard the procedure under the one Act or the other is required to be followed. It is only in that limited sense the expression 'commencement of an arbitration' qua 'a notice of arbitration' assumes significance."

8. It is not in dispute that under the Act of 1940, there is no provision for filing objections directly in the Court before the award having been filed as per the mandate of section 14 of the Act of 1940 for making it rule of the Court and notice thereof issued to the parties. It is only thereafter while resorting to section 30 of the Act that the award can be set aside, which procedure admittedly has not been followed in the instant case.

9. However, learned Assistant Advocate General would, however, argue that the appellant having taken a chance by filing objections before the Civil Judge (Senior Division) cannot now turn around and question the jurisdiction.

10. I am afraid, such contention cannot be accepted for the simple reason that neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, which otherwise is not competent to try the *lis*.

11. It is well settled and needs no authority that "*where a Court takes upon* itself to *exercise* a *jurisdiction* it has *not possessedits decision amounts* to *nothing"*. Consequently, any order passed by the Court having no jurisdiction is *non est* and its invalidity can be set up when it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. Any order passed by such authority is *coram non judis*.

12. This aspect of the matter has been considered by the Hon'ble Supreme Court in ***Hasham Abbas Sayyad*** vs. ***Usman Abbas Sayyad and others***, AIR 2007 (SC) 1077, wherein it was held as under:

> "[21] The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a court without jurisdiction would be coram non judice being a nullity, the same ordinarily should not be given effect to.
>
> [22] This aspect of the matter has recently been considered by this Court in Harshad Chiman Lal Modi V/s. DLF Universal Ltd. and Another, 2005 7 SCC 791, in the following terms :
>
> "We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in

any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity."

See also Zila Sahakari Kendrya Bank Maryadit v. Shahjadi Begum & Ors., 2006 (9) SCALE 675 and Shahbad Co-op.Sugar Mills Ltd. v. Special Secretary to Govt. of Haryana & Ors. 2006 (11) SCALE 674 para 29]

[23] We may, however hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Sec. 21 of the Code of Civil Procedure; and a decree passed by a court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

13. Consequently, the order passed by Civil Judge (Senior Division) Mandi on 29.12.2014 is *coram non judis* and is accordingly quashed and set aside and the objections preferred by the appellant are ordered to be returned to him for being presented before the competent court. In case the same is done within 30 days of the receipt of the certified copy of the Award, the Court shall extend the benefit of section 14 of the Limitation Act to the appellant and thereafter proceed to decide the objections as expeditiously as possible and in no event later than three months from the date of filing of objections.

14. The appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Lalita Devi …Appellant.

Versus

State of H.P. and another …Respondents.

LPA No. 81 of 2016
Reserved on: 07.12.2016
Decided on: 14.12.2016

Constitution of India, 1950- Article 226- Writ petitioner appeared in the teacher eligibility test – the answer key was circulated and objections were invited – the result was declared, keeping in view the report of the expert – the petitioner was declared to be unsuccessful – she challenged the report of the expert- held, that the Courts cannot substitute the expert opinion – the decision of deleting defective/wrong questions and allotting marks on pro-rata basis is legal- the objections were examined by the experts – mistakes were found and thereafter the result was declared – the Court has to respect the opinion of the experts – writ petition dismissed. (Para-7 to 22)

Cases referred:

Pankaj Sharma versus State of Jammu and Kashmir and others, (2008) 4 SCC 273
Kanpur University, through Vice-Chancellor and others versus Samir Gupta and others, (1983) 4 Supreme Court Cases 309
Abhijit Sen and others versus State of U.P. and others, (1984) 2 Supreme Court Cases 319

Showkat Ahmad Dar & Ors. versus State & Anr., 2012 (4) JKJ 141 [HC]
The Secretary, West Bengal Council of Higher Secondary Education versus Ayan Das & Ors., 2007 AIR SCW 5976
Arvind Kumar & others vs Himachal Pradesh Public Service Commission, I L R 2014 (IX) HP 905
Lalit Mohan versus H.P. Public Service Commission, I L R 2015 (VI) HP 61 (D.B.)
Rustam Garg and others versus Himachal Pradesh Public Service Commission, I L R 2016 (II) HP 591 (D.B.)

For the appellant:	Mr. Bhender Kumar Chaudhary, Advocate.
For the respondents:	Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 1. Mr. Lovneesh Kanwar, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this Letters Patent Appeal is to judgment and order, dated 29th April, 2016, made by the learned Single Judge/Writ Court in CWP No. 2648 of 2015, titled as Lalita Devi versus State of H.P. and another, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (for short "the impugned judgment").

2. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. The appellant-writ petitioner appeared in the Teacher Eligibility Test conducted by respondent No. 2, i.e. Himachal Pradesh Board of School Education, Dharamshala (for short "Board") on 30th November, 2014. The answer key was circulated vide press note, dated 9th December, 2014 and time was given for submitting objections, if any, till 18th December, 2014.

4. It appears that objections were filed qua questions No. 30, 73 and 123, were considered by respondent No. 2-Board by referring the matter to the subject experts, the result was prepared after taking note of the expert's opinion and thereafter, the result was declared by respondent No. 2-Board, in terms of which the appellant-writ petitioner was declared to be unsuccessful.

5. Being aggrieved, the appellant-writ petitioner invoked the jurisdiction of the Writ Court by the medium of CWP No. 2648 of 2015 and sought writ of mandamus directing respondent No. 2-Board to award full marks to her in respect of Questions No. 30, 73 and 123 and declare her to have qualified the Teacher Eligibility Test-2014, on the grounds taken in the memo of the writ petition.

6. Respondent No. 2-Board filed reply to the writ petition and has specifically stated that the final answer key was prepared on the basis of the report of the subject experts. It is apt to reproduce paras 3 and 4 of the preliminary submissions in the reply filed by respondent No. 2-Board herein:

> *"3. That the respondent Board had also received the objections on question No. 30, 73 and 123 printed in the booklet series D. These questions were printed at serial No. 17, 75 and 145 in booklet series A. It is pertinent to mention here that there were four booklet series that is A, B, C and D, wherein the questions were similar but jumbled. Hence, the respondent Board had sought the opinion from the subject experts on the questions printed in booklet series A.*
>
> *4. That the respondent Board had prepared the final answer key on the basis of the report of the subject experts and result was prepared on the basis of the final result. The copy of final answer key of booklet series A is annexed as Annexure R-*

2/2. Hence, the present writ petition may kindly be dismissed in the interest of justice."

7. The Courts are not experts, thus, cannot substitute the expert opinion. If the Commission or any Body conducting the examination has to do the needful as per the Rules, after receiving compliant(s), the decision, if any made, cannot be interfered by the Courts.

8. The Apex Court in a case titled as **Pankaj Sharma versus State of Jammu and Kashmir and others,** reported in **(2008) 4 Supreme Court Cases 273,** has held that the decision of the Public Service Commission in deleting the defective/wrong questions and to allot those marks on pro-rata basis and to call the persons for interview if a candidate gets in after getting additional marks on pro-rata basis was legal one. It is apt to reproduce para 50 of the judgment herein:

> *"50. But there is an additional factor also which supports this view. It is clear from the fact that after the receipt of the complaints, the Commission had issued Press Note on 6-7-2005 and assured the candidates that the Commission would look into the matter and no injustice would be caused to them. The Commission also obtained expert advice and thereafter suo motu decided to delete certain questions by allotting those marks pro-rata to remaining questions. It is, therefore, clear that even according to the Commission, some action was necessary, after the examination was over."*

9. The Apex Court in other cases titled as **Kanpur University, through Vice-Chancellor and others versus Samir Gupta and others,** reported in **(1983) 4 Supreme Court Cases 309,** and **Abhijit Sen and others versus State of U.P. and others,** reported in **(1984) 2 Supreme Court Cases 319,** has held that the Courts can pass appropriate directions in appropriate cases in order to avoid delay and recurrence of such lapses.

10. The same view has been taken by one of us (Mansoor Ahmad Mir, Chief Justice) while sitting in Single Bench as a Judge of the High Court of Jammu and Kashmir, in a case titled as **Showkat Ahmad Dar & Ors. versus State & Anr.,** reported in **2012 (4) JKJ 141 [HC].**

11. It would also be profitable to reproduce paras 6 to 9 of the judgment rendered by the Apex Court in a case titled as **The Secretary, West Bengal Council of Higher Secondary Education versus Ayan Das & Ors.,** reported in **2007 AIR SCW 5976,** herein:

> *"6. The permissibility of re-assessment in the absence of statutory provision has been dealt with by this Court in several cases. The first of such cases is Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors. reported in (1984 (4) SCC 27). It was observed in the said case that finality has to be the result of public examination and, in the absence of statutory provision, Court cannot direct re-assessment/re-examination of answer scripts.*
>
> *7. The courts normally should not direct the production of answer scripts to be inspected by the writ petitioners unless a case is made out to show that either some question has not been evaluated or that the evaluation has been done contrary to the norms fixed by the examining body. For example, in certain cases examining body can provide model answers to the questions. In such cases the examinees satisfy the court that model answer is different from what has been adopted by the Board. Then only the court can ask the production of answer scripts to allow inspection of the answer scripts by the examinee. In Kanpur University and Ors. v. Samir Gupta and Ors. (AIR 1983 SC 1230) it was held as follows:-*
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> > *"16. Shri Kacker, who appears on behalf of the University, contended that no challenge should be allowed to be made to the correctness of a key answer unless, on the face of it, it is wrong. We agree that the key answer should be assumed to be correct unless it is proved to be wrong and that it*

would not be held to be wrong by an inferential process of reasoning or by a process of rationalization. It must be clearly demonstrated to be wrong, that is to say, it must be such as no reasonable body of men well versed in the particular subject would regard as correct. The contention of the University is falsified in this case by a large number of acknowledged text-books, which are commonly read by students in U.P. Those text books leave no room for doubt that the answer given by the students is correct and the key answer is incorrect.

17. Students who have passed their Intermediate Board Examination are eligible to appear for the entrance Test for admission to the Medical Colleges in U.P. Certain books are prescribed for the Intermediate Board Examination and such knowledge of the subjects as the students have is derived from what is contained in those text-books. Those text books support the case of the students fully. If this were a case of doubt, we would have unquestionably preferred the key answer. But if the matter is beyond the realm of doubt, it would be unfair to penalize the students for not giving an answer which accords with the key answer, that is to say, with an answer which is demonstrated to be wrong".

8. Same would be a rarity and it can only be done in exceptional cases. The principles set out in Maharashtra Board' case (supra) has been followed subsequently in Pramod Kumar Srivastava v. Chairman Bihar Public Service Commission, Patna & Ors. (2004 (6) SCC 714), Board of Secondary Education v. Pravas Ranjan Panda & Anr. (2004 (13) 714) and President, Board of Secondary Education, Orissa and Anr. v. D. Suvankar and Anr. (2007 (1) SCC 603).

9. In view of the settled position in law, the orders of learned Single Judge and the Division Bench cannot be sustained and stand quashed."

12. This Court in a case titled as **Mukesh Thakur and another versus Himachal Pradesh Public Service Commission,** reported in **2006 (1) Shim. LC 134,** interfered and quashed the result made by the Commission, was subject matter of Civil Appeals No. 907 and 897 of 2006 before the Apex Court, titled as **Himachal Pradesh Public Service Commission versus Mukesh Thakur and another,** reported in **(2010) 6 Supreme Court Cases 759.** It is apt to reproduce paras 23 to 26 of the judgment herein:

"23. The situation will be entirely different where the court deals with the issue of admission in mid-academic session. This Court has time and again said that it is not permissible for the courts to issue direction for admission in mid-academic session. The reason for it has been that admission to a student at a belated stage disturbs other students, who have already been pursuing the course and such a student would not be able to complete the required attendance in theory as well as in practical classes. Quality of education cannot be compromised. The students taking admission at a belated stage may not be able to complete the courses in the limited period. In this connection reference may be made to the decisions of this Court in *Pramod Kumar Joshi (Dr.) v. Medical Council of India, (1991) 2 SCC 179; State of U.P. v. Dr. Anupam Gupta, 1993 Supp (1) SCC 594 : AIR 1992 SC 932; State of Punjab v. Renuka Singla, (1994) 1 SCC 175 : AIR 1994 SC 932, Medical Council of India v. Madhu Singh, (2002) 7 SCC 258; and Mridul Dhar v. Union of India, (2005) 2 SCC 65.*

24. The issue of revaluation of answer book is no more *res integra.* This issue was considered at length by this Court in *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupeshkurmar Sheth, (1984) 4 SCC 27 : AIR 1984 SC 1543*, wherein this Court rejected the contention that in the absence of the provision for revaluation, a direction to this effect can be issued by the Court. The Court further held that even the policy decision incorporated in

the Rules/ Regulations not providing for rechecking/verification/revaluation cannot be challenged unless there are grounds to show that the policy itself is in violation of some statutory provision. The Court held as under: (SCC pp. 39-40 & 42, paras 14 & 16)

> "14. ....It is exclusively within the province of the legislature and its delegate to determine, as a matter of policy, how the provisions of the Statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act...
>
> * * *
>
> 16. ....The Court cannot sit in judgment over the wisdom of the policy evolved by the legislature and the subordinate regulation-making body. It may be a wise policy which will fully effectuate the purpose of the enactment or it may be lacking in effectiveness and hence calling for revision and improvement. But any drawbacks in the policy incorporated in a rule or regulation will not render it ultra vires and the Court cannot strike it down on the ground that, in its opinion, it is not a wise or prudent policy, but is even a foolish one, and that it will not really serve to effectuate the purposes of the Act."

25. This view has been approved and relied upon and re-iterated by this Court in *Pramod Kumar Srivastava v. Bihar Public Service Commission, (2004) 6 SCC 714,* observing as under: (SCC pp. 717-18, para 7)

> "7. ... Under the relevant rules of the Commission, there is no provision wherein a candidate may be entitled to ask for revaluation of his answer book. There is a provision for scrutiny only wherein the answer books are seen for the purpose of checking whether all the answers given by a candidate have been examined and whether there has been any mistake in the totalling of marks of each question and noting them correctly on the first cover page of the answer book. There is no dispute that after scrutiny no mistake was found in the marks awarded to the appellant in the General Science paper. *In the absence of any provision for revaluation of answer books in the relevant rules, no candidate in an examination has got any right whatsoever to claim or ask for revaluation of his marks."*
>
> (emphasis added)

A similar view has been reiterated in *Muneeb-Ul-Rehman Haroon (Dr.) v. Govt. of J&K State , (1984) 4 SCC 24 : AIR 1984 SC 1585; Board of Secondary Education v. Pravas Ranjan Panda, (2004) 13 SCC 383; Board of Secondary Education v. D. Suvankar, (2007) 1 SCC 603; W.B. Council of Higher Secondary Education v. Ayan Das, (2007) 8 SCC 242 : AIR 2007 SC 3098; and Sahiti v. Dr. N.T.R. University of Health Sciences, (2009) 1 SCC 599.*

26. Thus, the law on the subject emerges to the effect that in the absence of any provision under the statute or statutory rules/regulations, the Court should not generally direct revaluation."

13. The Apex Court, after discussing the law and judgments, which were governing the field till the date of the decision, has laid down the tests.

14. Coming to the merits of the case in hand, it appears that the purpose of inviting objections from the candidates before the examiner examines the papers and declares the result is just to examine those objections before declaring the result.

15. In the instant case, it has specifically been averred by respondent No. 2-Board, as discussed hereinabove, that they have invited the objections, asked the subject experts to

examine the objections, objections were examined, some mistakes were found, were rectified and thereafter, the result was declared. Thus, no case for interference is made out.

16. Had respondent No. 2-Board not invited the objections or had failed to take into account the said objections and the expert's opinion, in that eventuality, the judicial review was permissible.

17. Respondent No. 2-Board has specifically pleaded that the candidates have filed objections to the answer key. It has also furnished opinion of subject experts on the objected questions alongwith the reply.

18. At the costs of repetition, it is beaten law of land that the Courts are not experts, have to respect the opinion of the experts and cannot substitute the same. In the instant case, the experts have examined the questions and given their opinion. Thus, the objections raised by the candidates have been considered and judicial review is not permissible. Therefore, the writ petition was not maintainable on this count.

19. The same principle has been laid down by this Court in a batch of writ petitions, **CWP No. 9169 of 2013,** titled as **Vivek Kaushal & others versus Himachal Pradesh Public Service Commission,** being the lead case, decided on 17th July, 2014; **CWP No. 6812 of 2014,** titled as **Arvind Kumar & others versus Himachal Pradesh Public Service Commission,** and other connected matters, decided on 16th October, 2014; **CWP No. 3866 of 2015,** titled as **Lalit Mohan versus H.P. Public Service Commission,** decided on 2nd November, 2015; and **CWP No. 699 of 2016,** titled as **Rustam Garg and others versus Himachal Pradesh Public Service Commission,** decided on 29th March, 2016.

20. It is pertinent to record herein that the judgment rendered by this Court in **Vivek Kaushal's case (supra)** stands upheld by the Apex Court vide order, dated 7th August, 2014, rendered in Special Leave to Appeal (C) Nos. 20992 to 20995 of 2014.

21. Having glance of the above discussions, the Writ Court has rightly appreciated the controversy after applying the tests laid down by the Apex Court and this Court.

22. Viewed thus, the impugned judgment is well reasoned and legal one, needs no interference.

23. Having said so, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

NTPC Ltd., Kol Dam …Appellant.

Versus

Balam Singh & another …Respondents.

RFA No. 296 of 2012
Date of Decision: December 14, 2016.

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam- Land Acquisition Collector awarded the compensation at different rates- reference was made – exemplar sale deeds were produced, which were subsequent to initiation of acquisition proceedings- no material was placed on record to establish its similarity of potential, use, kind and nature with the acquired land – the Court has awarded compensation in respect of other acquired land of the same Tehsil on uniform basis irrespective of classification nature and category of land- Reference Court awarded compensation on uniform basis by taking the highest rate so determined by the Collector himself after relying upon several decisions of the Apex Court – the Reference Court had rightly determined the compensation- appeal dismissed.(Para-4 to 10)

Cases referred:
NTPC Ltd. Versus Kirpa and others, Latest HLJ 2016 (HP) 253
Haridwar Development Authority Versus Raghubir Singh and others, (2010) 11 SCC 581

For the Appellant: Mr. Kul Bhushan Khajuria, Advocate, for the appellant-NTPC.
For the Respondents: Mr. Ashwani Pathak, Sr. Advocate with Mr.Sandeep Sharma, Advocate, for respondent No.1.
Mr. R.S. Verma, Addl. AG., for respondent No.2-State.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

In terms of the impugned award dated 08.11.2011, passed by Additional District Judge, Mandi, Camp at Karsog, H.P., in Reference Petition No.55 of 2008, titled as *Balam Singh Versus LAC (Kol Dam), Bilaspur and another,* so filed under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), Reference Court, has re-determined the market value of the entire acquired land by awarding Rs. 6,08,980/-the highest rate awarded by the Collector Land Acquisition with respect to the best quality of land. Significantly, Reference Court has not enhanced any amount other than uniformly applying the said rate with respect to entire 3-12-0 bighas of land, acquired for public purpose i.e. construction of Kol Dam.

2. Certain facts are not in dispute: (i) 3-12-0 bighas of land came to be acquired in village Kidiya, Tehsil Karsog, District Mandi, H.P., with the publication of notification in the official gazette on 12.12.2000 so issued under Section 4 of the Act; (ii) The acquisition proceedings concluded with the passing of the Collector's Award No. 55 of 2006, dated 16.07.2006, so issued under Section 11 of the Act, whereby he determined the market value at the following rates and the State taking over possession of the land:-

Village	**Classification of land**	**Market value per bigha**
Sarour	Dhani Abal	Rs.6,08,980.00
Thogi	Dhani Dom	Rs.5,03,071.00
Kidiya	Barani Abal, Abadi, Khalwara etc.	Rs.3,70,684/-
Randol	Barani Dom	Rs.2,97,871.00
Thali	Barani Som	Rs.1,98,580.00
	Bagicha Barani /Kulahu	Rs.6,61,935.00
	Banjar Kable Kasht/Banjar Jadid	Rs.99,290.00
	Khadyatar Gair Mumkin	Rs.79,472.00

(iii) The purpose of acquisition being construction of Dam, commonly known as Kol Dam; (iv) Dissatisfied with the offer made by the Collector, claimants filed petition under Section 18 of the Act, and on the basis of evidence led by the parties, disposed of in terms of impugned award; (v) While the claimants accepted the award, only the beneficiary preferred the present appeal(s) under Section 54 of the Act; (vi) It is the common case of parties that the entire acquired land came to be submerged with the construction of Dam by the beneficiary. Also there is no evidence on record of either any requirement or any developmental activity carried out on the spot.

3. With these admitted/undisputed facts, material placed on record by the parties is being appreciated for just decision of the case.

4. Record reveals that claimant Balam Ram examined himself as PW.1, claiming value of the acquired land to be Rs. 15,00,000/- per bigha. Now significantly, except for

documentary evidence (Ex.P1), he did not place on record any exemplar sale deed. Though beneficiary did not lead any ocular evidence, but placed on record one exemplar sale deed (Ex.R1).

5. These documents, rightly stand rejected by the Reference Court for the reason that these sale transactions are subsequent to the initiation of acquisition proceedings and in any event there is nothing on record to establish its similarity of potential, use, kind and nature with that of the acquired land.

6. Noticeably with respect to other acquired land, in the same Tehsil, even this Court has awarded compensation, on uniform basis, irrespective of the classification, nature and category of land. In fact, in one such case reported in *NTPC Ltd. Versus Kirpa and others,* Latest HLJ 2016 (HP) 253, with respect to acquisition proceedings pertaining to the very same public purpose stands affirmed by the Apex Court.

7. Noticeably, Reference Court, while awarding compensation on uniform basis, by taking the highest rate, so determined by the Collector himself, referred to and relied upon several decisions rendered by the Apex Court and more pertinently so rendered in *Haridwar Development Authority Versus Raghubir Singh and others,* (2010) 11 SCC 581, wherein it is held as under:-

> "7. The question whether the acquired lands have to be valued uniformly at the same rate, or whether different areas in the acquired lands have to be valued at different rates, depends upon the extent of the land acquired, the location, proximity to an access road/Main Road/Highway or to a City/Town/Village, and other relevant circumstances. We may illustrate:
>
> (A). When a small and compact extent of land is acquired and the entire area is similarly situated, it will be appropriate to value the acquired land at a single uniform rate.
>
> (B). If a large tract of land is acquired with some lands facing a main road or a national highway and other lands being in the interior, the normal procedure is to value the lands adjacent to the main road at a higher rate and the interior lands which do not have road access, at a lesser rate.
>
> (C). Where a very large tract of land on the outskirts of a town is acquired, one end of the acquired lands adjoining the town boundary, the other end being two to three kilometers away, obviously, the rate that is adopted for the land nearest to the town cannot be adopted for the land which is farther away from the town. In such a situation, what is known as a belting method is adopted and the belt or strip adjacent to the town boundary will be given the highest price, the remotest belt will be awarded the lowest rate, the belts/strips of lands falling in between, will be awarded gradually reducing rates from the highest to the lowest.
>
> (D). Where a very large tract of land with a radius of one to two kilometers is acquired, but the entire land acquired is far away from any town or city limits, without any special Main road access, then it is logical to award the entire land, one uniform rate. The fact that the distance between one points to another point in the acquired lands, may be as much as two to three kilometers may not make any difference."

8. The Reference Court, rightly held the acquired land to fall within category (D).

9. Even the Collector, in his award observed that the value of the adjoining village i.e. Tatapani was more. It acknowledged the fact that deduction by 5% was to be effected with respect to village Kidiya only for the reason that it did not have facilities like road, hospital etc.

10. No other point urged or proved.

11. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Reference Court are perverse, illegal or erroneous. As such, present appeal stands dismissed, so also pending application(s), if any.

12. Cross-objection, if any, shall also stand disposed of.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Ms. Rajni Devi Sharma …Petitioner
Versus
Union of India & Others …Respondents

CWP No.187 of 2016
Judgment Reserved on: 30.11.2016
Date of decision: 14.12.2016

Constitution of India, 1950- Article 226- Deceased was posted in CRPF – he was found unconscious on his bed and was taken to hospital, where he was declared brought dead due to myocardial infraction- ordinary family pension was sanctioned to his widow- she claimed that her husband had died on account of illness in the snowbound hostile area- cause of death is directly attributable to government service – held, that rules provide that there should be causal connection between the death and the government service – if the disease is contracted because of continued exposure to a hostile work environment, subjected to extreme weather condition or occupational hazards resulting in death or disability, same are to be accepted as attributable to or aggravated by government service – the deceased was serving in insurgency hit area – he had no prior history of chronic heart disease – his death was caused by multiple factors like hostile work environment and extreme weather condition- writ petition allowed and petitioner held entitled to the benefit of extraordinary pension. (Para-12 to 31)

Cases referred:
Param Pal Singh vs. National Insurance Co.Ltd. and another, 2013 ACJ 526
Kamlesh Devi vs. State of Punjab, 2002(1) SCT 929

For the Petitioner: Mr.Onkar Jairath, Advocate.
For Respondents: Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma,J.

In the instant case, petitioner is a widow of deceased soldier Suman Kumar, who, at the time of his death, was serving as Assistant Sub Inspector in Central Reserve Police Force *(for short 'CRPF')* at Kishtwar in the State of Jammu & Kashmir. Late Shri Suman Kumar was initially recruited as Constable General Duty in CRPF in the year 1988 and was allotted the Constabulary No.880897767 and since then he remained posted at various stations. But, after his promotion to the post of ASI, he was posted in snowbound area of Tehsil and District Kishtwar of Jammu & Kashmir. Unfortunately, on 9.1.2014, deceased husband of the petitioner was found lying in an unconscious state on his bed and accordingly he was rushed to nearby hospital in Kishtwar, where he was declared dead by the doctors. Postmortem report suggests that late Shri Suman Kumar died of severe Myocardial Infraction *(for short 'M.I.')* which led to cardiopulmonary arrest.

2. Perusal of Annexure P-2, communication sent by Commandant-76 Battalion, CRPF, to Inspector General, CRPF, Western Sector, Chandigarh, reads as under:

> *"Opinion as to cause of death: - After going autopsy of deceased, Dr.Opinion, patient has died from severe M.I., which leads to cardiopulmonary arrest and subsequent death."*

3. Authority vide aforesaid communication also termed death of deceased ASI to be natural death and accordingly pension papers were processed for payment of admissible benefits, thereby allotting PPO No.239031411510 in favour of present petitioner being wife of deceased solider i.e. ASI Suman Kumar, granting her ordinary family pension in terms of Central Civil Services Rules, 1939.

4. By way of present petition, petitioner has claimed that she was entitled to be granted extra-ordinary family pension as defined in Central Civil Services (Extraordinary Pension) Rules, 1939 *(for short 'CCS(EOP) Rules')* because her husband died on account of illness while he was serving snowbound hostile area of Kishtwar. Petitioner further claimed that cause of death is/was directly attributable to the Government service, since her deceased husband was on active duty at that particular point of time and in all probabilities he suffered *'M.I.'* on account of aggravated demands of duty and tough terrain.

5. Mr.Onkar Jairath, learned counsel appearing for the petitioner, vehemently argued that action of the respondents in denying extraordinary pension in terms of Rule-3 of CCS(EOP) Rules is in violation of Rules occupying the field because it is an admitted case of respondents that at the time of initial recruitment of late Shri Suman Kumar in the CRPF and thereafter at the time of his posting in Kishatwar area being ASI, he was medically fit and he was not suffering from any kind of disease much less *'M.I.',* which ultimately led to his death. As per Mr.Jairath, mere factum of his being medically fit at the time of his posting at Kishtwar strengthen the claim of the petitioner that cause of death of the husband of the petitioner is directly attributable to the Government service, especially when deceased ASI Suman Kumar was on active duty at that particular point of time that too in the insurgency hit area Kishtwar in the State of Jammu & Kashmir.

6. In support of his arguments Mr.Jairath invited the attention of this Court to the judgment of Hon'ble Apex Court passed in ***Param Pal Singh vs. National Insurance Co.Ltd. and another, 2013 ACJ 526.*** Mr.Jairath also invited the attention of this Court to the following judgments passed by Hon'ble Punjab and Haryana High Court in ***Kamlesh Devi vs. State of Punjab, 2002(1) SCT 929, Promila Devi vs. Union of India and Others, CWP No.1399 of 2011(O&M), Smt.Kunta Devi vs. Union of India & Others, CWP No.17135 of 2009***, wherein death on account of *'M.I.'* has been held to be directly attributable to the service conditions.

7. Mr.Jairath further contended that ***Smt.Kunta Devi's*** case *supra* stands duly complied with by the respondents, which fact is evident from copy of order dated 21.2.2012 passed by Hon'ble Punjab and Haryana High Court in ***COPC No.3073 of 2011 (O&M)*** in ***CWP No.17135 of 2009,*** placed on record, wherein Hon'ble Court has directed the Pay and Accounts Officer, Central Pension Accounting Office, Ministry of Finance, Government of India, to issue PPO in favour of the petitioner. The Contempt Petition was disposed of with the direction to grant extraordinary family pension from the due date, as early as possible, but not later than two months from the date of receipt of certified copy of the aforesaid order.

8. Mr.Ashok Sharma, learned Assistant Solicitor General of India, while appearing on behalf of respondents refuted the aforesaid claim having been put forth on behalf of the petitioner by stating that petitioner was not entitled for grant of extraordinary pension in terms of Rule 3-A(1)(a) of the CCS(EOP) Rules, because death of the husband of the petitioner had no connection with the Government service and in no term it was attributable to Government Service.

9. Mr.Sharma, while inviting the attention of this Court to the aforesaid Rules, vehemently argued that for entitlement to extraordinary pension in the light of aforesaid Rules, death should be accepted as due to Government service, provided it is certified that it was attributable and aggravated by Government service. He further argued that to have benefit of aforesaid Rules for grant of extraordinary pension, there should be a casual connection between death and Government service. He also invited the attention of this Court to the guidelines issued by the Authorities for determining the aforesaid factors while deciding issue with regard to grant of extraordinary pension. According to learned Assistant Solicitor General, as per CCS(EOP) Rules Schedule-II, cases have been categorized in five distinct categories for determining the compensation payable for death or disability under different circumstances and he further stated that at best case of the husband of the petitioner could be considered under category-'A', wherein it has been specifically held that death and disability due to natural causes is not attributable to Government service e.g. chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty etc.

10. While concluding his arguments, Mr.Sharma forcefully contended that since husband of the petitioner died due to *'M.I.'*, there is neither any casual connection between the death and Government service nor same is attributable and aggravated by Government service and as such Authorities rightly granted ordinary family pension in favour of the present petitioner after the death of her husband, who was serving in CRPF. Mr.Sharma further argued that judgment having been relied upon by learned counsel representing the petitioner has no application in the present facts and circumstances, however, he fairly admitted that judgment passed by Hon'ble Punjab and Haryana High Court in ***Kunta Devi's*** case *supra* was accepted by the Authorities and extraordinary pension was granted to the petitioner in that case.

11. We have heard learned counsel for the parties and gone through the record of the case.

12. It is not in dispute that husband of the petitioner was serving as ASI in snowbound area of Tehsil and District Kishtwar of Jammu & Kashmir at the time of his death i.e. on 9.1.2014. It is also not in dispute that at the time of death of aforesaid ASI late Shri Suman Kumar, he was in active service of CRPF. Similarly, there is no quarrel, if any, with regard to cause of his death, who, as per medical information, died of severe *'M.I.'* which led to cardiopulmonary arrest.

13. Though respondents have released ordinary pension to the petitioner, but her claim for grant of extraordinary pension has been rejected on the ground that death of her husband due to heart attack was natural and in no term could be said to be attributable and aggravated by his service. Since final order issued by Court of inquiry dated 18.2.2014 termed the death of the husband of the petitioner as natural and not attributable to or aggravated by Government Service/Service Conditions, respondents rejected the claim of the petitioner for grant of extraordinary pension while applying the provisions contained under Rule 3-A of CCS(EOP) Rules which provides as under:-

"3-A(1)(a) Disablement shall be accepted as due to Government service, provided that it is certified that it is due to wound, injury or disease which:-

i) Is attributable to Government Service, or

ii) Exited before or arose during Government service and has been and remains aggravated thereby.

(b) Death shall be accepted as due to Government service provided it is certified that it was due to or hastened by:

i) a wound, injury or disease which was attributable to Government service,

or

(ii) the aggravation by Government service of a wound, injury or disease which existed before or arose during Government service

(2) There shall be a casual connection between

i) disablement and Government service; and

ii) death and Government service, for attributability or aggravation to be conceded. Guidelines in this regard are given in the appendix which shall be treated as part and parcel of these Rules."

14. The aforesaid Rules clearly suggest that for the grant of extraordinary pension in favour of individual deceased soldier, death should be accepted as due to Government service with further certification that it was due to wound, injury or disease which was attributable to Government service. Rules further suggest that there should be casual connection between death and Government service, for attributability or aggravation to be conceded. It would also be profitable to reproduce here-in-below Schedule-II of CCS(EOP) Rules, 1939, wherein factors have been defined for determination of compensation payable for death and disability under different circumstances:-

"Category 'A' Death or disability due to natural causes not attributable to Government service. Examples would be chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty etc.

Category 'B' Death or disability due to causes which are accepted as attributable to or aggravated by Government service. Diseases contracted because of continued exposure to a hostile work environment, subjected to extreme weather conditions or occupational hazards resulting in death or disability would be examples.

Category 'C' Death or disability due to accident in the performance of duties. Some examples are accidents while traveling on duty in Government vehicles or public transport, a journey on duty is performed by service aircraft, mishaps at sea, electrocution while on duty, etc.

Category 'D' Death or disability attributable to acts of violence by terrorists, anti social elements etc., whether in their performance of duties or otherwise. Apart from cases of death or injury sustained by personnel of the Central Police organizations while employed in aid of the Civil administration in quelling agitation, riots or revolt by demonstrators, other public servants including Police personnel etc, bomb blasts in public places or transport, indiscriminate shooting incidents in public etc , would be covered under this category.

Category 'E' Death or disability arising as a result of (a) attack by or during action against extremists, anti-social element, etc, and (b) enemy action in international war or border skirmishes and warlike situations, including cases which are attributable to (i) extremists acts, exploding mines, etc., while on way to an operational area (ii) kidnapping by extremists; and (iii) battle inoculation as part of training exercises with live ammunition."

15. In Category-'A' of the aforesaid Schedule, diseases, like heart and renal diseases, prolonged illness, accidents while not on duty have been termed to be not attributable to Government service.

16. But, in Category-'B' of the aforesaid Schedule, death or disability due to continued exposure to a hostile work environment, subjected to extreme weather conditions or occupational hazards have been accepted as attributable to or aggravated by Government service.

17. Similarly, death or disability occurred on account of accident while traveling on duty in Government vehicles or public transport, a journey on duty by service aircraft, mishaps at

sea and electrocution have also been accepted as attributable to and aggravated by Government service.

18. Reply filed on behalf of respondents as well as arguments having been made by learned Assistant Solicitor General of India clearly suggests that case of the present petitioner, who died from *'M.I.',* was considered by the Authorities under Category 'A', wherein chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty have not been termed as attributable to or aggravated by Government service.

19. At this juncture, it would be relevant to refer to following paras of reply filed by the respondents:

"Para 6. … … …In this instant case the husband of the petitioner died from severe MI (Myo cardial infraction) which leads to cardiopulmonary arrest and subsequent that, which was the type of a heart attack as petitioner mentioned in para no.4 of list of events and falls under category "A" wherein it is clearly mentioned that "Death or disability due to natural causes not attributable to Government service. Examples would be chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty etc. etc.

It is pertinent to mention here that the work accident while on duty is defined the other mishaps apart from examples like heart and renal disease, thus petitioner is entitled the extra ordinary pension under category "A" only.

Para 7. That in reply to this para, it is submitted that the husband of the petitioner died due to M.I which leads to cardiopulmonary arrest but the disease is neither attributable to the Govt.job nor aggravated during the same. It is submitted that late husband of the petitioner was medically SHAPE-I and he was advised to reduce weight, fat free diet and also regular exercise by the Medical officer of 76 Bn. CRPF. The petitioner wrongly interpreted the accident while on duty, whereas it is clearly mentioned in category "A" that the death, disability due to chronicle ailment like heart and renal disease comes under the category "A".

It is pertinent to mention here that the cold weather does not have direct connection with cardiopulmonary arrest. Apart from these the late husband of the petitioner was provided winder bears and other facilities to prevent the effect of the cold. Therefore, the averment of the petitioner is totally wrong and misconceived.

Para 8. That the contents of this para are wrong, hence denied. As submitted in para supra, the death of the husband of the petitioner was neither directly attributable to the Govt. service nor aggravated during the service. Since the medical category of the petitioner was of SHAPE-I, hence it cannot be said that the same is attributable to the Govt. service and cold weather does not have any direct connection with Cardiopulmonary arrest."

20. In nutshell, case of the respondents is that husband of the petitioner died due to natural cause i.e. *'M.I.'* which is not attributable to Government Service and as such being covered under Category "A", petitioner is not entitled to grant of extraordinary pension in terms of aforesaid Rules.

21. True, it is that chronic ailments like heart and renal diseases, prolonged illness, accidents while not on duty have been declared to be not attributable to or aggravated by Government service under Category "A", but, if Category "B" is perused carefully, it clearly suggests that if disease is contracted because of continued exposure to a hostile work environment, subjected to extreme weather condition or occupational hazards resulting in death or disability same are to be accepted as attributable to or aggravated by Government service.

22. In the instant case, this Court cannot loose sight of the fact that at that relevant time late husband of the petitioner being ASI was in active service of CRPF and there is no denial

of the fact that he was serving insurgency hit area i.e. Kishtwar (J&K). Similarly, this Court is fully conscious of extreme weather condition of the area of Kishtwar, especially in the month of January, when that entire area is submerged with snow.

23. In the aforesaid background, this Court deems it fit to refer to the aforesaid paras of reply filed by the respondents, wherein it has been repeatedly stated that deceased ASI Suman Kumar was fully fit and his medical category was of SHAPE-I; meaning thereby that deceased ASI Suman Kumar had no prior history of chronic heart disease.

24. Similarly, this Court finds no document having been placed on record by the respondents suggestive of the fact that at the time of unfortunate death of late ASI he was suffering from same kind of chronic disease, as stands mentioned in aforesaid Category "A" in Schedule-II of Rule 3. Though in para-7 respondents, while stating that late husband of petitioner was medically SHAPE-I, have stated that he was advised to reduce weight, fat free diet and also regular exercise by the Medical Officer of 76 Bn. CRPF. But, as has been observed above, there is no medical record placed on record by the respondents suggestive of the fact that the petitioner was not medically fit at the time of his death. Rather, respondents themselves have submitted that late husband of the petitioner was medically SHAPE-I and it cannot be said that death is attributable to Government service and cold, weather had no direct connection with cardiopulmonary arrest.

25. This Court, after taking note of the aforesaid specific averments contained in the reply filed by the respondents regarding medically fitness of late husband of the petitioner, has every reason to conclude that case of late husband of the petitioner could not be considered in the light of Category "A" as stands defined in Schedule-II. Rather, this Court is convinced and satisfied that late husband of the petitioner suffered from *'M.I.'* which led to his death due to multiple factors i.e. hostile work environment at Kishtwar, due to insurgency coupled with extreme weather condition that too in the month of January and as such case of late husband of petitioner was required to be dealt with in terms of Category-"B" and not Category-"A". Since late husband of the petitioner has no past history of chronic ailment as defined in Category "A" *supra*, the disease (*'M.I.')* contracted by him during service is required to be deemed to be because of continued exposure to a hostile work environment and due to extreme weather condition and as such same can be termed to be attributable to or aggravated by Government service. Action of respondents in denying extraordinary pension to the petitioner after death of his husband does not appear to be reasonable and in accordance with the Rules occupying the fields. This Court can also take note of the fact that had the husband of the petitioner suffering from chronic heart disease, he would have not been posted at a place like Kishtwar, which is admittedly insurgency hit area. Similarly, when petitioner, at the time of his posting at Kishtwar, was medically fit and was placed under Category of SHAPE-I, it can be safely concluded that he had no past history of heart disease and as such it can be safely inferred that husband of the petitioner suffered sudden heart problem which led to his death.

26. Hon'ble Apex Court in ***Param Pal Singh vs. National Insurance Co.Ltd. and another, 2013 ACJ 526,*** while dealing with the case under Workmen's Compensation Act, 1923, interpreted the words, *"in the course of employment"* Hon'ble Apex Court held that *"in the course of employment"* mean *"in the course of work which the workman is employed to do and which is incidental to it"*. It would be profitable to reproduce following paras of the judgment, wherein the Hon'ble Apex Court has held:-

> "26. Again in yet another celebrated decision of this Court in Ibrahim Mahmmod Issak, 1961 ACJ 422 (SC), this Court has set down the principles applied in such cases as under in paragraph 5:
>
> > "5. To come within the Act the injury by accident must arise both out of and in the course of employment. The words "in the course of the employment" mean "in the course of the work which the workman is employed to do and which is incidental to it." The words "arising out of employment" are understood to mean that "during the course of the

employment, injury has resulted from some risk incidental to the duties of the service, which, unless engaged in the duty owing to the master, it is reasonable to believe the workman would not otherwise have suffered." In other words, there must be a casual relationship between the accident and the employment. The expression "arising out of employment" is again not confined to the mere nature of the employment. The expression applies to employment as such to its nature, its conditions, its obligations and its incidents. If by reason of any of those factors the workman is brought within the zone of special danger the injury would be one which arises 'out of employment'. To put it differently, if the accident had occurred on account of a risk which is an incident of the employment, the claim for compensation must succeed, unless of course the workman has exposed himself to an added peril by his own imprudent act. In Lancashire and Yorkshire Railway Co. v. Highley, (1917) AC 352, Lord Summer laid down the following test for determining whether an accident "arose out of the employment." (Emphasis added)

27. Applying the various principles laid down in the above decisions to the facts of this case, we can validly conclude that there was CAUSAL CONNECTION to the death of the deceased with that of his employment as a truck driver. We cannot lose sight of the fact that a 45 years old driver meets with his unexpected death, may be due to heart failure while driving the vehicle from Delhi to a distant place called Nimiaghat near Jharkhand which is about 1152 kms. away from Delhi, would have definitely undergone grave strain and stress due to such long distance driving. The deceased being a professional heavy vehicle driver when undertakes the job of such driving as his regular avocation it can be safely held that such constant driving of heavy vehicle, being dependant solely upon his physical and mental resources & endurance, there was every reason to assume that the vocation of driving was a material contributory factor if not the sole cause that accelerated his unexpected death to occur which in all fairness should be held to be an untoward mishap in his life span. Such an 'untoward mishap' can therefore be reasonably described as an 'accident' as having been caused solely attributable to the nature of employment indulged in with his employer which was in the course of such employer's trade or business.

28. Having regard to the evidence placed on record there was no scope to hold that the deceased was simply travelling in the vehicle and that there was no obligation for him to undertake the work of driving. On the other hand, the evidence as stood established proved the fact that the deceased was actually driving the truck and that in the course of such driving activity as he felt uncomfortable he safely parked the vehicle on the side of the road near a hotel soon whereafter he breathed his last. In such circumstances, we are convinced that the conclusion of the Commissioner of Workmen's Compensation that the death of the deceased was in an accident arising out of and in the course of his employment with the respondent No.2 was perfectly justified and the conclusion to the contrary reached by the learned Judge of the High Court in the order impugned in this appeal deserves to be set aside. The appeal stands allowed. The order impugned is set aside. The order of the Commissioner for Workmen's Compensation shall stand restored and there shall be no order as to costs."(pp.537-538)

27. Similarly, Hon'ble Punjab & Haryana High Court in ***Kamlesh Kumari vs. Union of India, (2002) 1 SCT 929***, held as under:-

"The word "Accident" also occurs in Section 3 of the Workmen's Compensation Act, 1923 but here too it has not been defined and it has come to acquire a settled meaning and denotes some unexpected event happening without design even though there may be negligence on the part of the person

meeting with an accident. It would, therefore, include not only such obvious occurrence as collisions, tripping over floor obstacles, fall of roof, but also less obvious ones causing injury as strain which causes rupture, exposure to a draught causing chill, exertion causing apoplexy and shock causing neurasthenia. It would also include a heart attack which is an unexpected event happening without design".

28. Hon'ble Division Bench of Punjab and Haryana High Court in the aforesaid judgment, while interpreting word *"accident"*, has also held that any unexpected event happening without design even though there may be negligence on the part of the person meeting with an accident can be termed as *"accident".* Hon'ble Division Bench, in the aforesaid judgment, has further held even exposure to a draught causing chill, exertion causing apoplexy and shock causing neurasthenia and heart attack which is unexpected event happening without design as an accident.

29. In the present case, as has been observed above, the petitioner at the time of his death was posted in the area, which is insurgency hit area and has extreme chillness during the month of January coupled with the fact that same is a hostile area and as such there are multiple reasons which compels this Court to conclude that *'M.I.'* suffered by the petitioner was on account of continued exposure, hostile work, environment and extreme weather condition. This Court also perused the judgment passed by the Hon'ble Punjab and Haryana High Court in ***Promila Devi's*** case *supra*, which specifically dealt with issue of grant of extraordinary pension under Rule 3-A of the CCS(EOP) Rules, 1939, that too in case of employee of Central Reserve Police Force.

30. Aforesaid judgments further suggest that in those cases too persons had died due to *'M.I.'* and it was held to be attributable to Government Service. Further perusal of order dated 21.2.2012, passed in ***COPC No.3073 of 2011(O&M),*** i.e. ***Kunta Devi's*** case *supra,* clearly suggests that aforesaid judgments having been passed by the Hon'ble Punjab & Haryana High Court was accepted by the respondent i.e. C.R.P.F. and extraordinary pension was granted to the petitioner(s) therein. Hence, grievance of the petitioner in this writ petition, being fully covered by the aforesaid judgments, also deserves to be accepted.

31. Consequently in view of the aforesaid discussion this petition is allowed and the petitioner is held entitled to the benefits of the extraordinary family pension and other allied benefits, as provided by Rule 3-A of CCS(EOP) Rules. The needful be done as expeditiously, as possible, preferably within two months.

32. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Prem Chand .....Respondent.

Cr.Appeal No.226 of 2008
Decided on: 14/12/2016.

Code of Criminal Procedure, 1973- Section 377- Accused was convicted by the Trial Court and sentenced to undergo imprisonment for a period of 6 months- an appeal was filed, which was partly allowed and the sentence of imprisonment was modified – the accused was sentenced to undergo imprisonment till the rising of the Court - an appeal has been filed against the sentence imposed pleading that the sentence is inadequate – held, that the sentence imposed by the Trial Court can only be enhanced under Section 377 of Cr.P.C– in this case sentence was imposed by

the appellate court- hence, appeal is not maintainable – permission granted to file a revision petition. (Para-4)

For the Appellant: Mr. Vivek Singh Attri, Dy. A.G.
For the Respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The learned Judicial Magistrate 1st Class, Manali pronounced an order of conviction upon the accused for his committing an offence punishable under Section 325 IPC. The learned Judicial Magistrate concerned also sentenced him to undergo rigorous imprisonment for a period of six months besides sentenced him to pay a fine of Rs.2000/-, in default whereof he stood sentenced to undergo further simple imprisonment for a period of one month. The convict/accused standing aggrieved by the judgment recorded upon him by the learned Judicial Magistrate concerned whereupon he stood convicted for the offence for which he stood charged besides his standing aggrieved by the imposition of the afore-stated sentences upon him by the learned trial Court, he made a concert to assail them by preferring an appeal therefrom before the learned appellate Court. The learned appellate Court on standing seized with an appeal preferred therebefore by the accused/convict affirmed the apposite conviction pronounced upon him by the learned Judicial Magistrate concerned whereas it modified the sentence of imprisonment of six months imposed upon him by the learned trial Court to a sentence of his suffering imprisonment till the rising of the Court.

2. Imminently, the State of Himachal Pradesh did not under Section 377 of the Code of Criminal Procedure prefer any appeal before the learned first appellate Court for seeking enhancement of the sentence of imprisonment of six months imposed by the learned Judicial Magistrate concerned upon the accused/convict in a term higher than the aforesaid term of imprisonment. However, the State of Himachal Pradesh, through the instant appeal, constituted herebefore under Section 377 of the Cr.P.C. has sought enhancement of the term of imprisonment imposed upon the accused/convict by the learned first appellate Court whereupon he stood directed to suffer imprisonment till the rising of the Court, on anvil of it being grossly disproportionate vis-à-vis the concurrent renditions of conviction pronounced upon him by both the learned Courts below wherewithin both the learned Courts below concluded qua his committing a heinous offence constituted under Section 325 IPC.

3. The learned counsel appearing for the respondent/accused has contended qua the instant appeal constituted herebefore under Section 377 Cr.P.C. being statutorily not maintainable herebefore significantly with the State of Himachal Pradesh on conviction of the accused by the learned trial Magistrate on his facing trial therebefore, in sequel whereto a sentence of imprisonment as occurs in its apposite verdict stood imposed upon him, omitting to therefrom institute an appeal under Section 377 Cr.P.C. before the learned first appellate Court whereas it thereat held the apposite statutory empowerment to make a concert therebefore for enhancing the sentence of imprisonment as stood pronounced by the learned trial Magistrate upon the accused/convict on the latter's facing trial before the learned trial Magistrate concerned, in a term higher than the one to which he stood sentenced to undergo, on anvil of the sentence of imprisonment imposed upon the accused/convict by the learned trial Magistrate being grossly inadequate besides grossly disproportionate vis-à-vis the order of conviction recorded upon him by the trial Magistrate qua the charge he faced therebefore under Section 325 IPC.

4. For testing the tenacity of the aforesaid submission addressed herebefore by the learned counsel for the respondent/accused, an allusion to the relevant provisions engrafted in Section 377 Cr.P.C. is imperative, provisions whereof stand extracted herein-after:-

"377. Appeal by the State Government against sentence.-

(1) Save as otherwise provided in sub-section (2), the State Government may, in any case of conviction on a trial held by any Court other than a High Court, direct the Public Prosecutor to present an appeal to the High Court against the sentence on the ground of its inadequacy-

(a) to the Court of Session, if the sentence is passed by the Magistrate and

(b) to the High Court, if the sentence is passed by any other Court.

(2) If such conviction is in a case in which the offence has been investigated by the Delhi Special Police Establishment, constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [1] the Central Government may also direct] the Public Prosecutor to present an appeal against the sentence on the ground of its inadequacy-

(a) to the Court of Session, if the sentence is passed by the Magistrate; and

(b) to the High Court, if the sentence is passed by any other Court.

(3) When an appeal has been filed against the sentence on the ground of its inadequacy, the High Court shall not enhance the sentence except after giving to the accused a reasonable opportunity of showing cause against such enhancement and while showing cause, the accused may plead for his acquittal or for the reduction of the sentence."

An incisive perusal whereof makes a graphic disclosure qua on imminent workability of sub-section (2) thereof standing evinced, workability whereof evidently is un-evincible herebefore, the State Government holding a discretion to from an order of conviction besides a sentence imposed upon an accused on the latter's standing tried by any Court other than the High Court, to seek enhancement of the sentence pronounced upon the accused/convict by the learned trial Court, on anchorage of it being grossly inadequate, by its proceeding to prefer an appeal therefrom before the Court of Sessions, conspicuously, if the sentence stands recorded by the Sessions Court, also therefrom the State Government holds a statutory empowerment to before the High Court ventilate its apposite grievance under Section 377 Cr.P.C. The initial statutory bestowment under the afore-extracted provisions of the Code of Criminal Procedure, upon the State of Himachal Pradesh, to on an order of conviction besides a sentence of imprisonment standing pronounced upon the accused on his trial standing held by the learned trial Magistrate concerned, to on grounds of inadequacy of sentence imposed upon the convict/accused by the learned trial Magistrate seek its enhancement by its making an apposite motion thereunder before the Court of Sessions whereas evidently hereat, the aforesaid initial statutory bestowment conferred upon the State of Himachal Pradesh comprised in its by preferring an appeal under Section 377 Cr.P.C. before the learned Sessions Court assail the sentence pronounced upon the convict/accused by the learned trial Magistrate whereupon it held the statutory facilitation to seek enhancement of the sentence as stood imposed upon the accused on his trial standing held by the trial Magistrate, stood demonstrably omitted to be availed by the State of Himachal Pradesh, whereupon it is statutorily forbidden to avail herebefore the provisions of Section 377 Cr.P.C. for its thereupon making an apposite statutory endeavour for assailing besides seeking enhancement of the sentence pronounced upon the convict by the learned Additional Sessions Judge. The aforesaid statutory provisions also stand aroused from the factum of the sentence pronounced upon the convict by the learned Additional Sessions Judge on the latter's standing seized with an appeal preferred therebefore by the accused/convict not rendering the apposite pronouncement made by the learned Additional Sessions Judge being amenable to a construction qua its making ensuing from the learned Additional Sessions Judge trying the accused, reiteratedly when evidently the trial of the accused stood conducted by the learned trial Magistrate whereupon he stood convicted besides sentenced thereat alone the State Government held the statutory leverage to avail the apposite statutory provisions engrafted in Section 377 Cr.P.C. for its thereupon assailing before the learned Sessions Judge the sentence of imprisonment imposed upon the accused by the trial Magistrate besides seek its enhancement

therefrom. Reinforcingly, it was apt for the State Government to assail under Section 377 Cr.P.C. the sentence pronounced upon the accused/convict by the learned appellate Court only when it had held the accused to trial. However, when the learned appellate Court did not try the accused rather when the trial of the accused stood conducted by the learned trial Magistrate on consummation whereof the accused stood convicted besides stood sentenced to undergo imprisonment whereupon his standing aggrieved by the apposite pronouncement recorded by the learned trial Magistrate he preferred an appeal before the learned appellate Court wherebefore despite the State Government holding the apposite statutory empowerment to therebefore contest the adequacy of sentence imposed upon the accused by the trial Court its yet waiving its apposite statutory empowerment renders its concert herebefore by anviling it upon Section 377 Cr.P.C. to warrant its standing discountenanced by this Court. The objection raised by the learned counsel for the respondent/accused qua the maintainability of the instant appeal constituted before this Court by the State under Section 377 Cr.P.C., is upheld. However, at this stage, the learned Deputy Advocate General seeks permission of this Court to withdraw the instant appeal with liberty reserved to the appellant herein to institute an appropriate revision petition before this Court for assailing the pronouncement of sentence imposed upon the accused/convict by the learned appellate Court. Prayer accepted. Accordingly, the appeal stands dismissed as withdrawn. However, liberty stands reserved to the appellant herein to by instituting an apposite revision petition before this Court, impugn the sentence pronounced upon the accused/convict by the learned first appellate Court. Also it shall be open to the appellant herein to avail the benefit of Section 14 of the Limitation Act. Records of the Courts below be sent back forthwith.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Dr. Sushant Deshta …Petitioner.

Versus

State of H.P. and others …Respondents.

CWP No. 4508 of 2015
Judgment reserved on : 16.11.2016
Date of decision: 15. 12. 2016.

Constitution of India, 1950- Article 226- The delimitation process for ZilaParishadTikkar Ward was concluded on 20.8.2015 – petitioner raised objections and delimitation was set aside – a direction was issued to complete the delimitation process in accordance with Rule 9 of H.P. Panchayati Raj (Election) Rules, 1994 – model code of conduct came into force in the meantime – the final order of delimitation was passed – writ petitions were filed, which were dismissed as infructuous – the order passed by Deputy Commissioner completing the process of delimitation was challenged and the appeal was allowed- writ petition was filed challenging the order of election petition and the notification – held, that democracy is a basic feature of the Constitution- a specific procedure has been prescribed under the Rules and there is no possibility of deviating from the same – the procedure prescribed under the Rules is mandatory and has to be scrupulously followed – proposal regarding delimitation was required to be forwarded to the offices of ZilaParishad, Panchayat Samiti and Gram Panchayat for inviting objections – proposals were to be affixed on the notice board by the Secretaries of respective ZilaParishad, Panchayat Samiti and Gram Panchayat in the presence of two independent witnesses- no such exercise was undertaken – the language of the objections was same – Deputy Commissioner recorded the joint statements of the objectors – objections were not decided specifically – non-consideration of relevant material would make the order perverse and the Court has power to interfere with the same in exercise of judicial review – the authority is bound to given reasons in support of the objections - the order passed by Deputy Commissioner set aside- final order of delimitation also quashed and set aside.(Para-11 to 68)

Cases referred:

People's Union for Civil Liberties (PUCL) and another vs. Union of India and another (2003) 4 SCC 399
Dattatraya Moreshwar vs. The State of Bombay and others, AIR 1952 SC 181
State of U.P. and others vs. Babu Ram Upadhya, AIR 1961 SC 751
Raza Buland Sugar Co. Ltd. Rampur vs. Municipal Board, Rampur, AIR 1965 SC 895
Sharif-Ud-Din vs. Abdul Gani Lone, (1980) 1 SCC 403
Nazir Ahmad vs. King Emperor (AIR 1936, PC 253)
Rao Shiv Bahadur Singh and anr. vs. State of Vindh-P, AIR 1954, SC 322; Deep Chand vs. State of Rajasthan, AIR 1961 SC 1527
State of Uttar Pradesh vs. Singhara Singh and Ors, AIR 1964, SC 358
Chandra Kishore Jha vs. Mahavir Prasad, 1999 (8) SCC 266
Dhananjaya Reddy vs. State of Karnataka, 2001 (4) SCC 9
State of Jharkhand & Ors vs. Ambay Cements and anr. (2005) 1 SCC 368
Gujarat Urja Vikas Nigam Limited vs. Essar Power Limited, 2008 (4) SCC 755
Zuari Cement Ltd vs. Regional Director, ESIC, Hyderabad & Ors., AIR 2015, SC 2764
Uddar Gagan Properties Ltd. vs. Sant Singh and Ors. 2016 (5) JT 389
Daya Ram vs. Raghunath (2007) 11 SCC 241
Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank vs. Jagdish Sharan Varshney and others (2009) 4 SCC 240
Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others (2010) 9 SCC 496

For the Petitioner	Mr. B.C. Negi, Senior Advocate, with Mr. Raj Negi, Advocate.
For the Respondents	Mr. Shrawan Dogra, Advocate General, with Mr. Rupinder Singh and Ms. Meenakshi Sharma, Addl. A.Gs. with Mr. Kush Sharma, Deputy Advocate General, for respondents No. 1 and 2. Ms. Nishi Goel, Advocate, for respondent No.3. Mr. Sunil Mohan Goel, Advocate, for respondent No.4. Mr. B.S. Chauhan, Advocate, with Mr. Munish Datwalia, Advocate, for respondents No. 5 to 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The instant writ petition has been filed for directing the respondents authorities to retain the Zila Parishad Ward Tikkar in its original form i.e. as existing in the year 2010 and the orders to the contrary, be quashed and set-aside.

Certain undisputed facts may be noticed.

2. The delimitation process for the Zila Parishad Tikkar Ward was concluded on 20.8.2015. However, based upon the objections raised by the petitioner, delimitation qua the constituencies of Zila Parishad Shimla including Tikkar Ward was set-aside by the Divisional Commissioner, Shimla vide his order dated 9.9.2015 and the matter was remanded back to the Deputy Commissioner, Shimla to complete the delimitation process in accordance with Rule 9 of the Himachal Pradesh Panchayati Raj (Election) Rules, 1994 (for short Election Rules). However, before these objections could be decided, the State Election Commission vide notification dated 6.10.2015 issued the Model Code of Conduct and vide another notification dated 9.10.2015 the State Election Commission had given effect to Clause 12.1 of the Model Code of Conduct which inter alia provided as under:

"12.1. The structural, classification or area of the Panchayats and Municipalities shall not be altered during a period of one hundred twenty days ending on the date on which the five year term of the said institutions are due to expire, no decision taken earlier shall be implemented during this period."

3. In compliance to the order of remand, the Deputy Commissioner again issued the final order of delimitation on 15.10.2015 qua the constituencies of Zila Parishad, Shimla which included the Zila Parishad Ward, Tikkar. In the meanwhile, certain writ petitions came to be filed before this Court assailing therein the delimitation process. However, vide judgment dated 28.10.2015 writ petitions were dismissed as having rendered infructuous in view of notification dated 9.10.2015 (supra).

4. It is averred that it was after passing of the judgment by this Court on 28.10.2015 that the State Election Commission vide notification dated 2.11.2015 withdrew Clause 12.1 (supra) as had been given effect to vide notification dated 9.10.2015. In the meantime, the petitioner assailed the subsequent order passed by the Deputy Commissioner on 15.10.2015 by filing an appeal before the learned Divisional Commissioner and the same was allowed vide judgment dated 6.11.2015. It is alleged that the respondents-authorities on 6.11.2015 itself set into motion delimitation process qua Zila Parishad Wards in question.

5. On 9.11.2015 the proposal for delimitation was required to be kept open for inspection in the office of the concerned Zila Parishad, Panchayat Samiti, Gram Panchayats. However, as the proposal qua delimitation was not received, the same was not done. It is further averred that majority of the Panchayat Secretaries of the Gram Panchayats falling within the Zila Parishad Ward, Tikkar have categorically stated that till 12.11.2015 no proposal for delimitation of Zila Parishad had been received by the concerned Gram Panchayats and the copies of such letters have been annexed as Annexure P-11 with the petition. At the same time, it is also averred that some of the persons did object by filing objections and the same were rejected without application of mind in a slip shod and cursory manner vide the impugned order dated 16.11.2015 and the delimitation qua Zila Parishad Ward Tikkar and other Zila Parishad Wards in District Shimla have been retained as had been previously detailed vide letters dated 3.10.2015 and 15.10.2015, respectively.

6. Based upon the aforesaid averments, the petitioner has sought quashing the notification dated 2.11.2015 (Annexure P-15) whereby the State Election Commission withdrew Clause 12.1 as had been given effect to vide notification dated 9.10.2015 (Annexure P-8). In addition thereto, the petitioner has also sought quashment of order dated 16.11.2015 (Annexure P-13) whereby respondent No.2 dismissed the objections filed by the petitioner and the further notification issued on 16.11.2015 (Annexure P-14) whereby he passed the final order of delimitation, as would be evident from the relief clause which reads thus:-

"i) *Issue a writ of certiorari to quash Annexure P-15, 16 i.e. notifications dated 2.11.2015 (whereby Election Commission withdrawn notification dated 9.10.2015).*

(ii) Issue a writ of mandamus directing the respondent authorities not to implement Annexure P-15, 16 i.e. notifications dated 2.11.2015.

(iii) Issue a writ of certiorari to quash Annexure P-13, 14 i.e. office order dated 16.11.2015 and letter dated 16.11.2015.

(iv) Issue a writ of mandamus directing the respondent authorities not to implement Annexure P-13, 14 i.e. office order dated 16.11.2015 and letter dated 16.11.2015.

(v) Issue a writ of mandamus directing the respondent authorities to retain Zila Parishad Ward Tikkar in its original form as existing in the year 2010."

7. The Principal Secretary, Panchayati Raj and Deputy Commissioner, Shimla (respondents No.1 and 2) have filed joint reply wherein they have raised certain preliminary

objections and thereafter contested the claim of the petitioner on merits. The factual sequence of events has not been denied. It is averred that there was no procedural lapse on the part of the respondents either at the time of inviting or while deciding the objections regarding delimitation and in support of their claim, have relied upon the objection filed by the petitioner to contend that the proposal for delimitation was given wide publicity. In addition thereto, it has been averred that e-mail of draft notification of Zila Parishad Ward Tikkar was sent to the concerned executive officer Panchayat Samiti-cum-Block Development Officers for compliance and wide publicity was made in press and notification was also affixed in Zila Parishad office and DPO Office and this is the usual procedure of communication with the BDO Office.

8. As regards the notification dated 9.10.2015 and subsequent notification dated 2.11.2015, it is averred that these notifications have been issued by the State Election Commission and have no effect on the delimitation of Zila Parishad as it is only applicable to the re-organization of Gram Panchayat.

9. The Election Commission (respondent No.3) has filed its separate reply wherein it is averred that in pursuance to the provisions enshrined under Article 243E(3)(a) of the Constitution of India and Section 120 (2) (a) of the Himachal Pradesh Panchayati Raj Act, 1994, the State Election Commission has to conduct elections of Panchayati Raj Institutions before the expiry of five years term which was to expire on 21.1.2016. Therefore, in order to complete the election process, the Commission requires about 120 days to complete the statutory requirement and, therefore, enforced Clause 12.1-organizational-status-quo of the Model Code of Conduct so that the structural classification or area of the Panchayat and municipalities would not be altered during the period of 120 days ending with the date on which the five years term of the said institutions were due to expire. Accordingly, the notification dated 9.10.2015 was issued. However, thereafter, the Commission received requests from the Department of Urban Development and Department of Panchayati Raj vide their letters dated 2.11.2015 whereby they had requested the Commission to enforce the Clause 12.1 of the Model Code of Conduct only from the date of implementation i.e. 9.10.2015 or else it would result in delimitation and reservation in respect of those Panchayats which were altered due to inclusion of the areas in certain Municipalities, creation of Municipal Corporation, Dharamshala etc. The request was considered and the Commission found justification in the same and, therefore, in order to avoid fresh delimitation, the clarification/amendment was issued to implement the clause. The intention of the Commission was to enforce the Clause 12.1 of the Model Code of Conduct with immediate effect on 9.10.2015 as finds mention in notification itself but was constrained to amend the same in view of representations mentioned supra which then led to issuance of notification dated 2.11.2015.

10. During the pendency of the petition, three persons who claimed to have contested the elections, moved an application being CMP No. 6571 of 2016 seeking their impleadment as parties and the same was allowed vide order dated 24.8.2016 and the applicants were impleaded as respondents No. 5 to 7 in the writ petition. These respondents have not chosen to file separate reply and during the course of arguments have adopted the reply as also the arguments addressed on behalf of the official respondents.

I have heard learned counsel for the parties and have gone through the material placed on record.

11. There can be no gainsaying that democracy is a basic feature of the Constitution. The democratic set-up of the country has always been recognized as a basic feature of the Constitution, like other features example Supremacy of the Constitution, Rule of law, Principle of separation of powers, Power of judicial review etc.

12. In ***People's Union for Civil Liberties (PUCL) and another vs. Union of India and another (2003) 4 SCC 399***, the Hon'ble Supreme Court held as under:

> *"94. The trite saying that 'democracy is for the people, of the people and by the people' has to be remembered for ever. In a democratic republic, it is the will of the*

people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by this Court in Lily Thomas Vs. Speaker, Lok Sabha [(1993) 4 SCC 234] quoting from Black's Law Dictionary. The citizens of the country are enabled to take part in the Government through their chosen representatives. In a Parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makers and custodians of Government. People look to them for ventilation and redressal of their grievances………"

13. It was on account of 73rd amendment to the Constitution by which Part-IX consisting of Article 243 to Article 243(O) has been introduced in the Constitution. The Constitution of Panchayats has been prescribed under Article 243-B and same reads thus:

"243B. Constitution of Panchayats

(1) There shall be constituted in every State, Panchayats at the village, intermediate and district levels in accordance with the provisions of this Part

(2) Notwithstanding anything in clause (1), Panchayats at the intermediate level may not be constituted in a State having a population not exceeding twenty lakhs."

14. It is in the light of the aforesaid provisions of the Constitution that one has to examine the provisions of the H.P. Panchayati Raj Act, 1994 (for short 'Act'), H.P. Panchayati Raj Rules or for that matter the H.P. Panchayati Raj (Election) Rules, 1994 (for short Election Rules) as these have been enacted so as to bring these in conformity with the amended provisions of 73rd amendment of the Constitution.

15. Section 8 of the Act, provides for Constitution of Gram Panchayats and reads thus:

"8. Constitution of Gram Panchayats.-

(1) There shall be a Gram Panchayat for a Gram Sabha and every Gram Sabha shall, in the prescribed manner, elect from amongst its members a [Pradhan and Up-Pradhan] of the Sabha who shall also be called the [Pradhan and Up-Pradhan] of the Gram Panchayat and shall also elect from amongst its members an Executive Committee called the Gram Panchayat consisting of such number of persons not being less than seven and more than fifteen, including [Pradhan and Up-Pradhan] as the Government may by notification determine:

[Provided that the number of members excluding [Pradhan and Up-Pradhan] to be assigned to each Gram Sabha, shall be determined on the following scale:-

(a) with a population not exceeding 1750 .. five

(b) with a population exceeding 1750 but not exceeding 2750 .. seven

(c) with a population exceeding 2750 but not exceeding 3750 ..nine

(d) with a population exceeding 3750 but not exceeding 4750 ..eleven

(e) with a population exceeding 4750 ..thirteen:]

Provided further that the number of members of a Gram Panchayat, excluding [Pradhan and Up-Pradhan] shall be determined in such a manner that the ratio between the population of the Gram Sabha and the number of seats of members in such a Panchayat to be filled by election shall, so far as practicable, be the same throughout the Sabha area:

[Provided further that the member of the Panchayat Samiti, representing a part or whole of the Gram Sabha area shall also be the member of the concerned Gram Panchayat(s) and shall have the right to vote.]

(2) Seats shall be reserved in a Gram Panchayat--

(a) for the Scheduled Castes, and

(b) for the Scheduled Tribes,

and the number of seats so reserved shall bear, as nearly as may be, same proportion to the total number of seats in the Gram Panchayat as the population of the Scheduled Castes or the Scheduled Tribes in the Sabha area bears to the total population of the Sabha area:

Provided that in case no reservation of seats is possible as aforesaid due to small population of the Scheduled Castes and the population of Scheduled Castes of the Sabha area is atleast five percent of the total population of the Sabha area, one seat shall be reserved for the Scheduled Castes in such a Gram Panchayat:

Provided further that where there is no eligible candidate belonging to the Scheduled Castes to be elected as a member of the Gram Panchayat, no seat shall be reserved for Scheduled Castes:

Provided further that in non-tribal areas where there is Scheduled Tribes population in a Gram Sabha, seats shall be reserved for such members of the Scheduled Tribes within the reservation provided for the members of the Scheduled Castes and the determination of seats to be reserved amongst the Scheduled Castes and Scheduled Tribes shall be in proportion to their population in that Gram Sabha.

Explanation. *- The expression "non-tribal area" for the purpose of this proviso shall mean the areas other than the Scheduled Areas specified in relation to the State of Himachal Pradesh.*

(3) [One-half] of the total number of seats reserved under sub-section (2) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.

(3-A) [One-half] (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Gram Panchayat shall be reserved for women.]

(4) The State Government may, by general or special order, reserve such number of seats for persons belonging to Backward Classes in a Gram Panchayat, not exceeding the proportion to the total number of seats to be filled by direct election in the Gram Panchayat as the population of the persons belonging to Backward Classes in that Gram Sabha area bears to the total population of that area and may further reserve [one-half] of the total seats reserved under this sub-section for women belonging to Backward Classes.

(5) The seats reserved under sub-sections (2),(3), (3-A)] and (4) shall be allotted by rotation to different constituencies in the Sabha area in such manner as may be prescribed.

(6) If for any reason the election to any Gram Panchayat does not result in the election of required number of persons as specified in sub-section (1), the Deputy

Commissioner, shall within one month from the date on which the names of the elected persons are published by him under section 126 arrange another election to make up the deficiency."

16. Section 124 of the Act, reads thus:

*"**124. Territorial Constituencies**.- For the convenience of the election and also after every increase increase or decrease of the Panchayat area, the Deputy Commissioner shall, in accordance with such rules as may be prescribed in this behalf by the State Government-*

(a) divide the Panchayat area into as many single member territorial constituencies as the number of members are required to be elected:

(b) determine the extent of each territorial constituency; and

(c) determine the territorial constituency or constituencies in which seats are reserved under this Act.]

17. Chapter-II of the Election Rules, deals with the delimitation of Constituencies of Panchayats and the relevant Rules contained therein reads thus:

"DELIMITATION OF CONSTITUENCIES OF PANCHAYATS

3. Gram Sabha area to be divided into constituencies.-

(1) For the purpose of holding of election of members to a Gram Panchayat the Sabha area shall be divided into constituencies.

(2) The number of constituencies under sub-rule (1) shall be deter-mined in accordance with the provisions of section 8.

4. Limits of constituencies.*- (1) As far as practicable each constituency shall have equal population and each constituency shall be geographically compact and contiguous in areas and shall have natural boundaries, such as roads, paths, lanes, streets, streams, canal , drains, jungles, house No., ridges or such other marks which can easily be distinguished.*

(2) The constituency shall be delimited from the map of the Gram Sabha starting from North towards East and ending towards South to West direction.

(3) one member shall be elected from each constituency.

(4) The limits of each constituency shall be defined in all four direc-tions as follows:-

(i) Bounded on the North by ....

(ii) Bounded on the South by ....

(iii) Bounded on the East by ....

(iv) Bounded on the West by ....

5. Proposal for delimitation of constituencies and its publication.-

The Deputy Commissioner or any other officer, authorised by him in this behalf shall cause to be published a proposal for delimitation of constituencies by dividing a Gram Sabha area into constituencies and shall also indicate the territorial limits of each such constituency and shall keep the proposal open for inspection in the office of the Gram Panchayat, Panchayat Samiti within the territorial jurisdiction of which such sabha area falls and by affixing a copy of the same at two conspicuous places within such sabha area for inviting public objections thereon, within 7 days.

6. Disposal of objections and final order*.-The Deputy Commissioner, or any other officer authorised by him in this behalf, on receipt of objections, if any, under rule 5 shall inquire into the same and shall consider them within a period of seven days or such a shorter time as may be fixed by the Government and final order of*

delimitation of constituencies shall be made by him only after recording brief reasons for the acceptance or rejection of the objections.

***7. Name and number of constituency**.-Each constituency shall be known by the number given to that constituency, serially and it shall also be given a name, if practicable.*

***8. Delimitation of constituencies of a Panchayat Samiti**.-(1) The Deputy Commissioner or any other officer authorised by him in this behalf shall divide the Panchayat Samiti area into as many single member territorial constituencies as the number of members is required to be elected under sub-section (3) of section 78.*

(2) While delimiting the constituencies of a Panchayat Samiti, constituency of the Gram Panchayat shall be a unit. The constituencies shall be delimited from the map of the Panchayat Samiti area starting from North towards East and ending towards South to West, and every constituency of a Panchayat Samiti shall be assigned a serial number and the name of the Constituency of Panchayat Samiti. The name of constituency of a Panchayat Samiti may be assigned on the name of a Gram Sabha having largest population in that constituency.

(3) The limits of each constituency shall be defined in all four directions as follows:-

(i) Bounded on the North by ....

(ii) Bounded on the South by ....

(iii) Bounded on the East by ....

(iv) Bounded on the West by ....

(4) The Deputy Commissioner or any other officer authorised by him in this behalf, shall cause to be published a proposal for delimitation of constituencies by dividing a Samiti area into single member constituencies and shall also indicate the territorial limits of each such constituency and shall keep the proposal open for inspection in the office of the Panchayat Samiti and in each of offices of Gram Panchayats falling within the Panchayat Samiti area and by affixing copy of such proposal at two conspicuous places in each Sabha area for inviting public objections thereof, within seven days.

(5) The Deputy Commissioner, or any other officer authorised by him in this behalf on receipt of objections, if any, under sub-rule (4) shall inquire into the same and shall consider them within a period of seven days or such shorter periods as may be fixed by the Government and final order of delimitation of constituencies shall be issued by him only after recording in brief the reasons for the acceptance or rejection of such objection.

***9. Delimitation of constituencies of a Zila Parishad**.-*

(1) The Deputy Commissioner shall divide the Zila Parishad area into as many single member territorial constituencies as the number of members are required to be elected under sub-section (2) of section 89.

(2) While delimiting the constituencies of Zila Parishad, Sabha area shall be a unit. The constituencies shall be delimited from the map of the Zila Parishad area starting from North towards East and ending towards South to West and every constituency shall be assigned serial number and the name. The name of constituency may be assigned on the name of a Gram Sabha having the largest population in that constituency.

(3) The limits of each constituency shall be defined in all four directions as follows:-

(i) Bounded on the North by ....

(ii) Bounded on the South by ....

(iii) Bounded on the East by ....

(iv) Bounded on the West by ....

(4) The Deputy Commissioner, shall cause to be published a proposal for delimitation of constituencies by dividing a Zila Parishad area into single member constituencies and also indicate the territorial limits of each such constituency and shall keep the proposal open for inspection in the office of the Zila Parishad, Panchayat Samiti and in each of the offices of Gram Panchayats falling within the Zila Parishad area and by affixing a copy of such proposal at two conspicuous places within each Sabha area for inviting public objections thereon, within seven days.

(5) The Deputy Commissioner on receipt of objections, if any, under sub-rule (4) shall inquire into the same and shall consider them within a period of seven days and final order of delimitation shall be issued by him only after recording in brief the reasons for the acceptance or rejection of such objections.

***10. Appeal**.-Any elector aggrieved by the orders of the Deputy Commissioner may file an appeal to the Divisional Commissioner within a period of 10 days and who, after giving an opportunity of being heard to the appellant shall decide the same within a period of 15 days and communicate his orders thereon to the Deputy Commissioner. The order passed by the Divisional Commissioner shall be final.*

***11. Final publication of delimitation of constituencies.**-*

(1) The delimitation made under rules 6, 8 and 9 shall be amended in the light of the orders of the Divisional Commissioner, if any, made under rule 10 and the delimitation shall be finalised within a period of 30 days from the date of publication of the proposal in this behalf. A copy of the final orders of the delimitation of constituencies of the Panchayats shall be affixed on the notice boards of the offices of the Deputy Commissioner, Zila Parishad, Panchayat Samiti, Gram Panchayat and at such other places as the Deputy Commissioner may decide and the copies of the same shall also be sent to the State Election Commission and the State Government.

(2) An elector may obtain a copy of the final delimitation order by making an application to the Deputy Commissioner or to the Secretary of the Zila Parishad, Panchayat Samiti, Gram Panchayat, as the case may be, who shall make available the same to the said elector on payment of rupees five per page or part thereof against cash receipt.]"

18. The aforesaid provisions make it crystal clear that a specific procedure has been prescribed under the statutory rules and, therefore, there is no possibility of making any deviation therefrom by the authorities concerned.

19. Now, the further question that would arise for consideration is as to whether the procedure envisaged for proposal of delimitation of Zila Parishads is mandatory or directory. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose it seeks to achieve. It may also be necessary to find out the intent of the legislature for enacting such a provision and the serious and general inconveniences or injustice to persons relating thereto from its application. The provision is mandatory if it is passed for the purpose of enabling the doing of something and prescribes the formalities for doing certain things.

20. In ***Dattatraya Moreshwar vs. The State of Bombay and others, AIR 1952 SC 181,*** the Hon'ble Supreme Court has laid down that law which creates public duties is directory but it if confers private rights it is mandatory. Relevant passage from this judgment is quoted below:

> *"It is well settled that generally speaking the provisions of the statute creating public duties are directory and those conferring private rights are imperative. When the provision of a statute relate to the performance of a public duty and the*

case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of legislature, it has been the practice of the Courts to hold such provisions to be directory only the neglect of them not affecting the validity of the acts done."

21. In ***State of U.P. and others vs. Babu Ram Upadhya, AIR 1961 SC 751,*** a Constitution Bench of the Hon'ble Supreme Court considered the issue as to whether the provision involved in the said case was mandatory and held as under:

> *"For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."*

22. In ***Raza Buland Sugar Co. Ltd. Rampur vs. Municipal Board, Rampur, AIR 1965 SC 895,*** the Hon'ble Supreme Court held that whether a provision is mandatory or directory, would, in the ultimate analysis, depend upon the intent of the law-maker and that has to be gathered not only from the phraseology of the provision but also by considering its nature, its design and the consequence which would follow from construing it in one way or the other.

23. In ***Sharif-Ud-Din vs. Abdul Gani Lone, (1980) 1 SCC 403,*** the Hon'ble Supreme Court while considering the provisions of sub-section (3) of Section 89 of the J & K Representation of People Act, 1957, held that the difference between a mandatory and directory rule is that the former requires strict observance while in the case of latter, substantial compliance of the rule may be enough and where the statute provides that failure to make observance of a particular rule would lead to a specific consequence, the provision has to be construed as mandatory. The Hon'ble Supreme court held as under:-

> *"In order to find out the true character of the legislation, the court has to ascertain the object which the provision of law in question is to sub-serve and its design and the context in which it is enacted. If the object of the law is required to be defeated by non-compliance with it, it has to be regarded as mandatory….Whenever the statute provides that a particular act is to be done in a particular manner and also lays down that the failure to compliance with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow."*

24. On the basis of the aforesaid exposition of law, it can conveniently be held that in order to declare a provision mandatory, the test to be applied is as to whether non-compliance of the provision could render entire proceedings invalid or not. Further, whether the provision is mandatory or directory, depends upon the intent of Legislature and not upon the language for which the intent is clothed.

25. Examined in the light of the law referred to above, this Court entertains no doubt that the procedure as prescribed under Chapter-II of the Election Rules is mandatory and is, therefore, required to be scrupulously followed. Statutory provisions have a very serious repercussion and it, therefore, implicitly makes it imperative and obligatory on the part of the authority to have strict adherence to such provisions.

26. It is not in dispute that it was in exercise of the powers under Rule 10 that the Divisional Commissioner had initially vide order dated 9.9.2015 and thereafter subsequently vide order dated 6.11.2015 set-aside the entire process of delimitation of the constituencies of Zila

Parishad, Shimla on the ground that this exercise was in violation of Rule 9 of the Election Rules (supra). Pertinently, though, vide subsequent order dated 6.11.2015, the appeal filed by the petitioner was accepted, yet, this was not followed by an order of remand, however, that part of the order as passed by the Divisional Commissioner can only be taken to be an oversight having no effect on the merits of the case. However, at the same time, this Court will have to fall back on the initial order passed by the Divisional Commissioner on 9.9.2015 as to what precisely was required to be done by respondent No.2 after the order passed by him had been set aside, the relevant portion whereof reads thus:

> *"In view of the above discussions, the appeal is accepted and the order for final delimitation issued qua the constituencies of Zila Parishad Shimla, District Shimla is set aside and case is remanded back to the Deputy Commissioner, Shimla with the direction to complete the delimitation proceedings afresh as per Rule 9 of the H.P. Panchayati Raj (Election) Rules, 1994. It will also be appropriate for the Deputy Commissioner, Shimla to direct the Block Development Officers, Panchayat Secretaries and District Panchayat Officer concerned to display the draft notification on the notice board in the presence of two independent witnesses and send a certificate to this effect to them for record purposes. A copy of this order be sent to the Deputy Commissioner Shimla through special messenger for taking further action and case file of this Court be consigned to the Record Room after due completion."*

27. From the aforesaid extracted portion of the order, it would be evidently clear that respondent No.2 in order to complete the delimitation proceedings afresh and thereby comply with the order passed by the Divisional Commissioner was required to ensure:

- *(i) that the process of delimitation is undertaken afresh as per Rule 9 of the Election Rules;*
- *(ii) ensure that the Block Development Officers, Panchayat Secretaries and District Panchayat Officer concerned, display the draft notification on the notice board in the presence of two independent witnesses and send a certificate to this effect to him for record purposes.*

28. In order to satisfy myself as to whether these directions had in fact been complied with in letter and spirit, the records of the Deputy Commissioner were summoned. The records reveal that immediately after passing of the order by the Divisional Commissioner on 6.11.2015 and even before the receipt of copy thereof, a note in vernacular was put up to the Deputy Commissioner, the English translation whereof reads as under:

> "***In the ofice of District Panchayat Officer***
>
> *Kindly peruse: With reference to the appeal filed by Dr. Sushant Deshta, S/o Sh. Devender Deshta, R/o village Khangta, P.O. Tikkar, Tehsil Rohru, District Shimla, H.P., Sh. Ritesh Keprat S/o Sh. Hariman Prakash Keprat, R/o village and Post office Purag, Tehsil Kotkhai, District Shimla and Sh. Gopal Sharma S/o Sh. Vasudev Sharma, village Moonga, P.O. Chamba, Tehsil Suni, District Shimla, H.P. and others against the Notification dated 15.10.2015, issued by the Deputy Commissioner regarding delimitation, Ld. Divisional Commissioner on 6.11.2015, in the presence of District Panchayat officer, other officials of the office and appellants set aside and quashed the Notification dated 15.10.2015 as the Notification regarding re-constitution of the Zila Parishads has not been issued in accordance with the provisions of Act/Rules. In this regard it is submitted that notifications regarding delimitation of the wards of Zila Parishad, Shimla have already been issued twice earlier. Therefore, in compliance of the orders of the Ld. Divisional Commissioner dated 6.11.2015, notification regarding delimitation will have to be issued afresh and it will not be desirable to wait for the written orders of Ld. Divisional Commissioner because very little time is left for the election of the Panchayati Raj institutions and delimitation of constituencies is a lengthy process.*

It is further submitted that notification regarding delimitation of the Panchayati Raj Institution was issued on 20.8.2015 and appeal against the said notification could be filed before the Hon'ble Divisional Commissioner from 21.8.2015 to 30.8.2015. During this period 10 appeals were filed before the Ld. Divisional Commissioner which was heard by him on 9.9.2015. While deciding the aforesaid appeals, he observed that wards of Zila Parishad have been notified by the Deputy Commissioner on the basis of the Census of 2011 whereas in the draft notification, ward and villages were notified as per the elections held in 2010, which leads to uncertainty as to whether the Deputy Commissioner entertained the objections from the general public or not. He has pointed out in his order that as per the provisions of rule 9(4) and 9(5), a draft proposal was required to be prepared at the first instance and thereafter objections/queries of the public were to be received. Final notification was to be issued after considering the objection & passing appropriate orders regarding objections He also observed that proposal regarding the delimitations were not prepared as per rules and public was not given appropriate opportunity to file the objections.

He accepted all the aforesaid appeals and set aside the orders of Deputy Commissioner regarding delimitation of the wards of Zila Parishad with the direction to start afresh the delimitation process as per Rule 9 of the Panchayati Raj (Election) Act, 1994. Further, Block Development officers, Panchayat Secretaries and District Panchayat Officers were directed to display the draft notification on the notice board in the presence of two independent witnesses.

Complying with the aforesaid orders of Ld. Divisional Commissioner, final proposals of delimitation of wards of Zila Parishad as existed in 2010 were considered as the draft proposals and accordingly on 3.10.2015, draft proposals regarding delimitation were re-issued. On 15.10.2015, after hearing the objections received in this regard, notification was issued by Deputy Commissioner and appeal against the said notification could be filed before the Hon'ble Divisional Commissioner w.e.f. 16.10.2015 to 25.10.2015. During this period, 3 appeals were filed before Ld. Divisional Commissioner which were heard by him and on 6.11.2015, he set aside the orders of Deputy Commissioner. He also observed in his order that the Deputy Commissioner did not comply the orders passed by his office on 9.9.2015 and the same discrepancy was noticed in the notification regarding delimitation issued on 3.10.2015 which was found in the draft notification issued on 7.8.2015 and the orders passed by him have not been adhered to.

In this regard it is submitted that Ld. Hon'ble Divisional Commissioner ordered that the objections raised by the appellants be included in the proposals and thereafter draft notification regarding the de-limitation be issued. After hearing the objections received on these draft notifications and passing an order qua their appropriateness. The orders be included in the final publication and the notification be issued.

Sir, in compliance of the orders of Hon'ble Divisional Commissioner, proposal of delimitation of the wards of Zila Parishad has been prepared as per Section 124 of the Himachal Pradesh Panchayati Raj Act, 1994 and as per the provisions contained in the Rule 5, 8, 9 of the Himachal Pradesh Panchayati Raj(Election) Rules, 1994.(flag "K") and copies of proposal regarding delimitation of wards will be forwarded to the offices of Zila Parishad, Shimla, all Panchayat Samitis and Gram Panchayats for inviting objections and same will be affixed on the notice boards by the secretaries of respective Zila Parishads'/Panchayat Samiti and Gram Panchayats' in the presence of two independent witnesses whose signatures will also be obtained. Further concerned secretaries of Zila Parishads'/Panchayat Samiti and Gram Panchayats will furnish certificate in this

regard. To complete the further proceeding in respect of de-limitation of wards, the following schedule shall be followed:

Sl. No.	*Particulars of proceedings*	*Prescribed time period*	*Authorized officer/place*
1.	*Publication of the delimitation process of the wards of Zila Parishad.*	*6.11.2005*	*By the Deputy Commissioner, Shimla*
2.	*Displaying the lists of the wards of Zila Parishad for perusal*	*w.e.f. 7.11.2015 to 13.11.2015(7 days')*	*Offices of the concerned bodies*
3.	*Hearing of the objections in respect of the delimitation of the wards of Zila Parishad.*	*16.11.2015*	*By the Deputy Commissioner, Shimla*
4.	*Passing of the final orders by the Deputy Commissioner in respect of the publication of delimitation process of the wards of Zila Parishad after hearing the objections raised in this respect.*	*16.11.2015*	*By the Deputy Commissioner, Shimla*
5.	*Filing of the appeal against the final orders passed by the Deputy Commissioner regarding the publication of delimitation process of the wards of Zila Parishad after hearing the objections raised in this respect.*	*w.e.f. 17.11.2015 to 26.11.2015 (with in 10 days')*	*To the Divisional Commissioner, Shimla*
6.	*Decision regarding the appeals by the Divisional Commissioner*	*27.11.2015 to 1.12.2015*	*By the Divisional Commissioner, Shimla*
7.	*After deciding the appeals by the Divisional Commissioner, final publication regarding the delimitation of the wards*	*2.12.2015*	*By the Divisional Commissioner, Shimla*

File is submitted for favour of consideration, approval and signatures, please.

Sd//"

29. A perusal of the aforesaid noting reveals that the respondents even before the receipt of the copy of the order passed by the Divisional Commissioner very well knew and understood the content and directions passed by the Divisional Commissioner whereby the proposal regarding delimitation of wards was required to be forwarded to the offices of Zila Parishad, Shimla, all Panchayat Samitis and Gram Panchayats for inviting objections and same were to be affixed on the notice boards by the Secretaries of respective Zila Parishads'/ Panchayat Samiti and Gram Panchayats' and this was to be effected in the presence of two independent witnesses whose signatures were to be obtained.

30. However, the further scrutiny of record reveals that practically no such exercise, in fact, had been undertaken by the respondents. There is nothing on the record to indicate that the proposal regarding delimitation for inviting the objections was affixed on all notice boards by the Secretaries of the concerned authorities and further there is no document evincing the signatures of two independent witnesses that were required to be obtained, which clearly indicates that the directions passed by the Divisional Commissioner had not at all been complied with before issuance of final order of delimitation.

31. No doubt, some objections had been filed. However, from a closer scrutiny of these objections, it transpires that though some of the persons could lay their hands on the proposal regarding delimitation and had filed their specific objections. While some of the persons filed random objections without even having any knowledge regarding the proposed delimitation and had clearly stated so about the non display of the proposal regarding delimitation.

32. It is also borne out from the record that three persons i.e. Sunder Singh Nainta, Suresh Salakta and Pratap Zinta filed three separate objections, but the contents thereof were the same and reads thus:

"To

The Deputy Commissioner,
Shimla, District Shimla.

Subject: Objections with respect to the delimitation of the Zila Parishad wards/constituencies of the Panchayati Raj Institutions for the year 2015.

Sir,

With reference to your office letter No. PCH-SML/Delimitation Ward 2015-2232-42 regarding the de-limitation of the Zila Parishad, Ward Tikkar, hereby submit our objections as follows:

1. As per the census of 2011, the total population of the Zila Parishad ward Tikkar in 2010 was 23459 which comprised the seven Panchayats of Rohru, Vidhan Sabha constituency viz., Sheel, Bral, Katlah, Karchari, Karasa, Ukhali, Mahaidali and Shekhal respectively with the total population of 9443 and 8 Panchayats' of Jubbal Kotkhai i.e. Kativan, Kutari, Pujarali No.3, Dharara, Hanstari, Pujarali No.4, Sharontha and it constituent a single ward. New ward of Seema Rantadi has been carved out of aforesaid seven Panchayats with populations of 9443,Lower Koti & Munchar Panchayat of Arhal ward and Samoli and Semma Rantad; Panchayats of Dhagoli Ward. The total population of this ward is only 17369 whereas the 8 Panchayats of Tikkar area having population of 14016 has been annexed in Kotkhai. We object this move. If new ward is required to be made, then it should be carved out from the 8 Panchayats of Tikkar area which have the highest population of 14016.

2. That the 8 Panchayat(s) of aforesaid Tikkar ward, proposed to merge with Kotkhai area, having different geographical conditions, means of communication, transport and administrative access.

3. That if the delimitation of the aforesaid ward of Zila Parishad has been undertaken on the basis of the Vidhan Sabha constituencies, whether it has been implemented in the entire Shimla District? If no, then restore the status of 2010 in respect of this ward too.

4. That the Seao ward of Gram Panchayat, Pujarli No.4 which falls in the Vidhan Sabha constituency of Rohru has been included in the Kotkhai constituency.

Therefore, in view of the aforesaid objection, the Deputy Commissioner, Shimla is requested to issue the appropriate orders in the interest of general public.

Thanking you.

Applicant

Date: 12.11.2015 *Sd/-*

Place: Shimla. *Sunder Singh Neta."*

33. One Neelam Saraik also filed objections, which reads thus:

"To

The Deputy Commissioner,
Shimla, District Shimla.

Subject: Regarding objection with respect to the delimitation of Zila Parishad ward, Tharola.

Sir,

With reference to subject cited above, it is submitted that presently, it has been proposed to denotify the Zila Parishad ward, Tharol, Development Block, Jubbal-Kotkhai and to annex it in the Tikkar and Kalbog. Further, Panchayats of Jai Peeri Mata Ward have also been proposed to be included in them. Due to these alterations, Tharola ward will cease to exist which will be against the geographical and social conditions of this area. Apart from this, it will have an adverse effect at the administrative level. Proposed ward will be divided into two different Development Blocks and Sub Divisions which will create many hardships for people in getting their work done. Similarly, representatives of people will also face difficulties in executing the work of public. This adjustment will lead to many difficulties. Therefore, I completely disagree with this process and the status of 2010 be maintained.

Therefore, keeping in view the aforesaid intention and feelings of general public, I, as an elected representativeand in full state of mind, file my objection in this regard.

If necessary, you can call me to present my views personally. I will always be available for that.

Thanking you.

Yours faithfully,

Sd/-

Neelam Saraik."

34. One Ritesh Kaprate also filed random objections, which reads thus:

"To

The Deputy Commissioner, Shimla,
District Shimla, H.P.

Subject: Regarding Delimitation of Tharola Ward, Tehsil Kotkhai, District Shimla.

Sir,

This is in reference to your office notification No. PCH-SML/delimitation ward 2015-2232-42 for following objections:-

1. It is submitted that above mentioned notification regarding delimitation is without jurisdiction and against provision of law, especially when the State Election Commission vide its latest notification dated 09.11.2015 has clarified that

the notification dated 9th October, 2015 issued by the State Election Commission will have its prospective effect and the subsequent notification are not sustainable under the law.

2. It is submitted that the authorities has failed to follow the procedure prescribed under Rule 9 (4) of the Himachal Pradesh Panchayati Raj Election Rules, 1994, especially when the proposed draft of the area required to delimited from the area of Zila Parishad was neither published nor intimated to the respective affected Panchayats. The reasonable opportunity for raising the objections and hearing was not properly provided.

Therefore, your goodself is requested to restore the status of 2010 in larger public interest.

Thanking you.

Yours sincerely,

Dated: 13th Nov.,2015. *Sd/-*

Place: Shimla. *(Ritesh Keprate)."*

35. Whereas Ajay Goandka, Prem Raj Janartha, Ajay Tegta, Shamsher Sunta, Hitesh Dhanta, Virender Nainta, Nishant Kumar, Rajat Chauhan, Ankur Chauhan and Pushkar Chauhan though filed separate objections, but the contents thereof is verbatim the same and reads thus:

"Dated: 13.11.15.

To

The Deputy Commissioner,
Distt. Shimla, Himachal Pradesh.

Subject:- Objections w.r.t. notification dated 6.11.2015 vide : PHC-SML/Delimitation/Ward-2015-2232-42.

Dear Sir,

It is submitted to your kind self that I intend to file objections for the above captioned matter regarding delimitation of Zila Parishad Ward, Tikkar (Sub-division, Rohru) as under:-

1. That the Panchayats as mentioned in the draft delimitation notification of Tikkar ward i.e. Dharara, Hanstari, Kadiwan, Kuthari, Pujarli-3, Pujarli-4, Sharontha & Tikkar falls in Rohru Sub Division and development block whereas other remaining nine panchayats falls in Jubbal block & with Sub-Division, Theog.

2. That the Panchayat(s) which have been proposed to merge with Tikkar ward are geographically and topographically separated by physical barriers which are not easily accessible.

3. That the delimitation of Zila Parishad Ward on the basis of parliamentary constituency is against the established principles of law and is thus unconstitutional.

4. That it is apparent from the perusal of notification dated 09.10.2015 from the office of Election Commission that there shall not be delimitation of Zila Parishad ward(s) in the 2015 Panchayat elections.

5. That the draft notification in question has been notified in violation of established procedures of law, as the order passed by Ld. Divisional Commissioner dated 06.11.2015 whereby Ld. Div. Commissioner has quashed and set-aside the order for final delimitation issued on 15.10.2015 by Deputy Commissioner, Shimla.

6. That the proposed draft notification is not viable in its present form as it shall create a situation of pandemonium among the residents of concerned area as Tikkar ward wil fall in two different blocks and it will further increase the complexity.

7. That it is apparent from the entire series of events which has conspired till date that some political motives as well as an element of favourism is involved for the benefit of some politically influential persons.

It is, therefore, desired keeping in view the aforementioned facts that the status of year 2010 be maintained in the interest of law and justice.

Yours sincerely,
Sd/-
Ajay Gondka
S/o Sh. Khushi Ram Gondka,
Vill. Gujandli, P.O., Tikkar,
Tehsil Rohru, Distt. Shimla(HP)."

36. The Deputy Commissioner, i.e. respondent No.2 instead of deciding these objections individually, invented a noval procedure of having a joint statement of all the objectionists prepared and the same reads thus:

"JOINT STATEMENT ON BEHALF OF ALL THE OBJECTIONIST.

Dated: November 16, 2015.

We are placing on record Annexure A-1 which is a copy of statement stating that till dated 9.11.2011, no publication of the drat notification pertaining to delimitation of Ward Tikkar, proposed vide letter No. PCH-SML/delimitation/Ward-2015-2232-42, dated 6.11.2015 was received and hence was not affixed in the concerned Panchayat areas as is required under the provisions of law and moreover, statutory time period for filing objections is to be calculated thereon, i.e. after affixation has been effected.

We are also placing on record copy of Model Code of Conduct (as Annexure A-2) dated 6th October, 2015 pertaining to State Election Commission, Himachal Pradesh in which Section 12.1 reads as under:-

> *"The structural, classification or area of the Panchayats and Municipalities shall not be altered during a period of one hundred and twenty days ending on the date on which the five years term of the said institutions are due to expire, no decision taken earlier shall be implemented during this period."*

It is also averred that the draft Notification regarding the delimitation is without jurisdiction and the provisions of law as first proviso of clause 2.1 of the Himachal Pradesh Panchayats and Municipalities Model Code of Conduct, 2015 provides that the Commission may enforce different provisions of this Code on different dates and hence Commission enforced Clause 12.1 "Organizational Status Quo" of the said Code on 9th October, 2015 with immediate effect and the Commission had no intention to enforce the said Clause retrospectively. It means that Model Code of Conduct" was in force from 9th October, 2015. Moreover, Election Commission in its detailed Notification No. SEC-16-70-2014-4513-15, dated 2nd November, 2015 has stated that Notification dated 9th October, 2015 by the State Government, if not given effect, the delimitation of the Wards in respect of affected Panchayats and Municipalities will have to be undertan de-novo and Commission will have to generate the new draft electoral rolls as per delimitation, which will further delay the Election process (Annexure A-3).

It is further averred that objectionists fail to understand by any stretch of imagination that on which grounds the draft notification dated 6.11.2016 has been prepared as the Ld. Divisional Commissioner on dated 6.11.2015 has quashed and set-aside the order for final delimitation issued on 15.10.2015 and automatically all proceedings thereto ought to have been stand quashed. Hence, it is apparent on the fact of record and from the entire series of events which has conspired till date that there is a major procedural lapse in the entire process so initiated.

It is, therefore, prayed in this premise that status-quo of the year 2010 be maintained for the sake of larger public interest and in the interest of law and justice.

R O & A C

Sd/-

Objectionists: *DEPUTY COMMISSIONER, SHIMLA.*

1. Sd/- Susheel Gautam, Adv.

2. Sd/- Ritesh Keprate.

3. Sd/- Neelam Saraik.

4. Sd/- Mohinder Singh.

5. Sd/- Sunder Singh Nainta.

6. Sd/- Hitesh Dhanta."

37. This joint statement appears to have been got signed by only six of the objectionists and decided by a common order dated 16.11.2015, which reads thus:

"**Office Order**

Subject: *Representation/Objections on the proposed draft of delimitation of Zila Parishad ward Shimla circulated vide letter No.PCH-SML/Delimitation/ward-2015-2232-42 dated 6.11.15.*

The proposed/draft notification of delimitation of Zila Parishad Shimla was issued vide letter No.PCH-SML/Delimitation/ward-2015-2232-42 dated 6.11.2015 in compliance with the Hon'ble Divisional Commissioner Shimla order dated 6.11.2015. This draft proposal was issued by also taking into consideration the objections/suggestions made by the applicants to the Hon'ble Divisional Commissioner, Shimla on the final notification made by undersigned on 15.10.2015. This draft notification of dated 6.11.2015 of delimitation of Zila Parishad Shimla was circulated to the public through respective Zila Parishad office, BDO office and Gram Panchayat institutions to be made public for objection to all the concerned Panchayat Samitis and Gram Panchayat of District Shimla w.e.f. 7.11.2015 to 13.11.2015. The general public was also asked to submit their objections if any. The date of hearing of these objections was fixed on 16.11.2015 in the office of undersigned after giving reasonable time. The draft notification was made as per the provisions of the Section 124 of the H.P. Panchayati Raj Act, 1994 and all the provisions of this section were adhered strictly.

On the above proposed draft notification of delimitation of Zila Parishad Shimla 15 (fifteen) objections are received. The representatives were given opportunity of being heard and their written statements was also recorded. After perusal of the record placed before me objections raised by the representatives were appreciated and dealt under Rule 6 of H.P. Panchayati Raj (Election) Rule, 1994 as follows:-

1) It was objected that the draft notification was not sent to the concerned Gram Panchayats and the area of the ward is not compact and contiguous. After considering the facts it is concluded that while preparing the draft notification of delimitation of Zila Parishad Shimla, utmost care have been given to make each

Zila Parishad ward Topographically and Geographically compact, contiguous, well connected by roads, telecommunication and natural boundaries. All 15 objection were received for this ward only. It is also mentioned here that the area of Zila Parishad ward Seema Rantari is a part of old Socio-geographic area from the time of pre-independence. This area is situated on the right and left side of the Pabber river. This area falls under Sub-division, Rohru and also Development Block, Rohru. As stated above and in para-2 due opportunity to the public was provided to represent on the draft. 15 (fifteen) objections are presented by the representatives by due date i.e. 16.11.2015, is itself a proof of that.

2. It is also objected that the due process has not been adopted while preparing and notifying the draft notification of delimitation of Zila Parishad Wards and procedural lapses are committed. It is worthwhile to mention here that the draft notifications of delimitations of Zila Parishad Shimla circulated for objection on 7.8.2015 and on 3.10.2015 were on the accepted final proposal for the delimitation of Panchayati Raj Institutions on which the election were held in year 2010. The provisions of H.P. Panchayati Raj Act, 1994 and H.P.Panchayati Raj (Election) Rules, 1994 are strictly adhered to. Hence, no procedural lapses are committed while preparing and notifying the draft proposals of delimitation earlier as the proposal was to seek suggestions or objections on the existing Zila Parishad Wards.

3. It was also objected that the draft proposal of delimitation of Zila Parishad ward can not be made in the light of State Election Commission notification dated 9.10.2015. In this context, it is clarified that the State Election Commission has clarified vide letter No. SEC-16-68/2011-I-4661 dated 3.11.2015 that their notification dated 9.10.2015 enforcing clause 12.1 of the model code of conduct is not applicable on delimitation of wards within Panchayats.

In view of the above observations all the 15 number of objections received against the delimitation of Zila Parishad Ward, Tikker are rejected as this ward has been constituted in the larger public interest keeping in view the Topographical and Geographical compactness, Historical, Cultural, Socio-political aspects, Natural barriers and connectivity with transportation and telecommunication not to forget the existing administrative sub-division and Development Block, Rohru.

The objections submitted are hence, rejected and the draft notification is made final. The notification of delimitations of the Zila Parishad ward be finally notified.

Sd/-
Deputy Commissioner,
Dated: 16.11.2015. Shimla. "

38. The contents of the aforesaid order makes it clear that in totality as many as 15 objections had been received by the Deputy Commissioner, yet majority of objections as had been raised therein have not even been dealt with in the impugned order. This is clearly evident from the perusal of the objections and the decision taken thereupon.

39. It would be noticed that the objections as referred to in para 32 supra, specifically pertained to the annexation of 8 panchayats of Tikkar Ward in Kotkhai and it was specifically stated that if at all new ward is required to be made then it should be carved out from the 8 Panchayats of Tikkar area having the highest population of 14016. It was also pointed out that the 8 Panchayats of Tikkar ward that were proposed to be merged with Kotkhai were having different geographical conditions, means of communication, transport and administrative access. Similar objection was raised qua inclusion of Seao ward of Gram Panchayat, Pujarli No.4 in the Kotkhai constituency.

40. As regards the objections referred to in para 33 (supra), the proposed delimitation was challenged on the ground that though it has been proposed to denotify the Zila Parishad Ward, Tharol, Development Block, Jubbal-Kotkhai and to annex it in the Tikkar and Kalbog by inclusion of Panchayats of Jai Peeri Mata Ward, however that would result in Tharola ward being obliterate as it would cease to exist and same would be against the geographical and social conditions of this area. It was also pointed out that apart from the above, it will also have an adverse effect at the administrative level and proposed ward would result in division of two different development blocks and sub divisions which would create many hardships for people in getting their work done. Similarly, representatives of the people would also face difficulties in executing the work of the public and such adjustment is bound to lead many difficulties.

41. The objections as referred to in para 34 (supra) have been filed randomly wherein it has been categorically averred that the proposed delimitation is without jurisdiction and against the provision of law especially when the State Election Commission vide its latest notification dated 9.11.2015 has clarified that the notification dated 9.10.2015 earlier issued by it would have prospective effect and, therefore, the subsequent notification is not sustainable in the eyes of law. Apart from that, it has been categorically submitted that the authorities have failed to follow the procedure prescribed as envisaged under Rule 9 (4) of the H.P. Panchayati Raj Election Rules, 1994, especially when the proposed draft of the area required to delimited from the area of Zila Parishad was never published nor intimated to the respective affected Panchayats. It has specifically been averred that reasonable opportunity of raising the objections and hearing had not been provided for before the order of delimitation.

42. Now, adverting to the objections as raised by the objectors whose names find mention in para 35 (supra), it would be noticed that specific objections against the proposed merger of the Panchayats had been preferred wherein it was pointed out that the draft delimitation notification of Tikkar ward, which otherwise comprises of Dharara, Hanstari, Kadiwan, Kuthari, Pujarli-3, Pujarli-4, Sharontha and Tikkar falls in Rohru Sub Division and Development Block, whereas the other remaining nine panchayats fall in Jubbal block and with sub division, Theog, which are geographically and topographically separated by physical barriers and are not easily accessible. The delimitation of Zila Parishad Ward on the basis of parliamentary constituency was also objected to as being against the established principles of law and thus unconstitutional. It was specifically stated that the proposed draft notification was not viable in its present form and was bound to create a situation of pandemonium among the residents of concerned area as Tikkar ward would fall in two different blocks and it would further increase the complexity. Lastly, it was stated that the proposed delimitation was actuated by political motives and had an element of favouritism with the backing of some politically influential persons.

43. As has been noticed in para 36 (supra), the respondent No.2 instead of dealing with the objections individually, prepared a joint statement on behalf of the so called all the objectionists wherein none of the aforesaid objections have in fact even been noticed much less considered and obviously, therefore, the decision based upon the so called these objections is no decision in the eyes of law and cannot withstand judicial scrutiny.

44. In addition thereto, it would also be noticed that the petitioner alongwith the petition has appended as many as eight certificates issued by the Secretaries of various Gram Panchayats certifying that the notification regarding delimitation of wards dated 6.11.2015 had never been received by these Panchayats and pertinently all the certificates have been issued on 13.11.2015 or thereafter.

45. The respondents have failed to place on record of this writ petition any contemporaneous official record so as to controvert these allegations. More importantly even the records produced before this Court do not indicate that the notification regarding delimitation had been displayed on all the notice boards of the Block Development Officers, Panchayat Secretaries and District Panchayat Officers and have further failed to prove that this exercise was undertaken in the presence of two independent witnesses as had been directed by the Divisional

Commissioner in the order of remand. No certificate evincing this fact has been placed on record, meaning thereby, that not only the order passed by the Divisional Commissioner was not complied with while undertaking the exercise of delimitation, but even the provisions of Rule 9 were never adhered to and given a complete goby.

46. Now, the crucial question that emerges and calls for attention of this Court is the scope of judicial review in such matters. This Court entertains, no doubt that the power of judicial review in matters of the present kind is limited, but this Court definitely has the competence to examine whether the respondent No.2 (Deputy Commissioner) has applied its mind to the material available on record before passing the impugned order and further oversee as to whether these findings suffer from vice of arbitrariness or perversity etc.

47. It is settled law that non-consideration of relevant material renders an order perverse. A finding is said to be perverse when the same is not available or supported by evidence brought on record or the same are against law and suffer from vice of procedural irregularities. Arbitrariness in State action can be demonstrated by existence of different circumstances. Whenever both the decision making process and the decision taken are based on irrelevant facts, while ignoring relevant considerations, such an action can normally be termed as arbitrary. Where the process of decision making is followed but proper reasoning is not recorded for arriving at a conclusion, the action may still fall in the category of arbitrariness. Rationality, reasonableness, objectivity and application of mind are some of the pre-requisites of proper decision making. The concept of transparency in the decision making process of the State has also become an essential part of our Administrative law.

48. It is more than settled that an action to be taken in a particular manner as provided by a statute, must be taken, done or performed in the manner prescribed or not at all. More than eighty years back, the Hon'ble Privy Council in ***Nazir Ahmad vs. King Emperor (AIR 1936, PC 253)*** held that where a power is given to do a certain thing in a certain way, the things must be done in that way or not at all and this has been approved and further expanded by the Hon'ble Supreme court in catena of judgments (Refer: ***Rao Shiv Bahadur Singh and anr***. vs. ***State of Vindh-P***, AIR 1954, SC 322; ***Deep Chand*** vs. ***State of Rajasthan***, AIR 1961 SC 1527; ***State of Uttar Pradesh*** vs. ***Singhara Singh and Ors***, AIR 1964, SC 358; ***Chandra Kishore Jha*** vs. ***Mahavir Prasad***, 1999 (8) SCC 266 ; ***Dhananjaya Reddy*** vs. ***State of Karnataka***, 2001 (4) SCC 9; ***State of Jharkhand & Ors*** vs. ***Ambay Cements and anr.*** (2005) 1 SCC 368 ; ***Gujarat Urja Vikas Nigam Limited*** vs. ***Essar Power Limited***, 2008 (4) SCC 755 ; ***Zuari Cement Ltd*** vs. ***Regional Director, ESIC, Hyderabad & Ors***., AIR 2015, SC 2764 ; and ***Uddar Gagan Properties Ltd***. vs. ***Sant Singh and Ors***. 2016 (5) JT 389.).

49. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alterius"* meaning thereby 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 and following some other course is not permissible.

50. It would be noticed that as per the provisions contained in Rule 9, the Deputy Commissioner while considering the objections under sub-rule 4 was required to enquire into the same and pass final order of delimitation after recording in brief the reasons for acceptance or rejection of such objection. What the Rule postulates is not that the Deputy Commissioner is to write a detailed judgment nevertheless brief reasons for the decision had to be indicated inasmuch as it is an order affecting the rights of the parties and must therefore be supported by reasons. The order has to be reflective of due cogitation and requisite rumination. It must reflect application of mind, consideration of facts in proper perspective and appropriate ratiocination. The reasons ascribed may not be lengthy, but they should be cogent, germane and reflective. It is to be borne in mind, to quote from *Wharton's Law Lexicon:*

> *"The very life of law, for when the reason of a law once ceases, the law itself generally ceases, because reason is the foundation of all our laws."*

51. The necessity for giving reasons and making the order a speaking one has travelled all along to be a necessary ingredient in a justice delivery system. The Hon'ble Supreme Court has repeatedly stressed that an order passed by a quasi-judicial authority or even an administrative authority affecting the rights of parties must be a speaking one.

52. In ***Daya Ram vs. Raghunath (2007) 11 SCC 241***, the Hon'ble Supreme Court held as under:

> *"Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at." Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the "inscrutable face of the sphinx", it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking order. The "inscrutable face of a sphinx" is ordinarily incongruous with a judicial or quasi-judicial performance."*

53. In ***Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank vs. Jagdish Sharan Varshney and others (2009) 4 SCC 240***, the Hon'ble Supreme Court held that "*whether there was an application of mind or not can only be disclosed by some reasons."*

54. Towards the impressing need to inform reasons for a decision and the manner in which they are to be informed, the Hon'ble Supreme Court has succinctly summarized the legal position in ***Kranti Associates Private Limited and another Vs. Masood Ahmed Khan and others (2010) 9 SCC 496,*** in the following terms:-

> *"(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.*
>
> *(b) A quasi-judicial authority must record reasons in support of its conclusions.*
>
> *(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.*
>
> *(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power.*
>
> *(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.*
>
> *(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.*
>
> *(g) Reasons facilitate the process of judicial review by superior Courts.*
>
> *(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.*
>
> *(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.*

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor (1987) 100 Harward Law Review 731-37).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v.Spain (1994) 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA Civ 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires,

"adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "due process".

55. Therefore, the further question that arises for consideration is as to whether the respondent No.2 while passing the impugned order has infact applied its mind and given reasons for his conclusion or has simply arrived at a conclusion without disclosing any reasons. As observed earlier, the real objections which were filed by the objectors were never considered by respondent No.2 and even the objections which were so considered by him, are bereft of any reason as is clearly evident from the perusal of impugned order (Annexure P-13) para-37 (supra). However, for better understanding and appreciation of the question posed before me, it will once again be necessary to refer to the impugned order of delimitation, the relevant portion whereof is extracted below:-

"*1) It was objected that the draft notification was not sent to the concerned Gram Panchayats and the area of the ward is not compact and contiguous. After considering the facts it is concluded that while preparing the draft notification of delimitation of Zila Parishad Shimla, utmost care have been given to make each Zila Parishad ward Topographically and Geographically compact, contiguous, well connected by roads, telecommunication and natural boundaries. All 15 objection were received for this ward only. It is also mentioned here that the area of Zila Parishad ward Seema Rantari is a part of old Socio-geographic area from the time of pre-independence. This area is situated on the right and left side of the Pabber river. This area falls under Sub-division, Rohru and also Development Block, Rohru. As stated above and in para-2 due opportunity to the public was provided to represent on the draft. 15 (fifteen) objections are presented by the representatives by due date i.e. 16.11.2015, is itself a proof of that.*

2. It is also objected that the due process has not been adopted while preparing and notifying the draft notification of delimitation of Zila Parishad Wards and procedural lapses are committed. It is worthwhile to mention here that the draft notifications of delimitations of Zila Parishad Shimla circulated for objection on 7.8.2015 and on 3.10.2015 were on the accepted final proposal for the delimitation of Panchayati Raj Institutions on which the election were held in year

2010. The provisions of H.P. Panchayati Raj Act, 1994 and H.P.Panchayati Raj (Election) Rules, 1994 are strictly adhered to. Hence, no procedural lapses are committed while preparing and notifying the draft proposals of delimitation earlier as the proposal was to seek suggestions or objections on the existing Zila Parishad Wards."

56. It would be noticed that respondent No.2 while adjudicating upon the objections made specific note of two objections namely:-

(i) the area of the ward is not compact and contiguous; and

(ii) that the draft notification has not been sent to the concerned Gram Panchayats.

But then without discussing and assigning reasons, respondent No.2 concludes by stating "*after considering the facts it is concluded that while preparing the draft notification of delimitation of Zila Parishad Shimla utmost care have been given to make each Zila Parishad ward Topographically and Geographically compact, contiguous, well connected by roads, telecommunication and natural boundaries."* How and on what basis respondent No.2 arrived at the aforesaid conclusion is anybody's guess. What weighed and worked in his mind is not reflected in the impugned order and, therefore, I have no hesitation to conclude that the extracted portion above is only a conclusion devoid of any reasons.

57. Similarly, as regards the objection regarding draft notification having not been sent to the concerned Gram Panchayats, respondent No.2 while dismissing the objection has observed as under:-

" *It is worthwhile to mention here that the draft notifications of delimitations of Zila Parishad Shimla circulated for objection on 7.8.2015 and on 3.10.2015 were on the accepted final proposal for the delimitation of Panchayati Raj Institutions on which the election were held in year 2010. The provisions of H.P. Panchayati Raj Act, 1994 and H.P.Panchayati Raj (Election) Rules, 1994 are strictly adhered to. Hence, no procedural lapses are committed while preparing and notifying the draft proposals of delimitation earlier as the proposal was to seek suggestions or objections on the existing Zila Parishad Wards."*

58. Evidently, even the aforesaid extracted portion is undoubtedly only a conclusion and how the same was arrived at is again anybody's guess. What was the material available with respondent No.2 or what prevailed upon him to arrive such a conclusion is again not spelt out. After-all, whether the notifications were sent to the concerned Gram Panchayats or not was a matter which was required to be established and proved by contemporaneous official records and reference whereof was essentially to be made in the impugned order. That apart, how and on what basis respondent No.2 concludes that there have been no procedural lapses committed while preparing and notifying the draft proposals of delimitation had to be clearly spelt out in the impugned order.

59. Thus, on the basis of impugned order, it cannot be said that the relevant factors have been objectively considered before passing the impugned order. The minimum that was expected of respondent No.2 was atleast to support his order with reasons which ought to have been cogent, clear and succinct, more especially, when the order passed by him was subject to appeal. As already concluded, the decision being bereft of any reasons is a result of caprice, whim and fancy of respondent No.2 and suffers from vice of arbitrariness as also non-application of mind.

60. In light of the various pronouncements of the Hon'ble Supreme Court noticed above, it is unnecessary to say anything beyond what has been so eloquently said in support of the need to give reasons for orders made by Courts and statutory or other authorities exercising quasi judicial functions. I only need to reiterate that in a system governed by the rule of law, there is nothing like absolute or unbridled power exercisable at the whims and fancies of the

repository of such power. There is nothing like a power without any limits or constraints. That is so even when a Court or other authority may be vested with wide discretionary power, for even discretion has to be exercised only along well recognized and sound juristic principles with a view to promoting fairness, inducing transparency and aiding equity.

61. The decision making process of respondent No.2 is itself so flawed that the impugned order cannot be allowed to stand even for a moment. It does not require Solomon's wisdom to state that it is absolutely sans reasons, bereft of analysis and shorn of appreciation. That apart, the inquiry conducted by respondent No.2 is in violation of the directions passed by the Divisional Commissioner and cannot otherwise strictly be said to be in compliance to Rule 9 of the Election Rules.

62. As observed by the Hon'ble Supreme Court, the absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before the higher forum and, therefore, the order passed by respondent No.2 is clearly not sustainable in the eyes of law.

63. Though, the learned Advocate General would contend that in case a fresh exercise is directed to be undertaken by the Deputy Commissioner, the same would only result in undoing the things which have already been settled.

64. I am afraid that such contention may be a valid and may weigh with the Court while dealing with service matters, more particularly, matter regarding interse seniority, but the same has no applicability in matters pertaining to elections which have to be decided strictly in accordance with the provisions of law i.e. Act, Rules etc. and these provisions have to be complied with and implemented with its rigours and have to be scrupulously followed.

65. Even otherwise, the aforesaid principle does not apply to the instant case as it is not even the case of the respondents that the petitioner has not approached this Court expeditiously for the relief or has been fence a sitter, who has allowed the things to happen and then approached the Court to put-forth a stale claim and thereby tried to unsettle the settled matters. The final order of delimitation in the instant case was published by respondent No.2 on 16.11.2015 and the instant petition thereafter was promptly filed by the petitioner on 23.11.2015.

66. The provisions contained in the various legislations including the Panchayati Raj Act, Rules and Election Rules are salutary and are intended to strengthen the fabric of our democracy at grass root level by curbing unprincipled and unethical practices and the rule of law are the basic features of democracy. The concept of free and fair elections are necessary concomitant and attribute of democracy.

67. In view of the aforesaid discussion, the order passed by the Deputy Commissioner, Shimla dated 16.11.2015 cannot be sustained. Accordingly, I find merit in this petition and the same is allowed. The order passed by respondent No.2 on 16.11.2015 (Annexure P-13) whereby he rejected the objections to the delimitation is quashed and set aside and consequently the final order of delimitation dated 16.11.2015 (Annexure P-14) is also quashed and set aside. The respondents are directed to undertake the delimitation of Zila Parishad Ward, Tikkar, afresh, that too, strictly in accordance with the orders passed by the Divisional Commissioner on 9.9.2015 (Annexure P-3) and also in accordance with the rules occupying the field.

68. The petition is disposed of in the aforesaid terms, so also the pending application(s), if any, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

M/s Techno Plastic Industries .....Petitioner

Versus

M/S Kiran General store and another .....Respondents.

Cr.MMO No. 324 of 2015
Date of Decision: 15.12.2016

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque, which was dishonoured on presentation- the accused pleaded guilty and was convicted by the Trial Court- sentence of fine equivalent to the amount mentioned in the cheque was imposed - held, that the accused can be sentenced to an imprisonment for a term, which may extend upto two years and fine which may extend to double the cheque amount – however, discretion has been conferred upon the Magistrate to impose appropriate sentence – the fact that the accused has pleaded guilty was a relevant fact to be taken into consideration while imposing sentence – the complainant has suffered no inconvenience by the sentence- petition dismissed. (Para-2 and 3)

For the petitioner: Mr. Anshul Attri, Advocate.
For the Respondents: Mr. Vivek, Advocate vice counsel.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition stands directed by the petitioner herein against the impugned order rendered by the learned Judicial Magistrate, Ist Class-II, Nurpur, District Kangra, H.P. on 27.8.2015 in case No. 125-IV/2015, whereby the learned trial Court in sequel to the accused pleading guilty to the relevant charge convicted him for commission of an offence punishable under Section 138 of the Negotiable Instruments Act, also thereupon it imposed upon him a sentence of fine equivalent to the amount borne on the dishonored Negotiable instrument. Also a perusal of the impugned order discloses qua the accused on depositing the fine amount before the learned trial Court thereupon the complainant/petitioner herein standing entitled to receive it as compensation.

2. The learned counsel appearing for the complainant/petitioner has herebefore submitted with vigor qua the sentence afore-stated imposed upon the convict/accused being amenable for interference by this Court, its not holding concurrence with the mandate of Section 138 of the Negotiable Instruments Act. He submits qua the sentence of imprisonment prescribed therein also standing imposable upon the convict besides sentence of fine constituted in a sum double than the one borne in the dishonored instrument also being statutorily imposable upon the accused/convict whereas the aforesaid sentence(s) remaining un-imposed upon the convict by the learned Magistrate, renders the impugned order to beget an open infraction of its mandate. However the aforesaid submission is not amenable for acceptance significantly when the provisions of section 138 of the Act holding therewithin a mandate upon the Magistrate concerned, to on proven commission of an offence under Section 138 of the Act, his holding a discretionary jurisdiction to alternatively impose a sentence of imprisonment upon the convict for a term which may extend up to 2 years also his holding jurisdiction to in alternate thereto impose a sentence of fine upon him which may extend upto twice the amount of the dishonoured cheque besides he holds jurisdiction to impose both the aforesaid sentences upon the accused/convict. The statutory discretionary empowerment conferred upon the Judicial Magistrate concerned to impose the aforesaid alternative sentence(s) upon the convict or to impose all the sentences conjointly upon the convict does render the imposition by the learned Magistrate upon the accused/convict a sentence of fine equivalent to the amount borne on the dishonored Negotiable instrument to warrant no interference, conspicuously when the statutory discretion vested in him

to impose a sentence of fine upon the convict extending to double the amount borne on the dishonoured Negotiable instrument stands not couched in a mandatory phraseology rather stands couched in a directory phraseology whereupon the imposition of a sentence of fine equivalent to the cheque amount upon the convict/accused by the learned Magistrate concerned does not suffer from any gross perversity or absurdity unless evidence stood adduced qua his while exercising the apposite statutory discretion his evidently acting with malafides. Significantly, when the aforesaid evidence remained un-adduced hereat, the statutory discretion exercised by the learned Magistrate in imposing the pronounced sentence upon the accused is un-bereft of any taint.

3. Further more the statutory discretion vested in the Magistrate concerned in the imposition of alternative sentence(s) aforesaid upon the convict, in exercise whereof he imposed upon the accused/convict the impugned sentence of fine also remains undemonstrated by the counsel for the complainant to stand exercised capriciously or arbitrarily. Contrarily with the Magistrate concerned while under the impugned award imposing upon the convict/accused a sentence of fine equivalent in a sum borne on the dishonoured negotiable instrument hers also ordering qua on its deposit its standing released to the complainant besides given the factum qua the convict/accused pleading guilty to the relevant charge whereupon consumption of time which would stand otherwise consumed by the learned trial Court for concluding the trial stood curtailed whereupon also hence the revisionist/complainant suffered no inconvenience, does also constrain this Court to record an inference of the statutory discretion exercised by the Magistrate concerned to impose the impugned sentence of fine upon the convict standing exercised in a just, fair and reasonable manner.

4. In view of the above, the present petition is dismissed. Impugned order stands maintained and affirmed. All pending applications stand disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

NTPC Ltd.(Kol Dam) …Appellant.
Versus
Sukh Ram & others …Respondents.

RFA No. 118 of 2014
Date of Decision: December 15, 2016.

Land Acquisition Act, 1894- Section 18- The land was acquired for the construction of Kol Dam – Land Acquisition Collector determined the compensation @Rs.4,69,955/- for cultivated land and Rs.1,04,416/- for uncultivable land – Reference petition was filed and the Reference Court determined the market value @ Rs.4,69,955/- per bigha – held in appeal that sale deeds were tendered in evidence but in absence of evidence regarding the similarity of the acquired land with exemplar sale deed, the deeds cannot be taken into consideration to determine the market value of the acquired land –the sale deed pertained to two different villages and very small chunk of lands - the reference Court had rightly declined to take exemplar sale transactions into consideration- appeal dismissed. (Para- 5 to 12)

Cases referred:
Cement Corpn. of India Ltd. Versus Purya and others, (2004) 8 SCC 270
Haridwar Development Authority Versus Raghubir Singh and others, (2010) 11 SCC 581

For the Appellant: Mr. Chandernarayan Singh, Advocate, for the appellant-NTPC.
For the Respondents: Mr. R.S. Verma, Addl. AG., for respondent No.19-State.

The following judgment of the Court was delivered:

Sanjay Karol, J (oral).

In terms of the impugned award dated 18.02.2014, passed by Additional District Judge, Ghumarwin, District Bilaspur, H.P., (Camp at Biaspur), , in Reference Petition No.141-4 of 2008, titled as *Sukh Ram & others Versus LAC, Bilaspur and another,* so filed under Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act), Reference Court, has re-determined the market value of the entire acquired land by awarding Rs. 4,69,955/-, the highest rate awarded by the Collector Land Acquisition with respect to the best quality of land. Significantly, Reference Court has not enhanced any amount other then uniformly applying the said rate with respect to entire 29-0 bighas of land, acquired for public purpose i.e. construction of Kol Dam.

2. Certain facts are not in dispute: (i) 29-0 bighas of land came to be acquired in village Harnora (III File), Tehsil Sadar, District Bilaspur, H.P. with the publication of notification in the official gazette on 14.08.2004, so issued under Section 4 of the Act; (ii) The acquisition proceedings concluded with the passing of the Collector's Award No.58 of 2007 dated 25.04.2007, so issued under Section 11 of the Act, whereby he determined the market value at the following rates and the State taking over possession of the land:-

> "The market value for Cultivated (Majrua) Rs. 4,69,955.00 (Rupees Four Lacs Sixty Thousand Nine Hundred and Fifty Five) only and for Un-cultivated (Gair-Majrua) Rs.1,04,416.00 (Rupees One Lac Four Thousand Four Hundred and Sixteen) only as applied in Award No.5 of 2003 in village Harnora already approved by Distt. Collector, Bilaspur vide No.BLP-ADRA-4(9)/94-II-24142 dated 20-6-2002 appear to be just and reasonable for the land under acquisition in this award. Therefore, the rates already approved as discussed above have been applied in this award. *(Annexure-C)* ."

(iii) The purpose of acquisition being construction of Dam, commonly known as Kol Dam; (iv) Dissatisfied with the offer made by the Collector, claimants filed petitions under Section 18 of the Act, which came to be clubbed (with Reference Petition No.141-4 of 2008) and on the basis of common evidence led by the parties, disposed of in terms of impugned award; (v) While the claimants accepted the award, only the beneficiary preferred the present appeal(s) under Section 54 of the Act; (vi) It is the common case of parties that the entire acquired land came to be submerged with the construction of Dam by the beneficiary. Also there is no evidence on record of either any requirement or any developmental activity carried out on the spot.

3. With these admitted/undisputed facts, material placed on record by the parties is being appreciated for just decision of the case.

4. In the instant case, Reference Court has re-determined the market value of the acquired land by awarding the amount @ Rs. 4,69,955/- per bigha. It took into account the highest rate so awarded by the Collector Land Acquisition.

5. Record reveals that parties did place on record exemplar sale deeds in support of their respective claims. Whereas, as against claim of Rs. 15,00,000/- per bigha, so set up by the claimants, beneficiary tried to justify the passing of the award by the Collector. Now significantly, the claimants placed on record four sale deeds (Ex.P1 to Ex.P4) and beneficiary also placed on record four sale deeds (x.R1 to Ex.R4). But however, none of the witnesses i.e. Nathu Ram (PW.1), Kulbir Singh (PW.2), who stepped into the witness box could depose with regard to the similarity of the acquired land with that of the exemplar sale deeds. Also three sale deeds pertaining to land sold in village Chamyon and the sale transaction pertaining to village Harnora was only with respect to 0-12-0 bighas of land.

6. Insofar as beneficiary is concerned, sale deeds only came to be tendered in evidence which though could have been considered by the Reference Court in view of the law laid

down by the Apex Court in *Cement Corpn. of India Ltd. Versus Purya and others,* (2004) 8 SCC 270. But however, in the absence of any evidence with regard to similarity of the acquired land with that of these exemplar sale deeds, even such sale deeds cannot be taken to be true reflective value of the acquired land. Also two of such sale transactions pertain to different villages and remaining two sale transactions pertain to very small chunk of land admeasuring 0-1-0 bigha. Hence, Reference Court did not take exemplar sale transactions in re-determining the market value of the acquired land.

7. Insofar as other issue of enhancement of the amount is concerned, one finds that Reference Court rightly applied principle of law laid down in *Haridwar Development Authority Versus Raghubir Singh and others,* (2010) 11 SCC 581, relevant portion of which reads as under:-

> "7. The question whether the acquired lands have to be valued uniformly at the same rate, or whether different areas in the acquired lands have to be valued at different rates, depends upon the extent of the land acquired, the location, proximity to an access road/Main Road/Highway or to a City/Town/Village, and other relevant circumstances. We may illustrate:
>
> (A). When a small and compact extent of land is acquired and the entire area is similarly situated, it will be appropriate to value the acquired land at a single uniform rate.
>
> (B). If a large tract of land is acquired with some lands facing a main road or a national highway and other lands being in the interior, the normal procedure is to value the lands adjacent to the main road at a higher rate and the interior lands which do not have road access, at a lesser rate.
>
> (C). Where a very large tract of land on the outskirts of a town is acquired, one end of the acquired lands adjoining the town boundary, the other end being two to three kilometers away, obviously, the rate that is adopted for the land nearest to the town cannot be adopted for the land which is farther away from the town. In such a situation, what is known as a belting method is adopted and the belt or strip adjacent to the town boundary will be given the highest price, the remotest belt will be awarded the lowest rate, the belts/strips of lands falling in between, will be awarded gradually reducing rates from the highest to the lowest.
>
> (D). Where a very large tract of land with a radius of one to two kilometers is acquired, but the entire land acquired is far away from any town or city limits, without any special Main road access, then it is logical to award the entire land, one uniform rate. The fact that the distance between one points to another point in the acquired lands, may be as much as two to three kilometers may not make any difference."

8. The Reference Court, rightly held the acquired land to fall within the category (D) of the aforesaid ratio.

9. No other point urged or proved.

10. Hence in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Reference Court are perverse, illegal or erroneous. As such, present appeal stands dismissed, so also pending application(s), if any.

11. Cross-objection, if any, shall also stand disposed of.

12. Quite evidently, in terms of award No.58 of 2007, so passed by the Collector several land reference petitions came to be clubbed and disposed of by the common impugned award dated 18.02.2014, passed by Additional District Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur), in Reference Petition No.141-4 of 2008, titled as *Sukh Ram and others Versus LAC, Bilaspur and another.* Common evidence was led by the parties in land Reference Petition No.28 141-4 of 2008, subject matter of the present appeal. Learned counsel for the parties

contend that decision rendered in the present appeal would automatically apply to other connected matters which are pending before this Court. Registrar (Judicial) to take appropriate instructions from Hon'ble the Chief Justice for listing of such connected appeals before the appropriate Court, particulars whereof shall also be supplied by learned counsel for the parties.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Shankar Lal and others ...Appellants
Versus
State of Himachal Pradesh and another ...Respondents

LPA No. 121 of 2011
Reserved on: December 7, 2016
Decided on: December 15, 2016

Constitution of India, 1950- Article 226- Petitioners were appointed as beldar/plant observers – they were promoted to the post of Field Assistants - post of Field Assistants was merged with the post of horticulture Sub-Inspector by the State Government – petitioners claimed the pay scale of Horticulture Sub-Inspector on the basis of this notification – University claimed that it had its own ordinance and was not bound by the notification issued by the State Government- writ Court held that the University had framed its own recruitment and promotion Rules and had not taken any decision to merge the posts and dismissed the writ petition- held, that University has its own pay scale- no decision was taken to merge the post of Field Assistant with Horticulture Sub-Inspector – therefore, the petitioners cannot claim the pay scale of Horticulture Sub-Inspector – appeal dismissed. (Para-10 to 26)

Cases referred:

State of Haryana and others versus Charanjit Singh and others etc. etc., AIR 2006 scc 161
New Delhi Municipal Council versus Pan Singh & Ors., 2007 AIR SCW 1705
State of Madhya Pradesh and others versus Ramesh Chandra Bajpai, (2009) 13 SCC 635
State of Punjab & Anr. Versus Surjit Singh & Ors., 2009 AIR SCW 6759
Steel Authority of India Limited and others versus Dibyendu Battacharya, (2011) 11 Supreme Court Cases 122
Union Territory Administration, Chandigarh and others versus Manju Mathur and another, (2011) 2 Supreme Court Cases 452
Hukum Chand Gupta versus Director General, Indian Council of Agricultural Research and others, (2012) 12 Supreme Court Cases 666
State of Himachal Pradesh and another versus Tilak Raj, 2014 AIR SCW 6581

For the appellants Mr. Bharat Thakur, Proxy Counsel.
For the respondents: Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for respondent No.1.
Mr. Balwant Singh Thakur, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

This Letters Patent Appeal is directed against judgment dated 21.9.2010 rendered by the learned Single Judge of this Court in CWP(T) No. 4716 of 2008 titled **Shankar Lal**

and others versus State of Himachal Pradesh and another, whereby the writ petition filed by the appellants-petitioners (here-in-after, 'petitioners') was dismissed.

2. Facts in brief are that petitioners were initially appointed as Beldars/ Plant Observers. They were promoted to the post of Field Assistant in the pay scale of Rs.400-600. Petitioners claimed that on the basis of letter dated 21.6.1986 (Annexure P-2 of writ petition), State ordered merger of posts of Field Assistants with the posts of Horticulture Sub-Inspectors in the pay scale of Rs.450-800/-. Petitioners claimed that they were not granted aforesaid pay scale. Petitioners have relied upon Statutes 5.6(1) and 6 of the respondent-University seeking pay scale of Rs.450-800 (later revised to Rs.1200-2100). Annexure P-2 dated 21.6.1986 reads as under:

> "I am directed to refer to your No. 15-65/79-Udyan-I dated the 20th November, 1985 and to say that Governor, Himachal Pradesh is pleased to allow the scale of Rs.450-800 to the posts of Field Assistants presently in the scale of Rs.400-600. This revision will come into force w.e.f. 1.1.78 on notional basis and monetary benefits will accrue to the concerned incumbents w.e.f. 1.3.1986. The pay of the incumbents in the revised scale of Rs.450-800 (from the scale of Rs.400-600) will be fixed in accordance with the provisions of Audit Instruction(1) below F.R. 22 and they will be eligible to exercise option in accordance with the provision of F.R. 23 within a period of three months, failing which option will be deemed to have been exercised in favour of revised scale. Option once exercised will be final.
>
> The Governor is further pleased to order that the posts of Field Assistants shall be merged with those of Horticulture Sub-Inspectors."

3. Clauses 5.6(1) to 5.6(3) of Chapter V of "Statutes Regarding The Classification, Qualifications And Appointment Of Employees Of The University Other Than The Officers and Teachers" reads as under:

> "5.6(1) The scales of pay of the posts of category A, B, C and D employees of the University shall be as prevalent at present. Conditions and rules for the release of higher scales of pay, for admissibility of special pay and other allowance to the employees shall be the same as applicable from time to time to the employees holding corresponding posts in Himachal Pradesh Government. But the rules of local allowance shall be as admissible to Government servants at the concerned stations of posting.
>
> (2). The Board shall have the powers to review the conditions for the release of scales and the scales of pay and allowances attached to any post of the University as and when the same are revised by the Himachal Pradesh Government for their own employees.
>
> (3) For such posts in the University as do not exist under the Himachal Pradesh Government, the University reserves the powers to frame its own pay scales, which shall, as far as possible, be in consonance with the pay scales of comparable posts in the Himachal Pradesh Government/sister Universities in the State."

4. Clause 6 of Chapter VI, "Scales of Pay" provide as under:

> 6.(1) Notwithstanding anything contained in Chapters III, IV and V of the Statutes, the scales of pay to be prescribed by the Board shall follow the pattern given in the succeeding clauses of this Chapter.
>
> (2) The conditions and rules for grant of scales of pay, for admissibility of special pay and allowances [other than the allowances mentioned in clause (5) below] to all Officers (other than Estate Officer), teachers, Deputy Registrars, Assistant Registrar, Deputy Students' Welfare Officers, Assistant Students' Welfare Officers, Sports Officers and other posts on the UGC pattern, shall be the same as prescribed by the University Grants Commission from time to time.

(3) The conditions and rules for the grant of scales of pay, for admissibility of special pay and allowances [other than the allowances mentioned in clause (5) below] to the Estate Officer and other employees of the University shall be the same as applicable from time to time to the employees holding corresponding posts in Himachal Pradesh Government.

(4) For such posts in the University as do not exist under the Himachal Pradesh Government and which do not fall within the UGC pattern of scales, the pay scales and allowances [other than the allowances mentioned in clause (5) below] shall be such as the Board may determine having regard to the functions, duties, status and qualifications of such posts, in relation to other posts in the University.

(5) In granting the Hill Compensatory Allowance, House Rent Allowance and other local allowances (other than DA and ADA) Himachal Pradesh Government pattern shall be followed.

(6) The incumbents of various posts in the University shall be entitled to the pay scales, special pay and other allowances admissible to them on the date of commencement of these Statutes unless revised by the Board."

5. The respondent-University in its reply before the writ Court, took stand that Statute 5.6(1) is regarding the scale of pay of University employees and it is clear in the chapter that pay scale of Technical Staff should be equal with the Department of Agriculture/Horticulture/ Forests/Fisheries/ Animal Husbandry/Education or where the University has evolved its own pay scales, the same will be revised by keeping in view the relative position of pre-revised scales. The posts of Field Assistant Grade-I are treated equivalent with that of Horticulture Sub-Inspectors, as far as grant of scale is concerned and University is providing same scale to the Field Assistant Grade-I which is being granted to Horticulture Sub-Inspectors. However, respondent-University also stated in its reply that it is not bound to frame Recruitment and Promotion Rules parallel to that of the Horticulture Department. In case, scale of Horticulture Sub-Inspector is revised by the Government, University is bound to grant same scale to the Field Assistant Grade-I.

6. The learned Single Judge also held in the impugned judgment that the post of Field Assistant is feeder cadre for promotion to the post of Field Assistant Grade-I and as such pay scales of both the posts are different. Moreover, respondent-University has framed its own Recruitment and Promotion Rules and it has never taken any decision to merge posts of Field Assistants with that of Horticulture Sub-Inspector. As such petitioners could not seek benefit of revision of pay scales notionally from 1.1.1978 and monetary benefits from 1.3.1986, as claimed in the petition. Accordingly, the petition was dismissed. Now, the petitioners have challenged the aforesaid judgment of the learned Single Judge by preferring the present appeal.

7. Mr. Bharat Thakur, learned Advocate representing the petitioners vehemently argued that the judgment passed by the learned Single Judge is not sustainable as the same is not based upon correct interpretation of Statutes 5.6(1) and 5.6(3) and as such same can not be allowed to sustain. Mr. Thakur further stated that the petitioners are entitled to the benefit of automatic revision of pay scale from Rs.400-600 to Rs.450-800 in terms of revision order of the State Government dated 17.5.1986, on notional basis from 1.1.1978, 10.8.1982 and 8.3.1983, respectively and financial benefits from 1.3.1986 with all consequential benefits including seniority, arrears of pay scale revision. Mr. Thakur, specifically invited attention of this Court to clause 5.6(1) of Chapter V of the Statutes regarding classification, qualifications and appointment of employees of the University other than officers and teachers to suggest that the scale of pay of all the employees of categories A, B, C and D, shall be the same as applicable from time to time to the employees holding corresponding posts in the Himachal Pradesh Government. As per the counsel representing the petitioners, Statutes 5.6(1) and 6 of the respondent-University provide that petitioners are entitled to pay scale of Rs.450-800, which was subsequently revised to Rs.1200-2100.

8. Mr. Balwant Singh Thakur, learned counsel representing respondent No.2-University supported the impugned judgment passed by the learned Single Judge. As per Mr. Balwant Singh Thakur, pay scale of Rs.450-800 has been granted to the Field Assistant Grade I and post of Field Assistant is in the feeder cadre for promotion to the post of Field Assistant Grade I. As per Mr. Balwant Singh Thakur, respondent-University has framed new Rules on 25.8.1988, wherein post of Field Assistant is in the feeder cadre for promotion to the post of Field Assistant Grade I and as such petitioners can not be granted pay scale of Rs.450-800 because the post of Field Assistant Grade I has been compared to that of Horticulture Sub-Inspector and, as and when the State Government revises/increases the pay scale of Horticulture Sub-Inspector, corresponding category of Field Assistant Grade I shall also get the same. In the aforesaid background, Mr. Balwant Singh Thakur, submitted that there is no illegality or infirmity in the judgment passed by the learned Single Judge and same deserves to be upheld.

9. We have heard the learned counsel for the parties and also gone through the records of the case carefully.

10. True it is that perusal of Statute 5.6 clearly suggests that pays scales of technical staff other than laboratory staff are to be equated with the departments of Agriculture/Horticulture/ Forests / Fisheries/ Animal Husbandry/ Education, however, the University has evolved its own pay scales and same are required to be revised by keeping in view the relative position in the pre-revised pay scales. In the instant case, petitioners, on the basis of letter dated 17.5.1986/21.6.1986 (Annexure P-2 of the writ petition) issued by the State of Himachal Pradesh, whereby posts of Field Assistant have been ordered to be merged with that of Horticulture Sub-Inspector in the pay scale of Rs.450-800 are claiming grant of revision of pay scale of Rs.450-800 as was ordered by the State Government from retrospective date.

11. Record reveals that vide communication dated 6.4.1992 (Annexure P-14 of Writ Petition), respondent-University rejected the claim of the petitioners namely Shankar Lal by stating that matter with regard to revised pay scale of Rs.450-800 of Field Assistant on parity with the Department of Horticulture was put up before the Joint Coordination Committee of both the Universities on 16.1.1992, whereby following decision was taken:

> "Since the Technical combine was framed with a view to providing promotional avenues to the Technical Staff, the categories of which did not exist in the State Government, and as such Committee did not favour the abolition of Technical Combine."

12. Petitioners being aggrieved by aforesaid rejection of the revision, approached the Himachal Pradesh Administrative Tribunal, by filing OA No. 2194 of 1997, which was later transferred to this Court and registered as CWP(T) No. 4716 of 2008, seeking following main relief(s):-

> "(i) That the applicants be held lawfully entitled for the grant of revised pay scale of Rs.450-800 on the State Government pattern with effect from the respective dates.
>
> (ii) That the decision of respondent-2/University as conveyed to the applicants vide Annexure P-14, dated 6-4-92 be declared illegal and be set aside, along-with all consequential benefits of arrears of pay, further promotions etc. to the applicants.
>
> (iii) That the respondents be directed to grant the scale of Rs.450-800 to the applicants on State Government pattern with effect from the corresponding date alongwith all consequential benefits thereof, such as, arrears of salary and further promotions etc. win a time bound period.
>
> (iv) That the respondents be directed to recast the seniority list of Field Assistants/Field Assistants Grade I strictly in accordance with the State Government decision and the applicants be placed at appropriately in the seniority list and be promoted further in case they become eligible in accordance

with the rules. Any other seniority list/contrary decision of respondent-2/University be declared illegal and be quashed as far as it is in conflict with the State Government as contained in Annexure P-2."

13. It also emerges from the record that prior to framing of its own Recruitment and Promotion Rules, the respondent-University had been following the Recruitment and Promotion Rules of Krishi Vishva Vidyalaya notified on 27.3.1986, wherein pay scale of Field Assistant was Rs.400-600 and that of Field Assistant Grade I was Rs.450-800. But with effect from 4.8.1986, respondent-University framed its own Rules, whereby they placed Field Assistant in the pay scale of Rs.400-600 and Field Assistant Grade I in the pay scale of Rs.450-800. In the instant case, petitioners were promoted to the post of Field Assistant Grade I on 28.10.l987 31.5.1988 and 2.6.1986, respectively. Subsequently on 25.8.1988, respondent-University also framed new Rules, wherein post of Field Assistant was kept in the feeder cadre for promotion to the post of Field Assistant Grade I and as such petitioners can not be granted pay scale of Rs.450-800. Perusal of Rules framed by the respondent-University vide notification dated 25.8.1988 provides following procedure for appointment/promotion to the posts of Field Assistant and Field Assistant Grade I:

DR. YASHWANT SINGH PARMAR UNIVERSITY OF HORTICULTURE & FORESTRY, SOLAN-173230.

"PROMOTION RULES FOR FIELD STAFF"

Sr. No.	Name of the post	Mode of recruitment and ratio in which the posts are to be filled up		Educational qualification	Length of approved service	Field of Choice/Feeder posts	Composition of Promotion Committees
		By promotion	By direct recruitment				
(1.)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1.	Field Assistant (Rs.400-600)	25%	75%	Matriculation Or Middle Or Literate	Three years Or With ten years Or With eighteen years	From amongst category 'D' Employees Do Do	1. Director/Dean concerned .. Chairman 2. Other Deans/Directors .. Member 3. Heads of the Depts/Res. Station Concerned … Member 4. Registrar or his nominee .. Member
2.	Field Assistant	75"%	25%	Matriculation	Five years	Field Asstt.	-do-

	Gr. I (Rs.450-800)						

14. It is apparently clear that promotion to the post of Field Assistant should be made from amongst 'D' category employees and the post of Field Assistant Grade I is to be filled up 75% by promotion from amongst the Field Assistants and 25% by direct recruitment. Rules, further suggest that pay scale of Rs.450-800 stands revised to Rs.1200-2100. Since the respondent-University has framed its own Promotion Rules for filling up posts of Field Assistant and Field Assistant Grade I, and further the respondent-University has not taken any decision to merge the posts of Field Assistant with higher post of Field Assistant Grade I/Horticulture Sub-Inspector, this Court sees no force in the contentions having been put forth on behalf of the petitioners that they are entitled to be dealt in accordance with Notification dated 21.6.1986 (annexure P-2) issued by the Himachal Pradesh Government, whereby posts of Field Assistants have been ordered to be merged with that of Horticulture Sub-Inspectors, because as per Promotion Rules of the respondent-University, it has evolved its own pay scales of Rs. 400-600 for the post of Field Assistant and Rs. 450-800 for the post of Field Assistant Grade I, as such, petitioners can not claim revision of pay scales from 1.1.1978 on notional basis with monetary benefits from 1.3.1986, in terms of letter dated 21.6.1986 (Annexure P-2) issued by Himachal Pradesh Government ordering merger of Field Assistants with that of Horticulture Sub-Inspectors in the pay scale of Rs. 450-800.

15. At the cost of repetition, it is stated that as per new Rules having been framed by the respondent-University, higher post in the hierarchy is of Field Assistant Grade I, which is required to be filled in 75% by promotion from Field Assistants and 25% by direct recruitment. In view of aforesaid discussion, this Court does not find any illegality in the findings returned by learned Single Judge that the post of Field Assistant is feeder post for promotion to the post of Field Assistant Grade I and as such pay scales of both the posts are different.

16. Leaving everything aside, it clearly emerges from record that respondent-University has framed its own Promotion Rules and no decision has ever been taken to merge the posts of Field Assistant with Field Assistant Grade I/Horticulture Sub-Inspector, thus the petitioners are not entitled to the benefit of revision of pay scales in terms of letter dated 21.6.1986 (Annexure P-2). Otherwise also, respondent-University has specifically stated that as per own case of petitioners, post of Field Assistants in the State Government have been merged with that of Horticulture Sub-Inspectors as such there is no cadre of Field Assistants in the State Government and it is not understood qua which post/category, petitioners are claiming parity.

17. The Apex Court in a case titled as **State of Haryana and others versus Charanjit Singh and others etc. etc**., reported in AIR 2006 Supreme Court 161, held that the principle of '**equal pay for equal work**' has no mechanical application in every case. It is apt to reproduce para 17 of the judgment herein:

> "17. Having considered the authorities and the submissions we are of the view that the authorities in the cases of Jasmer Singh, Tilak Raj, Orissa University of Agriculture & Technology and Tarun K. Roy lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in

administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities made a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regards. In any event the party who claims equal pay for equal work has to make necessary averments and prove that all things are equal. Thus, before any direction can be issued by a Court, the Court must first see that there are necessary averments and there is a proof. If the High Court, is on basis of material placed before it, convinced that there was equal work of equal quality and all other relevant factors are fulfilled it may direct payment of equal pay from the date of the filing of the respective Writ Petition. In all these cases, we find that the High Court has blindly proceeded on the basis that the doctrine of equal pay for equal work applies without examining any relevant factors."

18. It would also be profitable to reproduce para 13 of the judgment rendered by the Apex Court in **New Delhi Municipal Council** versus **Pan Singh & Ors.,** reported in 2007 AIR SCW 1705, herein:

"13. They, thus, formed a class by themselves. A cut-off date having been fixed by the Tribunal, those who were thus not similarly situated, were to be treated to have formed a different class. They could not be treated alike with the others. The High Court, unfortunately, has not considered this aspect of the matter."

19. The Apex Court in cases titled as **State of Madhya Pradesh and others** versus **Ramesh Chandra Bajpai**, reported in(2009) 13 Supreme Court Cases 635, and **State of Punjab & Anr.** Versus **Surjit Singh & Ors**., reported in 2009 AIR SCW 6759, has discussed the development of law right from the year 1960 till 2009. It is apt to reproduce para 30 of the judgment delivered in Surjit Singh's case supra, herein:

"30. Mr. Swarup may or may not be entirely correct in projecting three purported different views of this Court having regard to the accepted principle of law that ratio of a decision must be culled out from reading it in its entirety and not from a part thereof. It is no longer in doubt or dispute that grant of the benefit of the doctrine of 'equal pay for equal work' depends upon a large number of factors including equal work, equal value, source and manner of appointment, equal identity of group and wholesale or complete identity."

20. The Apex Court in the case titled as **Steel Authority of India Limited and others** versus **Dibyendu Battacharya**, reported in (2011) 11 Supreme Court Cases 122, has discussed the development of law and the judgments made by the Apex Court right from the year 1968, in paras 18 to 29 of the judgment. It is apt to reproduce paras 30 and 31 of the judgment herein:

> 30. In view of the above, the law on the issue can be summarised to the effect that parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be the same but the skills and responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors. Granting parity in pay scales depends upon the comparative evaluation of job and equation of posts. The person claiming parity, must plead necessary averments and prove that all things are equal between the concerned posts. Such a complex issue cannot be adjudicated by evaluating the affidavits filed by the parties.
>
> 31. The onus to establish the discrimination by the employer lies on the person claiming the parity of pay. The expert committee has to decide such issues, as the fixation of pay scales etc. falls within the exclusive domain of the executive. So long as the value judgment of those who are responsible for administration i.e. service conditions etc., is found to be bonafide, reasonable, and on intelligible criteria which has a rational nexus of objective of differentiation, such differentiation will not amount to discrimination. It is not prohibited in law to have two grades of posts in the same cadre. Thus, the nomenclature of a post may not be the sole determinative factor. The courts in exercise of their limited power of judicial review can only examine whether the decision of the State authorities is rational and just or prejudicial to a particular set of employees. The court has to keep in mind that a mere difference in service conditions does not amount to discrimination. Unless there is complete and wholesale/ wholesome identity between the two posts they should not be treated as equivalent and the Court should avoid applying the principle of equal pay for equal work.

21. The Apex Court in **Union Territory Administration, Chandigarh and others** versus **Manju Mathur and another**, reported in(2011) 2 Supreme Court Cases 452, held that similarity of designation or nature or quantum of work is not determinative of entitlement to equality in pay scales.

22. The Apex Court in **Hukum Chand Gupta** versus **Director General, Indian Council of Agricultural Research and others**, reported in (2012) 12 Supreme Court Cases 666, held as to how parity can be claimed or granted. It is apt to reproduce relevant portion of para 20 of the judgment herein:

> 20. .... There cannot be straitjacket formula for holding that two posts having the same nomenclature would have to be given the same pay scale. Prescription of pay scales on particular posts is a very complex exercise. It requires assessment of the nature and quality of the duties performed and the responsibilities shouldered by the incumbents on different posts. Even though, the two posts may be referred to by the same name, it would not lead to the necessary inference that the posts are identical in every manner. These are matters to be assessed by expert bodies like the employer or the Pay Commission. Neither the Central Administrative Tribunal nor a writ court would normally venture to substitute its own opinion for the opinions rendered by the

experts. The Tribunal or the writ court would lack the necessary expertise to undertake the complex exercise of equation of posts or the pay scales."

23. A Division Bench of this Court in a case titled as **Roshan Lal** versus Ho**n'ble High Court of Himachal Pradesh and another**, being CWP No. 873 of 1993, decided on 27th October, 1994, held that even if a post of one cadre is created in two departments and different pay scales are granted, that cannot be a ground to claim parity. In order to claim parity, the writ petitioners have to indicate that their jobs, duties, responsibilities and functions are similar. In this case, the Court has examined whether the post of Book Binder sanctioned in the High Court and Secretariat of the State Government and in other departments are entitled to same pay scale? No doubt, the post of Book Binder was created in all these departments, but it was held that it is for the writ petitioner to plead and prove that he was performing the same type of work and responsibilities and other factors are similar. This Court, after discussing all facts and factors, rejected the plea for grant of parity and the writ petition was dismissed. It is apt to reproduce relevant portion of the judgment herein:

> "Having heard the learned counsel for the petitioner, we find no justification in the submission. It is too much of the employee of the High Court to claim that the High Court should be equated with the Printing and Stationery Department of the State Government. Even on the basis of job, there would be no similarity. The Printing and Stationery Department would have continuous and different varieties of work needing a different type of Book Binder than the Book-Binder in the High Court."

24. A similar view has been taken by this Court in case titled as **Himachal Pradesh State Electricity Board** versus **Rajinder Upadhaya & others**, being LPA No. 51 of 2009, decided on 11th September, 2014, LPA No. 11 of 2012, titled as **The Principal Secretary (Personnel) & another** versus **Pratap Thakur**, decided on 22nd September, 2014 and CWP No. 4184 of 2010 decided on 17.10.2014 titled **Beli Ram** versus **Hon'ble High Court of Himachal Pradesh and another**.

25. A similar view has also been taken by the apex Court while setting aside the judgment made by this Court in a latest judgment reported in 2014 AIR SCW 6581 titled **State of Himachal Pradesh and another** versus **Tilak Raj.** It is apt to reproduce para 22 of the said judgment herein.

> "22. It is also clear that disputed question of facts were involved in the petitions because according to the respondents, who were petitioners before the High Court, nature of work done by them was similar to that of the work of other Laboratory Attendants or Laboratory Assistants. Without looking at the nature of work done by persons working in different cadres in different departments, one cannot jump to a conclusion that all these persons were doing similar type of work simply because in a civil suit, one particular person had succeeded after adducing evidence. There is nothing on record to show that the High Court had examined the nature of work done by the respondents and other persons who were getting higher pay scale. The High Court had also not considered the fact that qualifications required for appointment to both the posts were different. In our opinion, the High Court should not have entertained all these petitions where disputed questions of fact were required to be examined. Without examining relevant evidence regarding exact nature of work, working conditions and other relevant factors, it is not possible to come to a conclusion with regard to similarity in the nature of work done by persons belonging to different cadres and normally such exercise should not be carried out by the High Court under its writ jurisdiction. It is settled law that the work of fixing pay scale is left to an expert body like Pay Commission or other similar body, as held by this Court in several cases, including the case of S.C. Chandra v. State of Jharkhand, 2007 8 SCC 279. Moreover, qualifications, experience, etc. are also required to be

examined before fixing pay scales. Such an exercise was not carried out in this case by the High Court."

26. Having said so, there is no merit in the appeal and same is dismissed, alongwith pending applications, if any. Judgment passed by the learned Single Judge is upheld.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

The State of Himachal Pradesh & others ...Appellants.
Versus
Shri Bhagat Ram & others ...Respondents.

RFA No. 57 of 2013 a/w connected matters.
Reserved on: 28.11.2016.
Decided on: 15.12.2016

Land Acquisition Act, 1894- Section 18- Land Acquisition Collector had awarded compensation on the basis of the settlement –held, that statutory benefits payable under the Act cannot be waived by the Land Owners – there can be no estoppel against the law- the benefits were rightly granted by the Reference Court – appeal dismissed. (Para-3 to 7)

For the Appellants: Mr. R.S Thakur, Additional Advocate General.
For the Respondents: Mr. Sudhir Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

Since common questions of fact and law stand raised for consideration in all the appeals, hence they are taken up together for disposal.

2. The instant appeals stand directed by the State of Himachal Pradesh against the impugned rendition recorded by the learned Reference Court whereby it in the amount constituted therewithin assessed compensation qua the lands of the respondents/landowners. The solitary contention addressed by the learned Additional Advocate General for unsettling the rendition recorded by the learned Reference Court stands hinged upon the factum qua with the respondents/landowners evidently entering into a consensual settlement with the appellants herein whereby they displayed their consent to receive the amount constituted therein as compensation amount assessable qua their lands as stood brought to acquisition thereupon the apt consensual settlement(s) warranted an inference qua theirs thereunder waiving besides abandoning their entitlement to seek any levy of the statutory benefits contemplated in the Land Acquisition Act on the consensually settled compensation amount whereas in the impugned rendition the learned Reference Court levying statutory benefits on the consensually agreed/settled compensation amount qua the apposite lands which stood proposed thereat to be brought to acquisition by the appellants herein warrants its standing quashed and set aside.

3. For determining the tenacity of the aforesaid submission addressed herebefore it is imperative to make an allusion to the apposite recitals manifested in the consensual statement(s) respectively made/recorded by the landowners (RW-3/D and Ex.RW-3/E in RFA No. 57 to 83 of 2013 (Ex. RW-5/D and Ex.RW-5/E in RFA Nos. 1,2,3,4 and 6 of 2013) with the authorities concerned wherewithin the respondents/landowners display their acquiescence to receive 8 lacs per bigha as compensation for their lands as stood proposed thereat to be brought to acquisition. Significantly therewithin no vivid display occurs of the respondents/landowners while accepting a sum of Rs.8 lacs per bigha as compensation amount for their lands which stood

proposed thereat to be brought to acquisition, theirs also making a palpable explicit communication therein qua the aforesaid consolidated sum of 8 lacs per bigha agreed by them to be the compensation amount qua their lands which stood proposed thereat to be brought to acquisition including also the statutory benefits levy-able thereon. In sequel the factum of non-occurrence therein with explicitly the aforesaid factum probandum does benumb the espousal of the learned Additional Advocate General qua with the landowners under the aforesaid statement(s) communicating their acceptance qua Rs. 8 lacs constituting the compensation amount for their lands which stood thereat proposed to be brought to acquisition theirs also unveiling therein the apposite willingness qua the amount aforesaid also including therein all statutory benefits levy-able thereupon nor also he can hence argue qua the respondents/landowners waiving besides abandoning their statutory rights qua the relevant statutory benefits standing levied thereon by the learned Reference Court.

4. Be that as it may a perusal of the apposite reference transmitted for adjudication by the Land Acquisition Collector concerned to the learned Reference Court unfolds qua preceding the Land Acquisition Collector concerned recording his award qua the acquired lands of the respondents/landowners wherein he meted deference to the consensual settlement(s) arrived at inter-se the respondents/landowners with the authorities concerned qua the relevant facet qua compensation amount assessable qua the lands of the respondents/landowners, his omitting to elicit the participation of respondents/landowners, sequel whereof is qua the consent award pronounced by the land Acquisition Collector concerned qua the lands of the respondents/landowners anvilled upon the relevant consensual settlement arrived inter-se them with the authorities concerned qua the relevant facet of compensation amount qua their lands which stood proposed thereat to be brought to acquisition, obviously hence standing vitiated with a stain of its infracting the rule of Audi alteram partem. Since the participation of the landowners in the proceedings preceding the pronouncement of an apposite award by the LAC concerned determining therein the compensation amount vis-à-vis the landowners concerned qua their lands which stood brought to acquisition would have facilitated emergence of the trite fact qua theirs while recording their respective consensual settlement(s) with the authorities concerned qua the compensation amount manifested in their respective consensual statement(s) to stand constituted in a sum of Rs. 8 lacs per bigha, theirs, while agreeing qua Rs.8 lacs per bigha constituting the sum of compensation assessable qua their lands which stood proposed thereat to be brought to acquisition, theirs also thereby acquiescing qua the amount aforesaid including also therewithin all the statutory benefits levyable thereon.

5. As afore-stated with the apposite consensual statement(s) recorded by the landowners with the authorities concerned omitting to make an explicit disclosure therein qua the respondents/landlords while accepting Rs.8 lacs as compensation amount qua their lands which stood proposed thereat to be brought to acquisition theirs also making a candid disclosure therein qua the aforesaid amount also including all the statutory benefits peremptorily levy-able thereon whereupon this Court has erected an inference qua hence the plain language of their consensual statement(s) not purveying any leverage to any construction standing made thereupon qua the respondents/landowners waiving their entitlement to seek levy of statutory benefits thereon when stands construed with the award of the Land Acquisition Collector concerned for the reasons afore-stated standing ingrained with a vice of his infracting the rule of Audi alteram partem begets a formidable inference of the respondents/landowners not abandoning their rights to seek levy of statutory benefits on the compensation amount which stood consensually agreed by them to be constituted in a sum of Rs. 8 lacs per bigha.

6. Even otherwise all the statutory benefits levyable on the judicially determined compensation amount are imperatively levyable thereon. Significantly when the levying of statutory benefits even on compensation amount determined by the Land Acquisition Collector besides judicially determined by the learned Reference Court spurs from a peremptory/mandatory dictate of the apposite statutory provisions, similarly with the respondents/landowners while consensually agreeing qua Rs. 8 lacs per bigha comprising the

relevant compensation amount qua theirs lands which stood proposed thereat to be brought to acquisition rendered the levying thereon of all the apposite statutory benefits to be their statutory entitlement. In aftermath with the levying of the apposite statutory benefits on the compensation amount being hence an inflexible statutory fiat peremptoriness whereof holding application even on the relevant compensation amount which stood consensually agreed to be received by the respondent landowners qua their respective lands, thereupon the levying thereon of the peremptory statutory benefit(s) was an unrelenting statutory exercise.

7. In aftermath no waiver can stand fastened upon the landowners qua the relevant consensual compensation amount not thereon begetting any levy of all the relevant statutory benefits nor the fiat of the principle of waiver or estoppel is workable qua any compensation amount consensually agreed to be received by the respondents/landowners unless cogent evidence stood displayed qua theirs with explicitly in the relevant writings marking the fact qua the consensually agreed relevant figure of compensation amount also including therewithin the statutory benefits whereas with the relevant echoings occurring in the relevant statements(s) not explicitly marking the aforesaid factum, the apposite conclusion therefrom reiteratedly is qua the respondents/landowners neither waiving their entitlement to seek levy of statutory benefits, on the consensually agreed compensation amount nor also they can stand estopped to claim levy thereon of the relevant statutory benefits.

8. Consequently there is no infirmity in the impugned award(s). The present appeals stand dismissed. Impugned award(s) stand maintained and affirmed. All pending applications are disposed of accordingly. The Registry is directed to place photocopies of this judgment on each file of the connected matters.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Vikas Sharma ....Petitioner
Vs.
State of Himachal Pradesh ....Respondent

Cr.M.M.O. No. 353 of 2016
Date of decision: 15th December, 2016.

Code of Criminal Procedure, 1973- Section 482- An FIR was registered for the commission of offences punishable under Section 376 and 417 of I.P.C against the petitioner- petitioner and second respondent were training together and were having a live in relationship – the petitioner had promised to marry the second respondent but had married elsewhere – FIR was registered against the petitioner at the instance of the second respondent – it was pleaded that no offence has been made out against the petitioner and FIR be quashed – held, that it was established that the petitioner did not have the intention to marry the second respondent from the inception- second respondenthad surrendered her mind, body and soul only because of the promise that petitioner would marry her – whether the physical contact was established between the parties with consent and without commitment of marriage would be seen during the course of trial – petition dismissed. (Para-3 to 9)

Case referred:

Amit Kapoor versus Ramesh Chander and another (2012) 9 SCC 460

For the petitioner :Mr. Aman Parth Sharma, Advocate.
For the respondent :Mr. Rupinder Singh, Additional Advocate General, with Mr. J.S. Guleria, Assistant Advocate General, for respondent No. 1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (oral)

Heard, Shri Amarn Parth Sharma, learned counsel for the petitioner and Shri Rupinder Singh, Additional Advocate General. Though the case was listed for admission, however, with the consent of the parties, it is taken up for final hearing.

2. The petitioner is arraigned as an accused for the offence punishable under Sections 376 and 417of IPC (for short 'Code'). It transpires that second respondent herein is complainant and it is an admitted fact that the petitioner and the second respondent, while pursuing MBA were training together and were having a live-in relationship. It further transpires that there was some discord in the relationship.

3. It is the specific case of second respondent that she had established physical contact/relationship with the petitioner only because he had promised to marry her but later on he solemnized his marriage elsewhere, compelling the prosecutrix to register the aforesaid case against the petitioner. Quashing of the FIR has been prayed on the ground that no offence is made out and it is averred that when a man and woman are mature and know the consequences of the act then mere promise to marry on future date does not attract punishment.

4. In ***Amit Kapoor*** *versus* ***Ramesh Chander and another (2012) 9 SCC 460***the Hon'ble Supreme Court has evolved the principal for proper exercise of jurisdiction with regard to quashing of criminal proceedings either under Section 379 or under Section 482 Cr.P.C. or together, as the case may be, and the same is summarized as follow:-

> "1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.
>
> 2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.
>
> 3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.
>
> 4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.
>
> 5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to an accused.
>
> 6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.
>
> 7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

> {Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v. s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC

203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.

16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence."

5. It is evident from the material produced on record that there was close relationship between the petitioner and second respondent. Therefore, if the allegations that the petitioner had committed breach of promise to marry, in normal circumstances would alone not be a crime and complainant can only claim damage and would hardly constitute a case to be prosecuted for cheating on that ground alone. However, if the allegations of the complainant of cheating are coupled with the allegations that the petitioner had continued sexual relationship with her on the promise of marry and thereafter resiled then things would definitely be different. More particularly, if it is also established that the petitioner right from inception did not have the intention to marry, then obviously in such cases both the provisions of Section 417 coupled with Section 376 would be attracted.

6. If it that be the test, then there is sufficient material available on record, which does indicate that second respondent had surrendered not only her mind but body and soul to the petitioner only because of solemn promise that he would eventually marry her.

7. After having won the confidence of second respondent and after having sexually used and abused the second respondent, the petitioner cannot now turn out and claim that no offence is made out, more particularly, when it has already come on record that he has solemnized his marriage elsewhere.

8. Whether physical contact established by the petitioner with the second respondent was consensual and without commitment of marriage as is sought to be canvassed by the petitioner is essentially a matter which has to be seen and determined during the course of the trial? Therefore, no case for quashing of FIR at this stage is made out.

9. Accordingly, there is no merit in the petition and the same is dismissed.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Cholamandlam MS General Insurance Company Limited …Appellant.
Versus
Smt. Shakuntla Devi and others …Respondents.

FAO No. 337 of 2012
Decided on: 16.12.2016

Motor Vehicles Act, 1988- Section 173- Insurer contended that the accident was not caused by the driver of the offending vehicle but by the deceased himself – however, the owner/insured and the driver have not questioned these findings and the insurer has no locus to question the same – insurer does not have the right to challenge the adequacy of compensation as it had not obtained the permission under Section 170 of Motor Vehicles Act- however, the Appellate Court is to do

complete justice between the parties – the income of the deceased was Rs. 15,630/- per month- the deceased was bachelor and 50% of the amount has to be deducted towards personal expenses – claimants have lost dependency of Rs.7,800/- per month- the age of the deceased was 23 years and multiplier of 15 was applicable – Tribunal had wrongly applied the multiplier of 18- claimants have lost source of dependency to the tune of Rs.7,800 x 12 x 15= Rs.14,04,000/- - claimants are entitled to the compensation of Rs.10,000/- each under the heads loss of love and affection, loss of estate and funeral expenses- total compensation of Rs.14,34,000/- awarded along with interest @ 7.5% per annum. (Para- 10 to 48)

Cases referred:

U.P.S.R.T.C. vs. Km. Mamta and others, AIR 2016 Supreme Court 948
Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation, (2013) 11 SCC 517
Giani Ram vs. Ramjilal, 1969 (1) SCC 813
Narayanarao (dead) through LRs and others vs. Sudarshan, 1995 Supp.(4) SCC 463
Mahant Dhangir and another vs. Madan Mohan and others, 1987 (Supp.) SCC 528
T.N. Rajasekar vs. N. Kasiviswanathan and others, AIR 2005 SC 3794
Delhi Electric Supply Undertaking vs. Basanti Devi and another, JT 1999 (7) SC 486
H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc., AIR 1980 Himachal Pradesh 16
United India Insurance Co. Ltd. vs. Dama Ram and others, 1994 ACJ 692
M. Adu Ama vs. Inja Bangaru Raja and another, 1995 ACJ 670
Himachal Road Transport Corporation vs. Saroj Devi and others, 2002 ACJ 1146
National Insurance Co. Ltd. vs. Mast Ram and others, 2004 ACJ 1039
LAC Solan and another vs. Bhoop Ram, 1997(2) Sim.L.C. 229
State Bank of India vs. M/s Sharma Provision Store and another, AIR 1999 J&K 128
Nati Devi and another versus Maya Devi and others, I L R 2016 (III) HP 1074
Sarita Devi & others versus Ashok Kumar Nagar & others, I L R 2016 (III) HP 1958
Raj Pal Yadav and another versus Jamna Devi and another, I L R 2016 (III) HP 2318
Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120
United India Insurance Co. Ltd. and others vs Patricia Jean Mahajan & others, (2002) 6 SCC 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant: Mr. Neeraj Gupta, Advocate.
For the respondents: Nemo for respondents No. 1 and 2.
Mr. Jagdish Thakur, Advocate, for respondent No. 3.
Nemo for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is award, dated 30th April, 2012, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (for short "the Tribunal") in M.A.C. Case No.

50 of 2009, titled as Shakuntla Devi and another versus Bhupinder Kaur and others, whereby compensation to the tune of ₹ 16,98,040/- with interest @ 8% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. In order to determine this appeal, it is necessary to give a brief resume of the facts of the case, the womb of which has given birth to the appeal in hand.

3. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation to the tune of ₹ 25,00,000/-, as per the break-ups given in the claim petition, on the ground that they became the victims of the vehicular accident, which was caused by the driver, namely Shri Jai Gopal, while driving tipper, bearing registration No. HP-69-0723, rashly and negligently on 8th March, 2009, at about 5.15 P.M., at Village Nandpur, in which deceased-Pardeep Singh @ Ajay Sandu sustained injuries, was taken to Regional Hospital, Una, wherefrom was referred to PGI, Chandigarh, where he succumbed to the said injuries.

4. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

5. On the pleadings of the parties, following issues came to be framed by the Tribunal on 8th June, 2011:

> *"1. Whether Sandeep Singh died as a result of injuries sustained in accident due to rash and negligent driving of respondent No. 2 Jai Gopal while driving vehicle No. HP-69-0723? OPP*
>
> *2. If issue No. 1 is proved, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether the petition is not maintainable? OPR*
>
> *4. Whether petition is bad for non-joinder of necessary parties i.e. the owner and insurer of motorcycle No. HP-20 B-0155 as alleged? OPR-3*
>
> *5. Whether respondent No. 2-driver of vehicle No. HP-69-0723 was not holding valid and effective driving licence at the time of accident? OPR-3*
>
> *6. Whether vehicle was being plied without valid and effective route permit, registration certificate and fitness certificate in violation of the terms and conditions of the insurance policy as alleged? OPR-3*
>
> *7. Relief."*

6. The claimants have examined three witnesses and one of the claimants, namely Smt. Shakuntla Devi, herself stepped into the witness box as PW-3 to substantiate their claim. The owner-insured of the offending vehicle has examined two witnesses in support of his defence and the driver, namely Shri Jai Gopal, himself stepped into the witness box as RW-3. The insurer has not led any evidence.

7. The Tribunal, after scanning the evidence, oral as well as documentary, awarded compensation to the tune of ₹ 16,98,040/- with interest @ 8% per annum from the date of filing of the petition till its realization in favour of the claimants and saddled the insurer with liability in terms of the impugned award.

8. The claimants, owner-insured and driver of the offending vehicle have not questioned the impugned award on any ground, thus, has attained finality so far it relates to them.

9. The appellant-insurer has questioned the impugned award on the grounds taken in the memo of the appeal.

Issue No. 1:

10. Learned counsel appearing on behalf of the appellant-insurer argued that the accident was not caused by the driver of the offending vehicle, but was caused by the deceased himself while driving the motorcycle. The owner-insured and the driver of the offending vehicle have not questioned the said findings. Thus, the insurer has no locus to question the same.

11. It is not the case of the appellant-insurer that there was collusion between the owner-insured and driver of the offending vehicle and the claimants. Had it taken the said defence and led evidence, question would have been different. Neither it has taken such defence nor has led any evidence. However, I have gone through the discussion made by the Tribunal in paras 11 to 17 of the impugned award, are legally and factually correct, need no interference. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to determine issues No. 3 to 6.

Issues No. 3 to 6:

13. The appellant-insurer has not questioned the findings returned by the Tribunal on issues No. 3 to 6. However, I have gone through the record and am of the view that the Tribunal has rightly made the discussion in paras 23 to 25 of the impugned award. Accordingly, the findings returned by the Tribunal on issues No. 3 to 6 are upheld.

Issue No. 2:

14. Admittedly, the insurer has not sought permission in terms of Section 170 of the MV Act, thus, is precluded from questioning the adequacy of the compensation.

15. I deem it proper to record herein that the appeal under Section 173 of the MV Act is alike the appeal under Section 96 of the Code of Civil Procedure, 1908 (for short, "CPC"). Therefore, the Court is under obligation to decide all issues arising in a case both on facts and law after appreciating the entire evidence.

16. The Apex Court in **U.P.S.R.T.C. vs. Km. Mamta and others,** reported in **AIR 2016 Supreme Court 948**, held that Section 173 of the MV Act and the first appeal under Section 96 CPC are alike and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case. It is profitable to reproduce paragraph 24 of the said judgment hereunder:

> *"24. An appeal under Section 173 of the M.V.Act is essentially in the nature of first appeal alike Section 96 of the Code and, therefore, the High Court is equally under legal obligation to decide all issues arising in the case both on facts and law after appreciating the entire evidence."*

17. It is worthwhile to record herein that Part VII of the CPC provides for filing of appeals arising out of decrees and orders. Section 96 CPC provides for appeals from original decree. It is apt to reproduce Section 96 CPC hereunder:

> *"**96. Appeal from original decree.** - 1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction the Court authorized to hear appeals from the decisions of such Court.*
>
> *(2) An appeal may lie from an original decree passed ex parte.*
>
> *(3) No appeal shall lie from a decree passed by the Court with the consent of parties.*
>
> *(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees."*

18. Section 107 CPC deals with the "Powers of the Appellate Court" and sub-section (2) thereof, provides specifically that the Appellate Court shall have the same powers and shall

perform as nearly as may be the same duties as are conferred and imposed on the trial Court. It is apt to reproduce Section 107(2) CPC as under:

"107. Powers of appellate court.-

(1) ....

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."

19. Section 176 of the MV Act empowers the State Government to make rules for the purpose of implementing the provisions contained in Sections 165 to 174 of the MV Act. It is apt to reproduce Section 176 of the Act, hereunder:

"176. Power of State Government to make rules.

A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:--

f) The form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;

g) The procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;

h) The powers vested in a Civil Court which may be exercised by a Claims Tribunal;

i) The form and the manner in which and the fees (if any) on payment of which an appeal may be preferred against an award of a Claims Tribunal; and

j) *Any other matter which is to be, or may be, prescribed."*

20. In terms of the mandate of Section 176(c) of the MV Act, the Claims Tribunals are vested with the powers of Civil Court.

21. In a Claim Petition, summary procedure is to be adopted and all provisions of CPC are not applicable, rather only some provisions have been made applicable in terms of Section 169 of the MV Act read with Rule 232 of the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "MV Rules"). It is apt to reproduce Rule 232 of the MV Rules herein:

"232. The Code of Civil Procedure to apply in certain cases:-

The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30; Order IX; Order XIII; Rule 3 to 10; Order XVI, Rules 2 to 21; Order XVII; Order XXI and Order XXIII, Rules 1 to 3."

22. Now, the question is - whether the Appellate Court while hearing an appeal under Section 173 of the MV Act can pass such an order which ought to have been passed by the Tribunal, without there being any appeal/challenge or cross objections from the person against whom the order has been made? The answer is in the affirmative for the reasons given hereinabove read with the mandate of law laid down by the Apex Court and the High Courts.

23. Part VII and Order 41 CPC deals with the powers and the scope of the Appellate Court in appeal proceedings.

24. The Apex Court in **Sharanamma and others vs. Managing Director, Divisional Contr., North-East Karnataka Road Transport Corporation,** reported in **(2013) 11 SCC 517,** has held that there are no fetters on the powers of the appellate Court to consider the entire case on facts and law, while hearing an appeal under Section 173 of the MV Act. It is apt to reproduce paragraphs 10, 11 and 12 of the said decision hereunder:

"10. When an Appeal is filed under Section 173 of the Motor Vehicles Act, 1939 (hereinafter shall be referred to as the 'Act'), before the High Court, the normal Rules which apply to Appeals before the High Court are applicable to such an Appeal also. Even otherwise, it is well settled position of law that when an Appeal is provided for, the whole case is open before the Appellate Court and by necessary implication, it can exercise all powers incidental thereto in order to exercise that power effectively. A bare reading of Section 173 of the Act also reflects that there is no curtailment or limitations on the powers of the Appellate Court to consider the entire case on facts and law.

11. It is well settled that the right of Appeal is a substantive right and the questions of fact and law are at large and are open to Review by the Appellate Court. Thus, such powers and duties are necessarily to be exercised so as to make the provision of law effective.

12. Generally, finding of fact recorded by Tribunal should not be interfered with in an Appeal until and unless it is proved that glaring discrepancy or mistake has taken place. If the assessment of compensation by the Tribunal was fair and reasonable and the award of the Tribunal was neither contrary nor inconsistent with the relevant facts as per the evidence available on record then as mentioned hereinabove, the High Court would not interfere in the Appeal. In the case in hand, nothing could be pointed out to us as to what were the glaring discrepancies or mistakes in the impugned Award of the Tribunal, which necessitated the Appellate Court to take a different view in the matter."

25. The Apex Court in the case titled as **Giani Ram vs. Ramjilal,** reported in **1969 (1) SCC 813,** held that Order 41 Rule 33 CPC empowers the appellate Court to pass any decree which justice may require. It is apt to reproduce paragraphs 8 and 9 of the judgment herein:

"8. Order 41, Rule 33 of the CPC was enacted to meet a situation of the nature arising in this case. In so far as it is material, the rule provides:

> *"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.*
>
> *The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.*

9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived, it would, be perpetrating gave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, CPC ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed."

26. The Apex Court inthe cases titled as **Narayanarao (dead) through LRs and others vs. Sudarshan,** reported in **1995 Supp.(4) SCC 463; Mahant Dhangir and another vs. Madan Mohan and others,** reported in **1987 (Supp.) SCC 528,** and **T.N. Rajasekar vs. N. Kasiviswanathan and others,** reported in **AIR 2005 SC 3794** held that the High Court, in order to do complete justice to the parties, can invoke the powers under Order 41 Rule 33 CPC and pass orders accordingly.

27. The Apex Court in another case titled as **Delhi Electric Supply Undertaking vs. Basanti Devi and another,** reported in **JT 1999 (7) SC 486,** while relying upon its earlier decision in Mahant Dhangir (supra), held in paragraph 19 as under:

> *"19. Conditions as laid in provision of Order 41, Rule 33 are satisfied in the present case. When circumstances exist which necessitate the exercise of discretion conferred by Rule 33, the Court cannot be found wanting when it comes to exercise its powers."*

28. This Court in **H.P. Road Transport Corporation vs. Pt. Jai Ram and etc. etc.,** reported in **AIR 1980 Himachal Pradesh 16,** held that under Order 41 Rule 33 CPC, wide powers have been given to the appellate Court and once it is seized of a matter in its appellate jurisdiction, it is within its power to do complete justice between all the concerned parties. It is apt to reproduce relevant portion of paras 39 and para 40 of the judgment herein:

> *"39. …………..Moreover, theme of Order 41 and especially the wide powers given to the Court under Rule 33 of Order 41 suggests that the intention of the Legislature is to see that 'once the Court is seized of a matter in its appellate jurisdiction, it is able to do complete justice between all the concerned parties. To us, therefore, it is very clear that the provision enabling a respondent to file cross-objections made in Rule 22 is a procedural provision under which even if a respondent has not preferred any appeal, the Court is enabled to do complete justice to the parties by allowing the respondent concerned to prefer cross-objections within the period of limitation. Under these circumstances, with great respect to the learned Judges of the Allahabad High Court, we find ourselves unable to accept their view that provision enabling a respondent to file cross-objections is a substantive provision and not a procedural one.*
>
> *40. In view of our finding that provision for filing cross-objections contemplated by Order 41, Rule 22 is a procedural provision, the ratio of the above referred two decisions of the Supreme Court would at once be attracted, and this Court being seized of an appellate jurisdiction conferred by Section 110-D of the Motor Vehicles Act, It has to exercise that jurisdiction in the same manner in which it exercises its other appellate jurisdiction allowing the respondents in such appeals to prefer cross-objections."*

29. Keeping in view the ratio of the judgment supra, it can safely be held that the appellate Court is competent to pass any order in the interest of justice.

30. The High Court of Rajasthan, while dilating upon the powers of the Appellate Court under Order 41 Rule 33 CPC, in the case titled as **United India Insurance Co. Ltd. vs. Dama Ram and others,** reported in **1994 ACJ 692,** held that the appellate Court can rectify the error invoking Order 41 Rule 33 CPC even in the absence of Cross Objections or appeal by the claimants. It is apt to reproduce paragraph 7 of the said decision hereunder:

> *"7. The Tribunal has not passed award in any case against the owner (insured) of the vehicle. It has passed awards against the appellant insurance company only. It is not in dispute that the Tribunal has categorically held that the said accident took place due to rash and negligent driving of the truck by its driver. As such his employer, namely, Mohd. Rafiq, owner of the said truck, was liable for his negligent act. Thus the Tribunal committed a serious error in not making liable the owner and driver of the offending truck to pay the said amounts of compensation. This error can well be corrected by this court by invoking the provisions of Order 41, Rule 33, Civil Procedure Code, even if no cross-objection or appeal has been filed by the claimants-respondents. It has been observed in Kok Singh v. Deokabai AIR 1976 SC 634, paras 6 and 7, as follows:*
>
> > *(6) In Giani Ram v. Ramji Lal AIR 1969 SC 1144, the court said that in Order 41, Rule 33, the expression 'which ought to have been passed' means 'what*

ought in law to have been passed' and if an appellate court is of the view that any decree which ought in law to have been passed was in fact not passed by the court below, it may pass or make such further or other decree or order as the justice of the case may require.

(7) Therefore, we hold that even if the respondent did not file any appeal from the decree of the trial court, that was no bar to the High Court passing a decree in favour of the respondent for the enforcement of the charge. Reference of Murari Lal v. Gomati Devi 1986 ACJ 316 (Rajasthan), may also be made here. Similar view has been taken by me while deciding United India Ins. Co. Ltd. v. Dhali 1992 ACJ 1057 (Rajasthan)."

31. The High Court of Orissa at Cuttack in the case titled as **M. Adu Ama vs. Inja Bangaru Raja and another,** reported in **1995 ACJ 670,** has laid down the same principle of law.

32. This High Court in **Himachal Road Transport Corporation vs. Saroj Devi and others,** reported in **2002 ACJ 1146,** held that appellate Court is not precluded from passing order which it considers just in the facts of the case, without there being any cross objection or cross appeal. It is profitable to reproduce paragraph 15 of the said decision hereunder:

"15. Keeping in view the aforesaid decisions of Supreme Court and different High Courts including this Court , we feel that there being no prohibition in law, i.e., either under Motor Vehicles Act or under the provisions of Civil Procedure Code, this Court is not precluded from passing order which it considers just in the circumstances of a case without there being either cross-objection or cross-appeal. As such we are further of the view that Order 41, Rule 33 is fully applicable to the appeals under the Motor Vehicles Act."

33. In the case titled as **National Insurance Co. Ltd. vs. Mast Ram and others,** reported in **2004 ACJ 1039,** the question arose before this High Court was – whether the appellate Court can modify the award in the absence of cross-appeal. This High Court answered in the affirmative. It is apt to reproduce paragraph 13 of the said judgment hereunder:

"13. Because of what has been held in this judgment, it is felt necessary to exercise power vested in this court under Order 41, Rule 33 of the Civil Procedure Code to set aside the findings in the operative portion of the award requiring the appellant to pay the amount and then to recover it from the 'insurer' (it should have been 'insured'?). This is a direction in the impugned award that needs to be set aside. On this aspect, Mr. Sharma had argued that there is no cross-appeal by the owner of the vehicle. To meet such a situation, legislature had enacted Order 41, Rule 33 in the Civil Procedure Code even in cases where an appeal is not filed by a party, like the owner in the present appeal. As such, this plea cannot be accepted."

34. This High Court in another case titled as **LAC Solan and another vs. Bhoop Ram,** reported in **1997(2) Sim.L.C. 229,** modified the awards in exercise of powers under Order 41 Rule 33 CPC.

35. Faced with the similar situation, the Jammu and Kashmir High Court, in a case titled as **State Bank of India vs. M/s Sharma Provision Store and another,** reported in **AIR 1999 J&K 128,** held that a High Court can pass a decree which ought to have been passed by the trial Court. It is apt to reproduce relevant portion of paragraph 7 of the said decision hereunder:

"7. …….This is an exceptional situation which authorises this Court in the present appeal to pass such decree as ought to have been passed or as the nature of the case demands. Similarly discretion vested in this Court under the aforesaid provision of law will not be refused to be exercised simply because respondents have not either filed an appeal or cross-objections."

36. This Court in **FAO No.203 of 2010,** titled as **Nati Devi and another versus Maya Devi and others,** decided on **20th May, 2016, FAO No. 448 of 2011,** titled as **Sarita Devi & others versus Ashok Kumar Nagar & others,** decided on **17th June, 2016,** and **FAO (MVA) No. 599 of 2008,** titled as **Shri Raj Pal Yadav and another versus Smt. Jamna Devi and another,** decided on 24th June, 2016,has taken the similar view.

37. Thus, it can easily be deduced that the mandate of Section 96, Section 107(2) and order 41 Rule 33 CPC is just to rectify the errors and achieve the aim and object of the legislation. The purpose of Order 41 CPC, as discussed hereinabove, is to enable the appellate Court to do complete justice between the parties and to pass order which ought to have been passed while keeping in view the facts and circumstances of the case.

38. Admittedly, the age of the deceased was 23 years at the time of the accident. The Tribunal has rightly assessed the monthly income of the deceased to be ₹ 15,630/- in terms of the Bill/salary statement of the deceased, Ext. PW-4/B.

39. The deceased was bachelor at the relevant point of time. Thus, the Tribunal has rightly deducted one half towards his personal expenses in terms of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120**. Thus, the claimants have lost source of income to the tune of ₹ 7,800/- per month.

40. The Tribunal has wrongly applied the multiplier of '18'. In view of the ratio laid down by the Apex Court in **Sarla Verma's** and **Reshma Kumari's cases (supra)** read with the Second Schedule appended with the MV Act, multiplier of '15' is just and proper.

41. Viewed thus, it is held that the claimants have lost source of income/dependency to the tune of ₹ 7,800/- x 12 x 15 = ₹ 14,04,000/-.

42. The claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'.

43. Having said so, the claimants are held entitled to compensation to the tune of ₹ 14,04,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 14,34,000/- .

44. The Tribunal has also fallen in an error in awarding interest @ 8% per annum, which was to be awarded as per the prevailing rates.

45. It is beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in **(2002) 6 SCC 281;Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738;Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053;Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982;Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

46. Having said so, I deem it proper to reduce the rate of interest from 8% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

47. The factum of insurance is admitted, thus, the Tribunal has rightly saddled the insurer with liability.

48. Having glance of the above discussions, the impugned award is modified and the appeal is disposed of, as indicated hereinabove.

49. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts after proper verification.

50. Excess amount, if any, be released in favour of the appellant-insurer through payee's account cheque.

51. Send down the record after placing copy of thejudgment on the Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Gautam Nath and another .....Appellants
Versus
Shri Duni Chand and others .....Respondents.

FAO (MVA) No. 120 of 2012.
Date of decision: 16th December, 2016.

Motor Vehicles Act, 1988- Section 149- Driver was driving a tipper un-laden weight of which is 2800 kg. – it falls within definition of light motor vehicle – the driver had a licence to drive light motor vehicle- no endorsement of PSV was required – the driver had a valid licence at the time of accident – the Tribunal wrongly discharged the insurer from liability- appeal allowed and insurer directed to satisfy the award. (Para- 9 to 22)

Cases referred:

Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd. AIR 1999 SC 3181
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 SCC 217

For the appellants: Mr. G.R. Palsara, Advocate.
For the respondents: Nemo for respondents No. 1 to 3.
Mr. Jagdish Thakur, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

This appeal is directed against the judgment and award dated 19.1.2012, passed by the Motor Accident Claims Tribunal II, Mandi, District Mandi, H.P. hereinafter referred to as "the Tribunal", for short, in MACT No. 38 of 2007, titled *Duni Chand and others versus Sh. Gautam Nath and others,* whereby compensation to the tune of Rs.2,36,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants and owner and driver came to be saddled with the liability, for short "the impugned award", on the grounds taken in the memo of appeal.

2. Claimants and insurer have not questioned the impugned award on any ground, thus it has attained the finality, so far as it relates to him.

3. Owner and driver have questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellants argued that the Tribunal has fallen in an error in discharging the insurer from the liability and prayed that the insurer be saddled with the liability.

5. Claimants being the victims of a vehicular accident, filed claim petition before the tribunal for the grant of compensation to the tune of Rs. 15 lacs, as per the break-ups given in the claim petition, which was resisted by the respondents and following issues came to be framed.

1. *Whether the deceased Chaman Lal died due to rash and negligent driving of Tipper No. HP-58-1710 by respondent Leela Prakash as alleged? OPP.*
2. *If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so to what amount and from whom? OPP.*
3. *Whether there was breach of terms and conditions of insurance policy? OPR.*
4. *Whether the driver was not holding valid and effective driving license at the time of accident? OPR-3.*
5. *Relief.*

6. Claimants have examined three witnesses and one of the claimants, namely Duni Chand also stepped into the witness-box as PW3. Respondents examined two witnesses, namely, Prem Singh and Leela Prkash driver of the offending vehicle No. HP-58-1710.

7. The Tribunal, after scanning the evidence oral as well as documentary, held that the claimants have proved that driver Leela Prakash had driven the offending vehicle bearing registration No. HP-58-1710 (Tipper) rashly and negligently and had caused the accident. There is no dispute about such findings. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

8. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 and 4 around which the entire controversy revolves. It was for the insurer to lead evidence to prove that the owner has committed willful breach, has not led any evidence. Thus, has failed to discharge the onus. The Tribunal has decided issue No. 4 without making any discussion. Driver was having licence to drive light motor vehicle, copy of which is on record as Ext. RW2/A, which does disclose that the driver was competent to drive LMV transport.

9. Admittedly, the driver was driving Tipper bearing registration No. HP-58-1710, the unladen weight of which is 2800 kilograms, as per the Registration Certificate, Ext. RW1/A, thus falls within the definition of "Light Motor Vehicle" as given in Sections 2 (21) and 2 (28) of the Motor Vehicles Act, for short "the Act".

10. The learned counsel for the appellants argued that the issues stand already determined by this Court in series of appeals.

11. The same issue was raised before the Supreme Court in case titled ***Ashok Gangadhar Maratha v. Oriental Insurance Co. Ltd.*** reported in ***AIR 1999 SC 3181***. It is apt to reproduce paras 10, 11 and 14 of the said judgment herein:

> *"10. Definition of "light motor vehicle" as given in clause (21) of Section 2 of the Act can apply only to a "light goods vehicle" or a "light transport vehicle". A "light motor vehicle" otherwise has to be covered by the definition of "motor vehicle" or "vehicle" as given in clause (28) of Section 2 of the Act. A light motor vehicle cannot always mean a light goods carriage. Light motor vehicle can be non-transport vehicle as well.*
>
> *11. To reiterate, since a vehicle cannot be used as transport vehicle on a public road unless there is a permit issued by the Regional Transport Authority for that purpose, and since in the instant case there is neither a pleading to that effect by any party nor is there any permit on record, the vehicle in question, would remain a*

light motor vehicle. The respondent also does not say that any permit was granted to the appellant for plying the vehicle as a transport vehicle under Section 66 of the Act. Moreover, on the date of accident, the vehicle was not carrying any goods, and thought it could be said to have been designed to be used as a transport vehicle or goods carrier, it cannot be so held on account of the statutory prohibition contained in Section 66 of the Act.

12-13 …. ….. …..

14. Now the vehicle in the present case weighed 5,920 kilograms and the driver had the driving licence to drive a light motor vehicle. It is not that, therefore, that insurance policy covered a transport vehicle which meant a goods carriage. The whole case of the insurer has been built on a wrong premise. It is itself the case of the insurer that in the case of a light motor vehicle which is a non-transport vehicle, there was no statutory requirement to have specific authorisation on the licence of the driver under Form 6 under the Rules. It had, therefore, to be held that Jadhav was holding effective valid licence on the date of accident to drive light motor vehicle bearing Registration No. KA-28-567."

12. This Court in **FAO No. 54 of 2012** titled ***Mahesh Kumar and another*** vs***. Smt. Piaro Devi and others*** decided on 25th July, 2014, held that such type of vehicle is LMV. It is apt to reproduce paras 10,11,14,16,18 and 19 of the said judgment herein:

"10.I deem it proper to reproduce the definitions of "driving licence", "light motor vehicle", "private service vehicle" and "transport vehicle" as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the MV Act herein:

"2. ……………..

(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.

xxx xxx xxx

(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.

xxx xxx xxx

(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.

xxx xxx xxx

(47) "transport vehicle" means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle."

11. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

12-13. …… …… …..

14. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In

this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

15.My this view is supported by Section 10 of the MV Act, which reads as under:

*"**10. Form and contents of licences to drive.** -*

(1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.

(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-

(a) motor cycle without gear;

(b) motor cycle with gear;

(c) invalid carriage;

(d) light motor vehicle;

(e) transport vehicle;

(i) road-roller;

(j) motor vehicle of a specified description."

15- …. ….. …..

16. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, which was substituted in terms of amendment of 1994, class of the vehicles specified in clauses (e) to (h) before amendment stand deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

17. ….. ……. …….. …….

*18. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:*

"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any

vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. ....

21. ....

22. ....

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

19. The Apex Court in another case titled as ***National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,*** *reported in* ***2008 AIR SCW 906,*** *has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:*

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. ....

10. ....

11. ....

12. ....

13. ....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. ....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

13. Applying the ratio, the vehicle in question is a "Light Motor Vehicle".

14. Same principles of law have been laid down by this Court in FAOs No. 385 of 2007 & 388 of 2007, decided on 14.11.2014, FAOs No. 33 & 55 of 2010, decided on 17.10.2014, FAO No. 293 of 2006 decided on 4.4.2014, and ***FAO No. 319 of 2012*** decided on 2.12.2016.

15. Having said so, the Tribunal has wrongly decided issue No. 4. Accordingly, it is held that the driver was holding a valid and effective driving licence at the time of accident and owner has not committed any breach.

16. It was for the insurer to plead and prove the insurer has committed willful breach in terms of **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v)........................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

17. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself

as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

18. Having glance of the above discussion, findings on issue No. 3 are set aside and is decided in favour of the claimants and against the insurer.

19. Viewed thus, the Tribunal has fallen in an error in discharging the insurer from the liability.

20. Factum of insurance is not in dispute. Thus, the insurer has to satisfy the award.

21. In view of the above, the appeal is allowed, impugned award is modified and the insurer is directed to satisfy the award.

22. The insurer is directed to deposit the amount alongwith interest, as awarded by the Tribunal, within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees' cheque account, or by depositing the same in their bank accounts, after proper verification. Statutory amount deposited by the appellants, is awarded as costs in favour of the claimants, be released accordingly.

23. Send down the record forthwith, after placing a copy of this judgment.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Hari Chand and another ..... Appellants
Versus
Chaya Kumari and others ..... Respondents

FAO No.415 of 2012 a/w
CO No.172 of 2013
Date of decision: 16.12.2016

Motor Vehicles Act, 1988- Section 149- Driver had a valid licence to drive a light motor vehicle – it was nowhere provided that the driver was not competent to drive a motorcycle or a scooter – the Tribunal had fallen into error in holding that the driver did not have a valid and effective driving licence to drive the vehicle – it was for the insurer to prove the breach of the terms and conditions of the policy and mere plea is not sufficient to seek exoneration. (Para-8 to 13)

Motor Vehicles Act, 1988- Section 166- Deceased was running a tea shop and was earning Rs.8,000/- per month – however, no documentary proof was filed – the income of the deceased can be taken as Rs.6,000/- per month or Rs.200/- per day- after deducting 1/3rd amount towards the personal income, loss of source of dependency will be Rs.4,000/- per month – the

deceased was 55 years of age and multiplier of 10 is applicable- thus, the claimants are entitled to Rs.4,000 x 12 x 10= Rs.4,80,000/- under the head loss of source of dependency – claimants are also entitled to Rs.10,000/- each under the heads loss of estate, loss of love and affection, loss of consortium and funeral expenses – the deceased remained admitted in the hospital w.e.f. 14th May, 2011 till 21st May, 2011 and must have spent some amount on the treatment – compensation of Rs.50,000/- awarded under the head treatment- claimants are entitled to Rs.4,80,000 + 40,000+ 50,000= Rs.5,70,000/- along with interest @ 7.5% per annum.

(Para-14 to 23)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh & others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217
Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellants: Mr.G.R. Palsara, Advocate.
For the respondents: Mr.Adarsh Sharma, Advocate, for respondents No.1 and 2.
Mr.Bhender Kumar Chaudhary, Advocate, for respondent No.3.
Mr.P.S. Chandel, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 25th July, 2012, passed by the Motor Accident Claims Tribunal, Kullu, District Kullu, H.P., (for short, "the Tribunal") in Claim Petition No.22 of 2011, titled Chaya Kumari and others vs. Hari Chand and others, whereby the claim petition was allowed and compensation to the tune of Rs.3,76,400/-, with interest at the rate of 9% per annum, came to be awarded in favour of the claimants No.1 and 3, and the owner and the driver came to be saddled with the liability, (for short the "impugned award").

2. Feeling aggrieved, the owner and the driver have challenged the impugned award by the medium of instant appeal, the claimants have filed Cross Objections No.172 of 2013 for enhancement of compensation, while the insurer has not laid challenge to the impugned award on any ground.

3. Facts of the case, in brief, are that on 14th May, 2011, at about 8.00 p.m., at Jhiri, District Mandi, H.P., original respondent No.2, namely, Karam Chand had driven the scooter bearing No.HP-34-7757 rashly and negligent, hit the deceased Pawan Kumar, as a result of which he sustained multiple injuries, was shifted to Zonal Hospital, Kullu, referred to PGI Chandigarh, where he succumbed to the injures, on 21st May, 2011. FIR bearing No.41/2011,

dated 15.5.2011, was lodged at Police Station, Aut, District Mandi, H.P. It was pleaded that the deceased was running a tea shop and was earning Rs.8,000/- per month. Hence, the claim petition for compensation to the tune of Rs.10.00 lacs, as per the break-ups given therein.

4. The claim petition was resisted by the respondents by filing replies. On the pleadings of the parties, the Tribunal framed the following issues:

"1. Whether Pawan Kumar died on 14.5.2011 in a motor vehicle accident on account of rash and negligent driving of respondent No.2? OPP

2. If issue No.1 is proved in affirmative, to what amount of compensation and at what rate of interest, the petitioners are entitled? OPP

3. Whether the respondent -3 is liable to make payment of compensation as indemnifier? OPP

4. Whether the vehicle in question was driven in breach of terms and conditions of the insurance policy? OPR-3

5. Whether respondent No.2 was not having valid and effective driving licence to drive the vehicle? OPR-3

6. Relief."

5. In order to prove their claim, the claimants examined PW-1 Dr.Akshit Chandel and PW-3 HC Khem Chand, while one of the claimants, namely, Sumit Kumar stepped into the witness box as PW-2. On the other hand, the driver and the owner have examined Devi Ram as RW-1while the insurer has not led any evidence.

6. The Tribunal, after scanning the evidence, held that the claimants have proved that Karam Chand had driven the scooter rashly and negligently on the fateful day and had caused the accident, in which the deceased sustained injuries and succumbed to the same lateron. The said findings recorded by the Tribunal on issue No.1 are not in dispute. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

7. Before I deal with issues No.2 and 3, I deem it proper to take up issues No.4 and 5 at the first place.

Issue No.4

8. It is beaten law of the land that the insurer has to plead and prove that the owner of the offending vehicle has committed willful breach of the terms and conditions contained in the policy and mere plea here and there cannot be a ground for seeking exoneration.

9. The Apex Court in case titled as **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531,** has taken the similar view**.** It is apt to reproduce relevant portion of para 105 of the judgment hereinbelow:

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings; but must also

establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v)........................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

10. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran ingh case. If despite such information with the owner that the licence possessed by his driver is 8 :*fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

11. Thus, it was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions contained in the insurance policy, has not led any evidence to that effect, thus, has failed to discharge the onus. The findings recorded by the Tribunal on issue No.4 are not legally and factually correct and are liable to be set aside. Accordingly, the findings on issue No.4 are set aside and the said issue is decided against the insurer.

12. As far as issue No.5 is concerned, it has been proved on record that the driver, namely, Karam Chand, was having a valid and effective driving licence to drive a Light Motor Vehicle. The driving licence has been proved on record as Ext.RW-1/A, a perusal of which does disclose that the driver was competent to drive a Light Motor Vehicle. It was nowhere stipulated in the said driving licence that the driver was not competent to drive a motor cycle or scooter. The Tribunal has fallen into an error in holding that the driver was not having a valid and effective driving licence to drive the offending vehicle. Accordingly, the findings returned by the Tribunal on issue No.5 are liable to be set aside and the same are set aside. The said issue is decided against the insurer.

13. In so far as issue No.3 is concerned, the factum of insurance is admitted. As has been discussed above, the insurer has failed to prove that the offending vehicle was being driven, at the relevant point of time, in contravention of the terms and conditions contained in the insurance policy. Therefore, this issue is decided in favour of the claimants and against the insurer and the insurer is held liable to pay the compensation.

14. Coming to issue No.2, which pertains to the quantum of compensation, the deceased, as has been pleaded, was running a tea shop at the time of accident and was earning Rs.8,000/- per month. Qua the income of the deceased, no documentary proof has been proved on record, but, it has come in the statement of PW-2 Sumit Kumar that the deceased was earning Rs.8,000/- per month, which has remained uncontroverted. The Tribunal has wrongly assessed the income of the deceased at Rs.4,000/-. As per the pleadings and the evidence on record, it can safely be said that the deceased was earning Rs.6,000/- per month i.e. Rs.200/- per day. Thus, it is held that the deceased, at the time of death, was earning Rs.6,000/- per month and after deducting 1/3rd towards his personal expenses, loss of source of dependency to the claimants can be said to be Rs.4,000/- per month.

15. The Tribunal has wrongly applied the multiplier of 11. The deceased, at the time of accident, was 55 years of age. In view of the law laid down by the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120** read with the 2nd Schedule attached with the Act, multiplier of 10 is just and appropriate and is applied in the present case.

16. Having said so, the claimants are held entitled to Rs.4,000/- x 12 x 10 = Rs.4,80,000/- under the head 'loss of source of dependency'.

17. In addition, the claimants are also held entitled to Rs.10,000/- each, i.e. Rs.40,000/- in all, under the heads 'loss of estate', 'loss of love and affection', 'loss of consortium' and 'funeral expenses'.

18. Apart from the above, the claimants have superficially pleaded in the claim petition and also proved by leading evidence that the deceased, after the accident, remained admitted in the hospital w.e.f. 14th May, 2011 (the date of accident) till 21st May, 2011, when he succumbed to the injuries sustained by him. Thus, during this period, the claimants would have spent considerable amount for the treatment of the deceased. Thus, supposedly, I award Rs.50,000/- under the head 'treatment'.

19. Having said so, the claimants are held entitled to compensation to the tune of Rs.4,80,000/- + Rs.40,000/- + Rs.50,000/- = Rs.5,70,000/-.

20. The Tribunal has also fallen into an error in awarding interest at the rate of 9% per annum. It is beaten law of land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** **reported in** ***(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,*** **reported in** ***2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,*** **reported in** ***(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,*** **reported in** ***2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,*** **reported in** ***2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,*** **reported in** ***(2015) 4 Supreme Court Cases 433,*** **and** ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,*** reported in ***(2015) 4 Supreme Court Cases 434,*** and discussed by this Court in a batch of FAOs, ***FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,*** being the lead case, decided on **19.06.2015**.

21. Having said so, it is held that the amount of compensation shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till the deposit thereof.

22. Yet again, the Tribunal has wrongly not awarded anything in favour of claimant Sumit Kumar, who is the son of the deceased. Accordingly, it is held that the amount of compensation shall be apportioned amongst all the claimants equally.

23. The amount of compensation, alongwith interest, shall be deposited by the insurer before the Tribunal below within a period of eight weeks from today and on deposit, the same be released in favour of the claimants forthwith. In case the owner/appellant has already deposited the amount of compensation, the same be released in his favour alongwith up-to-date interest accrued thereon, through payee's account cheque, after the amount is deposited by the insurer and released to the claimants.

24. In view of the above discussion, the appeal and the cross objections are allowed and the impugned award is modified, as indicated above. The appeal and cross objections stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Mohammad Farman and another ....Petitioners/applicants.
Vs.
State of H.P. .....Respondent/ Non-applicant.

Cr. MP No. 1281 of 2016, Cr. MP No. 1283 of 2016 Cr. MP No. 1304 of 2016&Cr. MP No. 1292 of 2016 in Cr. Revision No.: 73 of 2013
Date of Decision: 16.12.2016

Probation of Offenders Act, 1958- Section 6 read with Section 11- Applicants pleaded that accused were less than 21 years of age at the time of their conviction and it was mandatory for the Court to grant the benefit of Probation Of Offenders Act- held, that the Trial Court had considered the question, whether the benefit of Probation of Offenders was to be granted to the accused or not and taking into consideration the nature of the offence, the Trial Court had decided not to extend the benefit – this decision was not challenged in appeal or revision- a discretion has been vested in the Trial Court to grant the benefit of Probation or decline the same and the Court cannot be compelled to grant the benefit in all cases – application dismissed.
(Para-5 to 14)

Cases referred:
Ramji Missar and another Vs. State of Bihar AIR 1963 Supreme Court 1088
Rattan Lal Vs. The State of Punjab AIR 1965 Supreme Court 444

For the petitioners/ applicants: Mr. Rakesh Manta, Advocate.
For the respondent/Non-applicant: Ms. Parul Negi, Dy. A.G.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

Cr. MP No. 1281 of 2016&Cr. MP No. 1283 of 2016

This Court vide its judgment dated 02.11.2016, dismissed the Criminal Revision Petition filed by the present applicants against judgments passed by the Court of learned Judicial Magistrate, 1st Class, Court No. 1, Kasauli in Criminal Case No. 73/2 of 2009 dated 08.08.2011 and Court of learned Sessions Judge, Solan in Criminal Appeal No. 33-S/10 of 2011 dated 08.03.2013, respectively, whereby the present applicants were convicted by the learned trial Court, which judgment was upheld by the learned appellate Court.

2. By way of these applications, applicants have averred that while dismissing the revision petition, this Court erred in not granting benefit of Probation of Offenders Act, 1958 to the convicts as is envisaged under Section 6 read with Section 11 of the Probation of Offenders Act, 1958, keeping in view the fact that at the time when the crime was committed, both the accused were less than 21 years of age and even when the judgment was announced by the learned trial Court, the age of accused was less than 21 years.

3. According to Mr. Manta, there is no unfettered discretion vested in this Court so as not to comply with the provisions of Section 6 of the Probation of Offenders Act, 1958 and according to him, because the age of the convicts at the time when the crime was committed was less than 21 years, it was mandatory for this Court to have had granted them benefit of Probation of Offenders Act. For this purpose, Mr. Manta has relied upon the judgment of Hon'ble Supreme Court in **Ramji Missar and another** Vs. **State of Bihar** AIR 1963 Supreme Court 1088 and **Rattan Lal** Vs. **The State of Punjab** AIR 1965 Supreme Court 444.

4. I have heard Mr. Rakesh Manta, learned counsel for the applicants/petitioners as well as learned Deputy Advocate General.

5. A perusal of the judgment passed by the learned trial Court demonstrates that after convicting the accused and before imposing sentence upon them, learned trial Court considered the factum as to whether the benefit of Probation of Offenders Act was to be granted to the accused or not and after due application of mind, it held that keeping in view the facts and circumstances of the case, the benefit of Probation of Offenders Act cannot be extended to the accused. The findings so returned by the learned trial Court are quoted hereinbelow:

> *"27. Keeping in view the facts and circumstances and the manner in which the complainant was assaulted by the convicts much lenient view cannot be taken and the facts and circumstances of the case too suggest that it is also not a case where the benefit of Probation of Offenders Act can be given to the convicts. The complainant was very brutally assaulted by the convicts without any reason and it shows their high headedness. Owing to these facts and circumstances, neither much lenient view can be taken not the benefit of Probation of Offenders Act can be given to the convicts. However, keeping in view the fact that convicts are facing the trauma of the trial for the last three years and are first offenders a little lenient view is taken and the convicts are sentenced to undergo simple imprisonment for one year and fine of Rs.1000/- (Rs. One thousand only) each for the commission of offence punishable under Section 325 read with Section 34 of the Indian Penal Code. In default of payment of fine the convicts shall further undergo simple imprisonment for thirty days."*

6. Therefore, it is not a case where learned trial Court after convicting the accused, imposed sentence upon them in ignorance of the provisions of Section 6 of the Probation of Offenders Act.

7. A perusal of the grounds of appeal taken by the convicts before the learned appellate Court demonstrate that there was no challenge in the grounds of appeal to the adjudication made by the learned trial Court of not granting the convicts the benefit of Probation of Offenders Act. Similarly, even before this Court in the revision petition, there was no specific challenge laid to the order passed by the learned trial Court of not granting benefit of Probation of Offenders Act to the convicts and all that was stated in the revision petition was that the Courts below could have extended the benefit of Probation of Offenders Act to the convicts.

8. In my considered view, whether or not the benefit of Probation of Offenders Act is to be granted is a discretion vested with the Courts and though this discretion has to be exercised in a judicious manner by the learned Courts and not in an arbitrary manner, however, the convicts cannot force a Court to mandatorily grant a convict benefit of Probation of Offenders Act, if the convict happens to be less than 21 years of age at the time when the crime was committed, as is being canvassed by the petitioners. Neither Rule 6 of the Probation of Offenders Act nor Rule

11 of the same mandatorily directs a Court of law to grant benefit of Probation of Offenders Act to an accused if the accused happens to be less than 21 years of age at the time of commission of the offence, as is in fact the plea of the learned counsel for the petitioners. The Hon'ble Supreme Court in neither of the judgments relied upon by the petitioners has laid down this law that if an accused is less than 21 years of age as on the date when the offence is committed, then mandatorily he has to be granted benefit of Probation of Offenders Act.

9. Even otherwise, in my considered view, the judgments relied upon by the learned counsel for the applicants/petitioners do not have any applicability in the facts of the present case, because therein the factual position was totally different as High Court in the matter reported in ***AIR 1963 Supreme Court 1088***, had refused to exercise its powers under Section 11 of the Probation of Offenders Act on the ground that at the time when the accused were convicted by the learned trial Court, they were more than 21 years of age. It is not the factual position in this case, because admittedly it is not as if the learned trial Court refused to grant the accused benefit of Probation of Offenders Act on the ground that at the time when the judgment was announced by the learned trial Court, they were more than 21 years of age.

10. As I have already held above, learned trial Court has not denied the benefit of Probation of Offenders Act on the basis of erroneous or wrong consideration of age of the accused. It has denied the benefit of Probation of Offenders Act after taking into consideration the facts of the case.

11. Similarly, the factual position on which the Hon'ble Supreme Court adjudicated in ***AIR 1965 Supreme Court 444*** is also not akin to the factual position in this case, because in that case, the issue was with regard to retrospective operation of the Probation of Offenders Act.

12. There is no force in the arguments of learned counsel for the applicants/petitioners that because the applicants were less than 21 years of age as on the day when the crime was committed, therefore, they were entitled to be extended the benefit under Sections 3 & 4 or Section 6 of the Probation of Offenders Act, as a matter of right.

13. Recently, the Hon'ble Supreme Court in **Mohd. Hashim** Vs. **State of UP & Ors.**, Criminal Appeal No. 1218 of 2016, decided on 28.11.2016 has held:

> *"20. Presently, we shall advert to the second plank of the submission advanced by the learned counsel for the appellant. In Rattan Lal vs. State of Punjab7 . Subba Rao, J., speaking for the majority, opined thus:-*
>
> *"The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of criminal law is more to reform the individual offender than to punish him. Broadly stated, the Act distinguishes offenders 7 AIR 1965 SC 444 Page 15 15 below 21 years of age and those above that age, and offenders who are guilty of having committed an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. While in the case of offenders who are above the age of 21 years absolute discretion is given to the court to release them after admonition or on probation of good conduct, subject to the conditions laid down in the appropriate provisions of the Act, in the case of offenders below the age of 21 years an injunction is issued to the court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case; including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act."*
>
> *We have reproduced the aforesaid passage to understand the philosophy behind the Act.*
>
> *21. In this regard, it is also seemly to refer to other authorities to highlight how the discretion vested in a court under the PO Act is to be exercised. In Ram Prakash vs. State of Himachal Pradesh8 , while dealing with Section 4 of the PO Act in the context of the Prevention of Food Adulteration Act, 1954, the Court opined that the*

word 'may' used in Section 4 of the PO Act does not mean 'must'. On the contrary, as has been held in the said authority, it has been made clear in categorical terms that the provisions of the PO Act distinguishes offenders below 21 years of age and those 8 AIR 1973 SC 780 Page 16 16 above that age and offenders who are guilty of committing an offence punishable with death or imprisonment for life and those who are guilty of a lesser offence. Thereafter, the Court has proceeded to observe:- "While in the case of offenders who are above the age of 21 years, absolute discretion is given to the Court to release them after admonition or on probation of good conduct in the case of offenders below the age of 21 years, an injunction is issued to the Court not to sentence them to imprisonment unless it is satisfied that having regard to the circumstances of the case, including the nature of the offence and the character of the offenders, it is not desirable to deal with them under Sections 3 and 4 of the Act. (Ratan Lal vs. State of Punjab (supra) and Ramji Missir vs. the State of Bihar (AIR 1963 SC 1088)."

14. Therefore, in view of the findings returned above, these applications are dismissed.

Cr. MP No. 1304 of 2016&Cr. MP No. 1292 of 2016

15. As this Court has not interfered in the applications filed under Section 11(1) of the Probation of Offenders Act, 1958, these applications are accordingly dismissed as infructuous.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

National Insurance Company Ltd. .....Appellant
Versus
Sh. Pawan Kumar and others .....Respondents.

FAO (MVA) No. 451 of 2012 a/w connected matters.
Date of decision: 16th December, 2016.

Motor Vehicles Act, 1988- Section 149- Interrogatories were sent to District Judge, Mathura, who had sent the report to the Tribunal showing that the original licence was not issued in the name of the driver Shakti Chand – however, the insurer had not proved the said report – the licence was renewed at Kangra and the renewal was not fake – the burden was upon the insurer to establish that the insurer had committed willful breach of the terms and conditions of the policy, which was not proved – insurer was rightly saddled with liability- however, the rate of interest reduced to 7.5% per annum. (Para-5 to 17)

Cases referred:

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434
Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant(s): Mr. Ashwani K. Sharma, Sr. Advocate with Mr. Jeevan Kumar, Advocate.

For the respondent(s): Ms. Anjali Soni Verma, Advocate, for the claimants in respective appeals.
Mr. Rita Goswami, Advocate, for owner and driver in respective appeals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral).*

These appeals are outcome of one motor vehicle accident allegedly caused by driver, namely, Shakti Chand, while driving vehicle bus bearing registration No. HP-39-5281, rashly and negligently on 19.2.2009. Thus, I deem it proper to determine all these appeals by this common judgment.

2. Claimants had filed separate claim petitions before Motor Accident Claims Tribunal-II Kangra at Dharamshala, for short “the Tribunal” for the grant of compensation, as per the break-ups given in their respective claim petitions. The claim petitions were resisted by all the respondents and issues came to be framed by the Tribunal in all the claim petitions. I deem it proper to reproduce one set of issues framed in MACP No. 26-K/2009, subject matter of FAO No. 451 of 2012 herein.

1. *Whether on account of rash and negligent driving by respondent No. 2 on 19.2.2009 caused the death of deceased Subham Chaudhary? OPP*
2. *If issue No. 1 is proved in affirmative to what amount of compensation the petitioners are entitled and from whom? OPP*
3. *Whether the offending vehicle bearing registration No.HP-39-5281 as over loaded and violated the terms and conditions of the insurance policy? OPR*
4. *Whether the deceased was travelling in the vehicle No. HP-39-5281 as gratuitous passenger? OPR.*
5. *Whether the respondent No. 2 was not holding valid and effective driving licence at the time of accident? OPR*
6. *Whether respondent No. 1 was not having valid route permit, registration certificate, and fitness certificate?*
7. *Whether the accident is the result of mechanical defect? OPR*
8. *Relief.*

3. Compensation came to be granted by the Tribunal, in favour of the claimants in different claim petitions vide separate awards and insurer was saddled with the liability, hereinafter referred to as “the impugned awards”, for short. The details of compensation awarded in the claim petitions vide impugned awards are as under:-

Sr. No.	Claim petition No/title	Decided on	Compensation awarded	Subject matter of appeal.
1.	MACP No.26-K/2009 titled Pawan Kumar and another versus Ajay Goshwami and	31.8.2012	Rs.1,80,000/- alongwith interest @7.5% per annum.	FAO(MVA) No. 451 of 2012.

	others			
2.	MACP No.34-K/II-2009 titled Smt. Gaytri Devi and another versus Shakti Chand and others	12.12.2012	Rs.3,48,800/- alongwith interest @9% per annum.	FAO(MVA) No. 98 of 2013.
3.	MACP No.60-K/II-2009 titled Neelam Kumari versus Shakti Chand and others	12.12.2012	Rs.10,945/- alongwith interest @9% per annum	FAO(MVA) No. 99 of 2013.
4.	MACP No.33-K/II-2009 titled Smt. Sarla Devi versus Shakti Chand and others	12.12.2012	Rs.2,33,600/- alongwith interest @9% per annum	FAO(MVA) No. 100 of 2013.
5.	MACP No.61-K/II-2009 titled Bikku @ Priya Darshan versus Shakti Chand and others	12.12.2012	Rs.1,18,670/- alongwith interest @9% per annum	FAO(MVA) No. 101 of 2013.
6.	MACP No.32-K/2009 titled Amar Singh versus Ajay Goswami and others	30.11.2012.	Rs.1,04,000/- alongwith interest @7.5% per annum	FAO(MVA) No. 198 of 2013.
7.	MACP No.28-K/2009 titled Nirmala Devi and others versus Ajay Goshwami and others	15.1.2013	Rs.3,08,000/- alongwith interest @7.5% per annum.	FAO(MVA) No. 4049 of 2013.
8.	MACP No.26-K/2009 titled Santoh Kumari and others versus Ajay Goshwami and others	15.1.2013	Rs.6,32,000/- alongwith interest @7.5% per annum	FAO(MVA) No. 4054 of 2013.
9.	MACP No.29-K/2009 titled Simro Devi and another versus Ajay Goshwami and others	15.1.2013.	Rs.1,88,000/- alongwith interest @7.5% per annum	FAO(MVA) No. 4051 of 2013.
10.	MACP No.34-K/2009 titled Sonu Kumari versus Ajay Goswami and others	29.7.2013	Rs.75,500/- alongwith interest @7.5% per annum	FAO(MVA) No. 4191 of 2013.
11.	MACP No.38-K/2009 titled Sunita Devi versus Ajay Goswami and others	29.7.2013	Rs.34,000/- alongwith interest @7.5% per annum.	FAO(MVA) No. 4192 of 2013.

4. Claimants, owner-insured and driver have not questioned the impugned awards on any ground. Thus, the same have attained finality so far as they relate to them.

5. The appellant/ insurer has questioned the impugned awards on the following grounds;

(i) *That the compensation awarded is excessive;*

(ii) *That it is case of overloading,*

(iii) That the driver was not having a valid and effective diving licence at the time of accident.

6. All the three grounds are not well founded and sustainable, for the following reasons.

7. I have gone through all the impugned awards. The amount awarded is rather meager. Unfortunately, the claimants have not questioned the same and even have not prayed for the enhancement, are maintained. However, the Tribunal has fallen in an error in awarding interest at a higher rate in four claim petitions, subject matter of FAOs No. 98 of 2013, 99 of 2013, 100 of 2013 and 101 of 2013. The interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

8. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

9. Accordingly, interest @7.5% per annum is awarded from the date of claim petitions till realization of the amount in four appeals, referred to supra.

10. It is stated that the insurer has not questioned the impugned awards in other claim petitions for the reasons that the amount awarded was meager and in terms of the mandate of Motor Vehicles Act, for short "the Act" the appeal was not competent. It is worthwhile to mention herein that it is not the case of the insurer that the claim petitions were filed more than the risk covered. Seating capacity of the offending vehicle was 29 and the claim petitions have been filed for the compensation, viz-a-viz risk covered.

11. The Tribunal has rightly directed the insurer to satisfy the awards. Even otherwise, in case more claim petitions would have been filed, insurer had to satisfy the highest award. The Tribunal has awarded the amount relating to 29 claim petitions. Accordingly, this ground is also turned down.

12. Learned counsel for the insurer has argued that the interrogatories were sent to the District Judge, Mathura, for doing the needful, who has sent the report to the Tribunal, which does disclose that the original driving licence was not issued in the name of driver Shakti Chand and that has not been taken into consideration by the Tribunal. The driving licence is on record and it is recorded by the Tribunal that the original licence was not issued in favour of the driver aforesaid. But unfortunately, insurer has not taken any steps to prove the said report. However, be that as it may, the admitted case of the parties is that the driving licence was renewed in Kangra at Dharamshala and renewal is not fake. It was for the insurer to prove that the owner-insured was knowing that the licence was fake and that the insurer has committed willful breach in terms of **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531**. It is apt to reproduce relevant portion of para 105 of the judgment herein:

"105. ....

(i) ....

(ii) ....

(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v)........................

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."

13. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

14. Viewed thus, this ground also fails and is accordingly turned down.

15. Factum of insurance is not in dispute. Thus, the insurer has to satisfy the award.

16. Having glance of the above discussion, all the appeals are disposed of, impugned awards, except four, are upheld and the impugned awards so far the same relate to FAOs No. 98, 99, 100 and 101 of 2013, are modified, as indicated hereinabove.

17. The insurer is directed to deposit the amount alongwith interest @ 7.5% within eight weeks from today in the Registry. The Registry, on deposit, is directed to release the amount in favour of the claimants, strictly in terms of the conditions contained in the impugned awards, through payees' account cheque, or by depositing the same in their bank accounts, after proper verification. Excess amount , if any be refunded to the appellant/insurer accordingly.

18. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Om Parkash ... Appellant

Versus

Smt. Madhu Chandel and another ... Respondents

RSA No.229 of 2008
Reserved on: 25.11.2016
Date of decision:16.12.2016

Specific Relief Act, 1963- Section 20- Plaintiff filed a civil suit for specific performance and in the alternative for damages – it was pleaded that plaintiff had entered into an agreement to purchase the suit land for a consideration of Rs.98,000/- - a sum of Rs.70,000/- was paid as earnest money- the balance was to be paid at the time of the execution of the sale deed – the defendants failed to execute the sale deed- hence, the suit was filed – the suit was dismissed by the Trial Court- an appeal was preferred, which was partly allowed- held in second appeal that both the Courts found that agreement to sell was executed between the parties – sum of Rs.70,000/- was paid as earnest money- - Courts also found that Rs.28,000/- was not paid by the plaintiff on or before the due date – a substantial amount was paid to the defendants at the time of execution of the agreement – the suit should have been decreed by the Courts for specific performance – appeal allowed and the suit of the plaintiff decreed for the specific performance of the agreement.(Para-13 to 19)

For the appellant: Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate.

For the respondents: Ex parte.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

By way of this appeal, appellant/plaintiff has challenged the judgment and decree passed by the Court of learned District Judge, Solan, Camp at Nalagarh, in Civil Appeal No. 6-NL/13 of 2007 dated 16.01.2008, vide which learned Appellate Court while partly setting aside the judgment and decree passed by learned Civil Judge (Senior Division), Nalagarh, in Civil Suit No. 162/1 of 2004 dated 30.04.2007, decreed the suit of the appellant/plaintiff partly, by holding the appellant/plaintiff to be entitled for decree for recovery of Rs.70,000/- from respondents/defendants with interest at the rate of 6% per annum from the date of payment till its realization with proportionate costs.

2. Brief facts necessary for adjudication of the case are that the appellant/plaintiff (hereinafter referred to as the plaintiff), filed a suit for specific performance of contract dated 15.11.2002 and in the alternative, suit for damages on the grounds that the defendants were

owners in possession of the suit land measuring 1 Bigha 8 Biswas being 1/3rd share of total land measuring 4 Bighas 4 Biswas comprised in Khata/Khatauni Nos. 62min/62min, bearing Khasra No. 560 (4-4), situated in village Nangal Nihla, Pargana Plassi, Tehsil Nalagarh, District Solan and the plaintiff was interested to purchase the suit land and as defendants agreed to sell the said land to the plaintiff for a total sale consideration of Rs.98,000/-, accordingly an agreement to sell was reduced into writing on 15.11.2002 which was duly signed by the parties in the presence of the attesting witnesses. As per the plaintiff, a sum of Rs.70,000/- was paid as earnest money to the defendants at the time of execution of said agreement to sell on 15.11.2002 and it was agreed between the parties that the remaining amount of Rs.28,000/- shall be paid on or before 15.01.2003 and that the defendants will execute the sale deed in favour of the plaintiff on or before 15.01.2003. As per the plaintiff, he undertook to bear the expenses of sale deed and the defendants undertook to keep the suit land free from all encumbrances till the execution of the sale deed. Further as per the plaintiff, the balance amount of sale consideration i.e. Rs.28,000/- was also paid to the defendants on 30.11.2002 as the defendants had approached the plaintiff to pay the same on the ground that they were constructing their houses and therefore, they required the money. As per the plaintiff, defendants assured that they would execute the sale deed as and when the plaintiff would ask them to execute the sale deed, however, later on, they started postponing the execution of the sale deed of the suit land on one pretext or the other. As per the plaintiff, he remained always ready and willing and was still ready and willing to perform his part of contract dated 15.11.2002 but the defendants were not ready and willing to perform their part of contract and were not executing the sale deed of the suit land as per terms and conditions of agreement dated 15.11.2002. It was further pleaded in the plaint that the plaintiff requested defendants lastly on 12.05.2004 to execute the sale deed as per the terms of agreement dated 15.11.2002 but defendants were not ready to fulfil their part of contract and threatened to alienate the same to some other person and to cause wrongful loss to the plaintiff and wrongful gains for themselves. As per the plaintiff, the cause of action arose in his favour on 15.01.2003 when the defendants did not turn in the office of Sub Registrar, Nalagarh, to execute the sale deed as per terms of agreement dated 15.11.2002 and lastly on 12.05.2004 when defendants irrevocably refused to execute the sale deed. On these basis, the plaintiff prayed for decree for possession by way of specific performance of contract dated 15.11.2002 qua the suit land and in the alternative, decree for recovery of Rs.1,50,000/- alongiwth interest as damages so suffered and sustained by the plaintiff on account of non-performance of part of contract by the defendants with costs.

3. Defendants contested the suit and in the written statement took the stand that the consideration amount of sale agreement was not paid to the defendants and in fact, no agreement to sell was executed or signed by the defendants. As per averments made in the written statement, defendants had not agreed to sell their share to plaintiff. It was denied by the defendants that in November, 2002 an amount of Rs.28,000/- was also received by them from the plaintiffs as was pleaded by the plaintiff. The execution of sale agreement between the parties was denied and it was further stated in the written statement that if the sale agreement had been executed by the plaintiff himself, in that event the same was not binding on the defendants.

4. By way of replication, the plaintiff reiterated the claim as was made in the plaint.

5. On the basis of the pleadings of the parties, learned trial Court framed the following issues:-

1. Whether the plaintiff is entitled for the decree qua possession by way of specific performance of agreement dated 15.11.2002 as prayed? ... OPP
2. Whether the plaintiff is also entitled for the decree to the tune of Rs.1,50,000/- alongwith interest and damages as prayed? ... OPP
3. Whether the suit of the plaintiff is not maintainable and competent in law and facts? ... OPD

4. Whether there is no cause of action, as alleged? .... OPD
5. Whether the plaintiff has properly valued the suit for the purpose of Court fee and jurisdiction? .... OPP
6. Whether the plaintiff has suppressed the material facts, as alleged? ... OPD
7. Relief.

6. On the basis of material placed on record by the respective parties, learned trial Court returned the following findings to the issues so framed:-

Issue No. 1:	No.
Issue No. 2:	No.
Issue No. 3:	No.
Issue No. 4:	No.
Issue No. 5:	Yes.
Issue No. 6:	Yes.
Relief. :	The suit of the plaintiff stands dismissed as per operative portion of the Judgment.

7. While dismissing the suit so filed by the plaintiff, learned trial Court held that the execution of agreement to sell Ext. P-1 was duly proved and as it was clearly mentioned in the agreement to sell that an amount of Rs.70,000/- was received by the defendants and remaining amount of Rs.28,000/- was to be paid on or before 15.01.2003 and failure to make said payment on or before 15.01.2003 would result in forfeiture of earnest money, therefore, it was to be examined whether the plaintiff had paid Rs.28,000/- to the defendants. Learned trial Court held that the plaintiff himself was not confident with regard to payment of Rs.28,000/- as it was mentioned in affidavit in examination-in-chief that if receipt of Rs.28,000/- was not proved then he was ready and willing to pay Rs.28,000/- again. Learned trial Court held that there was no need to mention this fact had he actually paid the same. It was further held by learned trial Court that the plaintiff had not deposed in his affidavit in examination-in-chief that he had gone to the office of Sub Registrar, Nalagarh, on 15.01.2003 for the purpose of execution of the sale deed. Learned trial Court also held that in the absence of any evidence having been led by the plaintiff in this regard it could be easily inferred that on 15.01.2003 plaintiff had not gone to the office of Sub Registrar. On these basis, it was concluded by learned trial Court that it stood proved that receipt of Rs.28,000/- and willingness to get the sale deed registered on 15.01.2003 by plaintiff was not proved. Learned trial Court further held that as the relief under Specific Relief Act was discretionary relief and person who was seeking specific performance should have come to the Court with clean hands and as plaintiff had failed to prove that he had paid Rs.28,000/- and was willing to execute the sale deed as per the terms and conditions of the agreement, the plaintiff was not entitled to specific performance of the contract in view of the terms and conditions of the agreement to sell in which it was mentioned that if the amount of Rs.28,000/- was not paid by the plaintiff on or before 15.01.2003, then Rs.70,000/- shall be forfeited. On these basis learned trial Court dismissed the suit of the plaintiff.

8. Feeling aggrieved by the judgment and decree so passed by learned trial Court, plaintiff filed an appeal.

9. Learned Appellate Court vide its judgment dated 16.01.2008 while partly setting aside the judgment and decree passed by learned trial Court, partly allowed the suit of the plaintiff by holding him entitled for recovery of Rs.70,000/- from the defendants with interest @ 6% per annum from the date of payment till its realization with proportionate costs. While arriving at the said conclusion, it was held by learned Appellate Court that dubious stand taken by the plaintiff in his affidavit about the payment of balance amount of Rs.28,000/- created a doubt as to the payment of this amount to the defendants on 30.11.2002 as there was

no documentary proof of such document and it did not stand to reason that the plaintiff would have paid this amount without securing any receipt and without any witness. Learned Appellate Court held that even if the parties were closely related and if the amount had actually been paid on said date then why plaintiff did not ensure the execution of the sale deed, was also not explained. On these basis, it was held by learned Appellate Court that learned trial Court had rightly rejected this part of the evidence produced by the plaintiff to prove that the balance amount of sale consideration stood paid and had correctly drawn the inference that the plaintiff was not ready and willing to perform his part of the contract. However, learned Appellate Court further held that learned trial Court wrongly rejected the claim of the plaintiff for return of advanced money, as though the balance amount was not paid by the plaintiff by the agreed date, the condition in the agreement to sell that if the same was not paid on or before the date mentioned in the agreement to sell, should not have been construed strictly as time was not generally the essence of the contract in case of sale of immoveable property. Learned Appellate Court further held that in the case in hand substantial amount was paid to the defendants as an advance by the plaintiff and he had stated in the deposition that he was willing and ready to pay the balance amount during the pendency of the suit. On these basis, it was held by learned Appellate Court that learned trial Court should have ordered the payment of the advance amount if no damages as claimed, especially when learned trial Court had specifically rejected the plea of the defendants of not executing the agreement to sell and not receiving the advance of Rs.70,000/- which fact was duly proved by the evidence of the plaintiff. On these basis, learned Appellate Court held the plaintiff to be entitled for decree for recovery of Rs.70,000/- from the defendants at the rate of 6% per annum from the date of payment till its realization with proportionate costs.

10. The judgment and decree so passed by learned Appellate Court stands assailed by the plaintiff on the ground that learned Appellate Court should have had passed a decree for specific performance of agreement dated 15.11.2002 in favour of the plaintiff rather than passing a decree for recovery of Rs.70,000/- alongwith interest and proportionate costs which was admitted on 19.05.2008 on the following substantial questions of law:-

> "1. Whether the learned lower appellate Court mis-directed itself in not granting a decree for specific performance once it come to the conclusion that the agreement to sell has proved on record and that the plaintiff is ready and willing to perform his part of the contract?"

11. The judgment and decree passed by learned Appellate Court has not been challenged by the defendants.

12. I have heard learned Senior counsel for the appellant and have also gone through the records of the case as well as judgments and decrees passed by both learned Courts below.

13. The factum of agreement to sell dated 15.11.2002 Ext. P-1 having been executed between the plaintiff and defendants has been held concurrently in favour of the plaintiff and against the defendants by both the learned Courts below. Similarly, the factum of defendants having received Rs.70,000/- out of total sale consideration of Rs.98,000/- has also been concurrently held by learned Courts below in favour of the plaintiff and against the defendants. Whereas, learned trial Court dismissed the suit of the plaintiff for specific performance of contract and for damages, learned Appellate Court while modifying the judgment and decree so passed by learned trial Court though dismissed the suit of the plaintiff for specific performance, however, it partly decreed the suit of the plaintiff held him entitled for recovery of Rs.70,000/- from the date of payment till its realization alongwith interest and proportionate costs. As per the appellant/plaintiff when both learned Courts blow had concurrently come to the conclusion that agreement to sell dated 15.11.2002 was duly executed between the plaintiff and defendants and the defendants had received an amount of Rs.70,000/- as advance out of total sale consideration of Rs.98,000/- from the plaintiff then the said Court should have had passed a decree for specific performance of agreement dated 15.11.2002 in favour of the plaintiff rather

than passing a decree for recovery of Rs.70,000/- as has been done by learned Appellate Court.

14. While denying the relief of specific performance of agreement dated 15.11.2002 in favour of the plaintiff, both learned Courts below have held that as the plaintiff had neither paid the balance sale consideration of Rs.28,000/- as per terms of agreement to sell dated 15.11.2002 nor he had proved on record his willingness to execute the sale deed, therefore, he was not entitled for the specific performance of agreement to sell dated 15.11.2002.

15. A perusal of the judgment passed by learned Appellate Court demonstrates that the said Court held that clause contained in the agreement to sell to the effect that in case balance amount of Rs.28,000/- was not paid by the plaintiff to the defendants on or before 15.01.2003 then the earnest amount would be forfeited was not required to be construed strictly as time was not generally essence of the contract in case of sale of immoveable property.

16. In my considered view, taking into consideration the said findings returned by learned Appellate Court and the factum of willingness expressed by the plaintiff to perform his part of the agreement to sell both in the plaint as well as in the witness box, learned Appellate Court erred in not granting the relief of specific performance of agreement to sell dated 15.11.2002 in favour of the plaintiff. No doubt, the relief of specific performance of contract is a discretionary relief but the said discretion has to be exercised by the Court taking into consideration the totality of the circumstances and not in a whimsical manner. In the present case, admittedly out of the total sale consideration of Rs.98,000/-, a substantial amount of Rs.70,000/- stood paid to the defendants by the plaintiff at the time of the execution of agreement to sell. Neither the execution of agreement to sell nor receipt of an amount of Rs.70,000/- as earnest money has been disbelieved by both learned Courts below. Not only this, both learned Courts below erred in not appreciating that defence of the defendants was not that though they were willing to perform their part of the agreement, however, it was the plaintiff who failed to pay the balance amount and did not turn up for the execution of the sale deed. The stand of the defendants was of total denial about the execution of the agreement to sell itself which stand was found to be incorrect by both learned Courts below.

17. In this view of the matter, in my considered view, interest of justice demanded that learned Appellate Court should have had decreed the suit of the plaintiff for specific performance of agreement to sell dated 15.11.2002 rather than decreeing the suit of the plaintiff for recovery of Rs.70,000/- from the defendants. Learned Appellate Court could have had directed the plaintiff to pay the balance amount of Rs.28,000/- to the defendants as both the learned Courts had held that the plaintiff could not prove that he had paid the balance amount to the defendants, however, denial of the relief of specific performance to the plaintiff on this count cannot be justified.

18. In view of the above discussion, this appeal is allowed and the judgment and decree passed by learned Appellate Court is set aside whereby learned Appellate Court has not granted the decree of specific performance of agreement dated 15.11.2002 in favour of the plaintiff and the suit of the plaintiff is decreed for specific performance of agreement dated 15.11.2002 qua suit land measuring 1 Bigha 8 Biswas being 1/3rd share of total land measuring 4 Bighas 4 Biswas comprised in Khata/Khatauni Nos. 62min/62min, bearing Khasra No. 560 (4-4), situated in village Nangal Nihla, Pargana Plassi, Tehsil Nalagarh, District Solan. Defendants are directed to execute the sale deed in favour of the plaintiff within a period of two months from today and the plaintiff is directed to pay the balance amount of Rs.28,000/- to the defendants at the time of execution of the sale deed. It is further directed that the expenses of the sale deed as well as other incidental expenses shall also be borne by the plaintiff. Substantial question of law is answered accordingly.

19. Appeal stands allowed in above terms. Miscellaneous applications pending, if any, also stand disposed of. Interim order, if any, also stands vacated.

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BEFORE HON'BLE MR. JUSTICE P.S.RANA, J.

Sh Oriental Insurance Company Ltd. ....Appellant.

Vs.

Sh. Sandeep Sharma son of Sh Kuram Chand and others. ....Respondents.

FAO(MVA) No. 146 of 2011.
Decision reserved on: 15.11.2016.
Date of decision: December 16, 2016.

Motor Vehicles Act, 1988- Section 173- Deceased was travelling in the vehicle, which rolled down in the rivulet – MACT awarded the compensation of Rs.6,51,000/- along with interest- aggrieved from the award, insurer preferred the present appeal- held, that insurer had not examined any person to prove that the driver did not have a valid driving licence or other documents – the insurer was bound to indemnify the insured and was rightly saddled with liability – compensation was awarded in accordance with law- appeal dismissed. (Para-12 to 19)

Cases referred:

Vidhyadhar Vs. Mankikrao and another, AIR 1999 SC 1441
Iswar Bhai C. Patel Vs. Harihar Behera and another, AIR 1999 SC 1341
Sarla Verma and others Vs. Delhi Transport Corporation and another, 2009 (6) SCC 121
Reshma Kumari and others Vs. Madan Mohan and others, AIR 2013 SCW 3120

For appellant. Mrs.Seema Sood, Advocate.
For respondents No.3 to 8. Mr. G.R.Palsra, Advocate.
For other respondents. None.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Decision: Present appeal is filed under Section 173 of Motor Vehicles Act 1988 against award dated 24.2.2011 passed by Motor Accident Claims Tribunal-I Mandi to the tune of Rs. 651000/-(Six lacs fifty one thousand) along with interest @ 9% per annum from the date of petition till realization in MAC Petition No. 34 of 2009 title Smt.Geeta Devi and others Vs. Sh. Sandeep Sharma and others.

Brief facts of the case:

2. Smt. Geeta Devi and others filed claim petition under section 166 of Motor Vehicles Act 1988 pleaded therein that on dated 27.3.2008 near village and post office Kataula Tehsil Sadar District Mandi HP at about 11/11.30 PM Sohan Lal died when he was sitting in vehicle Tata Tipper No. HP 33B-1305 as mason-cum-labourer. It is pleaded that on dated 27.3.2008 deceased Sohan Lal boarded vehicle Tata Tipper No. HP 33B-1305 from village Batahan District Mandi and was going to village Kataula Tehsil Sadar District Mandi HP and when at about 11/11.30 PM vehicle reached near village Kataula vehicle was in excessive speed and driver of vehicle could not control vehicle due to excessive speed and vehicle was driven in rash and negligent manner. It is pleaded that driver of vehicle could not control vehicle as a result of which vehicle rolled down in rivulet. It is further pleaded that deceased along with driver and conductor also rolled down. It is further pleaded that deceased sustained multiple grievous injuries and head injuries which proved fatal and deceased died at the spot. It is further pleaded that post mortem of deceased was conducted by medical officer zonal hospital Mandi on 28.3.2008. The age of deceased is pleaded as 36 years at the time of accident. It is further pleaded that deceased was mason and agriculturist and monthly income of deceased pleaded as Rs.10000/- (Ten thousand) per month i.e. Rs.7500/- (Seven thousand five hundred) per month

from mason and Rs.2500/- (Two thousand five hundred) per month from agriculture work. It is further pleaded that FIR No. 138 of 2008 dated 28.3.2008 was registered in police station Sadar District Mandi under sections 279, 337 and 304-A IPC. It is further pleaded that co-petitioner No.1 is widow of deceased, co-petitioners No. 2 to 5 are daughters and son of deceased and co-petitioner No. 6 is mother of deceased. It is further pleaded that deceased was only bread earner in the family and all petitioners were dependant upon deceased. Compensation to the tune of Rs. 2000000/- (Twenty lac) sought.

3. Per contra response filed on behalf of co-respondents No. 1 and 2 owner and driver of vehicle No. HP 33B 1305 wherein factum of accident is admitted by co-respondents No. 1 and 2. It is pleaded that vehicle was not driven in rash and negligent manner. It is pleaded that deceased was stone cutting mason-cum- labourer in stone mines of co-respondents No. 1 and deceased used to load and unload stones in vehicle of co-respondent No.1. It is pleaded that petitioners have claimed excessive compensation amount. It is pleaded that vehicle was duly insured with Insurance Company at the time of accident. It is pleaded that co-respondent No.3 Insurance Company is under legal obligation to indemnify owner. It is pleaded that accident took place due to mechanical defect. It is admitted that deceased was employed as stone cutting mason-cum-labourer with co-respondent No.1 Sandeep Sharma owner of vehicle. It is admitted that on the day of accident deceased was travelling in vehicle to unload stones which were loaded at village Batahan and which were to be unloaded at village Kataula. Prayer for dismissal of petition sought. It is pleaded that if petitioners are entitled to any compensation amount the same would be paid by Insurance Company.

4. Per contra separate response filed on behalf of Insurance Company pleaded therein that there is breach of terms and conditions of Insurance Policy. It is pleaded that vehicle was driven without valid and effective R.C, route permit and fitness certificate. It is pleaded that the driver of vehicle involved in accident was not holding valid and effective driving licence at the time of accident. It is pleaded that deceased was travelling as gratuitous passenger in vehicle. It is pleaded that Insurance Company is not under legal obligation to indemnify the owner of vehicle. Prayer for dismissal of petition sought.

5. Motor Accident Claims Tribunal Mandi on dated 4.7.2009 framed following issues.

1.Whether on 27.3.2008 at about 11/11.30 PM near Kataula co-respondent No.2 was driving tipper No.HP 33B-1305 rashly and negligently and caused death of Sh Sohan Lal?. ...OPP

2. If issue No.1 is proved to what amount of compensation petitioners are entitled?. ..OPP.

3. Whether driver of Tipper No. HP 33B-1305 was not holding a valid and effective driving license to drive the tipper at the time of accident?....OPR.

4. Whether co-respondent No.2 was driving Tipper No. HP 33B-1305 without route permit and fitness certificate?. .... OPR.

5. Whether deceased was travelling as gratuitous passenger?.... OPR.

6. Relief.

6. Learned Motor Accident Claims Tribunal decided issues No. 1 and 2 in affirmative and learned Motor Accident Claims Tribunal decided issues No.3 to 5 in negative. Learned Motor Accident Claims Tribunal awarded compensation to the tune of Rs. 651000/- (Six lac fifty one thousand) along with interest @ 9% per annum from the date of petition till realization of amount.

7. Feeling aggrieved against award passed by learned Motor Accident Claims Tribunal Mandi Insurance Company filed present appeal under Motor Vehicle Act 1988.

8. Court heard learned Advocate appearing on behalf of Insurance Company and learned Advocate appearing on behalf of respondents and also perused entire record carefully.

9. Following points arises for determination in present appeal.

1. Whether appeal filed by Insurance Compnay is liable to be accepted as mentioned in memorandum of grounds of appeal.

2. Relief.

10.Findings upon point No.1 with reasons:

10.1 PW1 H.C Suresh Kumar has stated that copy of FIR Ext PW1/A is correct as per original record. He has stated that FIR No. 138 of 2008 dated 28.3.2008 was registered under sections 279, 337 and 304-A IPC. He has stated that FIR was not personally written by him.

10.2 PW2 Smt. Geeta Devi has filed affidavit Ext. PW2/A in examination-in-chief. There is recital in affidavit that on dated 27.3.2008 deceased was travelling in vehicle having registration No. HP 33B-1305 from Bathan to Kataula. There is recital in affidavit that at about 11/11.30 PM night when vehicle reached near Kataula then vehicle rolled down from road due to rash and negligent driving of vehicle. There is recital in affidavit that driver of vehicle could not control the speed of vehicle. There is recital in affidavit that deceased sustained serious injuries and died at the spot. There is recital in affidavit that on dated 28.3.2008 post mortem of deceased was conducted in zonal hospital Mandi. There is recital in affidavit that accident took place due to rash and negligent driving of vehicle. There is recital in affidavit that FIR was recorded in police station. There is recital in affidavit that the age of deceased at the time of his death was 36 years. There is recital in affidavit that deceased was mason-cum-labourer at the time of death and he was employed by co-respondent No.1 Sandeep Sharma owner of vehicle involved in the accident. There is recital in affidavit that salary of deceased was Rs.7500/- (Seven thousand five hundred) per month. There is recital in affidavit that deceased used to perform additional agriculture work and used to earn Rs.2000/- (Two thousand) per month. There is recital in affidavit that all petitioners were dependant upon deceased. There is recital in affidavit that co-respondents No.2 to 5 are minors. PW2 also tendered in evidence copy of family register Ext PW2/A, death certificate Ext PW2/B and post mortem report Ext PW2/C. She has stated that at the time of accident deceased was employed by owner of vehicle involved in accident for loading and unloading stones. She has denied suggestion that salary of her deceased husband was not Rs.7500/- (Seven thousand five hundred).

10.3 PW3 Sh Lal Singh has filed affidavit in examination-in-chief. There is recital in affidavit that deceased was known to him. There is recital in affidavit that deceased was mason. There is recital in affidavit that in the year 2007 deceased performed work of mason and Rs.200/- per day paid to deceased by deponent. PW3 has admitted that deceased used to load and unload stones from vehicle of Sandeep Sharma co-respondent No.1. PW3 has denied suggestion that deceased did not work as mason in his house. PW3 has denied suggestion that mason used to earn Rs.150/- (One hundred fifty) per day and labourer used to earn Rs.100/- (One hundred) per day.

10.4 RW1 Sandeep Kumar Sharma owner of vehicle has also tendered affidavit in examination-in-chief. There is recital in affidavit that deponent is the owner of vehicle No. HP 33B-1305. There is recital in affidavit that deceased was working as stone cutting mason-cum-labourer in stone mines of deponent. There is recital in affidavit that deceased also used to load and unload the vehicle owned by RW1 Sandeep Sharma. There is recital in affidavit that on dated 27.3.2008 deceased was travelling in vehicle of RW1 to unload the stones which were loaded at village Batahan and were to be unloaded at village Kataula. There is recital in affidavit that due to mechanical defect accident took place. There is recital in affidavit that vehicle was not driven in rash and negligent manner. There is recital in affidavit that deceased was travelling in vehicle as labourer of RW1 to unload the stones which were loaded in the vehicle. RW1 has denied suggestion that deceased was not working as labourer in vehicle. RW1 has stated that stones used to be loaded in vehicle manually. RW1 has denied suggestion that deceased was travelling as gratuitous passenger. RW1 has stated that he used to pay Rs.150/- per day to deceased for dressing hundred stones. RW1 has stated that deceased used to dress 80 to 100 stones in a day

and RW1 has stated that he used to pay extra charges to deceased for loading and unloading stones. RW1 has denied suggestion that accident did not take place due to mechanical defect.

10.5 RW2 Rup Singh has tendered affidavit in examination-in-chief. There is recital in affidavit that he was working as driver in vehicle No. HP 33B-1305 owned by Sh. Sandeep Sharma. There is recital in affidavit that on dated 27.3.2008 he was going to unload stones at village Kataula which were loaded by deceased Sohan Lal at village Batahan. There is recital in affidavit that deceased was working as stone cutting mason-cum-labourer in the mines of Sh Sandeep Sharma. There is recital in affidavit that deceased also used to perform work of loading and unloading of stones. There is recital in affidavit that on dated 27.3.2008 deceased was travelling in vehicle involved in the accident to unload the stones at village Kataula. There is recital in affidavit that due to mechanical defect the vehicle could not be controlled and rolled down. There is recital in affidavit that vehicle was not driven in a rash and negligent manner. RW2 has stated that at the time of accident three persons were travelling in vehicle i.e. RW2 Rup Singh, Soni Kumar conductor and deceased Sohan Singh labourer. RW2 has stated that RW1 is the owner of mines at village Batahan. RW2 has admitted that deceased Sohan Lal was working at the mines of Sh Sandeep Sharma for dressing of stones. He has admitted that there was lift system in the vehicle. Self stated that on the day of accident lift system was out of order. RW2 has stated that lift system was out of order since week. RW2 has denied suggestion that deceased was working as dresser of stones only. RW2 has denied suggestion that lift system was in order at the time of accident. RW2 has denied suggestion that deceased was not travelling as labourer in the vehicle at the time of accident. RW2 has denied suggestion that deceased was travelling as gratuitous passenger. RW2 has denied suggestion that vehicle did not develop mechanical defect at the time of accident.

11. None appeared in the witness box on behalf of Insurance Company for oral testimony despite opportunity granted by Motor Accident Claims Tribunal.

12. Following documentaries evidence filed by parties. (1) Ext. PW1/A FIR No. 138 of 2008. (2) Ext PW2/A extract of family register issued by panchayat. (3) Ext PW2/B death certificate of Sohan Lal. (4) Ext RA insurance policy. (5) Ext RB certificate of registration of vehicle No. HP 33B-1305. (6) Ext RC certificate issued by State Transport Authority Shimla. (7) Ext. RD driving licence. (8) Ext. RX package insurance policy issued by oriental insurance company. (9) Ext RY FIR No. 138 of 2008 dated 28.3.2008 under sections 279, 337 and 304-A IPC.

13. Submission of learned Advocate appearing on behalf of Insurance Company that driver of vehicle No. HP 33B-1305 was not holding valid and effective driving licence to drive tipper at the time of accident and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.3 was upon Insurance Company. No official on behalf of Insurance Company appeared in the witness box in order to prove issue No.3. Hence adverse inference under Section 114 (g) of Indian Evidence Act 1872 is drawn against Insurance company. See AIR 1999 SC 1441 title Vidhyadhar Vs. Mankikrao and another. Also see AIR 1999 SC 1341 title Iswar Bhai C. Patel Vs. Harihar Behera and another.

14. Submission of learned Advocate appearing on behalf of Insurance Company that driver was driving the vehicle without route permit and fitness certificate and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.4 was upon Insurance Company. No official on behalf of Insurance Company appeared in witness box in order to prove issue No.4. Hence adverse inference under section 114 (g) of Indian Evidence Act 1872 is drawn against Insurance Company in view of ruling cited supra.

15. Submission of learned Advocate appearing on behalf of Insurance Company that deceased was travelling as gratuitous passenger in vehicle at the time of accident and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.5 was upon Insurance Company. No official on behalf of Insurance Company appeared in the witness box in order to prove issue No.5. Hence adverse inference

under section 114 (g) of Indian Evidence Act 1872 is drawn against Insurance Company in view of ruling cited supra.

16. Submission of learned Advocate appearing on behalf of Insurance Company that there was lift system in the tipper for loading and unloading purpose and deceased used to dress stones only and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. The driver of vehicle namely RW2 Rup Singh who is eye witness of incident has specifically stated in positive manner that on the day of accident lift system of the vehicle involved in accident was out of order. RW2 Rup Singh has stated in positive manner that deceased was travelling in vehicle as labourer to unload the stones at village Kataula. Testimony of RW2 Rup Singh is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of RW2 Rup Singh. Insurance Company did not adduce in rebuttal oral evidence in order to rebut the testimony of driver of vehicle who is the eye witness of incident.

17. Submission of learned Advocate appearing on behalf of Insurance Company that terms and conditions of insurance policy violated by the owner and Insurance Company is not under legal obligation to indemnify the owner and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. No official on behalf of Insurance Company appeared in witness box in order to prove violation of terms and conditions of insurance policy. Insurance Company did not prove breach of terms and conditions of insurance policy as required under law. It is well settled law that breach of terms and conditions of Insurance Company should be proved by Insurance Company in positive, cogent and reliable manner. The plea of Insurance Company that terms and conditions of insurance policy flouted by owner is defeated on the concept of ipse dixit (Assertion made without proof).

18. Submission of learned Advocate appearing on behalf of Insurance Company that compensation awarded by learned Motor Accident Claims Tribunal is on higher side is rejected being devoid of any force for reasons hereinafter mentioned. Smt. Geeta Devi is the widow of deceased, Sita Devi, Leela Devi, Krishna Devi minors are daughters of deceased, Hoshiar Singh minor is son of deceased and Smt. Pati Devi is the mother of deceased. It is proved on record that all applicants who applied for compensation were dependant upon deceased at the time of his death. It is also proved on record that deceased was employed as mason-cum-labourer by co-respondent No.1 at the time of accident. RW1 Sandeep Sharma has specifically stated when he appeared in witness box that he used to pay Rs.150/- to deceased for dressing hundred stones. He has stated that deceased used to dress eighty to hundred stones in a day. He has stated that he used to pay extra charges for loading and unloading stones in vehicle. Testimony of RW1 Sandeep Sharma remained un-rebutted on record. Testimony of RW1 Sandeep Sharma relating to payment to deceased is reliable, trustworthy and inspires confidence of Court. In view of above stated facts it is held that learned Motor Accident claims Tribunal has rightly assessed monthly income of deceased to the tune of Rs. 4500/- (Four thousand five hundred) per month. It is held that learned Motor Accident Claims Tribunal has legally deducted 1/3rd of income of deceased as personal expenses. It is held that learned Motor accident Claims Tribunal has legally assessed the contribution of deceased towards applicants to the tune of Rs.3000/- per month. It is held that as the age of the deceased at the time of accident was 36 years learned Motor Accident Claims Tribunal has rightly applied multiplier of 16. It is held that learned Motor Accident Claims Tribunal has legally awarded additional compensation to the tune of Rs.10000/- (Ten thousand) for love and affection. It is held that learned Motor Accident Claims Tribunal has legally awarded compensation for funeral expenses to the tune of Rs.15000/-(Fifteen thousand) See 2009 (6) SCC 121 Sarla Verma and others Vs. Delhi Transport Corporation and another. See AIR 2013 SCW 3120 Reshma Kumari and others Vs. Madan Mohan and others. In view of above stated facts and case law cited supra point No.1 is decided in negative.

Point No.2 (Relief).

19. In view of findings on point No.1 appeal is dismissed. Parties are left to bear their own costs. File of learned Motor Accident Claims Tribunal be sent back forthwith along with

certified copy of decision. FAO(MVA) No. 146 of 2011 is disposed of. Pending applications if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

The New India Assurance Company Ltd. .....Appellant

Versus

Kirna & others .....Respondents

FAO No.486 of 2012 a/w CO No.153 of 2013

Date of decision: 16.12.2016

Motor Vehicles Act, 1988- Section 149- It was contended that the driver was under the influence of liquor and insurer is not liable – held, that the insurer had not led any evidence to prove this plea- the insurance policy does not contain any such clause – insurer cannot escape from liability on this ground. (Para-6 and 7)

Motor Vehicles Act, 1988- Section 166- The salary of the deceased was Rs.8,700/- per month – 1/3rd amount was to be deducted towards personal expenses – thus, the claimants have lost source of dependency to the tune of Rs.6,000/- per month- the age of the deceased was 30 years at the time of accident and multiplier of 16 is applicable – thus, claimants are entitled to Rs.6,000 x 12 x 16= Rs.11,52,000/- under the head loss of dependency – the claimants are also entitled to Rs.10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses- thus, total compensation of Rs.11,52,00 + 40,000/- =Rs.11,92,000/- awarded along with interest. (Para-8 to 14)

Cases referred:

Sarla Verma (Smt.) and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR (SCW) 3120

For the appellant:	Mr.B.M. Chauhan, Advocate.
For the respondents:	Ms.Seema K. Guleria, Advocate, for respondents No.1 to 3.
	Mr.Ashwani Sharma, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 20th September, 2012, passed by the Motor Accident Claims Tribunal (I), Mandi, H.P. (for short, "the Tribunal") in Claim Petition No.128 of 2009, titled Smt. Kirana & others vs. Paras Ram & others, whereby compensation to the tune of Rs.16,60,120/- alongwith interest at the rate of 7.5% per annum came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

2. The claimants, the owner-insured and the driver have not questioned the impugned award on any count. Thus, the same has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant-insurer has raised the following three points.

1. *That the accident was outcome of contributory negligence;*

2. That the driver of the offending vehicle was driving the same under the influence of alcohol; and

3. That the Tribunal has wrongly assessed the compensation and awarded excessive compensation.

Point No.1

5. I have gone through the evidence. The claimants have specifically pleaded and proved that the driver of the offending vehicle had driven the same rashly and negligently and caused the accident. There is not an iota of evidence that it was case of contributory negligence. PW-3 HC Devinder Kumar has specifically given the events as to how the accident had taken place and the driver of the offending vehicle has not questioned the same. I wonder how the insurer can question the said findings, are against the driver. It was for the driver to question the same, has not questioned the same. It was also not the case of the insurer that there was collusion between the driver, owner and the claimants. Having said so the first point raised by the learned counsel for the appellant fails. The Tribunal has rightly determined issue No.1. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

Point No.2

6. It was for the insurer to plead and prove that the accident was caused due to the fact that driver of the offending vehicle was driving the vehicle under the influence of alcohol and caused the accident as such, has not led any evidence to prove the same. The insurance policy Ext. RX is not containing such terms and conditions. This Court in ***FAO (MVA) No.18 of 2009 titled Managing Director, HPMC Nigam Vihar Versus Naresh Kumar and others***, has laid down the same principles of law. It is apt to reproduce paras 15 to 18 of the said judgment herein.

"15.The learned counsel for the insurance company has relied upon the terms and conditions of the insurance policy but the Tribunal has fallen in an error in holding that the owner has committed willful breach. The condition No. 2 (c) of the terms and conditions of the insurance policy read as under:

"The Company shall not be liable to make any payment in respect of:

(a) ….. …..

(b) ….. …….

(c) any accidental loss or damage suffered whilst the insured or any person driving the vehicle with the knowledge and consent of the insured is under the influence of intoxicating liquor or drugs." [Emphasis added]

16. It was for the insurer to plead and prove that the driver was under the state of intoxication with the knowledge and consent of the insured. No such evidence has been led by the insurer that the owner was accompanying the driver and driver had taken the alcohol with the knowledge and consent of the insured. In the given circumstances, how the Tribunal has exonerated the insurer, is not forthcoming.

*17. This Court in **Khem Chand versus Smt. Uma Devi and others,** reported in **Latest HLJ 2010 (HP) 1,** has laid down the same principle. It is apt to reproduce para-4 of the judgmentherein:-*

"4. The law is very well settled that a claim which falls within the purview of an Act policy i.e. a liability falling within the ambit of Section 147 of the Motor Vehicles Act, 1988 (the Act) can only be contested by the Insurance Company on the grounds available to it under Section 149 of the Act. It is not permitted to contest the proceedings on any other grounds. Intoxication of the driver is not a ground available to the Insurance Company under Section 149 of the Act. Therefore, the liability, which is statutory under Section 147 of the Act, has to be satisfied by the insurer. It may be clarified that in case the insurer in addition to the liability which it is bound to cover under the Act covers other liability then in case of such

extended liability, it may raise the defences available to it as per terms of the policy, but as far as statutory liability is concerned, the insurer has no authority to incorporate any term in the policy which is not contemplated in terms of Section 149 of the Act. Therefore, the Insurance Company could not have been permitted to raise this defence and it could not be permitted to recover the awarded amount from the insured."

18. This ground is not available to the insurer in terms of the mandate of Sections 147 and 149 of the Act."

7. Applying the test, this point also fails

Point No.3.

8. Though the insurer has not sought permission to contest the claim petition under Section 170 of the Motor Vehicles Act, 1988 (for short, "the Act"), but while going through the impugned award, it appears that the amount is excessive for the following reasons.

9. Admittedly, the deceased was working as Sales Executive with Jagatjit Industries and his gross salary at the time of accident was Rs.8,700/- per month, which stands duly proved by salary certificate Ext.PW-4/B. 1/3 was to be deducted towards his personal expenses. Thus, it can be safely held that the claimants have lost source of dependency to the tune of Rs.6,000/- per month. The age of the deceased was 30 years at the time of the accident thus, the multiplier of '16' was rightly applied by the Tribunal, in view of Schedule II appended to the Act read with the ratio laid down by the Apex Court in case tilted as ***Sarla Verma (Smt.) and others*** versus ***Delhi Transport Corporation and another***, reported in ***AIR 2009 SC 3104*** and upheld by a larger Bench of the Apex Court in case titled as ***Reshma Kumari & others*** versus ***Madan Mohan and another, reported in 2013 AIR (SCW) 3120***.

10. Thus, the claimants are entitled to compensation to the tune of Rs.6,000x12x16= Rs.11,52,000/- under the head loss of dependency.

11. In addition a sum of Rs.10,000/- each is awarded in favour of the claimants under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate', and 'funeral expenses.

12. In view of the above discussion, the claimants are held entitled to Rs.11,52,000/- + Rs.40,000/- (Rs.11,92,000/-in all), alongwith interest, as awarded by the Tribunal.

13. Accordingly, the appeal is allowed and the impugned award is modified, as indicated above.

14. The Registry is directed to release the award amount in favour of the claimants, strictly in terms of the impugned award and the excess amount, if any deposited, be released in favour of the appellant-insurer through payee's account cheque, after proper identification.

Cross Objections No.153 of 2013.

15. In view of the disposal of the appeal, the cross objections also stand disposed of.

16. Send down the record after placing copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Umed Singh …Appellant.

Versus

Shri Sohan Singh and others …Respondents.

FAO No. 332 of 2012

Decided on: 16.12.2016

Motor Vehicles Act, 1988- Section 166- Injured remained admitted in the hospital at Bilaspurw.e.f. 13th April, 2002 till 17th April, 2002 and thereafter at IGMC w.e.f. 9th May, 2002 till 17th May, 2002- the compensation has to be awarded under pecuniary and non-pecuniary heads by making guess work in case of injuries - the claimant pleaded that he was earning Rs.6,000/- per month as cleaner of the vehicle- however, by guess work, it can safely be held that he would have been earning not less than Rs.3,000/- per month – injured had suffered 45% permanent disability and loss of income will be Rs.1,500/- per month – age of the claimant was 24 years at the time of accident and multiplier of 15 is applicable- claimant has lost source of income of Rs.2,70,000/- (1500 x 12 x 15) – claimant has placed on record cash payment/medical bills amounting to Rs.13,909.64/- and is entitled to Rs.13,910/- under the head medical expenses – the claimant has placed on record taxi bills/bus tickets to the tune of Rs.35,443/- and is entitled to Rs.35,500/- under the head transportation charges – compensation of Rs.50,000/- each awarded under the heads pain and suffering and loss of amenities of life- thus, total compensation of Rs.4,19,410/- awarded with interest @ 7.5% per annum from the date of the award. (Para-17 to 21)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
Jakir Hussein versus Sabir and others, (2015) 7 SCC 252

For the appellant: Mr. G.R. Palsra, Advocate.
For the respondents: Mr. H.S. Rangra, Advocate, for respondents No. 1 and 2.
Mr. J.S. Bagga, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

By the medium of this appeal, the appellant-claimant-injured has called in question award, dated 17th March, 2012, made by the Motor Accident Claims Tribunal (II)-cum-Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 219/2005 (112S/2003), titled as Umed Singh versus Sh. Sohan Singh and others, whereby the claim petition came to be dismissed (for short "the impugned award").

2. The appellant-claimant-injured filed a claim petition before the Tribunal for grant of compensation to the tune of ₹ 5,00,000/-, as per the break-ups given in the claim petition, on the ground that he became the victim of the vehicular accident which was caused by the driver, namely Shri Tilak Raj, while driving truck bearing registration No. HP-32-0670, rashly and negligently, on 13th April, 2002, at about 4.00 P.M., at place Kulah, near Swarghat.

3. The respondents resisted the claim petition on the grounds taken in the respective memo of objections.

4. On the pleadings of the parties, following issues came to be framed by the Tribunal on 2nd August, 2005:

"1. Whether the petitioner sustained injuries due to rash and negligent driving of Truck No. HP-32-0670 on 13-4-2002 at place Kulah near Swarghat being driven by respondent No. 2 as alleged? OPP

2. If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from whom? OPP

3. Whether respondent No. 2 was not holding valid and effective driving licence at the time of accident? OPR-3

4. Whether the petitioner was a gratuitous passenger at the time of the accident, if so its effect? OPR-3

5. Whether the offending vehicle was being driven in contravention of the terms and conditions of the insurance policy at the time of accident? OPR-3

6. Relief."

5. The appellant-claimant-injured has examined six witnesses in support of his claim and himself appeared in the witness box as PW-4. The insurer has examined two witness in support of its defence.

6. It is apt to record herein that the owner-insured and driver of the offending vehicle were proceeded against ex-parte by the Tribunal vide order, dated 13th July, 2009.

7. The Tribunal, after scanning the evidence, oral as well as documentary, dismissed the claim petition in terms of the impugned award. Hence, the appeal.

<u>Issue No. 1:</u>

8. The Tribunal, while making discussions in paras 11 to 18 of the impugned award, held that the claimant-injured has proved that the accident was caused by the driver, namely Shri Tilak Raj, while driving the offending vehicle rashly and negligently at the relevant point of time, in which claimant-injured sustained injuries. The owner-insured and the driver of the offending vehicle have not questioned the said findings. The appellant-claimant-injured has also not questioned the same. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

9. Before dealing with issue No. 2, I deem it proper to determine issue No. 4 at the first instance.

<u>Issue No. 4:</u>

10. The Tribunal has dismissed the claim petition on the ground that the appellant-claimant-injured was travelling in the offending vehicle as a gratuitous passenger at the time of the accident.

11. The appellant-claimant-injured has specifically pleaded in paras 10 and 24 of the claim petition that he was travelling in the offending vehicle as cleaner of the vehicle, which factum is admitted by the owner-insured and driver of the offending vehicle in their respective replies. Thus, there was no dispute about the factum of the appellant-claimant-injured being employed as cleaner with the offending vehicle. Therefore, there was no need to frame the issue relating to the said fact in terms of the mandate of Order XIV of the Code of Civil Procedure (for short "CPC").

12. However, the insurer has taken a specific plea in its reply that the appellant-claimant-injured was travelling in the offending vehicle as a gratuitous passenger at the time of the accident. Thus, it was for the insurer to discharge the onus.

13. The insurer has examined Shri Roshan Lal, Senior Assistant from the office of RLA, Gohar, as RW-1, who has specifically stated that the offending vehicle was registered as 'light goods vehicle' and conductor was permitted to travel with the driver in the offending vehicle.

14. Even otherwise, as per the registration certificate, Mark R-1, the seating capacity of the offending vehicle is '2+1', thus, the risk of the appellant-claimant-injured, being the cleaner, was covered, cannot be said to be gratuitous passenger. Viewed thus, the Tribunal has fallen in an error in deciding issue No. 4 by holding that the appellant-claimant-injured was a gratuitous passenger. Accordingly, the findings returned by the Tribunal on issue No. 4 are set

aside and it is held that the appellant-claimant-injured was travelling in the offending vehicle as cleaner and not as a gratuitous passenger.

Issue No. 3:

15. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same, though has examined Shri Chet Singh Thakur, Clerk from the office of RLA (Motors), Rural Shimla, as RW-2, but has failed to do so. Even otherwise, the driving licence is on the record as Mark R-2, the perusal of which does disclose that the driver was having a valid and effective driving licence to drive the offending vehicle. Accordingly, issue No. 4 is decided in favour of the owner-insured and driver of the offending vehicle and against the insurer.

Issue No. 5:

16. It was for the insurer to plead and prove that the offending vehicle was being driven in contravention of the terms and conditions of the insurance policy, thus, the owner-insured has committed a willful breach, has failed to do so, as discussed hereinabove. Accordingly, this issue is decided against the insurer.

Issue No. 2:

17. The Tribunal has not assessed the amount of compensation, to which the appellant-claimant-injured is entitled to. The perusal of the record does disclose that the claimant-injured remained admitted in Zonal Hospital, Bilaspur with effect from 13th April, 2002 to 17th April, 2002 and thereafter at IGMC, Shimla, with effect from 9th May, 2002 to 17th May, 2002.

18. It is beaten law of land that in an injury case, the compensation is to be awarded under pecuniary and non-pecuniary heads by making guess work.

19. My this view is fortified by the judgments made by the Apex Court in the cases titled as **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,**reported in **AIR 1995 SC 755,Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another,**reported in **2010 AIR SCW 6085,Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited,**reported in **2011 AIR SCW 4787,**and **Kavita versus Deepak and others,** reported in**2012 AIR SCW 4771**.

20. This Court has also laid down the same principle in a series of cases.

21. The claimant-injured has pleaded that he was earning ₹ 6,000/- per month as cleaner of the offending vehicle. However, by guess work, it can safely be held that he would have been earning not less than ₹ 3,000/- per month.

22. The disability certificate is on the record as Ext. PW-3/A, in terms of which the claimant-injured has suffered 45% permanent disability. Thus, it can be safely held that the claimant-injured has suffered loss of income to the tune of ₹ 1,500/- per month.

23. The age of the claimant-injured was 24 years at the time of the accident, which is not in dispute. Thus, the multiplier of '15' is to be applied in view of the second Schedule appended with the Motor Vehicles Act, 1988, (for short "MV Act") Act read with the law laid down by the Apex Court in the case titled as **Sarla Verma and others versus Delhi Transport Corporationand another** reported in **AIR 2009 SC 3104,** and upheld in **Reshma Kumari and others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

24. Having said so, the claimant-injured has lost source of income to the tune of ₹ 1,500/- x 12 x 15 = ₹ 2,70,000/-.

25. The claimant-injured has placed on record the cash memos/medical bills, Mark 1 to 36, amounting to ₹ 13,909.64/. Thus, he is held entitled to ₹ 13,910/- under the head 'medical expenses'.

26. The claimant-injured has also placed on record taxi bills/bus tickets, Ext. PW-1/A, Ext. PW-1/B, Mark 37 to 43 to the tune of ₹ 35,443/-, thus, is held entitled to compensation to the tune of ₹ 35,500/- under the head 'transportation charges'.

27. The Apex Court in its latest decision in the case titled as **Jakir Hussein versus Sabir and others,** reported in **(2015) 7 SCC 252,** while discussing its earlier pronouncements, observed that in injury cases, the compensation would include not only the actual expenses incurred, but the compensation has to be assessed keeping in view the struggle which the injured has to face throughout his life due to the permanent disability and the amount likely to be incurred for future medical treatment, loss of amenities of life, pain and suffering to undergo for the entire life etc. It is apt to reproduce paragraphs 11 and 18 of the judgment herein:

> *"11. With regard to the pain, suffering and trauma which have been caused to the appellant due to his crushed hand, it is contended that the compensation awarded by the Tribunal was meagre and insufficient. It is not in dispute that the appellant had remained in the hospital for a period of over three months. It is not possible for the courts to make a precise assessment of the pain and trauma suffered by a person whose arm got crushed and has suffered permanent disability due to the accident that occurred. The appellant will have to struggle and face different challenges as being handicapped permanently. Therefore, in all such cases, the Tribunals and the courts should make a broad estimate for the purpose of determining the amount of just and reasonable compensation under pecuniary loss. Admittedly, at the time of accident, the appellant was a young man of 33 years. For the rest of his life, the appellant will suffer from the trauma of not being able to do his normal work of his job as a driver. Therefore, it is submitted that to meet the ends of justice it would be just and proper to award him a sum of Rs.1,50,000/- towards pain, suffering and trauma caused to him and a further amount of Rs.1,50,000/- for the loss of amenities and enjoyment of life.*
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> *...........*
>
> *18. Further, we refer to the case of Rekha Jain & Anr. v. National Insurance Co. Ltd., 2013 8 SCC 389 wherein this Court examined catena of cases and principles to be borne in mind while granting compensation under the heads of (i) pain, suffering and (ii) loss of amenities and so on. Therefore, as per the principles laid down in the case of Rekha Jain & Anr. and considering the suffering undergone by the appellant herein, and it will persist in future also and therefore, we are of the view to grant Rs.1,50,000/- towards the pain, suffering and trauma which will be undergone by the appellant throughout his life. Further, as he is not in a position to move freely, we additionally award Rs.1,50,000/- towards loss of amenities & enjoyment of life and happiness."*

28. In view of the ratio laid down by the apex Court in the judgment (supra), I am of the considered view that the claimant-injured is entitled to compensation to the tune of ₹ 50,000/- under the head 'pain and sufferings' and ₹ 50,000/- under the head 'loss of amenities of life'.

29. Having glance of the above discussions, the claimant-injured is held entitled to total compensation to the tune of ₹ 2,70,000/- + ₹ 13,910/- + ₹ 35,500/- + ₹ 50,000/- + ₹ 50,000/- = ₹ 4,19,410/- with interest @ 7.5% per annum from the date of the impugned award till its realization.

30. The factum of insurance is admitted. Thus, the insurer is saddled with liability.

31. In view of the above, the impugned award is modified, the appeal is allowed and the claim petition is granted, as indicated hereinabove.

32. The insurer is directed to deposit the awarded amount before the Registry within eight weeks. On deposition, the same be released in favour of the claimant-injured strictly as per

the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in his bank account.

33. Send down the record after placing copy of the judgment on Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Vishal Puri and others. ...Appellants.
Versus
Yashpal Singh ...Respondent.

RFA No. 342 of 2003 a/w Cross Objection No. 9 of 2004.
Reserved on: 5.12.2016.
Decided on: 16.12.2016

Code of Civil Procedure, 1908- Section 96- Plaintiff pleaded that he was assaulted and humiliated by the defendant No.1 in the presence of many people – the defendants subsequently gave him beatings- the Trial Court awarded the compensation of Rs. 22,000/- along with interest @ 9% per annum – held in appeal that witnesses of the plaintiff proved the case of the plaintiff – an FIR was registered regarding the incident – one defendant was convicted by the Juvenile Justice Board – MLC proved the injuries suffered by the plaintiff – compensation of Rs.22,000/- is inadequate and is enhanced to Rs.1 lac – appeal partly allowed.(Para-3 to 11)

For the Appellants: Mr. Neeraj Gupta, Advocate.
For the Respondents: Mr. K.D Sood, Sr.Advocate with Mr. Ankit Aggarwal, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge:

The instant appeal stands directed by the defendants against the impugned judgment recorded by the learned District Judge, Hamirpur whereby he returned affirmative findings qua the plaintiff's entitlement to claim damages from defendant No.1 also thereupon he assessed damages qua the plaintiff comprised in a sum of Rs.22000/- alongwith 9% interest from the date of decree till realization, liability whereof qua its defrayment stood fastened upon defendant No.1.

2. The plaintiff also stands aggrieved by the pronouncement recorded by the learned Court below whereupon it assessed damages vis-à-vis him in the sum aforesaid, quantum whereof stands contended herebefore to be grossly disproportionate to his apposite entitlement thereof besides the plaintiff stands aggrieved by the pronouncement recorded by the learned District Judge whereby it fastened liability qua the quantum of damages assessed thereunder vis-à-vis the plaintiff only upon defendant No.1 whereas it was jointly and severably fastenable upon all the defendants.

3. In an incident which occurred on 15.3.1997 in the Court of the Sr. Sub Judge, Hamirpur the plaintiff alleges qua his therein standing assaulted by the defendant No.1 besides his standing humiliated in the presence of people present thereat whereafter despite the plaintiff for averting perpetration of further assaults upon him by defendant No.1 proceeding to the litigant hall, yet the defendant No.1 chasing him thereupto whereat he meted threats to him. The plaintiff also avers qua on 15.3.1997 at about 4.45 p.m. when he was returning home on his scooter all the defendants forcibly stopping him at Gandhi Gate in sequel whereto he avers qua his falling on the ground whereafter the defendants stand averred to belabor him with kick and fist blows in consequence whereof he sustained injuries on his nose, forehead, teeth and eyebrows. Also he avers qua his thereat standing intimidated by the defendants for his

conducting case Onkar Walia versus Urmila in the Court of Sub Judge, Hamirpur against Urmila daughter of defendant No.1, sister of defendant No.2 and mother of defendant No.3. The plaintiff further avers qua on 17.3.1997 at about 9.30 a.m. when he was proceeding on his scooter to Court all the defendants forcibly stopped him near Satyanarayan Mandir whereat he stood manhandled by defendant No.1.

4. An FIR qua the incident bearing No. 59/07 stood lodged by the plaintiff against the defendants at Police Station, Hamirpur. The primadonna factum of the incidents aforesaid which occurred on 15.3.1997 and on 17.3.1997 respectively in the Court premises besides in the evening of the day aforesaid at Gandhi Gate and thereafter on 17.03.1997 at 9.30 A.M. near Satyanarayan Mandir warranted theirs standing unflinchingly proved by cogent reliable evidence standing adduced by the plaintiff whereupon the plaintiff would stand entitled to pecuniary damages for proven acts of tort of assault and battery standing perpetrated upon him.

5. In proof of the incident No.1 aforesaid, the plaintiff relied upon the testifications of PWs 5,6 and 7, all of whom rendered a credible account qua the incident which occurred on 15.3.1997in the Court premises. The oral testifications of the afore-stated ocular witnesses to the incident which occurred in the Court premises warrants imputation of credence thereto conspicuously when their respective testifications occurring in their respective examinations-in-chief remained unshred of their tenacity besides efficacy during the ordeal of a rigorous cross-examination whereto they respectively stood subjected to by the learned counsel for the defendants. In sequel thereto the ascription(s) made by the plaintiff in the suit qua defendant No.1 assaulting him in the Court premises stands invincibly proven.

6. The testification of the plaintiff in proof of the incident which occurred in the evening of 15.3.1997 at Gandhi Gate wherein he stood belabored by the defendants stands meted corroboration by the testification of an eye witness thereto who deposed as PW-6. The testification of PW-6 in corroboration to the testification of the plaintiff warrants imputation of credence thereto arising from the factum of his testification qua the relevant fact embodied in his examination-in-chief remaining uneroded during the ordeal of an exacting cross-examination to which he stood subjected to by the learned counsel for the defendants.

7. The incident of 17.3.1997 which occurred at 9.30 a.m at Satyanaryan Mandir, holding ascriptions therein qua the defendant No.1 manhandling the plaintiff, for obviation of his further manhandlings thereat by the defendant No.1 he stood evacuated by the people present thereat whereafter he fled therefrom and arrived in the premises of the Bar Association located in the Court campus whereupto also he stood chased by defendant No.1 also thereat the defendant No.1 unsuccessfully concerted to perpetrate an assault upon him stands proven by the un-eroded testification of the plaintiff, untainted corroboration whereto stands meted by PW-11 the then Pradhan of Bar Association, Hamirpur. In sequel thereto the incident aforesaid which occurred on 17.3.1997 near Satyanarayan Temple wherein the defendant No.1 manhandled the plaintiff also the incident subsequent thereto which occurred in the premises of the Bar Association located in the Court premises stands also emphatically proven.

8. Be that as it may the FIR borne on Ex.PW-2/A lodged with Police Station Sadar, Hamirpur by PW-11 sequelled the preferment before the Court concerned a report under Section 173 Cr.P.C by the Investigating Officer concerned. A charge in consonance therewith stood framed against the relevant accused yet the fate of the apposite charge is not evincible from the record which is available hereat. Conspicuously with the charge framed by the Court concerned against the accused named in the FIR Ex.PW-2/A remaining un-adjudicated by the trial Magistrate also does not purvey any vigour to the concert of the defendants to espouse qua thereupon the credible testimonies of PWs standing benumbed rather with co-accused/Juvenile at the relevant stage one Gaurav Walia against whom too penal ascriptions stand averred by the plaintiff when as unravled by a verdict recorded by the Juvenile Court embodied in Ex. PW-5/G stands convicted in respect thereto does give leverage to the espousal of the plaintiff qua his thereupon succeeding in establishing the averment(s) constituted in the complaint qua in

the evening of 15.3.1997 the defendants jointly at Gandhi Gate belaboring him with kick and fist blows.

9. The effect of the aforesaid discussion brings to the fore the inevitable sequel of the plaintiff succeeding in proving his averment(s) qua the defendant No.1 and other co-defendants respectively at the place(s) afore-stated jointly apart therefrom singularly perpetrating upon him tort of assault and battery also theirs meteing intimidations to him. However, the defendants had concerted to exculpate their liability qua pecuniary damages standing assessed vis-à-vis the plaintiff arising from his/theirs in the afore-stated manner his/theirs respectively jointly besides singularly at the place(s) aforesaid perpetrating tort of assault and battery upon him, by anvilling upon registration of FIR No. 61/97 against the plaintiff, yet with Ex.P-7 making an open pronouncement therein qua the Judicial Magistrate concerned accepting the proposal made in the apposite report furnished before the Court concerned by the Investigating Officer qua the FIR aforesaid warranting cancellation renders the aforesaid espousal by the defendants qua the relevant facet to stand benumbed. Also with a criminal complaint instituted by defendant No.1 against the plaintiff as apparent from an order borne on Ex.DA standing anvilled upon a statement of the complainant borne on Ex.DB whereupon it stood ordered to be withdrawn sequels an inference of defendant No.1 making an unsuccessful bid to exculpate his liability for assessment of pecuniary damages qua the plaintiff arising from his perpetrating assault and battery upon him, contrarily the afore-stated pronouncements occurring in Ex. P-7 and in Ex.DA make loud echoings qua the defendants contriving to falsely implicate the plaintiff also connotes their acquiescence qua the ascriptions made qua them by the plaintiff holding sinew besides vigor.

10. The MLC comprised in Ex.PW-9/A proven by PW-9 unravels qua multiple injuries occurring on the person of the plaintiff. The aforesaid pronouncements made in the afore-stated MLC give succor to the testification of the plaintiff besides his witnesses qua the defendants jointly at Gandhi Gate belaboring the plaintiff with fist and kick blows.

11. The learned Court below had aptly for lack of cogent evidence declined quantification of pecuniary damages to the plaintiff as stood claimed by him for loss of professional income besetting him arising from his clientele suffering erosion in sequel to the proven incidents of assault besides battery standing perpetrated on his person respectively singularly by defendant No.1 also by other co-defendants while joining defendant No. 1 at places aforesaid. However with the plaintiff adducing unflinching evidence unraveled by the MLC aforesaid in proof of the factum of his standing assaulted besides his suffering injuries in the relevant incidents of assault and battery preponderantly also with the evident factum of his standing subjected to repeated assaults by defendant No.1 did entail upon the learned trial Court to compute qua the plaintiff pecuniary damages in a figure higher than the one which stood computed vis-à-vis him. Even though there is no unbending rule of inflexible rigor for purveying guidance in measuring besides calibrating monetary damages assessable qua a victim of tort of assault and battery yet dehors the aforesaid lack of rigid guidelines for computing pecuniary damages to a victim of proven tort of assault and battery, the status of the victim also the places whereat it evidently occurred ultimately the repetitive perpetration of assault(s) upon his person singularly by defendant No.1 also with the latter standing joined by other co-defendants are relevant parameters which are always to be borne in mind. Cumulatively bearing in mind besides meteing deference to the aforesaid factors it is deemed fit and appropriate to conclude qua computation of Rs.22000/- as pecuniary damages vis-à-vis the plaintiff on account of his standing subjected to proven tort of assault and battery respectively by defendant No.1 at two places afore-stated besides by all the defendants jointly in the evening of 15.3.1997 at Gandhi Gate, being a meager besides a scanty amount whereupon this Court is constrained to modify the aforesaid figure of pecuniary damages in a sum of Rs.1,00,000/- (Rupees one lac). Also with the plaintiff proving ascriptions made by him vis-à-vis the defendant No.1 qua his perpetrating assault upon him singularly at two places besides with an evident display occurring of co-defendants joining defendant No.1in perpetrating an assault upon his person in the evening of 15.3.1997 at Gandhi Gage warranted the learned trial Court to hold decree qua all defendants

being jointly and severely liable to pay pecuniary damages to the plaintiff especially when they were proven tortfeasor whereas its fastening the relevant liability singularly upon defendant No.1 has committed an error. In view of the above, the present appeal is dismissed. The impugned judgment is modified accordingly. Cross-objections are allowed to the extent qua pecuniary damages vis-à-vis the plaintiff standing enhanced from Rs.22,000/- to Rs.1,00,000/- also all the defendants are held jointly liable to defray to the plaintiff the aforesaid amount of damages.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Ashok Kumar. ....Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

Cr. MP (M) No.1484 of 2016

Decided on: 19th December, 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 332, 353, 452, 342 and 504 read with Section 34 of I.P.C – the petitioner pleaded that he has been falsely implicated – informant had given beatings to the petitioner – held, that keeping in view the fact that simple injuries were sustained by the petitioner, the petitioner is permanent resident of the place and is not in a position to flee from justice or to temper with the prosecution evidence; bail application allowed subject to conditions. (Para-8)

For the petitioner: Mr. D.R. Verma and Mr. Arsh Rattan, Advocates.

For the respondent: Mr. Pushpinder Jaswal, Dy. AG, with Mr. Rajat Chauhan, Law Officer.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge. *(oral).*

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 116 of 2016, dated 12.11.2016, under Sections 332, 353, 452, 342, 504 read with Section 34 Indian Penal Code (hereinafter referred to as "the IPC"), registered at Police Station, Nadaun, District Hamirpur, H.P.

2. As per the learned counsel for the petitioner, the petitioner is innocent and has been falsely implicated in the present case due to extraneous circumstances. He is resident of the place and no purpose will be served by keeping him behind the bars.

3. Police report stands filed. As per the prosecution story, on 12.11.2016, complainant Rakesh Kumar, Constable No. 321, got his statement recorded under Section 154 Cr.P.C., wherein he has stated that he is working in Police Station, Nadaun, as General Duty Constable from 2016 and on 12.11.2016 he was on night duty in Police Help Room at Bus Stand, Nadaun. At about 7:45 p.m. he went to the shop of Ashok Kumar (petitioner herein) wherefrom noise was coming and he asked not to create noise. On this, Ashok Kumar started abusing him and thereafter the complainant came to Police Help Room, but the petitioner also came there alongwith his son and driver and dragged him to his shop and gave him beatings and also damaged his uniform. Police registered a case against the present petitioner.

4. I have heard the learned counsel for the petitioner, learned Deputy Advocate General for the State and gone through the record, including the police report, carefully.

5. As per the learned counsel for the petitioner, the petitioner has been implicated in the present case as the complainant was paying for the juice, which he has taken from the shop of the complainant, in old currency note of Rs. 500/- which the petitioner refused to accept. It is also submitted that in fact the complainant gave beatings to the petitioner.

6. On the other hand, the learned Deputy Advocate General has argued that the petitioner is making entirely a false case and as the petitioner is involved in a crime against the police, he may not be released on bail.

7. In rebuttal, the learned counsel for the petitioner has argued that for such a small offence, as registered by the police, the petitioner, who is a juice seller at Nadaun, is behind the bars since 12-13 November, 2016, and no fruitful purpose will be served by keeping him behind the bars, as the investigation in the present case is complete.

8. This Court has taken into consideration the nature of the injuries sustained by the complainant, which are, in fact, on his finger and other simple injuries and the fact that the petitioner is resident of the place and is not in a position to flee from justice, nor is he in a position to tamper with the prosecution evidence, therefore, no fruitful purpose will be served by keeping the petitioner behind the bars for unlimited period. This Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail is required to be exercised in favour of the petitioner, so it is ordered that the petitioner be released forthwith on bail on his furnishing personal bond to the tune of Rs. 20,000/- (rupees twenty thousand only) with one surety in the like amount to the satisfaction of learned ACJM/JMIC, Nadaun in case FIR No. 116 of 2016, dated 12.11.2016, under Sections 332, 353, 452, 342, 504 read with Section 34 IPC, registered at Police Station Nadaun. The bail is granted subject to the following conditions:

(i) That the petitioner will join investigation of the case and when called for by the Investigating Officer in accordance with law.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Investigating Officer or Court.

9. In view of the above, the petition is disposed of. Copy *dasti*.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Babita …..Petitioners.

Versus

State of H.P. & others. …..Respondents.

CWP No. 2609 of 2015
Reserved on: 05.12.2016
Decided on: 19.12.2016

Constitution of India, 1950- Article 226- Petitioner was engaged as drawing master – she was subsequently asked not to come on the duty - respondent stated that the permission to fill up the post was withdrawn by respondent No.3 as no criteria was approved by the Government for distribution of marks- held, that the petitioner has scored maximum marks in the interview and her selection was not challenged – action of the respondent of not allowing the petitioner to work is arbitrary- writ petition allowed and respondent directed to permit the petitioner to work.

(Para- 7 to 11)

For the petitioner: Mr. P.P. Chauhan, Advocate.

For the respondents: Mr. Virender K. Verma, Addl. AG, with Mr. Pushpinder Jaswal, Dy.AG and Mr. Rajat Chauhan, Law Officer, for respondents No. 1 to 4.
Mr. Deepak Kumar, Lecturer, GSSS Badahlag, Tehsil Kasauli, District Solan, H.P. in person.
Nemo for respondent No. 5.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner under Article 226 of the Constitution of India for issuing the writ of certiorari, mandamus or any other appropriate writ/order or direction to the respondents.

2. Succinctly, the facts giving rise to the present petition, as per the petitioner, are that pursuant to interview held on 13.11.2014 by the School Management Committee/respondent (SMC), she was engaged as Drawing Master on and w.e.f. 15.11.2014. Surprisingly, she was asked verbally not to come on duty w.e.f. 01.03.2015. The petitioner has further contended that she is Plus Two and having Diploma in Arts and Crafts, thus she is fully eligible for the post of Drawing Master. She was initially engaged as Drawing Master by the SMC w.e.f. August, 2014, and she was being paid from collection made from the students. Subsequently, on 13.11.2014, SMC conducted interview for the post of Drawing Master on period basis qua GSSS, Badhalag, Solan, H.P., in which 12 out of 18 candidates participated. Merit list was drawn and the petitioner held first position and consequently she was issued an order of assignment on 14.11.2014. The petitioner joined her duties in the said school on 15.11.2014 and continued there till 28.02.2015, but till date no remuneration has been paid to the petitioner by the respondents. As per the petitioner, on 03.12.2014 fresh selection was conducted by the respondents, wherein also the petitioner, being meritorious, scored first rank out of 12 appearing candidates. However, to the utter surprise of the petitioner w.e.f. 01.03.2014 the Principal of the School verbally conveyed the petitioner not to come on duty. The respondents now intend to fill up the said vacancy through similar arrangement, which is wholly impermissible in law. Lastly, the petitioner, by way of filing the present writ petition, sought the following substantive reliefs:

> *"(i) To issue a writ of certiorari or direction in nature thereof, quashing the impugned verbal order of respondent Principal whereby he has told the petitioner not to come on duty, as unconstitutional and illegal and contrary to the law;*
>
> *(ii) To issue a writ of mandamus, appropriate writ, order or direction in nature thereof, directing the respondent department/School Management Committee to continue the petitioner on the same post till fresh appointments are made by the respondent department on regular basis in accordance with Recruitment & Promotion Rules;*
>
> *(iii) To issue a further writ of mandamus or an appropriate writ, order or direction in nature thereof directing the respondents to reinstate the petitioner, in case the services of the petitioner are replaced by another incumbent appointed on the same basis and not on regular basis w.e.f. such illegal appointment with all consequential benefits and arrears of salary alongwith interest thereon @ 18% p.a.;*
>
> *(iv) To issue a further writ of mandamus or an appropriate writ, order or direction in nature thereof directing the respondents to pay the remuneration to the petitioner for the period from 15.11.2014 till 28.02.2015 alongwith interest thereon @ 18% p.a."*

3. Respondents No. 1 to 4, by filing reply to the petition, have resisted the claim of the petitioner. The replying respondents have contended that the petitioner was engaged as Drawing Master on period basis by the President of SMC on 14.1.2014 pursuant to interview conducted under the Chairmanship of S.D.M. Solan. The petitioner joined her duties on 15.11.2014, however permission so granted for filling up the said post was withdrawn by respondent No. 3 on 21.11.2014, as no criteria was approved by the Government for distribution of marks in the personal interview. The petitioner performed her duties from 15.11.2014 to 24.11.2014 and private respondent No. 5 has to pay qua that period. The replying respondents have denied that the petitioner worked w.e.f. 15.11.2014 to 28.02.2015. As per the replying respondents, the petitioner was not informed verbally not to come to School w.e.f. 01.03.2015, but on 24.11.2015 she noted the orders of respondent No. 4. Ultimately, the replying respondents prayed that the writ petition may be dismissed.

4. I have heard the learned counsel/Additional Advocate General for the appearing parties and gone through the record carefully.

5. The learned counsel for the petitioner has argued that the petitioner was duly selected in a selection process and subsequen procedure of selection, as approved by respondent No. 2, was not applicable to her, as the petitioner was selected/appointed before coming into force of that subsequent selection procedure.

6. Conversely, the learned Additional Advocate General has argued that the petitioner was asked not to work as she was selected in the earlier procedure of selection and same procedure stood withdrawn by respondent No. 3.

7. It is evident from the select list, which is annexed with the petition, that the petitioner was selected being most meritorious out of eighteen candidates. The selection committee was headed by S.D.M. Solan and they had awarded the marks after sub-dividing the marks for matric, Plus Two, Diploma, candidate belonging to the same Patwar Circle etc. etc. It is also manifest that the petitioner scored maximum marks in the said interview. The said selection process was not challenged by any other candidate, who appeared in it.

8. The petitioner was given appointment on 14.11.2014 and from the order it seems that the letter of the new procedure was received and issued after she was appointed. Though the petitioner has also enclosed with the petition a subsequent advertisement, inviting applications for the post in question, for which the petitioner was selected and appointed, but the respondents have stated that there was no such move ever.

9. In view of what has been discussed hereinabove, it is held that the petitioner was selected and appointed as Drawing Master in GSSS Badahlog, Tehsil Kasauli, District Solan, H.P., and she has a right to continue on the said post, as she was duly appointed after following the procedure prevalent at that time. The right of the petitioner has not diminished and the same cannot be abridged. Thus, this Court comes to the conclusion that the action of the respondents in not allowing the petitioner to work continuously is arbitrary. The action of the respondents also violates the principle of *audi alteram partem,* as the petitioner was not even provided an opportunity of being heard by the respondents.

10. The net result of the above discussion is that verbal order dated 01.03.2015, passed by respondent No. 4, asking the petitioner not come on duty, is illegal and appropriate writ is required to be issued to the respondents. Therefore, the respondents are directed to allow the petitioner to work on the post on which she was duly selected and appointed by them on 13.11.2014. However, the petitioner is not held entitled to any remuneration/wages for the period she could not work.

11. In view of the above, the petition stands disposed of. All pending application(s), if any, also stand(s) disposed of. No order as to costs.

****

BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Oriental Insurance Company Ltd. ....Appellant.
Versus
Hima Vati & another ....Respondents.

FAO (WCA) No. 483 of 2007.
Decided on: 19th December, 2016

Employees Compensation Act, 1923- Section 4- Deceased was a driver in a truck – he died in the accident of the truck – compensation of Rs.4,42,740/- was awarded along with interest- held in appeal that the owner had not specifically denied that deceased was employed by him as a driver – it was asserted in the examination-in-chief by the applicant that deceased was working as driver and his wages were Rs.6,000/- per month – respondent No.1 also admitted that deceased was working as a driver and his wages were Rs.5,000/- per month – the fact that the driver was the brother of the owner will not make the case suspect – the provision of Code of Civil Procedure and Evidence Act are not applicable to the proceedings under Workmen Compensation Act – the deceased was having a valid driving licence to drive the vehicle – appeal dismissed.
(Para-16 to 25)

Cases referred:

T.S. Shylaja versus Oriental Insurance Company & Another, (2014) 2 SCC, 587
Gottumukkala Appala Narasimha Raju & Others versus National Insurance Company Ltd. & Another, 2007 ACJ, 1025
Brahmu Ram & Another versus United India Insurance Company & another, 2009(2) Shim. LC, 26
Santosh Devi versus Oriental Insurance Co. & Another, 2011 (Supp.) Him. L.R 1715,
Om Prakash Batish versus Ranjit @ Ranbir Kaur & Others, (2008) 12, SCC, 212

For the appellant Mr. G.C. Gupta, Senior Advocate with Mrs. Meera Devi, Advocate.
For the Respondents Mr. Chandranarayana Singh,Advocate for respondent No.1.
Mr. G.S. Rathore, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Aggrieved by award dated 5.9.2005, passed by learned Commissioner under Workmen's Compensation Act, Sub-Division, Shimla (Rural), District Shimla in an application under Section 4 and 4(A) of the Workmen's Compensation Act registered as case No.02/2005 is in appeal before this Court.

2. Respondent No.1, hereinafter referred to as the applicant-claimant, is mother of deceased Narender Kumar. In the application she filed for the award of compensation against the owner of ill-fated vehicle i.e. truck No.HP51-1244, respondent No.2, hereinafter referred to as respondent No.1, and appellant, hereinafter referred to as respondent No.2-insurer. It is averred that her deceased son Narender Kumar died in the accident of truck No.HP51-1244 on 16.3.2005 at Jalog, Tehsil Suni, while driving the same. According to her, she was dependent upon the earning of deceased Narender Kumar, who was employed as driver by respondent No.1 with ill-fated truck on payment of Rs. 6,000/- per month as salary. The accident was reported to the Police of Police Station, Dhalli. The deceased at the time of his death was 22 years of age.

3. The first respondent, in reply to the application had submitted in preliminary that at the time of accident the vehicle was duly insured with insurer-respondent No.2, therefore,

the liability, if any, to pay compensation to the applicant-claimant was of the said respondent. It was further averred that the vehicle was being driven by an authorized person, holding a valid and effective driving licence at the time of accident. There being no breach of the contract of insurance, on this score also it is respondent No.2-Insurer, who is liable to pay the compensation.

4. The contents of paras 1 and 2 of the applications were denied for want of knowledge and the petitioner was called upon to produce the documentary proof regarding the averments made therein. No reply was intended to be given to the contents of paras 3 and 4 of the application being matter of record. It was, however, reiterated that the liability to pay the compensation, if any, was that of respondent No.2.

5. The insurer-respondent No.2, has also pleaded in preliminary that as per the FIR, deceased was traveling in the vehicle as gratuitous passenger having no express or implied authority to drive the same. Without admitting the liability to pay the compensation, it was submitted that since the deceased was not holding a valid and effective driving licence; the insurer-respondent No.2 was not liable to pay the compensation. The deceased was brother of respondent No.1 and as such the mother had filed the claim petition to obtain compensation on false grounds. The vehicle was being driven in contravention of the provisions contained in the Motor Vehicles Act and there being breach of the terms and conditions of the insurance policy, the insurer-respondent No.2 is not liable to pay the compensation. The application as constituted and instituted is stated to be neither competent nor maintainable nor was the applicant entitled to claim any damages. The application was also claimed to be bad for non-joinder of necessary parties.

6. On merits also, the insurer-respondent No.2 had denied that the deceased was employed as driver by respondent No.1 on payment of Rs. 6000/- per month as salary to him. He rather was travelling as gratuitous passenger in the ill-fated vehicle, hence the applicant is not entitled to award of any compensation.

7. On such pleadings of the parties, following issues were framed:

1. Whether the application is maintainable in the present form? OPP
2. Whether the vehicle is insured with the respondent No.2? OPR-1
3. Whether the deceased is covered under the definition of workman? OPP
4. Whether the deceased was traveling in the vehicle as a gratuitous passenger? OPR-2
5. Whether the deceased was not holding a valid driving licence at the time of accident? OPR-2
6. Whether the petition is being filed in collusion with the respondent No.1.? OPR-2
7. Whether the vehicle was being plied in contravention of Motor Vehicle Act? OPR-2
8. Whether the petition is bad for non-joinder of necessary parties? OPR-2
9. Relief.

8. Learned Commissioner, on appreciation of the evidence produced by the parties on both sides, has concluded that the deceased was a workman within the meaning of the Act and died during the course of his employment while driving the ill-fated truck. The application as such was held to be maintainable. Issues No.4 and 5 were answered against the insurer while arriving at a conclusion that the deceased was not travelling in the capacity of a gratuitous passenger in the ill-fated truck and rather was driving the same and holding a valid and effective driving licence to drive the same. The objections that the application was filed in collusion with respondent No.1 and that the truck was being plied in contravention of the provisions contained under Motor Vehicles Act and that the application was bad for non-joinder of necessary parties, were not acceded to while answering issues No.6 to 8 against insurer-respondent No.2.

Consequently, the application was allowed and a sum of Rs. 4,42,740/- was awarded as compensation by selecting 221.37 as the relevant factor whereas 50% of the wages of the deceased i.e. Rs. 2,000/- per month. Besides a sum of Rs. 1,26,180/- was also awarded as interest on the amount of compensation so worked out. Respondent No.2 was held liable to pay the entire amount to the applicant-claimant.

9. The insurer-respondent No.2 has assailed the legality and validity of the impugned award on the grounds *inter alia* that the findings recorded by learned Commissioner below on issues No.3 to 6 are erroneous and contrary to the facts proved on record. The owner of the vehicle, in reply to the application, had nowhere submitted that deceased was either employed by him as driver in the vehicle or the relationship of employer and employee was in existence between them. In reply to the application, he never averred that the salary of the deceased was Rs. 6000/- per month. The only case as set-up in the reply by the said respondent was that the vehicle was being driven by an authorized (wrongly mentioned as unauthorized) person holding a valid driving licence to drive the same. He has nowhere stated that the deceased was employed as driver with ill-fated truck.

10. The contents of paras 1 and 2 of the application for award of claim were denied for want of knowledge. Neither any record regarding payment of salary produced nor any such record qua appointment of the deceased as driver produced in evidence. Learned Commissioner, therefore, erroneously concluded that the salary of the deceased was Rs. 5,000/- per month. The findings so recorded are neither supported by the petition nor from the reply thereto filed on behalf of insured-respondent No.1. The deceased as per the evidence available on record was rather travelling in the ill-fated truck in the capacity of a gratuitous passenger. He was real brother of respondent No.1 and the claim petition was filed by the applicant in collusion with respondent No.1. The insurer-respondent No.2, therefore, could have not been saddled with the liability to pay the compensation.

11. The appeal has been admitted on the following substantial questions of law:-

(a) Whether the respondent No.1 has proved on the record that the deceased was employed as a driver by respondent No.2 in the absence of any evidence on the record and whether any evidence in the absence of any pleadings could be looked into by the Commissioner below?

(b) Whether the Commissioner below is right in holding the salary of the deceased to be Rs.5,000.00 per month without the production of the records regarding the same by respondent No.2 and in view of his specific denial in the reply filed on his behalf?

(c) Whether the Commissioner below has rightly decided issues No.3, 4 and 7 in favour of the claimants in view of the allegations made in the application as well as the reply filed on behalf of respondent No.2?

12. Mr. G.C. Gupta, learned Senior Advocate assisted by Mrs. Meera Devi, Advocate has strenuously contended that the relationship of employer and employee between the deceased and first respondent is not at all proved, therefore, neither the deceased could have been treated as a workman nor his salary taken as Rs. 5000/- per month. In reply to the claim petition the insured-respondent No.1 has not admitted that the deceased was employed by him as driver on payment of Rs. 6,000/- as salary per month and rather the averments to this effect in the application have been denied for want of knowledge. The testimony of the insured-respondent No.1 beyond the pleadings, according to Mr. Gupta, could have not been taken into consideration.

13. On the other hand, Shri G.S. Rathore, Advocate learned counsel representing the insured-respondent No.1 has urged that the insured while in the witness box has proved that the deceased was employed by him as driver with ill-fated truck and his salary was Rs. 5,000/- per month. According to Mr. Rathore, appointment of his own brother as driver is not legally barred. It has thus been urged that learned Commissioner below on appreciation of the evidence in its right perspective has rightly held the insurer-respondent No.2 liable to indemnify the insured.

14. Shri Chandranarayana Singh, Advocate learned counsel representing the applicant-claimant has submitted that the contents of reply to the application filed by first respondent manifestly reveals that he has not denied the engagement of the deceased as driver with ill-fated truck and rather while admitting the averments in paras 3 and 4 of the application being matter of record. It is implied that respondent No.1 has admitted that the deceased was employed as driver with the ill-fated truck. It has also been urged that the statement of insured respondent No.1 while in the witness-box, leaves no manner of doubt qua engagement of the deceased as driver with the ill-fated truck on payment of salary. Therefore, according to learned counsel, no other and further evidence was required to form an opinion that the deceased was a workman and died during the course of his employment. It has thus been urged by Mr. Singh, that learned Commissioner below has not committed any illegality and irregularity in allowing the claim petition and awarding a sum of Rs. 4,42,740/- as compensation to the applicant-claimant.

15. Although the appeal has been admitted on three substantial questions of law, yet Mr. Gupta, learned Senior Advocate has restricted his claim mainly on substantial question of law at (a) above.

16. True it is that in reply to the claim petition, respondent No.1 has not specifically admitted the averments in para 2 of the claim petition that the deceased was employed as driver with ill-fated truck on payment of Rs. 6000/- as salary per month. He, however, has even not denied also that the deceased was not employed by him as driver with ill-fated truck. The contentions in para 4 of the petition that the deceased was 22 years of age and the applicant was dependent upon him have, however, been admitted by the said respondent being matter of record. Meaning thereby that it is manifest and implied from the reply to the application filed on behalf of first respondent that he had engaged the deceased as driver with the ill-fated truck. Not only this, but while in the witness-box the applicant has categorically stated that the deceased was working as driver with the truck belonging to respondent No.1 and his wages was Rs. 6,000/- per month. She has tendered the postmortem report Ex.PW-11/B and the age certificate Ex.PW-11/C as well as death certificate Ex.PW-11/D in her statement. In her cross-examination, she even has proved the driving licence Ex.RX. She has been cross-examined on behalf of the insurer-respondent No.2, however, her testimony that the deceased was working as driver with ill-fated truck and died during the course of employment remained un-shattered because the suggestions to the contrary put to her were denied being wrong.

17. Now coming to the statement of respondent No.1, he has categorically stated that deceased Narender Kumar was driving the ill-fated truck at the time of accident. He was employed as driver on seeing his driving licence Ex.RX, which, according to him, was legal and valid. The wages of the deceased, according to respondent No.1, were Rs. 5,000/- per month. In his cross-examination conducted on behalf of the insurer, he tells us that the deceased was his real brother and at the time of accident the vehicle was deputed for bringing grass. The suggestions to the contrary that neither the deceased was employed by him as driver nor was he being paid Rs. 6000/- per month as wages have been denied being wrong.

18. True it is that Shri B.S. Dadwal, Administrative Officer of respondent No.2 has stated that the deceased was travelling unauthorizedly in the truck in question, however, when cross-examined, he has stated that the insurance policy nowhere prohibits the deployment of a real brother as driver of a vehicle by its owner and that the owner rather can employ any person as driver of the vehicle may be his real brother. He further tells us that in the FIR cancellation report was prepared and the same was registered against Narender Kumar, the deceased. Such evidence is, therefore, suggestive of that deceased Narender Kumar was employed by the owner of the vehicle as driver. The deceased was holding valid and effective driving licence to drive the vehicle involved in the accident. Mr. G.C. Gupta, learned Senior Advocate no doubt has emphasized that some record regarding engagement of the deceased as driver and payment of wages to him should have been produced by the insurer-respondent No.1, however, he failed to pin-point the particulars of such record. Otherwise also, in terms of the law laid down by the apex Court in ***T.S. Shylaja*** versus ***Oriental Insurance Company & Another, (2014) 2 SCC,***

587, in the absence of the particulars of such record/ document, the sole testimony of the insured qua engagement of a person as driver on payment of salary is sufficient to conclude that the deceased was a workman and died during the course of employment. Relevant portion of this judgment reads as follows:-

> "11. The only reason which the High Court has given to upset the above finding of the Commissioner is that the Commissioner could not blindly accept the oral evidence without analysing the documentary evidence on record. We fail to appreciate as to what was the documentary evidence which the High Court had failed to appreciate and what was the contradiction, if any, between such documents and the version given by the witnesses examined before the Commissioner. The High Court could not have, without adverting to the documents vaguely referred to by it have upset the finding of fact which the Commissioner was entitled to record. Suffice it to say that apart from appreciation of evidence adduced before the Commissioner the High Court has neither referred to nor determined any question of law much less a substantial question of law existence whereof was a condition precedent for the maintainability of any appeal under Section 30. Inasmuch as the High Court remained oblivious of the basic requirement of law for the maintainability of an appeal before it and inasmuch as it treated the appeal to be one on facts it committed an error which needs to be corrected."

19. It is seen that in the case supra also deceased driver was real brother of the owner of vehicle involved in the accident like in the present case before this Court.

20. No doubt, Mr. Gupta, has placed reliance on the judgment of the apex Court in ***Gottumukkala Appala Narasimha Raju & Others versus National Insurance Company Ltd. & Another, 2007 ACJ, 1025***, where driver of the ill-fated tractor was husband of the owner, in which it has been held that in order to establish the contract of employment documentary proof and independent witnesses were required to be examined, however, in view of the ratio of the latest judgment of the apex Court in ***T.S. Shylaja's*** case supra, and also in the given facts and circumstances of the case is of no help to the case of the appellant-respondent No.2.

21. Similarly the ratio of the judgment of a coordinate Bench of this Court in ***Brahmu Ram & Another*** versus ***United India Insurance Company & another, 2009(2) Shim. LC, 26***, in which the judgment of the apex Court in ***Gottumukkala Appala Narasimha Raju's*** case supra has been relied upon, is also of no help to the case of respondent No.2-appellant.

22. If coming to the judgment again that of a coordinate Bench of this Court in ***Santosh Devi*** versus ***Oriental Insurance Co. & Another, 2011 (Supp.) Him. L.R 1715***, the same is also distinguishable on facts.

23. On the other hand, the apex Court in ***Om Prakash Batish*** versus ***Ranjit @ Ranbir Kaur & Others,(2008) 12, SCC, 212*** has held that in the proceedings before Commissioner under the Workmen's Compensation Act, the provisions of Code of Civil Procedure or that of the Evidence Act are not strictly applicable. The Commissioner for the purpose of arriving at the truth can rely upon the evidence produced before it. Also that the manner in which the Commissioner appreciated the evidence adduced by the parties is out of the purview of an appellate Court. Relevant extract of this judgment reads as follows:-

> "16. A right of appeal under the Act is provided, both to the management as also the workman. It is difficult to hold that whereas for the workman the High Court shall exercise a wider jurisdiction but in the event the employer is the appellant, its jurisdiction would be limited. The High Court unfortunately proceeded on the basis that appreciation of evidence also would give rise to a substantial question of law.

> 17. In a proceeding initiated under the Act the provisions of the Code of Civil Procedure or of the Evidence Act are not applicable. The Commissioner could lay down his own procedures. He could, for the purpose of arriving at the truth, rely upon such documents which were produced before it."

24. The apex Court has held so keeping in view that the Workmen's Compensation Act is a piece of beneficial legislation and to be construed liberally to impart substantial justice to the dependants upon the victim of an accident and in a case of personal injury, to the injured-workman.

25. In view of what has been said hereinabove no question of law, what to speak of substantial questions of law as formulated, arises for adjudication in this appeal. The appeal as such is dismissed. Consequently, the impugned award is affirmed. Pending application(s) if any shall also stand disposed of. No order so as to costs.

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BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Smt. Savitri Devi widow of late Shri Balwant Singh ….Appellant/Petitioner

Versus

Sh. Mohinder Pal son of Shri Ram Lal & others ….Respondents.

FAO (MVA) No. 121 of 2013
Judgement Reserved on 6th December 2016
Date of decision 19th December 2016

Motor Vehicles Act, 1988- Section 166- Deceased was hit by a car – he fell down upon the motorcycle – the driver and pillion rider also sustained injuries – a claim petition was filed for seeking compensation of Rs.6,12,000/- - the Tribunal dismissed the petition – held in appeal that PW-2 specifically stated that accident was caused due to the negligence of the driver – his testimony was corroborated by the report of post-mortem – thus, rashness and negligence were duly proved – monthly income of the deceased can be taken as Rs.3,000/-- 1/3rd amount is to be deducted towards personal expenses and loss of dependency will be Rs.2,000/- per month- the age of the deceased was 56 years and multiplier of 8 is applicable – compensation of Rs.1,92,000/- (2000 x 12 x 8) awarded towards loss of dependency- compensation of Rs.10,000/- each awarded under the heads funeral expenses, loss of love and affection and loss of consortium – thus, total compensation of Rs.2,22,000/- awarded with interest @ 9 % per annum.

(Para-13 to 22)

Cases referred:

Sarla Verma & others vs. Delhi Transport Corporation and others, 2009)6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, AIR 2013 SCW 3120

For the Appellant: Mr. J.L. Bhardwaj Advocate.
For Respondents Nos. 1 & 2: Mr. T.S. Chauhan Advocate.
For Respondent No.3: None.

The following judgment of the Court was delivered:

<u>P.S. Rana, Judge.</u>

<u>Decision:-</u> Present appeal is filed under Section 173 of Motor Vehicles Act 1988 against award passed by learned Motor Accident Claims Tribunal Fast Track Court Una (H.P.) announced in MAC petition No. 17 of 2008 title Savitri Devi vs. Mohinder Pal and others.

Brief facts of the case

2. Smt. Savitri Devi filed claim petition under Section 166 of Motor Vehicles Act 1988 pleaded therein that deceased namely Balwant Singh had gone to pay electricity bill at Bijlighat near Mittal Industries Gagret and when he came after depositing the bill at 10.45 AM then deceased was standing on a portion of road near tractor repair shop at about 11 AM. It is pleaded that a maruti car No. HP-19-5008 came from Gagret side which was driven by Mohinder Pal Suniara who was giving training of driving to his son namely Nitin @ Ladi. It is pleaded that as soon as Mohinder Pal handed over the car to his son Nitin who could not control the vehicle and hit the car with deceased Balwant Singh standing on road. It is pleaded that deceased fell upon motor cycle No. PB-08R-3285 which was driven by Vijay Kumar resident of village Panjawar and Manoj Kumar son of Deep Kumar was pillion rider over motor cycle and they also sustained injuries. It is pleaded that Vijay Kumar and Manoj Kumar were admitted in PHC Gagret and thereafter discharged. It is pleaded that Manoj Kumar son of Deep Kumar reported the matter at police station Gagret and FIR No. 25 of 2008 dated 18.2.2008 was registered under Sections 279, 304A and 201 IPC in P.S. Gagret. It is pleaded that police officials did not conduct the investigation fairly and impartially and they did not associate the actual culprits named above during pendency of investigation. It is pleaded that petitioner thereafter filed written complaint to Director General of Police on 30.5.2008. It is pleaded that petitioner is poor lady and she has no source of income and she was dependent upon income of deceased. Age of deceased pleaded as 56 years and occupation of deceased pleaded as private business. Monthly income of deceased pleaded as Rs.6000/- (Rupees six thousand) per month. It is pleaded that deceased sustained head injury and also sustained damage to his skull bones. It is pleaded that deceased died at the spot. Compensation to the tune of Rs.612000/- (Rupees six lac tweleve thousand) sought.

3. Per contra response filed on behalf of co-respondents Nos. 1 and 2 pleaded therein that petition is not maintainable and petitioner has no cause of action to file present petition. It is pleaded that co-respondents Nos. 1 and 2 were not driving the car No. HP-19-5008 at the relevant time. It is pleaded that co-respondent No.1 has sold car No. HP-19-5008 to third person. Prayer for dismissal of petition sought.

4. Per contra separate response filed on behalf of co-respondent No. 3 namely Vijay Kumar pleaded therein that claim petition is not maintainable. It is pleaded that claim petition is bad for misjoinder of parties. It is pleaded that co-respondent No. 3 was not driving vehicle No. HP-19-5008 at the time of accident. It is pleaded that co-respondent No. 3 was not owner of vehicle No. HP-19-5008 at the time of accident. Prayer for dismissal of petition sought.

5. Petitioner also filed rejoinder and re-asserted allegations mentioned in petition.

6. As per pleadings of parties learned MACT Una framed following issues on 23.2.2011:-

1. Whether deceased Balwant Singh died due to rash and negligent driving of car bearing registration No. HP-19-5008 on 18.2.2008 at 10.45 AM near electricity office Gagret by co-respondent No.1? OPP

2. If issue No. 1 is proved in affirmative whether the petitioner is entitled for compensation if so how much and from whom? ….OPP

3. Whether petition is not maintainable in present form? ..OPR

4. Whether petitioner has no cuase of action against the respondents? ….OPRs 1 & 2

5. Whether petition is bad for mis-joinder of party as alleged? ….OPR 3

6. Relief.

7. Learned MACT Una decided issues Nos. 1, 3 and 5 in negative and decided issue No. 4 in affirmative. Learned MACT Una decided issue No. 2 as redundant. Learned MACT dismissed petition filed under Section 166 of Motor Vehicles Act 1988.

8. Feeling aggrieved against award passed by learned MACT appellant namely Savitri Devi filed present appeal.

9. Court heard learned Advocate appearing on behalf of appellant and learned Advocate appearing on behalf of respondents and Court also perused entire record carefuly.

10. Following points arises for determination in appeal:-

1. Whether appeal filed by appellant is liable to be accepted as mentioned in memorandum of grounds of appeal?

2. Relief.

11. Findings upon point No.1 with reasons

11.1 PW1 Savitri Devi has filed her affidavit in examination in chief. There is recital in affidavit that on 18.2.2008 at about 10.45 AM deceased Balwant Singh went to electricity office at Gagret market and when he was standing near electricity office then car No. HP-19-5008 came from Gagret market which was driven by Nitin Kumar @ Ladi and Mohinder Pal was sitting by side of seat of car No. HP-19-5008. There is further recital in affidavit that Mohinder Pal was giving training of driving to his son Ladi. There is recital in affidavit that said car struck against deceased Balwant Singh who fell on motor cycle No. PB-08R-3285. There is recital in affidavit that motor cycle was driven by Vijay Kumar and Manoj Kumar was sitting as pillion rider on motor cycle. There is recital in affidavit that FIR was lodged in police station Gagret and deceased was brought to PHC Gagret. There is recital in affidavit that post mortem of deceased was conducted in District Hospital on 18.2.2008. There is recital in affidavit that age of deceased Balwant Singh was 56 years and he was earning Rs.6000/- (Rupees six thousand) per month. There is further recital in affidavit that accident took place due to rash or negligent driving of vehicle by Mohinder Pal and his son Ladi. There is further recital in affidavit that deponent spent Rs.60000/- (Rupees sixty thousand) on cremation and for performing last religious ceremony. PW1 has stated that accident did not take place in her presence. PW1 has stated that accident took place in presence of Vijay and Manoj. PW1 has stated that post mortem of deceased was conducted. PW1 has stated that FIR was filed in police station. PW1 has denied suggestion that no accident took place. PW1 has admitted that deceased did not die due to fault of motor cycle No.PB-08R-3285.

11.2. PW2 Bhajan Lal has filed affidavit in examination-in-chief. There is recital in affidavit that on 18.2.2008 deponent had gone to Gagret market and when he was standing near electricity Ghat at 10.45 AM he met Balwant Singh deceased who was standing there. There is recital in affidavit that Mohinder Pal and his son Nitin Kumar @ Ladi came in car No. HP-19-5008. There is further recital in affidavit that Ladi was driving the car and Mohinder Pal was giving him training. There is recital in affidavit that Ladi was driving the car in rash and negligent manner and struck car against deceased Balwant Singh who fell on motor cycle No. PB-08R-3285 and died. There is further recital in affidavit that motor cycle No. PB-08R-3285 was driven by Vijay Kumar and Manoj Kumar was sitting as pillion rider. There is further recital in affidavit that both of them took the deceased to PHC Gagret for his medical examination. There is recital in affidavit that Balwant Singh deceased was earning Rs.6000/- (Rupees six thousand) per month. There is further recital in affidavit that accident was informed by deponent to wife of deceased. PW2 has denied suggestion that accident did not take place in his presence. PW2 has stated that accident did not take place due to fault of driver of motor cycle No. PB-08R-3285.

11.3 PW3 Dr.Indu Bhardwaj medical officer Regional Hospital Una has stated that she is posted as medical officer in regional hospital Una since 1.3.2006. PW3 has stated that on 18.2.2008 she conducted post mortem of deceased Balwant Singh. PW3 has stated that cause of death was fracture of skull and brain haemorrhage. PW3 has stated that post mortem report is Ext.PW3/A which is in her hand and bears her signatures. PW3 has stated that injury could be caused if person would strike against car and fall on hard surface with big impact. PW3 has stated that deceased died within 2/3 minutes. PW3 has stated that if motor cycle would run and if struck then injury could be possible.

11.4 RW1 Mohinder Pal has filed affidavit in his examination in chief. There is recital in affidavit that no accident caused by deponent or his son namely Nitin. There is further recital in affidavit that deponent and Nitin were not driving car at the relevant time. There is further recital in affidavit that false petition filed against deponent and his son. RW1 has admitted that Nitin Kumar is his son. RW1 has admitted that he was owner of car having registration No. HP-19-5008. RW1 has admitted that Savitri has filed complaint against him before Director General of Police. RW1 has denied suggestion that his son Nitin was learning driving and he was helping him to drive car. RW1 has stated that he has sold vehicle No. HP-19-5008.

12. Following documentaries evidence adduced by parties. (1) Mark A is death certificate of deceased Balwant Singh. (2) Ext.PW3/A is post mortem report of deceased Balwant Singh. As per post mortem report deceased died due to head injury leading to severe damage. (3) Mark C is complaint filed by Savitri Devi to Director General of Police. (4) Mark D is FIR No. 25 of 2008 dated 18.2.2008 registered under Sections 279, 304-A and 201 IPC.

13. Submission of learned Advocate appearing on behalf of appellant that it is proved by way of testimony of PW2 Bhajan Lal who is eye witness of accident that deceased had died due to rash and negligent driving of maruti car No. HP-19-5008 is accepted for the reasons hereinafter mentioned. Court has carefully perused affidavit filed by PW2 Bhajan Lal placed on record. There is recital in affidavit that Mohinder Pal and his son Nitin Kumar @ Ladi came in car No. HP-19-5008. There is further recital in affidavit that Ladi was driving the car and Mohinder Pal was associating him in driving car. There is recital in affidavit that Ladi was driving the car in rash and negligent manner and struck car against deceased Balwant Singh who fell and died. Testimony of PW2 Bhajan Lal who is eye witness of accident is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve testimony of PW2 Bhajan Lal who was eye witness of accident. There is no evidence on record in order to prove that PW2 Bhajan Lal has hostile animus against Mohinder Pal or Nitin @ Ladi at any point of time. Testimony of PW2 Bhajan Lal is corroborated by post mortem report Ext.PW3/A wherein it is specifically mentioned that deceased had died due to head injury leading to severe damage.

14. Submission of learned Advocate appearing on behalf of appellant that appellant is widow of deceased and was dependent upon deceased at the time of his death and is entitled for compensation is accepted for reasons hereinafter mentioned. Age of deceased at the time of his death was 56 years. There is no positive direct evidence relating to income of deceased. No income certificate placed on record issued by competent authority of law. Hence Court assess the monthly income of deceased as Rs.3000/- (Rupees three thousand) per month at the time of death. 1/3rd income of deceased is deducted for his personal expenses and dependency of appellant is assessed at Rs.2000/- (Rupees two thousand). As age of deceased was 56 years multiplier of 8 is applied. Following compensation is awarded:-

(i) Compensation for loss of dependency awarded(2000X12X8)	=Rs.192000-00
(ii) Compensation for funeral expenses awarded	= Rs. 10000-00
(iii) Compensation for loss of love and affection awarded:	= Rs. 10000-00
(iv) Loss of consortium awarded	= Rs. 10000-00
(v) Compensation for medical expenses awarded (As no medical certificate placed on record)	= NIL
Total compensation awarded	= Rs.222000-00

(Two lacs twenty two thousand)

15. ***See (2009)6 SCC 121 Sarla Verma & others vs. Delhi Transport Corporation and others. See AIR 2013 SCW 3120 Reshma Kumari and others vs. Madan Mohan and another.*** Compensation is awarded against co-respondents Nos. 1 and 2. Compensation amount will be paid by Mohinder Pal co-respondent No. 1 on the concept of vicarious liability. There is no evidence on record that vehicle was insured with insurance company and no insurance certificate placed on record.

16. Submission of learned Advocate appearing on behalf of respondents that petition is not maintainable is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record by way of testimony of eye witness PW2 Bhajan Lal that deceased had died due to rash and negligent driving of maruti car No. HP-19-5008. Testimony of PW2 Bhajan Lal is corroborated by post mortem report placed on record. It is well settled law that widow of deceased can file application for compensation under Motor Vehicles Act 1988. Hence it is held that present petition is maintainable under Motor Vehicles Act 1988.

17. Submission of learned Advocate appearing on behalf of respondents that petitioner has no cause of action against respondents is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that cause of action is proved by way of oral as well as documentaries evidence placed on record. After careful perusal of oral and documentaries evidence placed on record it is held that petitioner has cause of action to file compensation petition under Motor Vehicles Act 1988 against co-respondents Nos. 1 and 2.

18. Submission of learned Advocate appearing on behalf of respondents that petition is bad for non-joinder of necessary parties is rejected being devoid of any force for reasons hereinafter mentioned. There is no evidence on record in order to prove that petitioner has not impleaded necessary party in present petition. It is held that petitioner has impleaded all necessary parties in petition as required in accordance with law. Plea of co-respondents Nos. 1 and 2 that petition is bad for non-joinder of necessary party is defeated on concept of *ipse dixit* (An assertion made without proof).

19. Submission of learned Advocate appearing on behalf of respondents that in FIR number of vehicle not mentioned in FIR and on this ground appeal be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that FIR is not substantive piece of evidence but FIR is only a corroborative piece of evidence. It is held that in view of positive testimony of PW2 Bhajan Lal who is eye witness of accident non-mentioning of vehicle number in FIR is not fatal in present petition.

20. Submission of learned Advocate appearing on behalf of co-respondent No. 1 that co-respondent No.1 has sold vehicle No. HP-19-5008 and is not legally liable to pay compensation is rejected being devoid of any force for the reasons hereinafter mentioned. Co-respondent No.1 did not adduce any evidence on record in order to prove that he has sold vehicle to some other person at the time of accident. No affidavit relating to sale of vehicle No. HP-19-5008 at the time of accident is placed on record as required under Sales of Goods Act. It is well settled law that person who is owner at the time of accident is liable to pay compensation amount relating to accident. Hence it is held that co-respondent No.1 is liable to pay compensation amount in accordance with law.

21. Submission of learned Advocate appearing on behalf of respondents that petitioner Smt. Savitri Devi is not eye witness of accident and on this ground appeal be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In present case Savitri Devi has examined eye witness namely PW2 Bhajan Lal. PW2 Bhajan Lal has specifically stated in positive manner that deceased had died due to rash and negligent driving of vehicle No. HP-19-5008. Respondents did not adduce any independent rebuttal evidence in order to rebut testimony of PW2 Bhajan Lal. In view of above stated facts point No.1 is answered in affirmative.

Point No. 2 (Relief)

22. In view of findings upon point No.1 appeal is allowed. Award passed by learned Motor Accident Claims Tribunal Fast Track Court Una in MAC petition No. 17 of 2008 is set aside

and compensation to the tune of Rs.222000/- (Rupees two lac twenty two thousand) is awarded in favour of appellant and against co-respondent No. 1 and 2. Co-respondent No. 1 will be liable to pay compensation amount on concept of vicarious liability. Petition against co-respondent No. 3 Vijay Kumar is dismissed. In addition interest at the rate of 9% per annum from the date of petition till realisation is also awarded upon compensation amount. Memo of costs be drawn accordingly. File of learned MACT Fast Track Court Una be sent back forthwith along with certified copy of decision. FAO No. 121 of 2013 is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Subhash Chand. .....Petitioner.

Versus

Rajinder Thakur & others. ......Respondents.

CMPMO No. 216 of 2016
Reserved on: 29.11.2016
Decided on: 19.12.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Petitioner was appointed as beldar – he was promoted and trained to operate the hydra crane – he was being transferred to the Mining Department without any training- a civil suit was filed along with an application for seeking ad-interim injunction- the injunction was granted by the Trial Court- an appeal was filed, which was allowed- held in revision that the petitioner was transferred to the Mining Department and was asked to undergo training in dumper operation, which the petitioner refused – the petitioner was transferred to crusher section and was advised to report to HOD crusher – the petitioner refused and was charge-sheeted – an employee can be posted anywhere to subserve the administration – the petitioner is not interested to undergo the training but wants to continue only on one machine – he cannot deny the order of superior – no prima facie case exists in favour of the petitioner – the injunction was rightly denied to the petitioner- revision dismissed. (Para-9 to 14)

For the petitioner: Mr. V.D. Khidta, Advocate.
For the respondents: Mr. Rajnish K. Lal, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present petition is maintained by the petitioner/plaintiff (hereinafter referred to as *'the petitioner'*) against the order of learned District Judge, Bilaspur, H.P. passed in Civil Miscellaneous Appeal No. 1/14 of 2016, dated 25.04.2016, whereby the order passed by the learned Civil Judge (Junior Division) Bilaspur, H.P. in CMA No. 67/6 of 2015, dated 02.01.2016, was set aside.

2. Briefly stating the facts giving rise to the present petition are that petitioner maintained a suit in the Court of first instance seeking permanent prohibitory injunction against the respondents/defendants (hereinafter referred to as *'the respondents'*). The petitioner also maintained an application under Order 39, Rules 1 and 2 read with Section 151 CPC and the learned Civil Judge (Junior Division) Bilaspur, H.P. vide order dated 02.01.2016, restrained the respondents from interfering, transferring and changing the nature of job of the petitioner from his primary job, i.e., Operator of Hydra Crane and Fork Life for which he was trained and appointed till disposal of the main suit. The said order was assailed by the respondents in the Court of learned District Judge, Bilaspur, H.P., successfully. As per the petitioner, on

14.02.1994, he was appointed as *Beldar* in ACC, Barmana. Subsequently, on 01.04.2009, he was promoted and trained to operate the Hydra Crane. Respondent No. 1, who is General Manager, ACC Barmana, belongs from the native place of the petitioner. Owing to some family feud, respondent No. 1 is harassing the petitioner. The petitioner has further contended that he has not been trained to work in the mining department to which he is to be transferred. Special medical fitness is necessary to work in the mining department and he is not medically fit, as he is suffering from disk/back problem. His transfer to the mining department is *mala fide* action of respondent No. 1. The petitioner is being compelled to work in the mining department, operate a dumper and climb ladder having more than five steps. In the mining department he has to climb on a running Starker, which is hazardous and risky. As per the petitioner, Starker is an electrical instrument and computerized machine and he has no knowledge of the same and likewise Dumper moves on treacherous roads resulting into bumpy drive. The petitioner sought interim orders restraining the respondents from interfering, transferring or changing the nature of his job/work from his primary job for which he was appointed and trained by the respondents.

3. The respondents, by way of filing reply to the application, raised preliminary objections qua maintainability, *locus standi*, estoppel, jurisdiction etc. On merits it was averred by the respondents that respondent No. 1 is not inimical towards the petitioner. As per the respondents, the petitioner started working as *Mazdoor* in Grade-E w.e.f. 14.02.1994 and Clause-7 of appointment letter provides *"it is understood and agreed that you are liable to be transferred to work in any of our works including quarries, departments or offices managed by this company or subsidiary company. If you are transferred permanently to and of the company's other units, your remuneration will be governed by the terms and conditions obtaining at that unit".* The respondents have further averred that the petitioner was promoted as Machinery Attendant w.e.f. 01.01.2008 and as an Operator w.e.f. 01.04.2009 and was shifted from kiln department to motor vehicle department and he was subsequently transferred therefrom to mining department on 21.03.2014. The petitioner himself declined to undergo training in dumper operation and was willing to operate Hydra Crane only. As per the respondents, the petitioner was then shifted to crusher section for operating stacker/crusher and was to undergo training, but he again refused. The petitioner did not perform his duties and remained idle; hence he was charge-sheeted on 18.02.2015. The petitioner is medically fit and as per the terms and conditions of appointment, any employee of the company can be transferred anywhere in the company.

4. The learned Civil Judge (Junior Division) Bilaspur, H.P. allowed the application under Section 39, Rules 1 and 2 read with Section 151 CPC. However, the learned Lower Appellate Court quashed and set aside the order passed by the learned Civil Judge (Junior Division) Bilaspur, H.P., hence the present petition.

5. The learned counsel for the petitioner has argued that the learned Lower Appellate Court has failed to take into consideration the fact that the petitioner has a *prima facie* case in his favour and balance of convenience also lies in his favour. He has further argued that by rejecting the application under Section 39, Rules 1 and 2 read with Section 151 CPC, the petitioner is suffering irreparable loss. In the interest of justice, the order passed by the learned Lower Appellate Court rejecting the application of the petitioner may be set aside.

6. Conversely, the learned counsel for respondents No. 1 to 4 has argued that the petitioner has no *prima facie* case in his favour. As an employee, the petitioner cannot choose where he wants to work. He has also referred to the appointment letter and other documents, which are on record.

7. In rebuttal, the learned counsel for the petitioner has argued that the petitioner is suffering from back ache and the work which he is being directed to perform is hazardous and he is not in a position to perform the same.

8. In order to appreciate the rival contention of the parties, I have gone through the record in detail and the pleadings of the parties, which are on record.

9. It is clear from the letter dated 21st March, 2014, that the petitioner was transferred to mining department and his services were urgently required in the said department. Vide another communication dated 25.03.2014, the petitioner was required to undergo training in dumper operation on and w.e.f. 26.03.2014 with some Senior HEMMO of mining department for a month. However, the petitioner refused to undergo the training and he wrote a letter dated 26.03.2014 to the authorities expressing that he has no interest to run heavy machinery, including dumper and he be allowed to operate Hydra Crane, which he was operating earlier. The petitioner nowhere highlighted his back problem to the authorities. Subsequently, vide letter dated 14.06.2014, the petitioner was transferred to crusher section. The said letter further revealed that the petitioner was required to operate the stacker/crusher and he was advised to report to HOD Crusher on 16.06.2014, but he did not do so. Thus, he was charge-sheeted on 18.02.2015 and the inquiry is still pending against him. Admittedly, the petitioner approached the Civil Court by filing suit for permanent prohibitory injunction coupled with injunction application on 20.03.2015. The petitioner approached the Civil Court much later to his last transfer. Earlier the petitioner did not highlight his ill-health to his employer. An employee can be posted anywhere by the employer in order to sub-serve the administration of work and the choice of the employee is always secondary. From the facts of the case it can be easily gathered that the petitioner is not interested to operate on a particular machine or undergo the training, he just wanted to continue on a specific machine only.

10. From the record it is not clear that the petitioner is having any major problem qua back ache. Although, he has produced the prescription slip on record, but the same nowhere justifies that the petitioner is not in a position to work. The appointment letter of the petitioner is amply clear that he can be posted anywhere. The petitioner cannot deny the orders of his superiors, as he is required to work and discharge duties as per the orders of his superiors.

11. In these circumstances, this Court finds that *prima facie* case does not exist in favour of the petitioner and balance of convenience is also not in his favour. In case interim order is granted in favour of the petitioner, other employees will also start disobeying the orders of their superiors and it will be difficult to run the administration for the respondents/defendants. The interests of justice demand that the petitioner should perform his duties as he is serving with the respondents.

12. In view of the above, I do not find any reason to interfere with the well reasoned order of the learned Lower Appellate Court. Accordingly, the petition, being devoid of merits deserves dismissal and is accordingly dismissed, however, with no orders as to costs.

13. The parties are directed to appear before the learned Trial Court on ***12th January, 2017.*** The learned Trial Court will try to dispose of the Civil Suit as early as possible.

14. The petition stands disposed of as also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Balwinder Singh …Petitioner.
Versus
The State of Himachal Pradesh and others …Respondent.

CWP No. 2186 of 2016
Reserved on: 12.12.2016
Date of order: 20.12.2016

Constitution of India, 1950- Article 226- Petitioner had applied for sanitation tender at Mahatama Gandhi Medical Services Complex, Khaneri Rampur but ineligible firms were declared qualified in the technical bid- the tender was allotted to respondent No.4 despite the fact that it

was not fulfilling terms and conditions of the tender documents- respondent stated that the tender was allotted to respondent No.4 as it was found to be the lowest bidder - a writ petition was filed earlier, which was dismissed as not maintainable- respondent No.4 raised an objection that petitioner had not participated in the tender and cannot questionthe process – held, that petitioner had not participated in the tender process and has no locus standi to question the same – ESIC No. was wrongly blocked/cancelled by ESIC, which mistake was rectified by ESIC – no case for judicial review was made out—petition dismissed.(Para-8 to 10)

For the petitioner: Mr. Javed Khan, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. Kush Sharma, Deputy Advocate General, for respondents No. 1 to 3.

Mr. Ashok Sood, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of the instant writ petition, the petitioner has called in question awarding of the sanitation tender process drawn by respondents No. 1 to 3 at Regional Hospital, Kullu, on the ground that the said tender has been allotted in favour of respondent No. 4 without following due process of law.

2. The petitioner has pleaded in paras 2 and 4 of the writ petition that the petitioner had applied for sanitation tender at Mahatma Gandhi Medical Services Complex (MGMSC) Khaneri, Rampur, for the financial year 2016-17, but the firms, which were not eligible, were declared qualified in the technical bid. Further averred that respondents No. 1 to 3 have wrongly and illegally awarded the sanitation tender at Regional Hospital, Kullu, in favour of respondent No. 4 despite the fact that it was not fulfilling the terms and conditions contained in the tender document.

3. The respondents have filed the replies. Respondents No. 1 to 3, in their reply, have stated that as per the check list of the documents to be attached with the technical bid, respondent No. 4 was found to be eligible and the tender of sanitation in respect of the Regional Hospital, Kullu, was allotted in its favour being the lowest bidder. But, when the fact of cancellation/rejection of the ESIC number of respondent No. 4 came into the notice of respondent No. 3, the matter was got verified from the Employees State Insurance Corporation, Baddi (for short "ESIC") and, thereafter, respondent No. 4 was asked to explain, which furnished new ESIC number allotted to it alongwith copies of various challans paid with effect from 15th February, 2015. Respondents No. 1 to 3 have specifically taken these pleas in the preliminary submissions and in paras 2 and 5 of the reply on merits.

4. Respondents No. 1 to 3 have also specifically stated that the petitioner had challenged the tender process for sanitation in respect of MGMSC Khaneri, Rampur, by the medium of CWP No. 882 of 2016, which was dismissed by this Court, being not maintainable vide judgment and order, dated 27th June, 2016, thus, cannot maintain this writ petition on similar grounds.

5. Respondent No. 4, in para 2 of the preliminary submissions and reply on merits, has specifically averred that it was registered with ESIC since February, 2015, under Employer's Code No. 1532240001001, was blocked/cancelled by ESIC without any enquiry/verification on the wrong assumption that the business premises of the said respondent is situated outside the municipal limits of Municipal Corporation, Shimla, which is non-implemented area under the Employees' State Insurance Act, 1948 (for short "the Act"). Further averred that when it came to know about the blocking/cancellation of the Employer's Code, it immediately approached ESIC alongwith revenue record and certificate from the concerned Patwari to the effect that its business

premises is situated within the limits of Municipal Corporation, Shimla. Thereafter, ESIC revoked the rejection and issued fresh Employer's Code enforceable with effect from February, 2015, because a number/code, once blocked, cannot be re-allotted. Thus, it has been pleaded that respondent No. 4 was eligible in all respects.

6. Respondent No. 4 has also specifically stated that the petitioner has not participated in the tender process, thus, has no right to question the same. It has also been stated that the petitioner, being involved in the business of providing contract services in hospitals and other public institutions throughout the State of Himachal Pradesh, has obtained several service contracts by producing forged documents resulting in registration of various FIRs against the petitioner's firm and is facing trial. It is also stated that the petitioner is in the habit of approaching the Courts whenever his tender is rejected.

7. We have examined the pleadings read with the record and are of the considered view that respondents No. 1 to 3 have not committed any illegality or irregularity in awarding the tender in favour of respondent No. 4 being the lowest bidder for the following reasons:

8. Mr. Romesh Verma, learned Additional Advocate General, was asked to seek instructions as to whether the petitioner has participated in the tender process in question or not, has furnished list of the firms which have participated in the sanitation tender process at Regional Hospital, Kullu, for the year 2016-17, made part of the file. The perusal of the said list does disclose that the petitioner or his firm has not participated in the said tender process, has no locus to question the same. Thus, the writ petition is not maintainable only on this score.

9. It has duly been established by respondent No. 4 that the ESIC number was wrongly blocked/cancelled by ESIC, which mistake was rectified by ESIC, when pointed out by respondent No. 4 supported by relevant documents, by issuing fresh ESIC number with effect from February, 2015. The same ESIC number could not be issued to respondent No. 4 for the reason that once a number/code is blocked by the computer, the same cannot be re-allotted. Respondent No. 4 has used the said ESIC number and filed various challans for depositing the share of employer's contribution towards the contributory insurance premium of its employees. Thus, no case for judicial review is made out.

10. Having glance of the above discussions, the writ petition is dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Bhuri Singh …..Appellant.
Versus
State of Himachal Pradesh and others …..Respondents.

LPA No.28 of 2013.
Judgment reserved on : 13.12.2016.
Date of decision: December 20, 2016.

Constitution of India, 1950- Article 226- Petitioner joined the services of the department as daily waged beldar – he was engaged as a pipe fitter – his case was considered for regularization and he was appointed as a work charge beldar – he joined under protest and filed original application before the Tribunal – a direction was issued to appoint the petitioner to the post of work charge pipe fitter – a corrigendum was issued and the designation of the petitioner was shown as fitter – the petitioner filed an original application claiming the time scale on seniority basis – the application was transferred to the High Court and was dismissed – held in appeal that the petitioner was directed to be appointed as pipe fitter in the lowest grade with the scale of work charge beldarby the Tribunal – the corrigendum was issued in terms of the direction- the

petitioner should have filed a review petition or an appeal, if he was not satisfied with the direction issued by the Tribunal- he cannot claim that he should have been appointed as a daily waged pipe fitter with the time scale – appeal dismissed.(Para-8 to 13)

For the Appellant	Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate.
For the Respondents	Mr.Shrawan Dogra, Advocate General with Mr.P.M.Negi, Mr.Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. Kush Sharma, Deputy Advocate General, for respondents No.1 to 3. Mr.Sat Parkash, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This Letters Patent Appeal is directed against the judgment passed by the learned writ Court on 15.07.2011 whereby his claim for appointment as Pipe Fitter with retrospective effect came to be dismissed.

2. As per the pleaded case of the appellant, he joined services of the respondent-Department in the year 1984 as daily waged 'Beldar' and subsequently in July, 1986, was engaged as a Pipe Fitter. His case for regularization was considered in the year 1993 and he was appointed as a work charged 'Beldar' instead of a Pipe Fitter. He thereafter on 09.03.1995 joined under protest and at the same time filed OA (M) No.424/95 before the learned Tribunal wherein he claimed regularization as Pipe Fitter. The Original Application was decided on 25.06.1996 by directing that the appellant would be entitled for appointment to the post of work charged Pipe Fitter in the lowest grade i.e. the scale of Rs. 770-1350/- and his services would be regularized in the said category as and when vacancy is available with the respondent-Department.

3. In compliance to the judgment, the respondents on 07.03.1998 issued a corrigendum and the designation of the appellant instead of 'Beldar' was shown as Fitter in the scale of Rs. 770-1350/-.

4. Aggrieved by the corrigendum, the appellant filed O.A.No.78/2002 wherein he claimed that the respondent-Department should have appointed the appellant to the post of Pipe Fitter and granted him time scale on seniority basis. It was further averred that the respondents in violation of the judgment earlier passed by the learned Tribunal had appointed junior persons to the post of Pipe Fitter thereby violating the provisions of Articles 14 and 16 of the Constitution of India.

5. The respondents filed reply wherein it was averred that the judgment passed by the learned Tribunal in favour of the appellant had been implemented in its letter and spirit and the appellant had been appointed in the pay scale of Rs. 770-1350/-, even though no post of Pipe Fitter was available.

6. It was upon closure of the learned Tribunal at that time that the record of the Original Application No.78/2002 was transferred to this Court and was registered as CWP(T) No.8192/2008. The same came up for consideration before the learned writ Court on 15.07.2011 and the only argument put-forth by the appellant was that the judgment passed by the learned Tribunal on 25.06.1996 has not been implemented in its letter and spirit. However, the said contention was negated by the learned writ Court.

7. It is this judgment which has been assailed by the appellant on the ground that the learned writ Court had fallen in error in concluding that the petition had been filed for seeking compliance of the judgment of the erstwhile Tribunal in OA (M) No.424/95, whereas, the appellant had infact set up a claim that he should be considered as daily waged Fitter with effect

from July, 1996, so as to be eligible and entitled for the grant of work charged status of Pipe Fitter after 10 years.

We have heard the learned counsel for the parties and gone through the records of the case.

8. At the outset, we may notice that the directions passed by the learned Tribunal in OA (M) No. 424/95 are very specific whereby the appellant was directed to be appointed as Pipe Fitter in the lowest grade with the scale of work charged 'Beldar' in the scale of Rs. 770-1350/- and the same read as under:-

> "*The lowest grade of the post held by the applicant i.e. Beldar and Pipe Fitter to complete 10 years continuous service is that of Beldar, that is to say the scale of the Beldar is that of 770-1350, as such the applicant is to be made a work charged employee as Pipe Fitter in the lowest grade i.e. the scale of work charged Beldar in the scale of Rs.770-1350. The applicant would thus entitled to be appointed to the said post and his services to be regularised in the said category as and when vacancy is available with the respondent-department and the regularisation is to be done on the basis of seniority of the applicant in the seniority list maintained by the Department under the scheme."*

9. We further find that the respondents in compliance of the aforesaid directions had infact issued a corrigendum on 07.03.1998 and the same reads as under:-

> *"As the status of Pipe fitter in the lowest grade of Rs.770-1350 has been given by the Administrative Tribunal H.P. Shimla in OA No. (M)-424/95 as per judgment dated 25.06.1996 in favour of Shri Bhuri Singh S/o Sh.Tashi Ram Village Kuthed, P.O.Deola, Tehsil Churah, Distt. Chamba, the name of post as written as Beldar in the appointment order of Shri Bhuri Singh may be read as Fitter in the scale of Rs.770-1350. This is w.r.to the clarification as sought for vide IPH-A-5-E(3)28/97 dated 5.12.97 from the Financial Commissioner-cum-Secretary (IPH) to the Govt. of Himachal Pradesh Shimla."*

10. From what has been extracted above, we have no doubt in our mind that the order passed by the learned Tribunal directing the appellant to be designated as Pipe Fitter in the lowest grade of Rs. 770-1350/- was duly complied with by the respondents by issuing corrigendum dated 07.03.1998. If that be so, then there is no occasion for the appellant to have any further grievance. What infact the appellant is striving for is questioning the orders passed by the learned Tribunal on 25.06.1996 in OA (M) No.424/95 which obviously is not permissible? If at all the appellant was aggrieved by the directions passed by the learned Tribunal whereby he was ordered to be placed in the lowest grade, he ought to have either filed a review petition or assailed the said order before the higher Forum/Court.

11. Having failed to do so, the findings as recorded by the learned Tribunal would obviously stare at his face having attained finality. That apart, even at the time of filing of CWP (T) No.8192/2008 out of which the present appeal arises was taken up for consideration, the only contention put-forth by the appellant was that the judgment passed by the learned Tribunal on 25.06.1996 had not been implemented in its letter and spirit, as would be evident from the perusal of the judgment, the relevant portion whereof reads thus:-

> *"3. Mr. Rajesh Raghuvanshi, learned counsel for the petitioner has argued that the judgment dated 25th June, 1996 rendered by the learned Tribunal has not been implemented in letter and spirit.*
>
> *4. However, it is evident from the material placed on record and the contents of Annexure-R dated 9.3.1998 filed with supplementary affidavit that the petitioner's designation was changed from Beldar to pipe fitter in the pay-scale of Rs. 770-1350.*

5. The grievance of the petitioner stands redressed and the judgment rendered in OA (M) No. 424 of 1995 has already been implemented. Consequently, there is no merit in this petition and the same is dismissed, so also the pending application(s), if any. No costs."

12. Having obtained judgment in his favour, the appellant cannot turn around and now claim that he should have been appointed as a daily waged Pipe Fitter with effect from July, 1986 alongwith pay-scale which in teeth of the findings recorded by the learned Tribunal in its judgment dated 25.06.1996 is not clearly available to him. That apart, even while filing OA No.78/2002 (CWP(T) No. 8192/2008), the only claim agitated at the time of arguments pertained only to the non-implementation of the aforesaid judgment and that being the position, the appellant is otherwise precluded and estopped from raising the contention as now sought to be raised in this appeal.

13. Consequently, we find no merit in this appeal and accordingly the same is dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Kulvinder Singh …….Petitioner

Versus

The Managing Partner, M/S Cousins Gun Manufactures Mandi …….Respondent

CWP No. 6565 of 2011
Decided on : December 20, 2016

Industrial Disputes Act, 1947- Section 25- The workman was appointed as a driver – his services were terminated orally without issuance of notice – a reference was made, which was allowed by the Labour Court- held, that the management had not challenged the award – the Industrial Tribunal had wrongly denied the benefit of backwages especially when continuity in service and seniority were granted – Writ Court does not have jurisdiction to re-appreciate the facts- however, Tribunal had failed to exercise the jurisdiction by denying the back wages – writ petition allowed and workman held entitled to 50% of back wages from the date of retrenchment till passing of award. (Para-9 to 16)

Cases referred:

Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157
T.N. Terminated Full Time Temporary LIC Employees Assn. V. LIC, (2016) 9 SCC 366
Raghubir Singh vs. General Manager, Haryana Roadways, Hissar, 2014(6) SLR 6 (S.C.)

For the petitioner : Mr. V.B. Verma, Advocate.
For the respondent : Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Dhatwalia, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By way of instant petition under Article 226 of the Constitution of India, the petitioner-workman (herein after, 'workman') has laid challenge to Award dated 4.12.2010 passed by the Industrial Tribunal-cum-Labour Court, Dharamshala in Ref. No. 74/2006, whereby the learned Tribunal below though has granted benefit of continuity in service and seniority from the date of illegal termination of the workman but has denied the back-wages.

2. Briefly stated facts, as emerge from the record are that appropriate Government made following terms of reference under Section 10(1) of the Industrial Disputes Act to the learned Industrial Tribunal-cum-Labour Court:

> "Whether the termination of services of Shri Kulvinder Singh S/o Shri Preetpal Singh workman by the M/s Cousins Gun Manufacturers Mandi, H.P. w.e.f. 20.5.2004 without complying the provisions of the Industrial Disputes Act, 1947 as alleged by the workman is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to?"

3. Workman, in his statement of claim before the learned Tribunal below stated that he was appointed as a Driver by the respondent-management (herein after, 'management') in the year 1998 and as such he continued to work till 20.5.2004, whereafter his services were terminated by the management orally, without issuance of any notice. Since workman had completed more than 240 days in each calendar year, his services could not be terminated without resorting to the provisions of Industrial Disputes Act. Record further reveals that when the workman raised industrial dispute before the Labour-cum-Conciliation Officer, Management issued a notice alongwith cheque amounting to Rs.2815/- in favour of the workman virtually in compliance of Section 25 (F) of the Act, however, the fact remains that the same was not accepted by the workman. In the aforesaid background, workman claimed before the Tribunal that he be ordered to be re-engaged forthwith in the same capacity as he was working earlier alongwith consequential benefits including back-wages.

4. It also emerges from the record that despite various opportunities to the Management, it failed to file any reply to the statement of claim filed by the workman, as such, claim was decided on the basis of material adduced on record by workman. Workman while examining himself as PW-1 specifically stated that he was appointed as a Driver by the Management in the year 1998 and thereafter, he worked uninterruptedly till 20.5.2004, when his services were all of a sudden terminated without resorting to the provisions of Industrial Disputes Act. It is also stated that he has completed more than 240 days in each calendar year during his service with the Management. In support of his aforesaid claim, he also examined one Shri Manohar Lal as PW-2, who also corroborated version having been put forth by the workman that workman was working as Driver with the management from 1998 till 2004, when his services were terminated by the Management. As has been observed above that the Management despite sufficient opportunities, failed to file reply, as a result of which averments made in the statement of claim and statement having been made by the workman during the proceedings before the learned Tribunal below, remained unrebutted and learned Tribunal below rightly presumed and inferred that the workman had worked continuously and uninterruptedly with the Management since 1998 and his services were illegally terminated by the Management without following provisions of Section 25(F) of the Industrial Disputes Act and as such his termination was rightly quashed and set aside. At this stage, it may be taken note of as also clearly emerges from the Award passed by learned Tribunal below that when workman raised industrial dispute before the Labour-cum-Conciliation Officer, Management, in semblance of compliance of Section 25(F) of the Act, issued a notice alongwith cheque of Rs.2815/- to the workman, which was not accepted/ withdrawn by the workman, meaning thereby that there was admission on the part of the Management as far as non-compliance of Section 25(F) of the Act at the time of termination of services of workman is concerned. By way of impugned Award, learned Tribunal below while accepting the claim having been put forth by the workman, directed the Management to reengage the workman at same place and in the same post, against which workman was working with the Management at the time of his illegal termination. Award further suggests that workman was also held entitled to benefit of continuity in service and seniority from the date of his illegal termination, but he was not granted any back wages. In the aforesaid background, being aggrieved with the denial of back wages by the learned Tribunal below, workman approached this Court seeking following main relief:

> " ii) Allow the present Civil Writ Petition and the petitioner may also be held entitled to full back wages while reinstating his services with seniority and other consequential service benefits from the date of his illegal termination i.e. 20-05-2010 with cost through out."

5. Since the management has not laid any challenge to the impugned award passed by the learned Tribunal below whereby direction has been issued for reinstatement of workman with benefit of continuity in service and seniority, Award has attained finality to that extent qua the Management.

6. Mr. V.B. Verma, learned counsel representing the workman vehemently argued that the impugned award passed by learned Tribunal below denying back wages to the workman is illegal and against the law laid down by the Apex Court in a catena of cases, wherein it has been categorically held that once workman is entitled to the benefit of continuity in service and seniority, he is also entitled to back wages and as such Award deserves to be modified. Mr. Verma, further contended that the learned Tribunal below has failed to appreciate that the onus to prove that workman was not gainfully employed during the period of termination was not upon the workman but the same was upon the Management, which claimed that during the period of retrenchment, workman remained gainfully employed. With a view to substantiate his aforesaid plea, he made this Court to travel through the records of the case to demonstrate that at no point of time, Management was able to prove on record by leading cogent and convincing evidence that the workman was gainfully employed during the period of retrenchment and as such impugned award having been passed by learned Tribunal below deserves to be modified. While concluding his arguments, Mr. Verma, further contended that despite there being order of reinstatement passed by learned Tribunal below, Management has not reengaged the workman, as such impugned award is harsh, inequitable and unfair to the workman especially for the reasons that after passing Award, substantial justice has eluded the workman since neither the workman has been reinstated nor he has been paid for the period.

7. Mr. B.S. Chauhan, learned Senior Advocate duly assisted by Mr. Munish Dhatwalia, Advocate, supported the award passed by Industrial Tribunal-cum-Labour Court. Mr. Chauhan, vehemently argued that there is no illegality and infirmity in the impugned award passed by learned Tribunal below as the same is based upon correct appreciation of evidence adduced on record by the parties and as such there is no scope of interference by this Court, especially in view of the findings of fact recorded by the learned Tribunal below. In this regard he placed reliance upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.*** While refuting the contentions having been put forth on behalf of the learned counsel representing the petitioner, that onus was upon the Management to prove that workman was not gainfully employed during the period of retrenchment, Mr. Chauhan, strenuously argued that as per settled law, onus is always upon the person, who claims wages for the period of retrenchment, to prove that during the period of termination, he was not gainfully employed at some other place and as such there is no illegality or infirmity in the impugned award passed by learned Tribunal below as far as denial of back wages is concerned. Mr. Chauhan, further contended that since the respondent Unit is closed for the reasons beyond the control of the Management, services of workman could not be reengaged and as such there is no disobedience on the part of the Management, as alleged by the workman. While concluding his arguments, Mr. Chauhan also invited attention of this Court to the judgment having been passed by the Apex Court in **T.N. Terminated Full Time Temporary LIC Employees Assn. V. LIC**, reported in (2016) 9 SCC 366, to suggest that considering the hardships of the respondent-Management, workman may not be held entitled to back wages.

8. I have heard the learned counsel representing the parties and also gone through the Award and records.

9. At the risk of repetition, it may be reiterated that there is no challenge to the impugned award passed by learned Tribunal below by the respondent-Management, whereby workman has been held entitled to reinstatement with benefit of continuity in service and

seniority, as such to that extent, award has attained finality qua the Management. Since no challenge has been laid to the impugned award by the Management, it can be safely inferred that for all intents and purposes, Management has accepted the workman to be in continuous service, who was admittedly appointed as Driver in the year 1998 and continued to work as such till 20.5.2004, when his services were illegally terminated by the Management, without resorting to the provisions contained in Industrial Disputes Act.

10. After perusing the pleadings as well as Award, this Court sees substantial force in the claim of the workman that he could not be denied back wages, especially when on the basis of the evidence adduced on record learned Tribunal came to the conclusion that the termination is bad being in violation of various provision of the Act, learned Tribunal could not deny the benefit of back wages, especially when the petitioner was granted the benefits of continuity in service and seniority. The benefit of continuity in service and seniority could only be granted by the Court if it was satisfied that workman/petitioner was not allowed to work during the retrenchment period despite there being sufficient work available with the management. In the present case, learned Tribunal while holding the termination of the petitioner bad came to the conclusion that the termination was in violation of Section 25-F of the Act, meaning thereby, learned Tribunal was convinced that after retrenchment of the petitioner, work was available but for some extraneous reasons services of the petitioner were terminated without resorting to provisions contained in Section 25-F of the Act. Otherwise, also this Court after perusing the evidence as has been discussed above is fully convinced that the respondent-company was unable to prove that at the time of retrenchment of the petitioner, no work was available and no persons junior to him were retained. Once, the petitioner was able to prove on record that at the time of his termination, no procedure as prescribed under Industrial Disputes Act, was followed, learned Tribunal below ought to have granted back wages also. Apart from above, when learned Tribunal on the basis of the evidence held the petitioner entitled to benefit of continuity in service and seniority, there was no occasion whatsoever, to deny the benefit of back wages because benefit of continuity of service could only be granted, if tribunal was satisfied that during retrenchment period petitioner was purposely stopped from discharging his duty despite there being availability of sufficient work.

11. In this regard reliance is placed on the judgment of the Hon'ble Apex Court in ***Raghubir Singh vs. General Manager, Haryana Roadways, Hissar, 2014(6) SLR 6 (S.C.),*** wherein the Court held:

> **"39.** Now, it is necessary for this Court to examine another aspect of the case on hand, whether the appellant is entitled for reinstatement, back wages and the other consequential benefits. In the case of **Deepali Gundu Surwase V. Kranti Junior Adhyapak Mahavidyalaya (D. Ed) and Ors.,(2013)10 SCC 324: [2013(6) SLR 642 (SC),** this Court opined as under:-
>
> > **"22. The very idea of restoring an employee to** the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance. The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the

employee to claim full back wages. If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments.

23. A somewhat similar issue was considered by a three Judge Bench in Hindustan Tin Works Pvt. Ltd. v. Employees of Hindustan Tin Works Pvt. Ltd. (supra)......The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law's proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen's demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages..... In the very nature of things there cannot be a strait-jacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority, that something is to be done according to the Rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular.....

24. Another three Judge Bench considered the same issue in **Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi (supra)** and observed: Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too......In such and other

exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted." **(Emphasis supplied by this Court)" (pp.23-25)**

12. Hence, this Court after carefully going through the aforesaid judgment having been passed by the Hon'ble Apex Court, has no hesitation to conclude that learned Tribunal below erred in not granting back wages to the workman, while extending him benefit of reinstatement alongwith benefit of continuity in service and seniority, as such, impugned award deserves to be modified accordingly. Aforesaid view has been reiterated by the Hon'ble Apex Court in (2016) 3 SCC 340 and (2016) 6 SCC 541.

13. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the Management, clearly suggests that error of law which is apparent on the face of record can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law which can be corrected by a writ of certiorari. Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of certiorari can be issued if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

"16. ....The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in

proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

14. Perusal of aforesaid findings returned by the Hon'ble Apex Court nowhere completely bars jurisdiction of writ Court to examine the correctness and genuineness of the Award having been passed by the Tribunal especially when there is an error of law apparent on the face of record. In the instant case, as has been discussed in detail, learned Tribunal below could not have denied benefit of back wages to the workman, especially when Tribunal, on the basis of material, came to the conclusion that the workman is entitled to reinstatement alongwith benefit of continuity in service and seniority. Once, the learned Tribunal below had come to the conclusion that the workman is entitled to the benefit of continuity in service and seniority, it ought to have granted benefit of back wages as has been laid down by the Hon'ble Apex Court in case ***Raghubir Singh vs. General Manager, Haryana Roadways, Hissar.***

15. Hence, this Court is of the view that learned Tribunal below failed to exercise jurisdiction vested in it and erroneously refused to admit admissible claim of the workman and as such this Court has the jurisdiction to correct the same while exercising writ jurisdiction as laid down in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.(supra)***.

16. Consequently, in view of above, the Award dated 4.12.2010 passed by the Industrial Tribunal-cum-Labour Court, Dharamshala in Ref. No. 74/2006, is modified to the extent of denying back wages to the workman. Workman is held entitled to the 50% of the back wages from the date of illegal retrenchment till the date of passing of the Award by the Industrial Tribunal-cum-Labour Court below.

17. Pending applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Lalit Narain Mishra. ....Petitioner.

Versus

The State of Himachal Pradesh & others ....Respondents.

CMP No. 10020 of 2016 in
CWP No. 1449/2015
Reserved on 12.12.2016
Decided on: 20.12. 2016

Constitution of India, 1950- Article 226- A writ petition was filed by the petitioner seeking direction to the University to show the answer sheets/books of the petitioner and the copy of notification of dates of examination – the petition was dismissed – SLP was filed before the Supreme Court, which was also dismissed – a CMP was filed to provide the record kept in the sealed cover –the petitioner was directed to approach the authorities for obtaining the copy of the requisite documents – the petitioner filed the present application pleading that he is not satisfied with the order passed by the authority – held, that the language used by the petitioner is intemperate and contemptuous – the petitioner has attempted to interfere with the due course of judicial proceedings – no licence can be given to the petitioner to commit contempt of Court – however, no action was taken considering the fact that petitioner is a student — further, the writ

petition has been disposed of and the Court has become functus officio - no direction can be issued – petition dismissed. (Para-6 to 24)

Cases referred:
Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248
Chetak Construction Ltd. v. Om Prakash (1998) 4 SCC 577:
Radha Mohan Lal v. Rajasthan High Court (2003) 3 SCC 427
Jaswant Singh Vs. Virender Singh (1995 (supp.1) SCC 384)

For the Petitioner: In person.
For the Respondents: Mr. Shrawan Dogra, Adocate General with Mr. Anup Rattan & Mr. Romesh Verma, Addl. A.Gs. and Mr. Kush Sahrma, Dy. A.G. for respondent No.1.
Nemo for respondent Nos. 2 to 6.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

By medium of this application, the petitioner has prayed for the following reliefs:

(a) "Recall the copy of answer book handed over to the respondent university vide order dated 15th November, 2016 in CMP No. 9077/2016 in Writ Petition No. 1449 of 2015 to the petitioner in the interest of justice and provide a copy of that with the seal of the court so that truth of the University can be verified in the open court in the interest of justice.

OR

(b) Verify the said answer book in the open court with an expert whether it bears handwriting of the petitioner or not in the interest of justice.

(c) Pass any other order deems fit to this Hon'ble Court in favour of petitioner in the interest of justice."

2. The writ petition is no longer on the dockets of this Court. The petitioner filed writ petition claiming therein four reliefs, however, at the time of hearing, only two reliefs were prayed for and the same read as under:

> "(i). That the respondent-University may be directed to show the answer sheets/books of the petitioner of the examination of 2nd Semester of 2nd Year M.Sc.(Horticulture), in First hourly, Mid term, Second hourly and Practical Examination for course No. FSC-516/Course title Systematics of Fruit Crops, Academic Year 2013-2014 and the copy of notification of dates of examination for the said examination, for which grading has been reported at Annexure P-1.
>
> (ii). That the respondent–University may be directed to show or place on records the answer sheets/books of the petitioner in examination of Practical examination and final examination of M.Sc (Horticulture), academic year 2013-14, Course No. FSC-506, 2nd semester, Course Title: Breeding of Fruit Crops, Cr. Hrs: 2+1 for which grading has been shown at Annexure P-2."

3. This Court vide judgment dated 2.9.2015 dismissed the petition after having arrived at conclusion that the same sans merit. The petitioner thereafter assailed the judgment passed by this Court by approaching the Hon'ble Supreme Court by filing SLP (C) No.6203/2016. However, the same was dismissed by the Hon'ble Supreme Court vide order dated 19.9.2016, which reads thus:

"Upon hearing the counsel the Court made the following

O R D E R

The special leave petition is dismissed. Pending application is disposed of."

4. After the dismissal of the Special Leave to Appeal, the petitioner filed CMP No. 9077 of 2016 wherein the prayer was made for providing the record kept in sealed cover as per the orders earlier passed by this Court on 2.9.2015.

5. Even though we had doubts regarding the maintainability of this application, however, vide order dated 15.11.2016, we asked the petitioner to approach the concerned authorities for obtaining the copy of requisite documents and at the same time, the Registry was directed to handover the sealed cover documents to the learned Senior Counsel of the respondent-University. This would be evident from the order passed on 15.11.2016, which reads thus:

> "Petitioner/applicant has moved this application in a decided CWP No. 1449 of 2015. It is moot question-whether this application is maintainable? We leave this question open. It is for the petitioner to approach the concerned authorities for obtaining the copy of the requisite documents. Registry is directed to hand over the sealed covered documents filed on 27.5.2015 to Ms. Ranjana Parmar, learned Senior Advocate. Accordingly, the application is disposed of."

6. It is thereafter that the petitioner has filed the instant application and would contend that he is not satisfied with the orders passed by the authorities concerned and prayed that the application may be decided on merit.

7. At the outset, we may point out that we are really pained and rather taken aback by some of averments made in the application, more particularly, those contained in para No.3, which reads thus:

> "That this Hon'ble Court had dismissed the writ petition No.1449 of Year 2015 without hearing it on merits and the Hon'ble High Court had told in the judgment of the said writ petition that the respondent University had filed the answer-book of the petitioner in the Hon'ble High Court and the Hon'ble High Court without verifying the answer book of the petitioner by means of expert test considered blindly that the answer book filed by the University is written by the petitioner in the sealed envelop."

8. We have already exercised great amount of restrain while adjudicating the writ petition on merit and even at that time we refrained ourselves from imposing exemplary costs only because the petitioner is a student, as would be clearly evident from para 9 of the judgment, which reads thus:

> "9. As the petitioner has based his claim on falsehood and has not come with clean hands, we would have normally awarded exemplary costs, but we refrain from doing so since the petitioner is only a student."

9. However, it appears that the sympathy and consideration shown to the petitioner was totally misplaced or else he would have taken extreme care and caution, more particularly, in the use of words and language while drafting the instant petition.

10. It is evidently clear from the language used by the petitioner that the same is intemperate and contemptuous and we have no hesitation to conclude that the petitioner by deliberately using the words in the para extracted above has attempted to interfere with the due course of judicial proceedings and such action could be construed to be obstructive or attending to obstruct the administration of justice.

11. No affront to the majesty of law can be permitted. The fountain of justice cannot be allowed to be polluted by disgruntled litigants. The protection is necessary for the courts to

enable them to discharge their judicial functions without fear. (***Ajay Kumar Pandey, Advocate, (1998) 7 SCC 248).***

12. It is well settled that litigant cannot be permitted to browbeat the court or terrorize or intimidate the Judges as held by the Hon'ble Supreme Court in ***Chetak Construction Ltd. v. Om Prakash (1998) 4 SCC 577:***

> "16. Indeed, no lawyer or litigant can be permitted to browbeat the court or malign the presiding officer with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and the rule of law would receive a setback. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot be permitted to 'terrorise' or 'intimidate' Judges with a view to 'secure' orders which they want. This is basic and fundamental and no civilized system of administration of justice can permit it."

13. These observations were subsequently, reiterated in ***Radha Mohan Lal v. Rajasthan High Court (2003) 3 SCC 427.***

14. Only because a party has appeared in person does not give him a licence thereby to commit contempt of the Court by using intemperate language or innuendos against the Judges while discharging the judicial function. The safeguards are not for the protection of any Judge individually but are essential for maintaining the dignity and decorum of the courts. No doubt, fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith, in proper language, do not attract any punishment for contempt of court. However, when from the criticism deliberate, motivated and calculated attempt is discernible to bring down the image of judiciary in the estimation of the public or to impair the administration of justice or tend to bring the administration of justice into disrepute, the courts must bestir themselves to uphold their dignity and the majesty of law. No system of justice can tolerate such unbridled licence on the part of a person to permit himself the liberty or scandalizing a court by casting unwarranted, uncalled for an unjustified aspersions on the integrity, ability, impartiality or fairness of a Judge in the discharge of his judicial functions as it amounts to an interference with the due course of administration of justice. (***Jaswant Singh*** Vs***. Virender Singh (1995 (supp.1) SCC 384)***.

15. In ordinary circumstances, we would not have hesitated to initiate proceedings against the petitioner under the Contempt of Courts Act, however, again taking into consideration that the petitioner is still a student, whose career may otherwise be spoiled by any adverse order that may be passed by this Court, we leave the matter to rest here. However, with a stern warning to the petitioner to disassociate from such kind of misadventures in future.

We now proceed to consider the application on merit.

16. Indubitably, the main writ petition is not on the dockets of the Court and as observed earlier has been decided on 2.9.2015 and even the Special Leave to Appeal against the decision stands dismissed on 19.9.2015 and, therefore, it is settled law that once the writ petition has finally been decided and proceedings stand terminated the Court becomes *functus officio*. It is only by filing an application for review of the order passed earlier that the Court may be called upon to examine the issue raised therein. That apart, the Court would by invoking its inherent powers correct some kinds of error, which normally would be arithmetical, grammatical etc. However, such powers would be invoked only in exceptional circumstances to avoid miscarriage of justice. Fraud is genuine, albeit limited, exception to the important principle of finality of litigation upon which the doctrine of *functus officio* is founded.

17. *"Functus officio"* is a Latin term meaning having performed his or her office. With regard to an officer or official body, it means without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

18. *"Functus"* means having performed and "*officio"* means office. Thus, the phrase *functus officio* means having performed his or her office, which in turn means that the public officer is without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.

19. *Trayner's Latin* Maxims, 4th Edn. Gives the expression *functus officio* the following meaning:

> *"Having discharged his official duty. This is said of any one holding a certain appointment, when the duties of his office have been discharged. Thus a Judge, who has decided a question brought before him, is functus officio and cannot review his own decision."*

20. In *Wharton's Law Lexicon*, 14th Edn., the expression *functus officio* is given the meaning, *"a person who has discharged his duties, or whose office or authority is at an end."*

21. *P. Ramanatha Aiyar's Law Lexicon* gives the expression the meaning, "*A term applied to something which once has had a life and power, but which has become of no virtue whatsoever. Thus when an agent has completed the business which he was entrusted his agency is functus officio.*"

22. In *Black's Law Dictionary Tenth Edition*, meaning of *functus officio* is : "*having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.*"

23. In other words, the authority, which had a life and power, has lost everything on account of completion of purpose/activities/act.

24. Notably, what the petitioner is seeking is virtually a writ of mandamus in a decided case, which is legally impressible.

24. Accordingly, we found no merit in this application and the same is dismissed with the clear warning to the petitioner, as aforesaid.

The Registry is directed to send a copy of this order to the petitioner.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Maharishi Markandeshwar Medical College and Hospital and others. …Petitioners.

Versus

State of Himachal Pradesh and others. …Respondents.

CWP No. 4773/2015
Reserved on: 2.11.2016
Decided on: 20.12. 2016

Constitution of India, 1950- Article 226- Petitioner No.1 is an unaided private college established by petitioner No.3 and is a constituent of petitioner No.2- essentiality certificate was issued in favour of the petitioner No.3 by the State Government after which the college was established- Medical Council of India granted letter of intent to petitioner No.3 to open the medical college with certain conditions – State Government notified the procedure for admission and fee structure – State Government issued a notification amending Himachal Pradesh Private Medical Educational Institution (Regulation of Admissions and Fixation of Fee) Act, 2006 – amendment was challenged by the petitioner on the ground of competence of the State Government to carry out the amendments – held, that the Medical College has to apply for permission and to submit consent of affiliation from a recognized University – once recognition is

granted, College is required to take affiliation from University – recognition and affiliation are distinct and their purposes are different – role of MCI is confined to recognition whereas affiliation is left to the State Government or the examining University- Himachal Pradesh University Act, 1970 is the parent statute under which all the Universities in the State have to be constituted – the petitioners can have no right to claim that it will be affiliated to the University of its choice – writ petition dismissed.(Para-22 to 54)

Cases referred:
Modern Dental College and Research Centre and others Vs. State of Madhya Pradesh and others, 2016 (7) SCC 353
Rajasthan Prdesh Vaidya Samiti, Sardarshahar and another vs Union of India and others, (2010) 12 SCC 609
Bhartia Education Society vs. State of H.P., 2011 (4) SCC 527
State of Madhya Pradesh and another vs. Kumari Nivedita Jain and others, (1981) 4 SCC 296

For the Petitioners: Mr. K.D. Shreedhar, Sr. Advocate with Mr. Yudhbir Singh Thakur, Advocate.

For the Respondents: Mr. Shrawan Dogra, A.G. with Mr. Anup Rattan, Mr. Romesh Verma, Addl. A.Gs. and Mr. J.K. Verma, Dy. A.G. for respondent No.s 1 and 2.
Mr. Ashok Sharma, Asstt. Solicitor General of India with Mr. Ajay Chauhan, Advocate for respondent Nos. 3 and 4.
Mr. B.C. Negi, Sr. Advocate with Mr. Raj Negi, Negi, Advocate for respondent No.5.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

This instant writ petition has been filed with the following substantive prayers:

i) To issue a writ in the nature of mandamus or any other appropriate writ, direction or order striking down sections 3 (6), 3 (6) (a) and 3 (6) (b) of the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 as amended vide Amendment Act No. 24 of 2015 as null and void being wholly arbitrary, grossly malafide, in contravention of the law settled by the Hon'ble Supreme Court and in naked breach of the fundamental rights of the petitioners under Article 19 (1) (g) of the Constitution of India.

ii) To issue the orders of appropriate nature that the petitioner No.1 MM Medical College and Hospital or any other intuitions of Medical Streams which may be started by petitioners be governed by the MMU (E&R) Act."

2. It is vide notification dated 30.9.2015 that the State Government amended the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2006 (Act No. 24 of 2015). The amendment carried in section 3 reads thus:

3. Amendment of section 3.- In section 3 of the principal Act, for sub-section (6), the following sub-section shall be substituted, namely:-

"(6) If the State Government is satisfied that the institution affiliated to the Himachal Pradesh University or any other University has contravened any of the provisions of this Act, it may recommend to that University for withdrawal of recognition or affiliation of such institution.

(6-a) In order to insure common standards for maintaining the excellence of Medical Education in the State, the Himachal Pradesh University shall have the exclusive power to affiliate Private Medical Education Institutions set up in the State; and

(6-b) Notwithstanding anything contained in this Act, the Private Medical Educational Institutions shall be bound to comply with all the rules, directions and notifications issued by the State Government, from time to time, and provide all such facilities and assistance as are required to implement such rules, directions and notifications."

3. However, at the time of arguments, the petitioners have confined their arguments only to the amendment carried in sub-section (6-a) of section 3.

4. One of the moot questions that therefore arises for consideration in the instant petition is as to which authority has the power to decide regarding the affiliation of Medical College. Is it the Central Government through MCI or the State Government or is the petitioner-college, which is alleged to be constituent of Maharishi Markandeshwar University established under the Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010, that can decide this question?

However, before answering the question certain facts, as pleaded may be recapitulated:

5. The petitioner No.1 is an unaided private college established by the petitioner No.3-Maharishi Markandeshwar University Trust (for short 'University Trust') and is a constituent of petitioner No.2 Maharishi Markandeshwar University (for short University).

6. The University was set up pursuant to letter of intent issued by the State Government on 20.8.2008 under section 5 (1) of the Himachal Pradesh Private Universities (Establishment and Regulations) Act, 2006 (for short 'Private University Act').

7. The petitioner-trust was issued an essentiality certificate by the State for establishment of a Medical College, subject to its observing all codal formalities as per law/prevailing Act/Rules/ Instructions and it was further made clear that the Trust would abide by the 'Private University Act'.

8. The petitioner-University after obtaining the essentiality certificate purchased 125.02 bighas of land at Khalogra in Kumarhatti-Solan contiguous to the land purchased by it for setting up the petitioner-University. On 16.6.2010, the Maharishi Markandeshwar University (Establishment and Regulation) Act, 2010 (for short 'MMU Act') was brought into force.

9. The University-Trust vide its letter dated 27.7.2012, requested the State Government for the grant of Essentiality Certificate to establish a new medical college at Kumarhatti, Solan under petitioner No. 2-University, which though was granted by the State Government on 29.8.2012, however, the same was subject to the following conditions:

i) The institution concerned will have to abide by the regulations/terms issued by the Medical Council of India and State; and

ii) The admission, fee structure and related issues shall be governed as per the Himachal Pradesh Private Medical Education Institutions (Regulation of Admission and Fixation of Fee) Act, 2006.

10. Petitioner No.3-Trust upon the receipt of essentiality certificate/NOC applied to the Central Government alongwith required scheme under section 10-A of the Indian Medical Council Act, 1956 (for short 'IMC Act, 1956) for grant of permission for establishment of a new Medical College at Kumarhatti under petitioner No.2-University. The application was processed by the MCI and after carrying out the physical inspection of the Medical College, granted letter of intent to the petitioner-trust for establishment of a new Medical College from the academic session 2013-2014 with certain conditions.

11. Thereafter, vide letter of permission dated 14.7.2013, approval of the Board of Governors of MCI was granted for the establishment of a new Medical College in the name and style of Maharishi Markandeshwar Medical College and Hospital, Kumarhatti,Solan Himachal Pradesh by the Maharishi Markandeshwar University. The State Government vide notification dated 14.8.2013 issued under section 3(3) of the Private University Act notified the procedure for admission and fee structure for the University. It is here that the dispute with regard to affiliation of the petitioner-University began to arise.

12. There was protracted correspondence between the MCI and the State with regard to the affiliation of the petitioner-University and finally the MCI vide its letter dated 2.9.2015 informed the State Government and reiterated its earlier view that the petitioner-University was statutorily empowered by way of section 5 (1) (xxvi) "to setup colleges" and further that the State Legislature had itself granted the right to the petitioner-University to have its own college, therefore, in such case insisting on affiliation of its medical college to another University, i.e. H.P. University appeared to be contrary to the Act of Himachal Legislature.

13. It is thereafter that the State Government issued a notification thereby carrying out an amendment in the Himachal Pradesh Private Medical Educational Institutions (Regulations of Admission and Fixation of Fee) Act, 2006, as aforesaid.

14. It is this amendment, which has been assailed in this writ petition mainly on the ground that the co-ordination and determination of standards in higher education falls in Entry 66, List-I of the Seventh Schedule of the Constitution of India and therefore, the State Government cannot by controlling education in the State encroach upon the standards in the institutions for higher education, as these powers lie only within the purview of the University Grant Commission and the power vested in the MCI under Section 3 of the MCI Act, which are not merely advisory in nature, but are mandatory and the Universities are bound by the standards prescribed.

15. The respondent-State has contested the petition by taking various preliminary objections. It is averred that it is the State Government who alone is competent to regulate the standards of education to be imparted in Medical Colleges and this has so been recognized by the Hon'ble Supreme Court in various pronouncements.

15. In addition to that, it is averred that in view of Entry 25 of List-III of the Seventh Schedule of the Constitution, Union as well as State have the power to legislate subject to the provisions of Entry 66 of List-I of the Seventh Schedule, which deals with determination of standards in institutions for higher education. Therefore, the State has a right to control education, including medical education.

17. It is further averred that the letter of intent was actually issued in favour of petitioner No-1-Medical College and not to petitioners No.2 or 3. Moreover, the essentiality/ feasibility certificate was issued to the petitioners subject to the following conditions:

i) The institution concerned will have to abide by the regulations/terms issued by the Medical Council of India and State; and

ii) The admission, fee structure and related issues shall be governed as per the Himachal Pradesh Private Medical Education Institutions (Regulation of Admission and Fixation of Fee) Act, 2006.

18. It has thereafter been specifically denied that the State Government had approved to establish College under the MMU Act. It has been reiterated that it is the State Government, which alone has power to regulate any profession with regard to causing standards of quality, public welfare, equality of opportunity etc. and merely because the petitioners Institution is in the business of imparting education, cannot have unregulated right of admitting students in a non-transparent manner.

19. The MCI has filed a separate reply wherein it is averred that it is a statutory body constituted under the provisions of the MCI Act, 1956 and has been given the responsibility of

discharging the duties of maintenance of highest standards of Medical Education throughout the country and in this regard by virtue of provisions of Section 33 of the MCI Act, 1956 has been empowered with the prior approval of the Central Government to frame regulations for laying down minimum standards of infrastructure, teaching and other requirements of conduct of medicine courses.

20. It is further averred that the regulations so issued are binding and mandatory and State enactments, rules and regulations framed by the Universities in relation to the conduct of medicine courses, to the extent they are inconsistent with the Act and the regulations made thereunder by the MCI, are repugnant by virtue of Article 254 of the Constitution of India.

21. We have heard the learned counsel for the parties and have gone through the material placed on record.

22. Incidentally, both the parties have referred to and have heavily relied upon the recent judgment of the Hon'ble Supreme Court in ***Modern Dental College and Research Centre and others*** Vs. ***State of Madhya Pradesh and others,*** 2016 (7) SCC 353, in support of their respective claims. Learned counsel for the petitioner would contend that the Hon'ble Supreme Court in para 101 of the judgment (supra) has though held that Entry 66 of List-I is a specific Entry having a very specific and limited scope and the same deals with coordination and determination of standards in institution of higher education or research as well as scientific and technical institutions, however, it has further clarified the words "coordination and determination of standards" and has recognized the exclusive domain of the Union in prescribing such standards.

23. On the other hand, learned Advocate General would rely upon the observations made in paras 101, 103 and 107 of the judgment in ***Modern Dental College's*** case (supra) to contend that the Hon'ble Supreme Court has specifically held that regulating "education" includes even Medical Education, i.e. prescribed in List-II Entry 25, thereby giving concurrent powers to both Union as well as State and it has been clarified that when two Entries relating to Education, one to the Union List and other in the Concurrent List, co-exist, they have to be read harmoniously and then it becomes manifest that when it comes to coordination and laying down of standards in the higher education or research and scientific and technical institutions, power rests with the Union/Parliament to the exclusion of the State Legislatures. However, the other facets of education, including technical and medical education as well as governance of universities is concerned; even State Legislatures are given power by virtue of Entry 25, which is wide enough and is only circumscribed to the limited extent of it being subject to List-1 Entries 63 to 66.

24. In order to better appreciate the contentions raised by the parties, it would be necessary to advert to the observations as are necessary for the adjudication of this case and the same are contained in paras 98 to 103, which read thus:

> "[98] The next issue to be considered is whether the subject matter of admissions was covered exclusively by Entry 66 of List I, thereby the States having no legislative competence whatsoever to deal with the subject of admissions or determination of fee to be charged by professional educational institutions.
>
> [99] Main reliance placed on behalf of the appellants is on Bharti Vidyapeeth (Deemed University) & Ors. v. State of Maharashtra & Anr., 2004 11 SCC 755 Heavy reliance was also placed by the appellants on Gujarat University & Anr. v. Shri Krishna Ranganath Mudholkar & Ors.,1964 Supp1 SCR 112 and the judgment of the Constitution Bench in the case of Dr. Preeti Srivastava & Anr. v. State of M.P. & Ors., 1999 7 SCC 120
>
> [100] The competing Entries are: List I, Entry 66 and List III, Entry 25. In the process, List II, Entry 32 also needs a glance. Thus, for proper analysis, we reproduce these Entries below:

"List I

66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

List II

32. Incorporation, regulation and winding up of corporation, other than those specified in List I, and universities; unincorporated trading, literacy, scientific, religious and other societies and associations; co-operative societies.

List III

25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour."

[101] To our mind, Entry 66 in List I is a specific Entry having a very specific and limited scope. It deals with co-ordination and determination of standards in institution of higher education or research as well as scientific and technical institutions. The words 'co-ordination and determination of standards' would mean laying down the said standards. Thus, when it comes to prescribing the standards for such institutions of higher learning, exclusive domain is given to the Union. However, that would not include conducting of examination, etc. and admission of students to such institutions or prescribing the fee in these institutions of higher education, etc. In fact, such co-ordination and determination of standards, insofar as medical education is concerned, is achieved by Parliamentary legislation in the form of Medical Council of India Act, 1956 and by creating the statutory body like Medical Council of India (for short, 'MCI') therein. The functions that are assigned to MCI include within its sweep determination of standards in a medical institution as well as co-ordination of standards and that of educational institutions. When it comes to regulating 'education' as such, which includes even medical education as well as universities (which are imparting higher education), that is prescribed in Entry 25 of List III, thereby giving concurrent powers to both Union as well as States. It is significant to note that earlier education, including universities, was the subject matter of Entry 11 in List II 5 . Thus, power to this extent was given to the State Legislatures. However, this Entry was omitted by the Constitution (Forty-Second Amendment) Act, 1976 with effect from July 03, 1977 and at the same time Entry 25 in List II was amended 6 . Education, including university education, was thus transferred to Concurrent List and in the process technical and medical education was also added. Thus, if the argument of the appellants is accepted, it may render Entry 25 completely otiose. When two Entries relating to education, one in the Union List and the other in the Concurrent List, co-exist, they have to be read harmoniously. Reading in this manner, it would become manifest that when it comes to co-ordination and laying down of standards in the higher education or research and scientific and technical institutions, power rests with the Union/Parliament to the exclusion of the State Legislatures. However, other facets of education, including technical and medical education, as well as governance of universities is concerned, even State Legislatures are given power by virtue of Entry 25. The field covered by Entry 25 of List III is wide enough and as circumscribed to the limited extent of it being subject to Entries 63, 64, 65 and 66 of List I.

[102] Most educational activities, including admissions, have two aspects: The first deals with the adoption and setting up the minimum standards of education. The objective in prescribing minimum standards is to provide a benchmark of the caliber and quality of education being imparted by various

educational institutions in the entire country. Additionally, the coordination of the standards of education determined nationwide is ancillary to the very determination of standards. Realising the vast diversity of the nation wherein levels of education fluctuated from lack of even basic primary education, to institutions of high excellence, it was though desirable to determine and prescribe basic minimum standards of education at various levels, particularly at the level of research institutions, higher education and technical education institutions. As such, while balancing the needs of States to impart education as per the needs and requirements of local and regional levels, it was essential to lay down a uniform minimum standard for the nation. Consequently, the Constitution makers provided for Entry 66 in List I with the objective of maintaining uniform standards of education in fields of research, higher education and technical education.

[103] The second/other aspect of Education is with regard to the implementation of the standards of education determined by the Parliament, and the regulation of the complete activity of Education. This activity necessarily entails the application of the standards determined by the Parliament in all educational institutions in accordance with the local and regional needs. Thus, while Entry 66 List I dealt with determination and coordination of standards, on the other hand, the original Entry 11 of List II granted the States the exclusive power to legislate with respect to all other aspects of education, except the determination of minimum standards and coordination which was in national interest. Subsequently, vide the Constitution (Forty-second Amendment) Act, 1976, the exclusive legislative field of the State Legislature with regard to Education was removed and deleted, and the same was replaced by amending Entry 25, List III, granting concurrent powers to both Parliament and State Legislature the power to legislate with respect to all other aspects of Education, except that which was specifically covered by Entry 63 to 66 of the List I."

25. Having gone through the judgment in ***Modern Dental College's*** case (supra), the relevant portion whereof has been extracted above, we find that the issue of affiliation has in fact not really been considered or dealt with in the aforesaid judgment. However, nonetheless the observations in para 101 (supra) have a definite bearing to the controversy in dispute. It has been clearly held that Entry 66 in List I deals with coordination and determination of standards which essentially means laying down the standards. It has been held that such standards insofar as medical education is concerned are achieved by the Parliamentary Legislation in the form of Indian Medical Council Act, 1956 by creating the statutory body like MCI. It has further been held that the functions that have been assigned to MCI include within its sweep determination of standards in a medical institution as well as coordination of standards and that of educational institutions. However, when it comes to regulating education, as such, which includes even medical education, the same is prescribed under List III Entry 25 thereby giving concurrent powers to both Union as well as States.

26. Judged in the light of aforesaid exposition of law, it would be necessary to advert to the provisions of the Indian Medical Council Act, 1956. Section 10-A provides for permission for establishment of new medical college, new course of study, etc. and reads thus:

"10A. Permission for establishment of new medical college, new course of study.

(1) Notwithstanding anything contained in this Act or any other law for the time being in force,—

(a) no person shall establish a medical college; or

(b) no medical college shall—

(i) open a new or higher course of study or training (including a post-graduate course of study or training) which would enable a

student of such course or training to qualify himself for the award of any recognised medical qualification; or

(ii) increase its admission capacity in any course of study- or training (including a post-graduate course of study or training), except with the previous permission of the Central Government obtained in accordance with the provisions of this section.

Explanation 1.—For the purposes of this section, "person" includes any University or a trust but does not include the Central Government.

Explanation 1.—For the purposes of this section, "admission capacity", in relation to any course of study or training (including post-graduate course of study or training) in a medical college, means the maximum number of students that may be fixed by the Council from time to time for being admitted to such course or training.

(2) (a) Every person or medical college shall, for the purpose of obtaining permission under sub-section (1), submit to the Central Government a scheme in accordance with the provisions of clause (b) and the Central Government shall refer the scheme to the Council for its recommendations.

(b) The scheme referred to in clause (a) shall be in such form and contain such particulars and be preferred in such manner and be accompanied with such fee as may be prescribed.

(3) On receipt of a scheme by the Council under sub-section (2), the Council may obtain such other particulars as may be considered necessary by it from the person or the medical college concerned, and thereafter, it may,—

(a) if the scheme is defective and does not contain any necessary particulars, give a reasonable opportunity to the person or college concerned for making a written representation and it shall be open to such person or medical college to rectify the defects, if any, specified by the Council;

(b) consider the scheme, having regard to the factors referred to in sub-section (7), and submit the scheme together with its recommendations thereon to the Central Government.

(4) The Central Government may, after considering the scheme and the recommendations of the Council under sub-section (3) and after obtaining, where necessary, such other particulars as may be considered necessary by it from the person or college concerned, and having regard to the factors referred to in sub-section (7), either approve (with such conditions, if any, as it may consider necessary) or disapprove the scheme and any such approval shall be a permission under sub-section (1):

Provided that no scheme shall be disapproved by the Central Government except after giving the person or college concerned a reasonable opportunity of being heard:

Provided further that nothing in this sub-section shall prevent any person or medical college whose scheme has not been approved by the Central Government to submit a fresh scheme and the provisions of this section shall apply to such scheme, as if such scheme has been submitted for the first time under sub-section (2).

(5) Where, within a period of one year from the date of submission of the scheme to the Central Government under sub-section (2), no order passed by the Central Government has been communicated to the person or college submitting the scheme, such scheme shall be deemed to have been approved by the Central Government in the form in which it had been submitted, and, accordingly, the

permission of the Central Government required under sub-section (1) shall also be deemed to have been granted.

(6) In computing the time-limit specified in sub-section (5) the time taken by the person or college concerned submitting the scheme, in furnishing any particulars called for by the Council, or by the Central Government shall be excluded.

(7) The Council, while making its recommendations under clause (b) of sub-section (3) and the Central Government, while passing an order, either approving or disapproving the scheme under sub-section (4), shall have due regard to the following factors, namely:—

(a) whether the proposed medical college or the existing medical college seeking to open a new or higher course of study or training, would be in a position to offer the minimum standards of medical education as prescribed by the Council under section 19A or, as the case may be, under section 20 in the case of postgraduate medical education;

(b) whether the person seeking to establish a medical college or the existing medical college seeking to open a new or higher course of study or training or to increase its admission capacity has adequate financial resources;

(c) whether necessary facilities in respect of staff, equipment, accommodation, training and other facilities to ensure proper functioning of the medical college or conducting the new course of study or training or accommodating the increased admission capacity have been provided or would be provided within the time-limit specified in the scheme;

(d) whether adequate hospital facilities, having regard to the number of students likely to attend such medical college or course of study or training or as a result of the increased admission capacity, have been provided or would be provided within the time-limit specified in the scheme;

(e) whether any arrangement has been made or programme drawn to impart proper training to students likely to attend such medical college or course of study or training by persons having the recognised medical qualifications;

(f) the requirement of manpower in the field of practice of medicine; and

(g) any other factors as may be prescribed.

(8) Where the Central Government passes an order either approving or disapproving a scheme under this section, a copy of the order shall be communicated to the person or college concerned."

27. Section 19 provides for withdrawal of recognition and reads thus:

"19. WITHDRAWAL OF RECOGNITION

1. When upon report by the Committee or the visitor it appear to the Council:-

1. that the courses of study and examination to be undergone in, or the proficiency required from candidates at any examination held by any University or medical institution,

2. that the staff, equipment accommodation, training and other facilities for instruction and training provided in such University or medical institution or in any college or other institution affiliated to that University, do not conform to the standards prescribed by the Council, the Council shall make a representation to that effect to the Central Government.

2. After considering such representation, the Central Govt. may send it to the State Government of the State in which the University or medical Institution is situated and the State Government shall forward it along with such remarks as it may choose to make to the University or Medical Institution, with an intimation of the period within which the University or medical institution may submit its explanation to the State Government.

3. On the receipt of the explanation or, where no explanation is submitted within the period fixed, then on the expiry of that period, the State Government shall make its recommendations to the Central Government

4. The Central Government, after making such further inquiry, if any, as it may think fit, may by notification in the official Gazette, direct that an entry shall be made in the appropriate Schedule against the said medical qualification declaring that it shall be a recognised medical qualification, only when granted before a specified date or that the said medical qualification if granted to students of a specified college or institution affiliated to any university shall be a recognised medical qualification only when granted before a specified date or, as the case may be, that the said medical qualification shall be a recognised medical qualification in relation to a specified college or institution affiliated to any University only when granted after a specified date.

28. Section 19-A provides for minimum standards of medical education and reads thus:

"19A. MINIMUM STANDARDS OF MEDICAL EDUCATION

1. The Council may prescribe the minimum standards of medical education required for granting recognised medical qualifications (other than postgraduate medical qualifications) by universities or medical institutions in India.

2. Copies of the draft regulations and of all subsequent amendments thereof shall be furnished by the Council to all State Governments and the Council shall before submitting the regulations or any amendment thereof, as the case may be, to the Central Government for sanction, take into consideration the comments of any State Government received within three months from the furnishing of the copies as aforesaid.

3. The Committee shall from time to time report to the Council on the efficacy of the regulations and may recommend to the Council such amendments thereof as it may think fit. "

29. Under section 33, the Council has been conferred with powers to make Regulations with the previous sanction of the Central Government and in terms thereof it has framed the Establishment of New Medical Colleges, Opening of Higher Courses of Study and Increase of Admission Capacity in Medical Colleges Regulation, 1993 (hereinafter referred to as "Regulations").

30. It would be noticed that at the time of submitting an application for permission of the Central Government to establish Medical College, the desirous Medical College has to apply for permission to set up new Medical College, who in addition to other documents, is required to submit consent of affiliation for the proposed medical college from a recognized university. This would be evident from qualifying criteria No.4, which reads thus:

> "4. That Consent of Affiliation for the proposed medical college has been obtained by the applicant from a recognised university."

31. In addition thereto, in terms of Part-III of the application, the same is required to contain the name of the university alongwith certified copy of consent of affiliation and State Government's permission.

32. Appendix I to the Regulations provides for instruction to the applicant for permission of the Central Government for starting new or higher courses (including P.G. Degree/Diploma and higher specialties) in a Medical College/institution, which reads thus:

> For starting higher courses in medical subjects (Annexure I) in the medical colleges/ institutions, the applicant should be a recognised medical college or institution. The applicant should conform to the guidelines laid down in the recommendations on Graduate/Postgraduate Medical Education adopted by the Medical Council of India and modified from time to time and approved by the Central Government. They should apply to the Central Government for this permission along with the State Government's permission. University's affiliation and in conformity with the Medical Council of India regulations along with the documentary evidence to show additional financial allocation, provision for additional space, provision for additional equipment and other infrastructural facilities and provisions of recruitment of additional staff as per Medical Council of India norms.

33. Appendix I also provides for Qualifying Criteria, which reads thus:

> 1-2………
>
> 3. Letter of University's permission for starting these courses at the existing medical college/institution has been obtained by the applicant from the University to which it is affiliated.
>
> 4……..6

34. It also provides for List of Enclosures, which reads thus:

> 1……
>
> 2. Certified copy of the consent of affiliation issued by a recognized University.
>
> 3-4……….

35. Now, what we can gather from the provisions of the MCI Act is that the committee constituted by the MCI is required to entertain the application for recognition, consider State opinion, cause inspection to be conducted by an expert team then grant or refuse recognition in terms of the Act. Once recognition is granted and public institution is permitted to commence the course, it is required to take an affiliation from the affiliating body, which is the University. Thus, grant of recognition and affiliation to an institute is condition precedent to running of the courses of the institute. If either of them is not granted to the institute, it would not be in a position to commence the relevant academic courses.

36. Grant of recognition is the basic requirement for the grant of affiliation. Therefore, it cannot be said that affiliation is insignificant or a mere formality on the part of the examining body. It is the requirement of law that the affiliation should be granted by the affiliating body in accordance with the prescribed procedure and upon proper application of mind.

37. 'Recognition' and 'affiliation' are expressions of distinct meaning and consequences. The affiliating body/examining body does not have any discretion to refuse the affiliation with reference to any of the factors which had been considered by the MCI while granting recognition. However, the examining body can always impose condition in relation to its own requirements. Some of which can be:

a) eligibility of students for admission;
b) conduct of examinations;
c) the manner in which the prescribed courses should be completed; and
d) to see that the conditions imposed by the MCI are complied with.

38. Despite the fact that 'recognition' itself covers the larger precept of 'affiliation' still the affiliating body is not to grant affiliation automatically but must exercise its discretion fairly and transparently while ensuring that conditions of the law of the university and the functions of the affiliating body should be complementary to the recognition of MCI and ought not to be in derogation thereto.

39. However, the purpose of 'recognition' and 'affiliation' is different. The difference was meticulously and succinctly delineated by the Hon'ble Supreme Court in ***Rajasthan Prdesh Vaidya Samiti, Sardarshahar and another*** vs ***Union of India and others***, (2010) 12 SCC 609, wherein it was held that the purpose of 'affiliation' is only to prepare and present the students for public examinations, whereas 'recognition' of the institute is for other purpose mentioned under the statute and unless the institute is recognized by the appropriate authority, the institute cannot be amenable to any other provision of the statute applicable in this regard. 'Recognition' is a governmental function, which signifies an admission or an acknowledgement of something existing before. The State or the State Authority can lay down the condition for recognition of an educational institution that the same must have particular amount of funds or number of students or standard of education and so on and so forth subject to provisions of the Constitution. It would be apt to reproduce the relevant observations, which read thus:

> [20] In The Principal and Ors. v. The Presiding Officer and Ors., 1978 AIR(SC) 344, this Court held that 'recognition' means that the school has been recognized or acknowledged by the appropriate authority under the Statute and 'affiliation' means that the students of that school are eligible to appear in the examination. Therefore, purpose of affiliation is only to prepare and present the students for public examination, recognition of a private school is for the other purposes mentioned under the Statute and unless the school is recognized by the appropriate authority, the school cannot be amenable to any other provision of the Statute applicable in this regard.
>
> [21] In Re: The Kerala Education Bill, 1957 AIR 1958 SC 956; and T.M.A Pai Foundation and Ors. v. State of Karnataka and Ors., 2002 8 SCC 481, this Court held that it is always open to the State or the Statutory Authority to lay down conditions for recognition of an educational institution namely, that the institution must have particular amount of funds or properties or number of students or standard of education and so on and so forth and it is also permissible for the Legislature to make a law prescribing conditions for such recognition, however, such a law should be constitutional and should not infringe any Fundamental Right of the minorities etc. Recognition is a Governmental function.
>
> [22] This Court has persistently deprecated the practice of an educational institution admitting the students and to allow them to appear in the examinations without having requisite recognition and affiliation. This kind of infraction of law has been treated as of very high magnitude and of serious nature. Students of a un-recognised institution cannot legally be entitled to appear in any examination conducted by any government, university or board. (Vide Minor Sunil Oraon Thr. Guardian and Ors. v. C.B.S.E. and Ors., 2007 AIR(SC) 458).
>
> [23] Similarly, recognition must be there with the school to make it subject to the provisions of the Act. Recognition signifies an admission or an acknowledgement of something existing before. To recognize is to take cognizance of a fact. It implies an overt act on the part of the person taking such cognizance. (Vide T.V.V. Narasimham and Ors. v. State of Orissa, 1963 AIR(SC) 1227).
>
> [24] In State of Tamil Nadu and Ors. v. St. Joseph Teachers Training Institute and Anr., 1991 3 SCC 87, this Court held that students of un-recognised institutions are not entitled to appear in any public examination held

by the Government and it is not permissible for the Court to grant relief on humanitarian grounds contrary to law to the person who claim to have passed any examination from such institutions.

25. In view of the above, it is evident that any institution which is not recognised cannot impart an education and students thereof cannot appear in the examination held by the government, university or Board."

40. Closer to the point in issue is a subsequent judgment of the Hon'ble Supreme Court in ***Bhartia Education Society*** vs. ***State of H.P.***, 2011 (4) SCC 527, wherein again the term 'recognition' and 'affiliation' came up for consideration and it was held that the purpose of 'recognition' and 'affiliation' is a different and it is apt to extract the relevant observations, which read thus:

> [19] The purpose of 'recognition' and 'affiliation' are different. In the context of NCTE Act, 'affiliation' enables and permits an institution to send its students to participate in the public examinations conducted by the Examining Body and secure the qualification in the nature of degrees, diplomas, certificates. On the other hand, 'recognition' is the licence to the institution to offer a course or training in teacher education.

41. It would be evidently clear from the aforesaid observations that 'affiliation' enables and permits an institution to send students to participate in the public examinations conducted by the Examining Body and secure the qualification in the nature of degrees, diplomas, certificates. Whereas, on the other hand, 'recognition' is the licence to the institution to offer a course or training in teacher education.

42. The Hon'ble Supreme Court in the aforesaid case was dealing with a case relating to National Council for Teacher Education Act, 1993 (for short NCTE Act) and it was observed that prior to the NCTE Act, in absence of apex body to plan and coordinate development of teachers education system, respective regulation and proper maintenance of the norms and standards in the teacher education system, including grant of 'recognition' was largely exercised by the State Government and Universities/Boards. It is only after the enactment of NCTE Act, the functions of NCTE as 'recognizing authority' and the Examining Bodies as 'affiliating authorities' became crystallized, though their functions overlap on several issues. NCTE Act recognizes the role of examining bodies in their sphere of activity.

43. On the same analogy, it can conveniently be held that prior to the MCI Act, in the absence of apex body to plan and coordinate, the development of education system, respective regulation and proper maintenance of the norms and standards in the teacher education system, including grant of 'recognition' was largely exercised by the State Government and Universities/Boards. However, after the enactment of MCI Act, the functions of the MCI as recognizing authority and the examining body as affiliating authority became crystallized. Meaning thereby that the role of the MCI is mainly confined to recognition, whereas the affiliation is best left to the State Government or the examining university.

44. Here, it would be advantageous to refer to earlier judgment of the Hon'ble Supreme Court in ***State of Madhya Pradesh and another*** vs. ***Kumari Nivedita Jain and others***, (1981) 4 SCC 296 wherein the powers conferred upon the MCI under MCI Act to make regulations to carry out the purpose of the Act have been clearly delineated and it was observed as under:

> "18. An analysis of the various sections of the Act indicate that the main purpose of the Act is to establish Medical Council of India, to provide for its constitution, composition and its functions; and the main function of the Council is to maintain the medical register of India and to maintain a proper standard of medical education and medical ethics and professional conduct for medical practitioners. The scheme of the Act appears to be that the Medical Council of India is to be set up in the manner provided in the Act and the Medical Council

will maintain a proper medical register, will prescribe minimum standards of medical education required for granting recognised medical qualifications, will also prescribe standards of post-graduate medical education and will further regulate the standards of professional conduct and etiquette and code of ethics for medical practitioners. The Act further envisages that if it appears to the Council that the courses of study and examination to be undergone in, or the proficiency required from candidates at any examination held by any University or Medical Institution do not conform to the standard prescribed by the Council or that the staff, equipment, accommodation, training and other facilities for instructions and training provided in such University or medical institution or in any college or other institution affiliated to that University do not conform to the standards prescribed by the Council, the Council will make a representation to that effect to the Central Government and on consideration of the representation made by the Council, the Central Government may take action in term of the provisions contained in Sec. 19 of the Act. The Act also empowers the Council to take various measures to enable the Council to judge whether proper medical standard is being maintained in any particular institution or not."

45. It would be clear from the extracted portion that the Medical Council of India has been set up to maintain a proper medical register, prescribe minimum standards of medical education required for granting recognised medical qualifications and also prescribe standards of post-graduate medical education and to regulate the standards of professional conduct and etiquette and code of ethics for medical practitioners. Whenever it appears to the Council that the courses of study and examination to be undergone in, or the proficiency required from candidates at any examination held by any University or Medical Institution do not conform to the standard prescribed by the Council or that the staff, equipment, accommodation, training and other facilities for instructions and training provided in such University or medical institution or in any college or other institution affiliated to that University do not conform to the standards prescribed by the Council, the Council will make a representation to that effect to the Central Government and on consideration of the representation made by the Council, the Central Government may take action in terms of the provisions contained in section 19 of the Act.

46. However, nowhere does the Act confer authority upon the Medical Council to itself affiliate a college with any particular University and that is best left to the State Government which is competent to affiliate the college to a State or other University provided the certificate for affiliation is otherwise in conformity with the norms and guidelines prescribed by the Central Government, i.e. Medical Council of India.

47. The affiliation primarily is the subject of the University of the State/Affiliating University/examining Body. The MCI, the State Government, the Affiliating Body or the University, as the case may, have been assigned a definite role under the provisions of the MCI Act. The provisions of the MCI Actidentify the scope and extent of power which each of the stakeholders is expected to exercise. While the MCI has been assigned the paramount role of according recognition, whereas the affiliation is best left to the State Government/University/examining body.

48. Notably, the Himachal Pradesh University Act, 1970 is the parent statute under which all the Universities in the State have to be constituted and this is so provided in section 7 of the Himachal Pradesh University Act, 1970, which reads thus:

7. Jurisdiction of the University.

(1) Save as other wise provided by or under this Act, the powers conferred on the University shall be exercisable in the area constituting Himachal Pradesh.

(2) Notwithstanding anything contained in any other law for the time being in force, no educational institution situated within the territorial limits of the University shall be admitted to any privilege of any other University, incorporated

by law in India, and any such privilege granted by any such other University to any such educational institution prior to the commencement of this Act, shall unless otherwise directed by the State Government be deemed to be withdrawn on the commencement of this Act, and any such institution shall be deemed to be admitted to the privileges of the Himachal Pradesh University.

(3) Where any institution or body established outside Himachal Pradesh seeks recognition from the University, then the powers and jurisdiction of the University shall extend to such institution or body subject to the laws in force in the State within which, and the rules and regulations of the University within whose jurisdiction, the said institution or body is situated.

49. Indubitably, the petitioners have not assailed the constitutionality of the aforesaid provision. Sub-section (2) of section 7 starts with the non-obstante clause and, therefore, would have predominance and would prevail inspite of anything contrary contained in any other law for the time being in force. Once that is so, the petitioners can have no right to claim that it should be affiliated to a University of its choice despite the fact as contained in section 7 (supra).

50. Even otherwise the State Government in its quest and endeavour to ensure common standards of maintaining the excellence of medical education within the State can always exercise its power to affiliate a private educational medical institute set up in a State to a particular University set up within the State, as this power vests within the exclusive domain of the State. The State can always act as a regulatory authority to ensure good quality education and see that the excellence of education standard does not fall below than what has been prescribed by the State Government. Rather, it is crucial for the State to act as a regulator even if this may have some effect on the autonomy of the private institution as that would not mean that the freedom of the Institute under Article 19 (1) (g) of the Constitution of India has been violated.

51. Similar issue came before this Court in CWP No. 7668 of 2013, ***titled as H-Private Universities Management Association (H-PUMA)*** Vs ***State of Himachal Pradesh and others***, decided on 23.7.2014 and this Court observed as under:

> ***20.*** In view of the various pronouncements of the Hon'ble Supreme Court, it can safely be concluded that in a right to establish an institution, inherent is the right to administer the same which is protected as part of the freedom of occupation under Article 19 (1) (g). Equally, at the same time, it has to be remembered that this right is not a business or a trade, given solely for the profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the public interest and private freedom determines the nature of public controls which can be permitted to be "permissible". Even the petitioners concede that they have established the institutions to ensure good quality education and would not permit the standard of excellence to fall below the standard as may be prescribed by the State Government. The petitioners also conceded that the State makes it mandatory for them to maintain the standard of excellence in professional institutions. Thus, ensuring that admissions policies are based on merit, it is crucial for the State to act as a regulator. No doubt, this may have some effect on the autonomy of the private unaided institution but that would not mean that their freedom under Article 19 (1) (g) has in any manner been violated. The freedom contemplated under Article 19 (1) (g) does not imply or even suggest that the State cannot regulate educational institutions in the larger public interest nor it be suggested that under Article 19 (1) (g), only insignificant and trivial matters can be regulated by the State. Therefore, what clearly emerges is that the autonomy granted to private unaided institutions cannot restrict the State's authority and duty to regulate academic standards. On

the other hand, it must be taken to be equally settled that the State's authority cannot obliterate or unduly compromise these institutions' autonomy. In fact it is in matters of ensuring academic standards that the balance necessarily tilts in favour of the State taking into consideration the public interest and the responsibility of the State to ensure the maintenance of higher standards of education.

23. The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in ***Visveswaraiah Technological University*** (supra)and reiterated in ***Mahatma Gandhi University*** (supra).

52. Importantly, not only the aforesaid judgment was assailed by filing Special Leave Petition, but the same was dismissed by the Hon'ble Supreme Court on 21.11.2014.

53. From the aforesaid detailed discussion, we are of the considered view that the provisions of the MCI Act identify the scope and extent of power which each of the State stakeholders, i.e. MCI, State Government, Affiliating Body or the University is expected to exercise. While the MCI has been assigned the paramount role of according recognition, the affiliation is best left to the State Government/University/examining body and, therefore, it is beyond the competence of the MCI or the Central Government to dictate terms to the State insofar as the question of grant of 'affiliation' is concerned or direct the State to affiliate a Medical College to a particular University. This is clearly beyond the powers conferred by the Constitution upon the Central Government or for that matter even the MCI. Even the College seeking affiliation is bound by the provisions of the Himachal Pradesh University Act, 1970, more particularly, the provisions contained in Section 7 thereof and cannot of its own claim any right or privilege to get affiliated to any University of its choice including petitioner No.2.

54. Having said so, we find no merit in this petition and the same is accordingly dismissed alongwith all applications leaving the parties to bear their own costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sandeep Chauhan .....Petitioner.

Versus

Union of India and others .....Respondents.

CWP No.300 of 2016.
Judgment reserved on: 22.11.2016.
Date of decision: December 20, 2016

Constitution of India, 1950- Article 226- Construction work on selected reaches on NH-70 was advertised – two bids were submitted – one was rejected by Tender Evaluation Committee – the Committee decided to cancel the tender process being single tender - the work was re-advertised – six bids were received out of which four were rejected – a complaint was filed regarding concealment of facts by respondent No.5, which was found to be correct on inquiry – another complaint was filed against the petitioner- the tender was again cancelled – the petitioner filed a writ petition challenging the cancellation process- held, that the officer of respondent No.2 was associated at the time of inquiry into complaint made against respondent No.5- he had written a letter subsequently that in case of opening of financial bid, no cognizance will be taken by respondent No.2- this shows lack of coordination between the respondents - the objection of

respondent No.5 regarding the fact that technical personnel will not be ready to work with the petitioner is an assumption belied by the documents showing that they had consented to work with the petitioner – petition allowed - letter quashed and set aside - respondents directed to award the work to the petitioner.(Para-17 to 29)

For the Petitioner :	Mr.B.C.Negi, Senior Advocate with Mr.Yashwardhan Chauhan, Advocate.
For the Respondents:	Mr.Ashok Sharma, Assistant Solicitor General of India, with Ms.Sukarma, Advocate, for respondents No.1 and 2. Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No.3 and 4. Mr.Bhuvnesh Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

If only the respondents would have taken extra care and not un-necessarily have blown up the issue only on account of lack of coordination amongst themselves and rectified the error without much ado, the filing of the instant petition could have conveniently been avoided and the precious public time of the Court could have been better utilized for the disposal of other cases.

2. The petitioner aggrieved by the cancellation of tender, has filed the instant petition claiming therein the following substantive reliefs:-

> *"i) Issue a writ of certiorari to quash* ***Annexure P-7 and Annexure P-8*** *i.e. letter dated 25.01.2016 and corrigendum dated 01.02.2016.*
>
> *ii) Issue a writ of mandamus directing the Respondent authorities not to implement* ***Annexure P-7 and Annexure P-8*** *i.e. letter dated 25.01.2016 and corrigendum dated 01.02.2016.*
>
> *iii) Issue a writ of mandamus directing the respondent authorities to award the work in question to the petitioner."*

Certain undisputed facts may be noticed.

3. The work of construction of retaining wall, breast wall, crash barrier, parapet etc. in selected reaches on NH-70 (New NH-03) Jallandhar- Hoshiarpur-Gagret-Mubarikpur-Amb-Kotli-Mandi road from Km. 152/0 to 196/495 in the State of Himachal Pradesh was sanctioned by the Ministry of Road Transport and Highways (for short MORTH) for Rs. 1084.40 lacs vide letter dated 19.02.2015.

4. Tender for the said work was called for by the State PWD for the first time on 21.05.2015 and only two bids qua the same were received. One of the bid was by the petitioner, whereas, other bid was by one SAB Industries Limited. These bids were evaluated on 16.07.2015 by the Tender Evaluation Committee. However, the work experience submitted by the SAB Industries Limited did not fulfill the relevant clause of the 'Detailed Notice Inviting Tender' (for short 'DNIT'). Since there was only a single bidder, the same was declared as non-responsive and the Committee decided to cancel the tender process being single tender in the first call in accordance with the Central Vigilance Commissioner (CVC) guidelines.

5. Tender for the aforesaid work was called for the second time by the State PWD on 23.08.2015 and this time six bids were received. The bids so received were evaluated by the Committee on 26.10.2015 and this time four bids were found to be non-responsive and ultimately only the bids of the petitioner and respondent No.5 were left in the fray. During the aforesaid meeting, the Executive Engineer, NH Division, informed the Committee that a complaint had been

received from the petitioner regarding concealment of facts with respect to the existing works in hand and commitments of the bids submitted by respondent No.5. He further informed that the veracity of this complaint was examined and was found to be genuine, as such, the Committee decided to declare the bid of respondent No.5 to be non-responsive under Clause 4.8 of DNIT which reads as under:-

> *"Even though the bidders meet the above qaualifying criteria, they are subject to be disqualified if they have:*
>
> *-Made misleading or false representations in the forms, statements and attachments submitted in proof of the qualification requirements…"*

6. However, in the meanwhile, the Regional Office of MORTH, Chandigarh i.e. respondent No.2 received various grievances from the bidders found to be non-responsive representing their cases and a complaint against the petitioner was received from respondent No.5. The representations/grievances/ complaints were referred to Chief Engineer (NH). As per the complaint submitted by respondent No.5, the petitioner had also concealed the fact regarding existing commitments of ongoing work and list of key personnel. Respondent No.2 in turn requested respondent No.4 to examine the veracity of this complaint before opening the financial bids. Respondent No.4 vide letter dated 21.01.2016 informed respondent No.2 that in order to deliberate upon the complaints of respondent No.5 and petitioner against each other, an internal Committee had been constituted, who in its meeting held on 14.12.2015 had decided that the objection against the petitioner was found to be false in respect of the concealed work details, however, regarding deployment of key personnel and requisite staff, it was decided by the Committee that an undertaking from the Contractor i.e. petitioner be taken before award of the work. It was further informed that the date for opening of financial bid had been fixed on 22.01.2016.

7. Respondent No.2 vide letter dated 25.01.2016 (Annexure P-7) requested respondent No.4 to scrupulously examine the veracity of various complaints and open the financial bids only after ascertaining that the charges levelled against the petitioner are found to be false and unfounded, lest tender process be annulled and short notice rebidding may be done. It also asked respondent No.4 not to proceed further with the opening of the financial bid as it was in disagreement with the procedure adopted and conveyed by respondent No.4 and it was observed that if the State PWD still goes ahead with the opening of the financial bid for the lone bidder i.e. petitioner, no cognizance will be taken by it and the same may be considered as null and void.

8. Respondent No.4 ultimately cancelled the tender process vide corrigendum dated 01.02.2016 (Annexure P-8) and the reason cited therein was "*cancelled due to administrative reasons*".

9. The petitioner has assailed the aforesaid action and would contend that the reasons cited in the letters dated 25.01.2016 and 01.02.2016 suffer from irrationality, unreasonableness besides being cryptic, vague and baseless and deserve to be quashed as respondents have failed to comply with the basic rules of natural justice and fair play.

10. The Union of India and the Regional Office of MORTH (respondents No.1 and 2) have filed their joint reply wherein the factual matrix of the case have not been disputed. However, it is claimed that the letter dated 21.01.2016 issued by the respondents was based upon the following:-

> *"(i) Submission of the undertaking by Sh.Sandeep Chauhan petitioner before award of the work that the requisite staff shall be deployed, does not absolve him from the charge of concealment of facts which was the basis for the declaration of Sh.Om Prakash Sharma and Sons as non-responsive by the Committee in its meeting held on 26.10.2015.*
>
> *(ii) There were some contradictions with regard to the way the complaint against Sh.Om Prakash Sharma & sons was dealt by CE(NH). If during the meeting*

of evaluation committee held on 26.10.2015, CE (NH) confirmed that the veracity of the complaint against Om Prakash Sharma & Sons was examined and found to be genuine, then why the same complaint was again got verified in writing on 13.01.2016."

11. It is further claimed that vide letter dated 25.01.2016, respondent No.2 had only expressed its disagreement with the procedure adopted and conveyed by respondent No.4. However, this letter was not meant to convey any sort of decision, judgment or did not even amount to issuing directions to respondent No.4 and was basically meant to ensure fairness in the bidding process and to avoid any procedural lapse. It is further contended that after opening of the financial bids on 23.01.2016, respondent No.4 of its own had cancelled the tender process citing administrative reasons and had not made the letter of respondent No.2 dated 25.01.2016 (Annexure P-7) the basis for cancellation of tender in the tender cancellation order. Therefore, it is not understood as to why letter dated 25.01.2016 (Annexure P-7) has been made the basis of this writ petition.

12. Respondents No.3 and 4 have filed their joint reply wherein they too have not disputed the factual matrix of the case and have specifically claimed that it was the letter issued by respondent No.2 dated 25.01.2016 (Annexure P-7) that eventually led to the cancellation of the tender process.

13. In addition to the aforesaid, it is averred that as per Clause 32 of Section 1 (instructions to bidders) in SBD, the Employer is having power to cancel the bidding process before award of contract and in view of this Clause, the action of the respondents is claimed to be legal and justified. It is also claimed that even if the respondent-department opts to proceed with the tender process, the Government of India i.e. respondents No.1 and 2 will not revalidate the sanction and for want of funds this project/work cannot be executed and, therefore, even on this ground the action of the respondents is claimed to be legal and valid.

14. Respondent No.5 has filed a separate reply and contested the petition mainly on the ground that his bid has wrongly been declared as non-responsive. Whereas, it was the petitioner, who had misrepresented by showing Engineers Sunit Thakur and Ambitabh Thakur as his key personnel knowing fully well that Engineer Sunit Thakur had gone abroad and staying there since long, whereas, Engineer Amitabh Thakur was himself an independent Contractor and would never agree to work with the petitioner and therefore, could not be key technical personnel of the petitioner. Therefore, in such circumstances, even the bid offered by the petitioner ought to have been declared as non-responsive.

15. For completion of records, we may notice that the petitioner on 02.07.2016 filed an application bearing CMP No.6691 of 2016 whereby he sought to place on record certain additional documents. In terms of para-3 of the application, it has been submitted that the petitioner had mentioned Shri Amitabh Thakur and Shri Narender Singh Chauhan as the key personnel against whom an objection was taken that these persons would not be ready and willing to work with the petitioner. However, when these persons were contacted, they have shown their readiness and willingness to work with the petitioner as per the certificates appended with the application as Annexures P-9 and P-10, respectively. Besides that one Shri Gaurav Chauhan is also stated to be ready and willing to work as site Engineer in the event of the bid in question being allotted to the petitioner and in support of such contention a certificate issued by Shri Gaurav Chauhan has been appended as Annexure P-11.

16. Notably, this application came up for consideration before this Court initially on 04.10.2016 and on the said date learned counsel for respondent No.5 stated at the Bar that he is under instructions not to file any response to the application. His statement was taken on record and his right to file response was ordered to be closed. Whereas, other respondents were granted three weeks' time to file response. Thereafter, when the matter came up for consideration on 25.10.2016, the respondents were granted further two weeks' time to file response to the

application, however, till date no response to the said application has been filed by the respondents.

We have heard the learned counsel for the parties and gone through the material placed on record.

17. Indubitably, it was the letter issued by respondent No.2 on 25.01.2016 (Annexure P-7) that triggered the entire action and compelled respondents No.3 and 4 to cancel the tender process.

18. Now, as regards respondents No.3 and 4, the only reason given by them for cancelling the tender is the letter dated 25.01.2016 (Annexure P-7) issued by respondent No.2, as would be evident from para-6 of the preliminary submissions which reads thus:-

> *"That the Govt. of India vide its letter No.RW/CH/HP/Misc/2760-62 dated 25-1-2016 communicated that the undertaking sought from petitioner will not absolve the petitioner as to whether he has wrongly mentioned the names of key personnel and concealed facts in his bid. The above communication also stated that if state PWD goes ahead with the opening of financial bid for the aforesaid work no cognizance will be taken by them and the same may be considered null and void. Hence, based upon this direction of respondent No.1 & 2 as well as public interest of road safety and lapse of sanction replying respondent decided to pass the order/corrigendum dated 1-2-2016 whereby the tender dated 23-08-2015 for the said work has been cancelled due to administrative reasons."*

19. Admittedly, the project in question is of respondents No.1 and 2 for which an amount of Rs. 1084.40 lacs already stands sanctioned and respondents No.3 and 4 are only the executing agencies. Therefore, once respondent No.2 itself had made the threatening observations in its letter dated 25.01.2016 (Annexure P-7), there was no option available with respondents No.3 and 4 but to cancel the tender process.

20. It is only now that respondents No.1and 2 in their reply have clarified that the letter dated 25.01.2016 had only expressed disagreement with the procedure adopted by respondent No.4 and had not asked him to cancel the tender process. The letter was basically to ensure fairness in the bidding process and to avoid any procedural lapse. Relevant portion of the reply reads thus:-

> *"10.That in the absence of proper response from the Chief Engineer, HP PWD, the Regional Officer, M/oRTH, vide letter No.RW/CH/HP/Misc/2760-62 dated 25.01.2016, expressing disagreement with the procedure adopted, conveyed to the Chief Engineer, HP PWD that if the State PWD goes ahead with the opening of the financial bid for the lone bidder i.e. "the petitioner", no cognizance will be taken by his office and the same may be considered as null and void. This letter of the Regional Officer, M/oRTH was not meant for any sort of decisive, judgmental or issuing direction to the Chief Engineer, HP PWD. This letter of the Regional Officer, M/oRTH, was basically meant to ensure fairness in the bidding process and to avoid any procedural lapse. A copy of letter No.RW/CH/HP/Misc./2760-62 dated 25.01.2016 of the Regional Officer, MORT&H, Chandigarh is being appended alongwith as Annexure R-2."*

21. It is evidently clear from the replies filed on behalf of the official respondents that there has been a complete lack of coordination and cooperation amongst them, though they were required to function harmoniously and work in unison as a team to achieve the desired target.

22. What is more surprising is that the meeting dated 26.10.2015, amongst others, was attended by Engineer Aditya Prakash, Regional Officer, on behalf of respondent No.2, in which the complaint made by the petitioner against respondent No.5 was found to be genuine and it was then that the bid of respondent No.5 was also declared to be non-responsive on account of concealment of fact and despite the petitioner being lone bidder, it was decided to

open the financial bid submitted by him. However, this very Officer i.e. Aditya Prakash vide letter dated 25.01.2016 retracted from what had been decided in the meeting dated 26.10.2015.

23. Apart from the above, it would be noticed that vide letter dated 25.01.2016, Aditya Prakash, the Regional Officer, in para-6 of the letter had clearly and unequivocally threatened that in case respondents No.3 and 4 still choose to go ahead with the opening of the financial bid for the work, no cognizance will be taken by his Office (respondent No.2) and the same be considered as null and void, as would be evident from paras 5 and 6 of the letter which reads thus:-

> "*5. The above mentioned content of letter of CE(NH) has been examined and found to be contradictory as far as dealing with the complaint of Sandeep Chauhan Contractor is concerned as mentioned in the minutes of the Technical Evaluation Committee meeting held on 26.10.2015 that*
>
> > *"Executive Engineer NH Division, HP PWD, Hamirpur informed that a complaint was received from Sandeep Chauhan, Govt. Contractor regarding concealment of the facts regarding existing work, in hand/commitments in the bid submitted by Om Prakash Sharma and sons. In this regard, CE (NH), chairman of the committee confirmed that the veracity of the complaint against Om Prakash Sharma & Sons was examined and found to be genuine."*
>
> *While, now it is stated in aforesaid letter of CE (NH) dated 21.01.2016 that in the meeting of PWD officers taken by CE (NH) on 14.12.2015 it was decided that complaint made by Shri Sandeep Chauhan Contractor was to be verified in writing to confirm the facts so that the financial bid is opened accordingly if found suitable. Thus, apparently during the meeting of Technical Evaluation Committee on 26.10.2015 the genuineness of the complaint of Sandeep Chauhan Contractor was not confirmed in writing. Further, the statement that "regarding key personnel it was decided to take undertaking from the contractor before award of work that the requisite staff shall be deployed as per Clause 4.5.4 of the Standard Bid Document" also not absolve Sandeep Chauhan Contractor as to whether he has wrongly mentioned the names of key personnel or not and concealed facts in his bid. The matter has accordingly been taken up with CE(NH) vide this office letter the same day dated 21.01.2016, again requesting thereby that the financial bid may be opened only after ascertaining that the charges levelled against the lone bidder left i.e. Sandeep Chauhan is false and unfounded, lest the tender process be annulled and short notice rebidding may be done.*
>
> *6. <u>As may be seen from the above, the issues being raised by this office/ELO Shimla are still to be properly responded by the State PWD w.r.t. various grievances/complaints involved. Under such circumstances, if the State PWD goes ahead with the opening of the financial bid for the work, no cognizance will be taken by this office and the same may be considered as null and void."</u>*

24. However, when reply to the writ petition was filed on behalf of respondents No.1 and 2, an affidavit sworn-in by one Abhilash Kumar, Engineer Liaison Officer, and a complete somersault has taken and it is averred that the letter dated 25.01.2016(Annexure P-7) was basically to ensure fairness in the bidding process and to avoid any procedural lapse and did not amount to a decision or a judgment or even a direction and, therefore, should not have been made the basis of the writ petition. If that was so, then why at the first place the letter dated 25.01.2016?

25. We have no doubt in our mind that the entire fiasco has been created by the official respondents themselves, in particular the respondent No.2 and the same has only resulted in precious time of the Court being wasted. It would have been better if the respondents No. 1

and 2 alongwith respondents No. 3 and 4 would have worked in tandem with a better coordination and thereby avoided such unsavoury mess.

26. Now, adverting to the objection of the respondents including respondent No.5 regarding the technical personnel mentioned by the petitioner in the bid document, according to them, would not be ready and willing to work with the petitioner. We find that this assumption has been clearly belied by the documents placed by the petitioner alongwith CMP No.6691 of 2016 annexed as Annexures P-9 and P-10, respectively. A perusal of these documents, reveal that the named technical personnels have consented to work with the petitioner.

27. As observed earlier, respondent No.5 has not contested this application by giving a statement before this Court on 04.10.2016, whereas, other respondents too have not contested this application despite having been given sufficient time and opportunity. Even otherwise, the question of engaging technical manpower would only arise if the contract is to be awarded in favour of the petitioner and for this purpose an undertaking from him for deployment of key personnel and staff has already been taken.

28. As there is virtually no opposition to the petition, we have no other option but to allow the same. Ordered accordingly. The letter dated 25.01.2016 (Annexure P-7) and corrigendum dated 01.02.2016 (Annexure P-8) are quashed and set aside and the respondents are directed to award the work in question to the petitioner within two weeks from today.

29. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Som Dutt Sharma ....Petitioner

Versus

The Presiding Judge, Industrial Tribunal-cum-Labour Court and another ....Respondents

CWP No. 8420 of 2010

Decided on : December 20, 2016

Industrial Disputes Act, 1947- Section 25- The petitioner was appointed as Librarian – his services were terminated after an inquiry, which was not proper – the Labour Court rejected the claim of the petitioner – held, that no objection was raised to the appointment of the Inquiry Officer – petitioner was unable to prove that he was deprived of an opportunity to examine the witnesses- serious allegations were made against the petitioner and the inquiry was rightly held to verify those allegations – the Writ Court will not act as a Court of appeal to disturb the findings of fact- writ petition dismissed.(Para-9 to 15)

Cases referred:

Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.
Deputy Inspector General of Police v. S. Samuthiram, (2013) 1 SCC 598
Commissioner of Police v. Mehar Singh, (2013) 7 SCC 685
State of West Bengal v. Sankar Ghosh, (2014) 3 SCC 610
Baljinder Pal Kaur v. State of Punjab, (2016) 1 SCC 671

For the petitioner : Mr. J.R. Poswal, Advocate.
For the respondents : None for respondent No.1.
Mr. Rahul Mahajan, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge:

By medium of this petition, petitioner-workman (herein after, 'workman'), has laid challenge to Award dated 15.9.2010 passed by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla in Ref. No. 69 of 2006, whereby claim of the petitioner has been dismissed.

2. Briefly stated the facts as emerge from the record are that the appropriate Government, in terms of Section 10 of the Industrial Disputes Act, 1947 (herein after, 'Act'), made following terms of reference to the learned Industrial Tribunal-cum-Labour Court, for adjudication:

> "Whether the dismissal from service w.e.f. 2.12.2003 of Shri Som Dutt Sharma S/o Late Shri Ganga Ram workman by the Management of M/s Sidhrtha Super Spinning Mills Ltd., Nilala Khera, Nalagarh, District Solan, HP w.e.f. 1.12.2003 after conducting domestic enquiry by the management is legal and justified? If not, what relief of service benefits and amount of compensation, the above aggrieved workman is entitled to"?

3. Petitioner by way of statement of claim stated before the Tribunal that he was appointed as Librarian by the respondent No.2-Company (hereinafter, 'respondent-company') on 15.6.1984 and worked as such till 2.12.2003, when his services were illegally and wrongly terminated without notice and against the mandatory provisions of the Act. Workman further claimed that on 22.9.2003, he was issued a charge sheet under the Certified Standing Orders, whereby he was called upon to explain his position vis-à-vis alleged charge sheet. Vide reply dated 25.9.2003 (sic 25.9.2007), workman denied all the charges but the respondent-Company dissatisfied with the explanation having been rendered by the workman, appointed one Shri Sanjeev Sharma, Advocate who at the relevant time was junior of Shri Rajeev Sharma, Advocate, presently working as Consultant with the respondent-Company, as an Enquiry Officer in order to enquire into the facts of the case. As such, the enquiry was a mere eye-wash. Workman further claimed that the Enquiry Officer refused to record the statements of four witnesses, as a result of which, grave prejudice was caused to him. Workman further claimed that since he had raised voice against agreement dated 31.2.2003, , respondent-Company was hell bent to make him scapegoat. Workman further averred that there was a case registered under Section 406 IPC against one Devinder Jain, MD of the respondent-Company and for this reason also the Management of respondent-Company was maltreating the workman, on one pretext or the other as workman was one of the prosecution witnesses in that case. Workman further averred that a false case under Section 354 IPC was also got registered against him and in this regard, he had made a representation, but his services were terminated without notice and in an illegal manner without resorting to the mandatory provisions of the Act, as such, workman deserves to be reinstated in service with all consequential benefits including back wages.

4. Respondent-Company by way of reply to the statement of claim, refuted the claim of the workman, by raising preliminary objections regarding maintainability. On merits also, respondent-Company refuted the claim of the workman by stating that the workman continued to remain in employment with the respondent-Company with effect from 15.6.1984 till 2.12.2003, when his services were dismissed. It was denied that his services had been dismissed in an illegal and improper manner against the provisions of the Act. Respondent-Company claimed that disciplinary proceedings were initiated against the workman on the basis of a written complaint having been filed by one Shri Vashisht Pandey, wherein it had been alleged that he had tried to outrage the modesty of his wife while residing in the bachelor quarters of the labour colony. Said Vashisht Pandey had also lodged a complaint with the police regarding same incident. Respondent-Company further claimed that on the basis of allegations having been made by the complainant Vashisht Pandey, Management decided to conduct an independent inquiry against the workman in order to ascertain truth of allegations leveled against him. Accordingly, a person

namely Shri Sanjeev Sharma was appointed as Enquiry Officer, who conducted enquiry strictly in terms of Certified Standing Orders and principles of natural justice. Respondent-Company further claimed that due and admissible opportunity of being heard was afforded to the workman by the Enquiry Officer before submitting final report. In nutshell, respondent-Company claimed that the Enquiry Officer having considered all the facts and circumstances of the case, submitted his report, on the basis of which, respondent-Company issued show cause notice-cum-proposed penalty, calling upon the workman to file reply. Pursuant to reply having been filed by the workman to the show cause notice, respondent-Company being dissatisfied with the explanation rendered by the workman, dismissed him from service. Respondent-Company further claimed that the management of the respondent-Company having regard to the misconduct of the workman, particularly his involvement in an immoral act, imposed penalty of dismissal, that too, after resorting to the provisions of the Act as well as principles of natural justice.

5. Learned Tribunal below, on the basis of pleadings as well as evidence led on record by the respective-parties, answered the reference in negative and rejected the claim of the workman. Being aggrieved and dissatisfied with the impugned award, workman approached this Court, by way of present petition, seeking following main relief(s):

> "i) That a writ in the nature of certiorari may kindly be issued, quashing the impugned award dated 15.9.2010 (Annexure P-10).
>
> ii) That a writ in the nature of mandamus may kindly be issued directing the respondent No.2 to reinstate the petitioner with all consequential benefits.
>
> iii) That the respondents may kindly be directed to pay the salary for the period for which petitioner remained out of job and other benefits which have not been paid to the petitioner since 2003. The entire arrears may kindly be directed to be paid to the petitioner alongwith 12% interest from the date of its due."

6. Mr. J.R. Poswal, learned counsel representing the workman, vehemently argued that impugned award passed by learned Tribunal below is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record by the respective parties, as such, same deserves to be set aside. Mr. Poswal, while referring to the impugned award as well as record, vehemently argued that learned Tribunal below failed to take into consideration that the workman was working with the respondent-Company from the year 1984, without any interruption and as such his services could not be terminated in a casual manner without resorting to the provisions of the Act. While referring to the impugned award, Mr. Poswal, strenuously argued that learned Tribunal below before returning findings on the controversy at hand, failed to frame proper issues and as such faulted in returning findings on issues No. 1,2 and 4, because, admittedly, these are without any reasons. Mr. Poswal, further contended that the learned Tribunal below failed to appreciate that there was nothing on record suggestive of the fact that respondent-Company before terminating the services of the workman, issued any notice as envisaged under the Act, to the workman, calling upon him to explain his conduct and as such impugned award can not be allowed to sustain. Mr. Poswal further contended that since Smt. Sarita Pandey, was not a worker in the respondent-Company, no action, if any, could be taken by the respondent-Company on her complaint, especially when in no manner, she could be termed as 'workman' as defined under the Act and as such no domestic inquiry could be initiated against the workman and thus the impugned action of dismissing the workman by the respondent-Company, ought to have been quashed and set aside by the learned Tribunal below while adjudicating the reference made to it by the appropriate Government. Mr. Poswal, further contended that the respondent-Company could not terminate the services of the workman on the basis of domestic enquiry, more particularly, in terms of provisions of Section 11-A of the Act, wherein enquiry can only be conducted on the basis of complaint of a workman. But in the instant case, complaint has been lodged by Sarita Pandey, who was not a worker at any point of time and as such action of the respondent-Company in dismissing the services of the workman

on the basis of domestic enquiry deserves to be set aside. While concluding his arguments, Mr. Poswal, forcefully contended that a bare perusal of impugned award clearly suggests that learned Tribunal below failed to appreciate the evidence in its right perspective, as a result of which, grave prejudice has been caused to the workman, who admittedly, was not allowed to examine his witnesses by the Enquiry Officer, during the disciplinary proceedings. He further contended that the learned Tribunal below miserably failed to take note of the judgment Ext. PA, placed on record by the workman, to demonstrate that he was acquitted in criminal case having been filed by aforesaid Sarita Pandey. Since workman was acquitted in criminal proceedings, he was entitled to the benefit of same in the domestic enquiry proceedings. In the aforesaid background, Mr. Poswal, prayed that impugned order of dismissal having been issued by the respondent-Company, may be set aside after setting aside the impugned award passed by the learned Tribunal below and workman be held entitled to reinstatement with back wages.

7. Mr. Rahul Mahajan, learned counsel representing the respondent-Company, supported the impugned award passed by the learned Tribunal below. Mr. Mahajan, while referring to the impugned award passed by learned Tribunal below vehemently argued that there is no illegality or infirmity in the impugned award passed by learned Tribunal below and same is based upon correct appreciation of evidence adduced on record by the respective parties and as such there is no occasion for this Court to interfere with the same. While refuting the contentions having been raised by the learned counsel representing the workman, Mr. Mahajan strenuously argued that perusal of award as well as record clearly suggests that the workman was unsuccessful in proving that domestic enquiry against him was not conducted in accordance with law by not resorting to the principles of natural justice. Mr.Mahajan, specifically invited attention of this Court to the reasoning having been given by learned Tribunal below, to demonstrate that each and every aspect of the matter has been dealt with meticulously by the learned Tribunal below and as such there is no scope of interference by this Court, especially in view of findings of fact recorded by the learned Tribunal below. In this regard he placed reliance upon judgment passed in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd. 2014 AIR SCW 3157.*** While concluding his arguments, Mr. Mahajan, further contended that acquittal in criminal proceedings can not be ground for automatic reinstatement, especially when individual is held guilty in domestic enquiry. In the aforesaid background, Mr. Mahajan, prayed for dismissal of the writ petition.

8. I have heard the learned counsel for the parties and also gone through the impugned award as well as record.

9. During proceedings of the case, this Court had an occasion to peruse the impugned award as well as other documentary evidence available on record, perusal whereof nowhere suggests that the learned Tribunal below misread and misconstrued evidence adduced on record by the respective parties, rather close scrutiny of impugned award clearly suggests that learned Tribunal below has dealt with each and every aspect of the matter meticulously and there is no scope of interference by this Court. However, with a view to ascertain the genuineness and correctness of the submissions having been made by the learned counsel representing the workman, this Court carefully examined evidence led on record by the respective parties. Learned counsel representing the petitioner vehemently argued that Shri Sanjeev Sharma, Advocate, who happened to be junior of Mr. Rajeev Sahrma, Advocate was appointed as Enquiry Officer by the management of respondent-Company solely with a view to defeat the claim of the workman but perusal of impugned award as well as record clearly suggests that no objection, if any, was ever raised by the workman at the time of appointment of Sanjeev Sharma, Advocate, as Enquiry Officer, who at the time of appointment, called upon the parties and explained the procedure to be followed in the enquiry proceedings. If workman was at all aggrieved with the appointment of Shri Sanjeev Sharma, Advocate as an Enquiry Officer, he could always raise objection, if any, before the respondent-Company or the Enquiry Officer stating therein reasons, if any, against appointment of Sanjeev Sharma, as Enquiry Officer. There is nothing on record suggestive of the fact that at the relevant time, workman raised any objection with regard to appointment of Sanjeev Sharma, as an Enquiry Officer. Similarly, this Court sees no force in the contentions

having been raised by the workman that no opportunity of examining witnesses was afforded by the aforesaid Enquiry Officer because learned Tribunal below has specifically recorded while returning its findings that there is nothing on record to show that which were the four witnesses, he wanted to examine and Enquiry Officer did not allow him to examine. Though the workman has stated that during enquiry proceedings, he was given opportunity to cross-examine witnesses of management but he was not allowed to examine his witnesses. But as has been notice above, workman was unable to prove before learned Tribunal below that which were those witnesses, whom he wanted to examine and as such there is no illegality and infirmity in the findings returned by the Court below that workman was unable to prove allegations against Enquiry Officer, Sanjeev Sharma. Similarly, nothing was placed on record by the workman to suggest that Sanjeev Sharma, being junior of one Shri Rajeev Sharma, Advocate, who happened to Consultant of the respondent-Company, was biased against him in any manner and he did not conduct enquiry in a fair and proper manner by resorting to the principles of natural justice. In the facts and circumstances of the case, it has been recorded by the learned Tribunal below that record clearly suggests that the workman was afforded due opportunity to be represented by Defence Assistant of his choice by the Enquiry Officer and to avail opportunity to cross-examine the witnesses of the respondent-Company. Hence, this Court sees no force in the contentions having been raised by the learned counsel representing the workman that learned Tribunal below has failed to appreciate the evidence its right perspective. Similarly, record clearly reveals that domestic enquiry was conducted by the Enquiry Officer in a most fair manner and due and admissible documents were made available to the workman during enquiry proceedings and pursuant to notice Exts. RC and RD, workman himself joined enquiry and examined witnesses. Learned Tribunal below after perusing zimni orders having been passed by Enquiry Officer, concluded that it clearly suggests that after completion of enquiry, report was given to the workman and he had also received notice from the respondent-Company regarding proposed penalty Ext. RD. Sanjeev Sharma, Advocate, Enquiry Officer, while deposing before the learned Tribunal below as RW-1 specifically proved that he was appointed as Enquiry Officer by the respondent-Company and he conducted enquiry against workman, after sending notice to both the parties specifically disclosing procedure to be followed by him while conducting enquiry. This Court, after carefully examining deposition of Sanjeev Sharma, sees no reason to disagree with the findings of the learned Tribunal below that domestic enquiry was conducted strictly in accordance with Certified Standing Orders.

10. Now, the Court would be adverting to the another contention raised by the learned counsel representing the workman, that no domestic enquiry could be initiated against him on the complaint of Smt. Sarita Pandey, who was not a workman. This Court, sees no force in the aforesaid contention of the learned counsel representing the workman because admittedly, complaint in the present case was lodged by the husband of Sarita Pandey i.e. Vashisht Pandey, who was admittedly workman as defined under Industrial Disputes Act. Since serious allegations were leveled against workman, by the husband of Sarita Pandey, respondent-Company in its wisdom thought it proper to get the matter investigated and as such it can not be said that no enquiry, could be initiated against the workman, on the basis of complaint having been made by the wife of fellow workman. Since a workman of the Company had specifically complained against the workman, respondent-Company rightly conducted enquiry against workman and after offering due opportunity of hearing, awarded appropriate punishment, more over, record nowhere suggests that the workman was able to prove on record, motive, if any, of husband of Sarita Pandey, to falsely implicate him in the case and as such aforesaid argument having been made by the workman deserves outright rejection.

11. As far as judgment of acquittal of workman, who has been held guilty in enquiry proceedings, vide Ext. PA in criminal proceedings having been initiated at the behest of wife of fellow workman, Vashisht Pandey is concerned, same was rightly not taken into consideration by the learned Tribunal below because it is well settled by now that once an employee is acquitted by a criminal court, as a matter of right he /she can not be reinstated in service. In this regard,

reliance is placed on judgment rendered by Hon'ble Apex Court in **Deputy Inspector General of Police v. S. Samuthiram,** reported in (2013) 1 SCC 598, wherein Apex Court has held as under:

> "26. As we have already indicated, in the absence of any provision in the service rule for reinstatement, if an employee is honourably acquitted by a Criminal Court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that the strict burden of proof required to establish guilt in a criminal court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile etc. In the case on hand the prosecution did not take steps to examine many of the crucial witnesses on eth ground that the complainant and his wife turned hostile. The court, therefore, acquitted the accused giving the benefit of doubt. We are not prepared to say in the instant case, the respondent was honourably acquitted by the criminal court and even if it is so, he is not entitled to claim reinstatement since the Tamil Nadu Service Rules, do not provide so.
>
> 27. We have also come across cases where the service rules provide that on registration of a criminal case, an employee can be kept under suspension and on acquittal by the criminal court, he be reinstated. In such cases, the re-instatement is automatic. There may be cases where the service rules provide in spite of domestic enquiry, if the criminal court acquits an employee honourably, he could be reinstated. In other words, the issue whether an employee has to be reinstated in service or not depends upon the question whether the service rules contain any such provision for reinstatement and not as a matter of right. Such provisions are absent in the Tamil Nadu Service Rules.
>
> 28. In view of the above mentioned circumstances, we are of the view that the High Court was not justified in setting aside the punishment imposed in the departmental proceedings as against the respondent, in its limited jurisdiction under Article 226 of the Constitution of India."

12. Reliance is further placed on judgment rendered by the Hon'ble Apex Court in **Commissioner of Police v. Mehar Singh**, reported in (2013) 7 SCC 685 and **State of West Bengal v. Sankar Ghosh**, reported in (2014) 3 SCC 610, wherein above judgment has been followed. This judgment has further been followed in **Baljinder Pal Kaur v. State of Punjab**, reported in (2016) 1 SCC 671.

13. As far as judgment passed by the Hon'ble Apex Court in case ***Bhuvnesh Kumar Dwivedi vs. M/s Hindalco Industries Ltd.*** is concerned, there can not be any quarrel with the settled proposition of law that the Courts while examining correctness and genuineness of the Award passed by Tribunal has very limited powers to appreciate the evidence adduced before the Tribunal below, especially the findings of fact recorded by the Tribunal below and same can not be questioned in writ proceedings and writ court can not act as an appellate Court. Careful perusal of aforesaid judgment having been relied upon by the learned counsel representing the Management, clearly suggests that error of law which is apparent on the face of record can be corrected by writ Court but not an error of fact, however, grave it may appear to be. Hon'ble Apex Court has further held in the aforesaid judgment that if finding of fact is based upon no evidence that would be recorded as error of law which can be corrected by a writ of certiorari.

Hon'ble Apex Court has further held that in regard to findings of fact recorded by Tribunal, writ of certiorari can be issued if it is shown that in recording said findings, tribunal erroneously refused to admit admissible evidence or erroneously admitted inadmissible evidence, which influenced impugned findings. It would be profitable to reproduce following paras of the judgment:

> "16. ………The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior Courts or tribunals: these are cases where orders are passed by inferior Courts or Tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is no entitled to act as an Appellate Court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as result of the appreciation of evidence cannot be reopened for questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ Court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

14. In the instant case, as has been discussed in detail, learned Tribunal below has dealt with each and every aspect of the matter meticulously and there is no error of law or fact apparent on record, which can be corrected by this Court while exercising writ jurisdiction.

15. Consequently, in view of the aforesaid law having been laid down by the Apex Court, this Court sees no force in the contentions having been raised by the workman that learned Tribunal below ought to have allowed his claim in view of judgment rendered by criminal Court in criminal proceedings initiated at the behest of wife of Vashisht Pandey,.

16. Accordingly, the writ petition is dismissed being without merits. Award dated 15.9.2010 passed by the learned Presiding Judge, Industrial Tribunal-cum-Labour Court, Shimla in Ref. No. 69 of 2006 is upheld. Pending applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

The Tiara Co-operative Agriculture Service Society Ltd. …Petitioner.

Versus

State of Himachal Pradesh and others. …Respondents.

CWP No. 3148/2016
Reserved on: 19.12.2016
Decided on: 20.12. 2016

Constitution of India, 1950- Article 226- Petitioner, a cooperative society filed a writ petition seeking quashing of inspection note and the office order issued on the basis of the inspection note – held, thatrevisional power has been given to the State Government under Section 94 of H.P. Cooperative Societies Act, 1968, where there is no provisions of appeal – the petitioner can approach the competent authority for the redressal of his grievances – the alternative and efficacious remedy is available to the petitioner – petitioner is required to pursue that remedy and not to invoke the writ jurisdiction of the High Court- petition dismissed as not maintainable.

(Para-5 to 19)

Case referred:

State of Bihar and others vs. Jain Plastics and Chemicals Ltd; (2002 1 SCC 216

For the Petitioner: Mr. Ajay Sharma, Advocate.

For the Respondents: Mr. Shrawan Dogra, A.G. with Mr. V.S. Chauhan, Mr. Romesh Verma, Addl. A.Gs. and Mr. Kush Sharma, Dy. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge:

The petitioner is a Cooperative Society and has filed the instant petition primarily seeking quashing of the inspection note (Annexure P-4) submitted by respondent No.4 and has further sought quashing of office order dated 16.8.2016 (Annexure P-6) whereby the Assistant Registrar, Co-operative Societies, Dharamshala has, on the basis of the inspection note, ordered an inquiry (surcharge proceedings) against the petitioner under Section 69 (1) of the Himachal Pradesh Co-operative Societies Act, 1968 (for short "the Act") by appointing the Block Inspector as an Inquiry Officer, who has further been directed to submit his report within one month.

2. In addition to the aforesaid reliefs, the petitioner has also prayed for quashing of the notice (Annexure P-12) issued to it seeking therein its justification and comments regarding appointment of two employees being in violation of the applicable laws.

3. The petitioner was asked to justify the maintainability of the petition on the ground of availability of an alternative and efficacious remedy under the Act.

4. However, learned counsel for the petitioner would vehemently argue that no such statutory remedy is available to the petitioner and, therefore, it has filed the instant petition.

5. We have gone through the provisions of the Act and Rules and are of the considered view that the petitioner has not only an alternative but efficacious statutory remedy available to it under the Act.

6. Chapter-VIII of the Act specifically deals with the audit, inquiry, inspection and surcharge. Section 65 therein deals with inspection of co-operative societies. Section 67 deals with inquiry by the Registrar. Whereas, Section 69 relates to surcharge proceedings, which are to be initiated in case during the course of an audit, inquiry, inspection or the winding up of a co-operative society, it is found that any person who is or was entrusted with the organization or

management of such society, or who is or has at any time been an officer or an employee of the society, has made any payment contrary to the provisions of the Act, the rules or the bye-law or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to the society, the Registrar may, of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorized by him, by an order in writing in this behalf, to inquire into the conduct of such person.

7. Chapter-XII relates to the jurisdiction, appeal and review and the relevant provisions for the adjudication of this petition is contained in Section 94, which reads thus:

> "4. Review and Revision:— (1) The State Government except in a case in which an appeal is preferred under section 93 may call for an examine the record of any inquiry or inspection held or made under this Act or any proceedings of the Registrar or of any person subordinate to him or acting on his authority, and may pass thereon such orders as it thinks fit.
>
> (2) The Registrar may at any time,—
>
> (a) review any order passed by himself; or
>
> (b) call for and examine the record of any inquiry or inspection held or made under this Act or the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit;
>
> Provided that, before any order is made under sub-section (1) and (2), the State Government or the Registrar as the case may be shall afford to any person likely to be affected adversely by such orders an opportunity or being heard.
>
> "Provided further that every application under sub-section (1) and (2), to the State Government or the Registrar, as the case may be shall be made within ninety days from the date of the communication of the order sought to be reviewed or revised."

8. A bare perusal of the aforesaid provisions clearly shows that this Section gives revisional powers to the State Government in a case where no appeal under section 93 of the Act has been preferred and similar powers have been conferred upon the Registrar to be exercised either *suo motu* or on an application of a party, provided the same is preferred within 90 days from the date of communication of the order sought to be reviewed or revised and further that the person(s) likely to be effected adversely by such order is afforded an opportunity of being heard. It is immaterial whether the revisional power is exercised, on action initiated at the instance of the interested party or *suo motu*, the order passed would be within jurisdiction.

9. This Section specifically deals with the power of the State Government/Registrar to call for and to examine the record of any inquiry or inspection held or made under this Act or any proceedings. The State Government can examine any proceedings of the Registrar or any person subordinate to him or acting on his authority, whereas the Registrar is empowered to call for and examine the proceedings of any person subordinate to him or acting on his authority and if it appears to him that any decision, order or award or any proceedings so called or should for any reason be modified, annulled or reversed, may pass such order thereon as he thinks fit.

10. However, it needs to be clarified that if revisional application is not maintainable, fortiori *suo motu* powers cannot also be exercised.

11. The power exercised by the State Government/Registrar under Section 94 of the Act is in the nature of supervisory jurisdiction conferred upon them.

12. In terms of the first proviso, the State Government or the Registrar, as the case may be, is obliged to afford to any person likely to be effected adversely by such order an opportunity of being heard. In terms of the section proviso, every application under sub-section (1) and (2), to the State Government or the Registrar, as the case may be, has to be made within 90 days from the date of the communication of the order sought to be reviewed or revised.

13. In view of what has been observed above, we can safely come to the following conclusions:

i) The State Government or the Registrar under Section 94 of the Act can exercise its *suo motu* revisonal jurisdiction or on an application made by an aggrieved party;

ii) the remedy of revision before the State Government is barred only in the cases where an appeal has already been preferred under section 93 of the Act;

iii) the remedy of revision either *suo motu* or otherwise can be exercised only against the decision or order passed by the authority under the Act or proceedings arising out of the Act or the Rules framed thereunder. However, this remedy cannot be invoked against an order passed by the society;

iv) the *suo motu* power of revision cannot be exercised by the State Government or the Registrar, as the case may be, if at the instance of an aggrieved party, the revision is not maintainable, fortiori *suo motu* power cannot also be exercised.

14. On the basis of the aforesaid application, we have no hesitation to conclude that the petitioner if aggrieved by the inspection note (Annexure P-4) on the basis of which, surcharge proceedings (Annexure P-6) have been ordered can conveniently approach the competent authority for the redressal of its grievance under section 94 of the Act.

15. As regards the communication (Annexure P-12) dated 21.9.2016, it is for the petitioner to file reply to the said communication. No exception can be taken to the same as it only calls upon the petitioner to justify the appointments of its employees and this communication *per se* does not adversely effect the rights of the petitioner.

16. In view of the aforesaid discussion, we are of the firm view that writ petition under Article 226 of the Constitutional of India is not the proper proceedings for adjudicating the disputes as raised in the instant petition, more especially, when not only an alternative but equally efficacious and proper remedy is available to the petitioner under the Act.

17. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226. [See: ***State of Bihar and others*** vs. ***Jain Plastics and Chemicals Ltd***; (2002 1 SCC 216.

18. In view of the aforesaid discussion, we are of the considered view that the instant petition is not maintainable as the proper remedy for the petitioner is to approach the statutory authorities in terms of the Act.

19. Before parting, we may observe that anything observed hereinabove shall not be construed to be opinion on the merits of the case.

20. With these observations, the petition is dismissed, so also the pending application(s). The petitioner is at liberty to pursue his remedy under the Act. Costs easy.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Dr. Y.S. Parmar University of Horticulture and Forestry, Nauni …Appellant
Versus
Mr. Satish Chand …Respondent

LPA No. 203 of 2015 with
LPA's No. 163, 164, 165 and 166 of 2016
Reserved on: December 8, 2016
Decided on: December 21 , 2016

Constitution of India, 1950- Article 226- Writ petitioners were regularized as hostel attendants vide different office orders- they claimed that they were discharging the duties of higher post of Hostel Assistants and are entitled to the pay of the same– University had proposed the upgradation of the post but the proposal was returned by the Comptroller - the writ petition was allowed by the Writ Court holding that the University had proposed the upgradation of the post which strengthens the claim of the writ petitioners- held in appeal that University had 11 hostels and only four persons are occupying posts of regular Hostel Assistants – writ Court had rightly held that the writ petitioners are looking after the work of Hostel Assistants – the judgment was based upon correct appreciation of fact and law- however, the petitioners are entitled to the arrears for the period of three years prior to filing of writ petition.(Para-11 to 19)

Cases referred:

Jai Dev Gupta versus State of Himachal Pradesh and another, AIR 1998 SC 2819
Union of India and others versus Tarsem Singh, (2008) 8 SCC 648
Asger Ibrahim Amin versus Life Insurance Corporation of India, JT 2015 (9) SC 329

For the appellant: Mr. Balwant Singh Thakur, Advocate
For the respondent(s): Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Thakur, Advocate.

The following judgment of the Court was delivered:

Per Sandeep Sharma, Judge:

Since common questions of law and facts are involved in all these appeals, same were taken up together for hearing and are being disposed of vide this common judgment.

2. These Letters Patent Appeals are directed against judgment dated 17.4.2015 rendered by the learned Single Judge of this Court in a batch of petitions i.e. lead case being CWP No. 4615 of 2012 titled **Satish Chand vs. Dr. Y.S. Parmar University**, whereby the petitions have been partly allowed and appellant University has been directed to pay to the respondents pay scale of Hostel Assistants from the time they were designated as Hostel Attendants. Appellant has also been directed to pay interest at the rate of 9% per annum till the date of payment.

3. Facts in brief emerging from the record are that the respondents after joining the services of the appellant-University were regularized as Hostel Attendants vide different office orders. The respondents claimed in the petition that though their services were regularized as Hostel Attendants but ever since they were performing duties of higher post of Hostel Assistants. It is the case of the respondents in the writ petition that there are only four posts of regular Hostel Assistants against eleven hostels and therefore, in the absence of regular Hostel Assistants, it is the respondents, who are discharging the duties of Hostel Assistants.

Respondents thus claimed equal pay for equal work. The writ petition was filed mainly with the following main relief(s):-

> "a) The writ of mandamus be issued against respondent, directing them to remove the anomaly in the pay scale of petitioner and respondent may further be directed to release the pay scale of Rs.3120-5160 w.e.f. 1996 and subsequently revised to Rs. 5910-20200 w.e.f. January, 2006 to the petitioner being Hostel Attendant as his counter part in the departments of State Govt. and H.P. University are being paid the pay scale of Rs.5910-20200 w.e.f. January, 2006 onwards alongwith consequential benefits.
>
> b) The respondents deserves to be directed to upgrade the post of Hostel Attendant to Hostel Assistant from class 1V to 111 as has been upgraded by the State Govt., CSKHPKV Palampur and H.P. University.
>
> b-a) The respondent may be directed to follow the principles of equal pay for equal work, further direct them to pay the scales of Hostel Assistant to the applicant because the applicant is performing the duties of Hostel Assistant.
>
> c) The respondents may be directed to release the arrears of pay to the petitioner w.e.f. Oct. 1999 till date along with 18% interest P.A."

4. During the course of hearing before the learned Single Judge, the respondents restricted their claim to relief (b-a) only.

5. Appellant University filed its reply and claimed that the Hostel Attendant is feeder category for promotion to the post of Hostel Assistant and case of upgradation of Hostel Attendants to that of Hostel Assistants in the revised pay scale of Rs. 5910-20200+1900 GP was sent to the Comptroller for being placed before the Finance Committee. However, the Comptroller returned the case with the observation that the case may be re-examined in light of approved core cadre strength and existing working strength. University further stated that the management vide item No. 8 of the proceedings of the meeting held on 30.3.2011 had approved the core strength of different categories of posts vide notification dated 8.4.2011 and the surplus post of different categories were abolished vide office order dated 25.4.2011 but the core strength was not approved by the State Government and as such fresh core cadre strength proposal was sent to the State Government vide letter dated 30.1.2014 and approval of same was stated to be awaited.

6. The learned Single Judge after hearing the learned counsel for the parties, came to the conclusion that as the respondents were discharging duties of the post of Hostel Assistant and it was the University itself, which proposed upgradation of posts of Hostel Attendants to that of Hostel Assistants, therefore, it strengthens the claim put forth by the respondents that in fact they are discharging and performing duties of Hostel Assistants in the absence of regular Hostel Assistants. The learned Single Judge thus partly allowed the petitions as noticed above.

7. The University being aggrieved, challenged the judgment passed by learned Single Judge by filing the present appeal.

8. Mr. Balwant Singh Thakur, learned counsel appearing for the appellant-University vehemently argued that that the judgment passed by the learned Single Judge is not based on correct appreciation of facts available on record as well as Rules governing the field, as such, same is not sustainable, in the eyes of law. He further contended that the findings returned by the learned Single Judge that the respondents though designated as Hostel Attendants are in fact working as Hostel Assistants, are solely based upon certificate (Annexure PA) issued by the Warden of the Hostel, who was not competent to issue such certificate and as such same could not be taken into consideration while recording aforesaid findings. Mr. Thakur further argued that the learned Single Judge failed to appreciate that the post of Hostel Assistant is promotional post for feeder post of Hostel Attendants and same can not be equated as claimed by the respondents. While concluding his arguments, Mr. Thakur strenuously argued that the direction issued by the learned Single Judge to pay to the respondents pay scale of the post of Hostel Assistants from the time they were designated as Hostel Attendants, is also against law laid down

by the Apex Court as well this Court, whereby financial benefits, if any, have been restricted only to three years prior to the date of approaching the Court for redressal of their grievances.

9. Mr. B.S. Chauhan, learned Senior Advocate duly assisted by Mr. Munish Thakur, Advocate, appearing for the respondents-petitioners supported the judgment passed by the learned Single Judge. Mr. Chauhan, vehemently argued that there is no illegality or infirmity in the judgment passed by learned Single Judge and same is based upon proper appreciation of facts as well as Rules occupying the field and as such there is no scope of interference, whatsoever, for this Court, especially in view of the fact that learned Single Judge has dealt with each and every aspect of the matter meticulously. Mr. Chauhan, forcefully contended that a bare perusal of impugned judgment as well as pleadings available on record clearly suggests that the respondents though were appointed as Hostel Attendants but since their appointment, they have been regularly performing the duties of Hostel Assistants and as such impugned judgment having been passed by learned Single Judge being correct in law, deserves to be upheld.

10. We have heard the learned counsel for the parties and also gone through the record of the case.

11. Perusal of the pleadings as well as impugned judgment clearly suggests that the respondents though were regularized as Hostel Attendants vide different orders but ever since their regularization, they have been discharging and performing duties of higher post of Hostel Assistants. It is also undisputed that there are eleven hostels in the appellant-University and only four persons are occupying posts of regular Hostel Assistants, meaning thereby that learned Single Judge has rightly concluded that in the absence of adequate staff of regular Hostel Assistants, respondents are discharging and performing duties of Hostel Assistants. Perusal of Annexure PA placed on record i.e. certificate issued by Warden of the Hostel clearly suggests that respondents though appointed as Hostel Attendants in the Hostels, are looking after works like maintaining stock/store items, giving complaints of the hostel regarding electricity, maintenance etc. If aforesaid certificate having been issued by the Warden is perused juxtaposing Annexure R-3, wherein duties of Hostel Assistants have been defined, clearly suggests that for all intents and purposes, respondents have been discharging duties of Hostel Assistants. Annexure R-3 suggests that Hostel Assistants are supposed to distribute mess bills for collection of money, collection of telephone charges from students, to make reports to the concerned warden regarding complaints of water/electricity etc., to maintain register of incoming and outgoing calls of hostel.

12. Hence, this Court, after careful perusal of Annexure PA vis-à-vis Annexure R-3, sees no illegality or infirmity in the findings returned by the learned Single Judge that the respondents are performing duties of Hostel Assistants. Similarly, pleadings available on record nowhere suggest that the appellant-University placed on record material, if any, to demonstrate that respondents are actually not performing duties of Hostel Assistants. Moreover, University specifically pleaded before the writ Court that it had proposed upgradation of Hostel Attendants to the post of Hostel Assistants in the revised pay scale, which did not find favour at the level of the Government. Aforesaid admission having been made on behalf of the appellant-University clearly strengthens the claim of the respondents that for all intents and purposes, they are discharging duties of Hostel Assistants, rather, attempt on the part of the appellant to send the proposal to appropriate authority for upgradation of seven posts of Hostel Attendants to that of Hostel Assistants clearly suggests that the University had acknowledged the claim of the respondents that they have actually been discharging duties of Hostel Assistants. It also emerges from the record that there is no dispute qua the duties and responsibilities as well as work being performed by them as the same is being performed by the Hostel Assistants and as such, learned Single Judge rightly concluded that the appellant can not deny the legitimate claim of the respondents and their action in denying the pays scale of Hostel Assistants to the respondents is ex facie arbitrary, irrational and unjust.

13. Careful perusal of impugned judgment passed by learned Single Judge suggests that the same is based upon correct appreciation of law having been laid down by the Hon'ble Apex Court in a catena of judgments. Hon'ble Apex Court has repeatedly observed that the

principle of "equal pay for equal work" is not a mere slogan but a fundamental right which can be enforced through constitutional remedies prescribed therein. Hence, learned Single Judge rightly concluded that determining of grant of pay scale is not the sole prerogative of the executive, rather an aggrieved employee has every right to knock the doors of justice for the redressal of his grievances.

14. Hence this Court sees no reason to interfere with the well reasoned judgment passed by the learned Single Judge, in as much as, respondents have been held entitled to the pay scale of Hostel Assistants. However, we see substantial force in the contentions having been raised by the learned counsel representing the appellant-University that the arrears, if any, in terms of judgment passed by learned Single Judge, were required to be restricted only for the period of three years prior to the filing of writ petition.

15. The Limitation Act, 1963, for short "the Act" provides for some mechanism or period within which an aggrieved person can seek the redressal of his grievances.

16. The question arose for the first time before the apex Court in case **Jai Dev Gupta** versus **State of Himachal Pradesh and another** reported in AIR 1998 SC 2819, whether the arrears can be restricted only for three years prior to the filing of the writ petition, in terms of the mandate of Limitation Act. The question was answered in affirmative by the apex Court. It is apposite to reproduce paras 2 and 3 of the said judgment herein.

> "2. Learned Counsel appearing for the appellant submitted that before approaching the Tribunal the appellant was making number of representations to the appropriate authorities claiming the relief and that was the reason for not approaching the Tribunal earlier than May, 1989. We do not think that such an excuse can be advanced to claim the difference in backwages from the year 1971. In Administrator of Union Territory of Daman and Diu v. R. D. Valand, 1995 Supp (4) SCC 593, this Court while setting aside an order of Central Administrative Tribunal has observed that the Tribunal was not justified in putting the clock back by more than 15 years and the Tribunal fell into patent error in brushing aside the question of limitation by observing that the respondent has been making representations from time to time and as such the limitation would not come in his way. In the light of the above decision, we cannot entertain the arguments of the learned Counsel for the appellant that the difference in backwages should be paid right from the year 1971. <u>At the same time we do not think that the Tribunal was right in invoking Section 21 of the Administrative Tribunals Act for restricting the difference in backwages by one year</u>.
>
> 3. In the facts and circumstances of the case, we hold that the appellant is entitled to get the difference in backwages from May, 1986. The appeal is disposed of accordingly with no order as to costs."[emphasis supplied]

17. The Hon'ble Apex Court in another judgment delivered in case **Union of India and others** versus **Tarsem Singh** reported in (2008) 8 SCC 648, has laid down the same propositions of law and held that arrears should be restricted to three years prior to filing of writ petition. It is apt to reproduce paras 4 to 8 of the said judgment herein.

> "4. The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. A continuing wrong refers to a single wrongful act which causes a continuing injury. Recurring/successive wrongs are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in Balakrishna S.P. Waghmare v. Shree Dhyaneshwar Maharaj Sansthan,, explained the concept of continuing wrong (in the context of Section 23 of Limitation Act, 1908 corresponding to section 22 of Limitation Act, 1963) :
>
> > It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from

the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.

5. In M.R. Gupta v. Union of India,, the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held :

> "5……The appellant s grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant s claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant s claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred....
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> 6. In Shiv Dass v. Union of India, 2007 9 SCC 274, this Court held:
>
> > "8.….The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.
> >
> > 10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition.... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years.
>
> 7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong

creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.

8. In this case, the delay of 16 years would affect the consequential claim for arrears. The High Court was not justified in directing payment of arrears relating to 16 years, and that too with interest. It ought to have restricted the relief relating to arrears to only three years before the date of writ petition, or from the date of demand to date of writ petition, whichever was lesser. It ought not to have granted interest on arrears in such circumstances."

18. The apex Court in a latest judgment delivered in case **Asger Ibrahim Amin** versus **Life Insurance Corporation of India** reported in JT 2015 (9) SC 329 has also laid down the same principles of law. It is profitable to reproduce paras 4, 4.1 and 16 of the said judgment herein.

"4. As regards the issue of delay in matters pertaining to claims of pension, it has already been opined by this Court in Union of India v. Tarsem Singh, 2008 8 SCC 648 that in cases of continuing or successive wrongs, delay and laches or limitation will not thwart the claim so long as the claim, if allowed, does not have any adverse repercussions on the settled third-party rights. This Court held:

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition. [emphasis is ours]

4.1. We respectfully concur with these observations which if extrapolated or applied to the factual matrix of the present case would have the effect of restricting the claim for pension, if otherwise sustainable in law, to three years

previous to when it was raised in a judicial forum. Such claims recur month to month and would not stand extinguished on the application of the laws of prescription, merely because the legal remedy pertaining to the time barred part of it has become unavailable. This is too well entrenched in our jurisprudence, foreclosing any fresh consideration.

5 to 15.......... ....

16. We thus hold that the termination of services of the Appellant, in essence, was voluntary retirement within the ambit of Rule 31 of the Pension Rules of 1995. The Appellant is entitled for pension, provided he fulfils the condition of refunding of the entire amount of the Corporation's contribution to the Provident Fund along with interest accrued thereon as provided in the Pension Rules of 1995. Considering the huge delay, not explained by proper reasons, on part of the Appellant in approaching the Court, we limit the benefits of arrears of pension payable to the Appellant to three years preceding the date of the petition filed before the High Court. These arrears of pension should be paid to the Appellant in one instalment within four weeks from the date of refund of the entire amount payable by the Appellant in accordance of the Pension Rules of 1995. In the alternative, the Appellant may opt to

get the amount of refund adjusted against the arrears of pension. In the latter case, if the amount of arrear is more than the amount of refund required, then the remaining amount shall be paid within two weeks from the date of such request made by the Appellant. However, if the amount of arrears is less than the amount of refund required, then the pension shall be payable on monthly basis after the date on which the amount of refund is entirely adjusted."

[emphasis supplied]

19. Having said so, it is held that the writ petitioners are entitled to the arrears for the period of three years prior to the filing of writ petitions. The impugned judgment is modified accordingly and the appeals are disposed of, alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Smt. Raksha Devi .....Petitioner.

Versus

Smt. Uma and others .....Respondents.

CMPMO No.126 of 2013.
Judgment reserved on: 15.12.2016.
Date of decision: December 21st , 2016.

Code of Civil Procedure, 1908- Order 21 Rule 32- Section 47- A petition was filed for the execution of the decree of specific performance – the petitioner filed objections pleading that the decree is unexecutable as she is not in possession of the flat – the bank had taken possession of the flat and had auctioned it to N- objections were dismissed by the Trial Court- held, that any right created during the pendency of the suit will not affect the decree holder in view of the doctrine of lispendens – this doctrine is also applicable to the Court sales – the petitioner had prolonged the proceedings for 3½ yearsafter obtaining ex-parte stay order – petition dismissed with the cost of Rs.30,000/-. (Para-6 to 20)

Cases referred:

Jayaram Mudaliar versus Ayyaswami and others AIR 1973 SC 569

Guruswamy Nadar versus P.Lakshmi Ammal (D) by L.R.s and others AIR 2008 SC 2560,

For the Petitioner : Mr.P.S.Goverdhan, Advocate vice Mr.V.S.Chauhan, Advocate.
For the Respondents: Mr.Anupinder Rohal, Advocate vice Mr.Tek Chand Sharma, Advocate, for respondents No.1 and 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India is directed against the order dated 07.01.2013 passed by the learned Civil Judge (Senior Division), Court No.1, Shimla, whereby the objections filed by the petitioner under Section 47 of the Code of Civil Procedure came to be dismissed.

2. It is not in dispute that the suit filed by the decree holders was dismissed by the learned trial Court, however, the said judgment and decree was reversed by the learned first appellate Court and the operative portion of the judgment reads thus:-

> *"34. ……The defendant No.1 is directed to execute and register a sale deed of the disputed premises i.e. one room, one kitchen, another room between kitchen and bath/WC towards Eastern side Ashok Sharma building in the ground floor of a house built on 4/59 shares, measuring 0-4 biswa, out of the land comprised in Khata Khatauni No.14/14, 15, Khasra No.214/202 and 201/52, kitas 2, measuring 2 bighas 19 biswas, situated at Village Shakral, Pargana Chabrogti, Tehsil and District Shimla, H.P. in favour of the legal representatives of original plaintiff Badri Singh (present appellants) within a period of three months from today itself. The stamp duty and other expenses of execution and registration of sale deed shall be borne by the appellants (legal representatives of the original plaintiff). The parties are left to bear their own costs."*

3. The respondents on the basis of the judgment and decree passed by the learned first appellate Court filed execution petition under Order 21 Rule 32 of the Civil Procedure Code for execution of decree of specific performance. On receiving notice from the learned executing Court, the petitioner filed objections under Section 47 of the Code of Civil Procedure on the ground that the decree in question is unexecutable against the petitioner as she is not in possession of the flat in question. It was also averred that husband of the petitioner had procured loan to run his company known as 'M/s N.R. and Company' and mortgaged the entire building with Banker i.e. UCO Bank. The husband of the petitioner could not liquidate the loan amount, therefore, the Banker took possession of the building under SARFESI ACT and auctioned the same to one Shri Naresh Chauhan for an amount of Rs. 24.50 lacs. The petitioner was intimated by the Banker through letter dated 14.02.2008 informing that the premises in question had been auctioned in a private bid to Shri Naresh Chauhan for total amount of Rs. 24.50 lacs. The petitioner tried to liquidate the loan amount, but she could not do so and as per her information, the same has been confirmed in favour of the auction purchaser. The husband of the petitioner faced great losses in the business and went in depression due to which he left the petitioner and minor daughter and his whereabouts are not known.

4. The objections preferred by the petitioner were dismissed by the learned Executing Court vide its order dated 07.01.2013 (for short 'impugned order'). It is against this order that the petitioner has approached this Court by invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution.

5. It is contended by the learned counsel for the petitioner that the findings recorded by the learned executing Court are totally perverse as it has failed to take into consideration that the petitioner is neither in possession nor owner of the premises in question and, therefore, not in a position to execute the sale deed in compliance to the judgment and decree dated 30.06.2009. It is further stated that once the premises in dispute have been sold in an open auction to one Shri Naresh Chauhan, who has become the registered owner thereof, the

petitioner cannot be asked to perform, that what is impossible and deliver the premises which is not in his possession.

I have heard the learned counsel appearing for the parties and gone through the records of the case.

6. As regards the possession of the disputed premises, I find that in para-1 of the objections, the petitioner has categorically stated that the possession of the premises is already with the respondents and the said averments read thus:-

> *"1. That the judgment and decree under execution is unexcitable decree as the same can not be executed as the JD/Objector is not in possession of the flat/set regarding which decree has been passed. It is submitted that the husband of JD/objector had procured loan to run his company namely N.R. & Company and the JD/objector stood as surety in favour of the company of her husband and mortgaged the building in dispute which had been purchased from the predecessor of DH/plaintiffs long back and due to losses in the company, the husband of the JD/objector could not liquidate the said loan in time and the banker under SARFESI Act took the possession of the entire building and auction the same to one Sh. Naresh Chauhan for an amount of Rs.24.50 lacs as is clear from the perusal of letter issued by banker i.e. Uco Bank, annexed herewith. The JD/objector is not in physical possession of the same and the DH/plaintiffs are in illegal occupation of the flat and their status can not be held more than that of tenant. It is further submitted that the objector/JD is trying her level best to liquidate the loan amount and take back the possession of the building from the bank or any other person to whom the same has been handed over. As per information of the objector/JD, the auction sale has not been confirmed in the name of auctioneer so far as no intimation in that regard has not been given to her. It is worthwhile to mention here that the JD/objector is not in possession of any documents presently as all the documents with respect to building in dispute had been handed over to Bank. At the cost of repetition, JD/objector is trying her level best to deposit the loan amount and take back the possession of the building. It is further submitted that the where about of husband of the JD/objector is not known for the last more than four years. It is further submitted that the husband of JD/objector faced big losses in the business and was under great depression due to which he left the JD/objector and one daughter in the year 2007. Since then the where about of husband of JD/objector are not known. It was only for this reason that the JD/objector could not liquidate the loan amount."*

7. Once this is the admitted position, it is not understood as to how the petitioner claims that the physical possession of the premises has been taken over by the UCO Bank and how the said premises were further sold to any other person. In addition to what has been observed aforesaid, it would be noticed that the respondents in reply to the objections have categorically claimed themselves in physical possession of the premises even prior to the execution of the agreement and, therefore, any right created during the pendency of the suit would obviously not hamper their rights in view of the doctrine of lis pendens which applies to a transfer pendente lite and would prevent the rights of any third party from being fructified or getting matured.

8. It is more than settled that the doctrine of lis pendens was intended to strike at the attempts by parties to a litigation to circumvent the jurisdiction of a Court, in which a dispute of rights or interests of a immovable property was pending by a private dealings which might remove the subject matter of the litigation from the ambit of Court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are bound, by the application of the aforesaid doctrine, by the decree passed in the suit even though they may not have been impleaded in it.

9. In ***Jayaram Mudaliar*** *versus* ***Ayyaswami and others AIR 1973 SC 569***in the Corpus Juris Secundum (Vol. LIV. 570) defines the lis pendens in the following terms:-

> "*Lis pendens literally means a pending suit; and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in a suit, pending the continuance of the action, and until final judgment therein"."*

10. The doctrine of lis pendens is available to the purchaser at the execution of sale and the doctrine further applies to the Court sales also.

11. Here, it shall be apt to reproduce the following observations made by the Hon'ble Supreme Court in ***Guruswamy Nadar****versus* ***P.Lakshmi Ammal (D) by L.R.s and others AIR 2008 SC 2560,*** which read thus:-

> "*3.......The main argument which was advanced before learned Single Judge was that Section 19 of the Specific Relief Act, 1963 provides that a decree for specific performance against a subsequent purchaser for bona fide who has paid the money in good faith without notice of the original contract can be enforced as the same is binding on the vendor as well as against the whole world. As against this, it was contended by the respondents that Section 52 of the Transfer of Property Act which lays down the principle of lis pendens that when a suit is pending during the pendency of such suit if a sale is made in favour of other person, then the principle of lis pendens would be attracted. In support of this proposition a Full Bench decision of the Allahabad High Court in Smt. Ram Peary and others v. Gauri and others [AIR 1978 All. 318] as well as a Division Bench judgment of the Madras High Court was pressed into service. Therefore, the question before us in this case is what is the effect of the lis pendens on the subsequent sale of the same property by the owner to the second purchaser. Section 19 of the Specific Relief Act clearly says subsequent sale can be enforced for good and sufficient reason but in the present case, there is no difficulty because the suit was filed on 3.5.1975 for specific performance of the agreement and the second sale took place on 5.5.1975. Therefore, it is the admitted position that the second sale was definitely after the filing of the suit in question. Had that not been the position then we would have evaluated the effect of Section 19 of the Specific Relief Act read with Section 52 of the Transfer of Property Act. But in the present case it is more than apparent that the suit was filed before the second sale of the property. Therefore, the principle of lis pendens will govern the present case and the second sale cannot have the overriding effect on the first sale. The principle of lis pendens is still settled principle of law. In this connection, the Full Bench of the Allahabad High Court in Smt. Ram Peary (supra) has considered the scope of Section 52 of the Transfer of Property Act. The Full Bench has referred to a decision in Bellamy v. Sabine[(1857) 44 ER 842 at p.843)wherein it was observed as under:*
>
>> *" It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.*
>>
>> *Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind required that the decision of the Court in the suit shall be finding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end."*

Similarly the Privy Council in Faiyaz Husain Khan v. Munshi Prag Narain [(1907) 34 Ind App 102] where the Court lay stress on the necessity for final adjudication and observation that otherwise there would be no end to litigation and justice would be defeated. The Full Bench of Allahabad High Court further referred to the work of Story on Equity IIIrd Edition,(para 406) which expounded the doctrine of lis pendens in the terms as follows:

> *" Ordinarily, it is true that the judgment of a court binds only the parties and their privies in representations or estate. But he who purchases during the pendency of an action, is held bound by the judgment that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the action. Where there is a real and fair purchase without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise, alienations made during an action might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim pendent elite, nihil innovetur; the effect of which is not to annul the conveyance but only to refer it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them."*

Normally, as a public policy once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, the principle of lis pendens has been evolved so that the litigation may finally terminate without intervention of a third party. This is because of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end."

12. Another factor which is very intriguing is that there is no material placed on record by the petitioner wherefrom it can be gathered as to when exactly the husband of the petitioner took loan from the UCO Bank. The letter issued by the UCO Bank has been placed on record. The contents of the letter (Annexure P-6) do reveal that on account of loan taken by the husband of the petitioner, the account was declared as non performing account on 01.07.2006 and it also finds mention therein that the premises has been sold through a private sale to one Shri Naresh Chauhan for a sum of Rs. 24.50 lacs. However, that in itself is inconsequential as the suit out of which it gives rise to the decree sought to be executed was presented on 10.06.2003 and, therefore, any transaction entered into by the petitioner after the said date would be hit by the doctrine of lis pendens.

13. As regards other objections regarding there being no agreement between the parties etc., the same are not open to challenge as these objections have been conclusively decided by the first appellate Court which judgment and decree admittedly has attained finality.

14. However, before parting, I would now like to advert to another aspect of the case which relates to the all out endeavours made by the petitioner to prolong these proceedings.

15. A perusal of the order sheet indicates that further proceedings in the execution petition have been ordered to be stayed vide an ex parte order passed by this Court on 06.05.2013. Thereafter, the petitioner took no steps for getting the respondents served and eventually on 04.09.2014, this Court passed the following orders:

> *"Steps for service of respondents, complete in all respects be positively taken within a period of four weeks. If steps are not taken within the aforesaid period, petition shall automatically stand dismissed for non prosecution without any further reference to this Court. In the event of steps being taken, notices be issued to the respondents returnable for 22nd October, 2014."*

16. Lateron, vide order dated 19.12.2014, the order passed earlier on 04.09.2014 was though recalled, however, even thereafter no serious endeavour was made by the petitioner to get the respondents served, as would be evident from the order sheet dated 03.06.2015 which reads thus:-

> *"As per Registry report steps for service of co-respondents No.1 to 3 not taken. Steps be taken within two weeks. Thereafter, notices be issued to co-respondents No.1 to 3 returnable within four weeks. Be listed thereafter."*

17. Thereafter, on 03.09.2015, learned counsel representing the petitioner made out a grievance with regard to incorrect proceedings recorded by the official of this Registry and accordingly Registrar (Judicial) was directed to examine and submit his report and the matter was directed to be listed on 09.09.2015. On 09.09.2015, it was the learned counsel for the petitioner, who candidly conceded that the process fee so filed by him was lying under objection and the same escaped his attention.

18. It is eventually on 29.10.2015 that respondents No.1 and 2 came to be served, yet no steps for service of respondent No.3 were effected uptill 03.06.2016. On 21.07.2016, notices issued to respondent No.3 were stated to be awaited, however, since these were actual date notices, they could not be awaited any further and, therefore, the petitioner was directed to take fresh steps for the service of respondent No.3 within two days. Despite this order, the petitioner took no steps to serve respondent No.3 uptill 23.08.2016. Even on 23.08.2016, the process fee was filed only because the case was listed before this Court on 24.08.2016. Even thereafter, the petitioner took no steps and eventually on 30.11.2016, this Court after taking into consideration that the notices to respondent No.3 had been issued on 25.10.2016 and the statutory period of service had come to an end, concluded that respondent No.3 would be deemed to be served and was thereafter proceeded ex parte.

19. The aforesaid narration of facts makes it evidently clear that the petitioner after having obtained ex parte order from this Court has abused the process of law and managed to keep the proceedings in a state of limbo for more than 3 ½ years. Obviously, this was done with an intent to tire out the decree holders so as to make them to succumb to the illegal and unjustified demand of the petitioner and the same is not legally permissible.

20. Having said so, there is no merit in this petition and the same is otherwise nothing but an abuse of the process of the Court. Accordingly, the petition is dismissed with costs of Rs. 30,000/- to be paid to the respondents within four weeks from today and in default thereof, the respondents shall be at liberty to have the same recovered by resorting to the process of execution. Pending application, if any, also stands disposed of. Interim order dated 06.05.2013 is vacated.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

State of Himachal Pradesh. …Appellant

Versus

Ajay Kumar & Another. …Respondents

Criminal Appeal No. 508 of 2011
Judgment Reserved on: 19.10.2016
Date of decision: 21.12.2016

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- Deceased was married to the accused No.1- accused No.2 was mother-in-law of the deceased – the accused started maltreating the deceased for bringing insufficient dowry – they used to beat the deceased – the deceased committed suicide by consuming poison – the accused were tried and acquitted by the

Trial Court- held in appeal that PW-1 admitted in cross-examination that accused had not demanded dowry at the time of marriage or till the death of deceased- statement of PW-4 is general in nature and no specific instance was given by her- material witness was not examined- the complaint stated to have been written by the deceased was suspicious – the FIR was lodged after three years and no explanation for the same was provided – the prosecution version was not proved beyond reasonable doubt and the accused were rightly acquitted by the Trial Court- appeal dismissed. (Para-5 to 18)

For the Appellant: Mr.V.S. Chauhan, Additional Advocate General with Mr.Vikram Thakur and Mr.Puneet Rajta, Deputy Advocate Generals.

For the Respondents: Mr.Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur J.

State has filed the instant appeal against the acquittal of respondents vide judgment dated 17.9.2011 passed by learned Additional Sessions Judge (II), Kangra at Dharamshala in case RBT S.C. No. 71-J/VII/2010/2007 in FIR No. 72 of 2006, registered under Sections 306, 498-A read with Section 34 of the Indian Penal Code at Police Station Jawali, District Kangra, H.P.

2. We have heard learned counsel for the parties and also have gone through the records of the case.

3. Prosecution case is that deceased Nisha Devi alias Monika was married to respondent No. 1 Ajay Kumar in the year 2004. Respondent No. 2, Shakuntla Devi was mother-in-law of deceased. After one year of marriage, respondents started maltreating deceased Nisha Devi for want of sufficient dowry in her marriage and respondents used to beat deceased Nisha Devi and did not allow her to sleep on the cot for no cot was brought by her from her parental house. On 22nd March, 2006 at about 7:00 P.M., PW-1, Surestha Devi, mother of deceased heard about death of her daughter and inquired from one Shambhu Nath. After knowing about death of her daughter, PW-1, Surestha Devi along with her relatives and villagers went to the house of accused/respondents. On information, police also reached there. After preparation of inquest report, dead body of deceased was sent for post mortem. Initially possibility of death due to asphyxia was not ruled out by doctor who conducted post mortem on 23.3.2006. However, as per chemical analysis report, deceased was found to have consumed Phosphate. In these circumstances, on 25.3.2006 FIR under Sections 306, 498-A read with Section 34 IPC was registered in pursuance to statement of PW-1, Surestha Devi. On conclusion of the trial, respondents were acquitted by the trial Court.

4. To prove allegations of dowry demand and maltreatment to deceased Nisha Devi by respondents, prosecution has relied upon statements of PW-1 Surestha Devi, PW-2 Darshan Singh, PW-3 Shambu Singh and PW-4 Tripta Devi and also complaint Ex. PW-1/B alleged to be written at the instance of deceased, Nisha Devi against the respondents.

5. Scrutiny of statements of prosecution witnesses PW-1, PW-2, PW-3 and PW-4 reflects that allegations of demand of dowry is not proved on record, rather it has been contradicted by PW-1, Surestha Devi herself by admitting in cross-examination that it was correct that accused persons did not demand dowry at the time of solemnization of marriage and also did not demand dowry from her after the marriage till the death of Nisha Devi. She admitted that they had not given any article in dowry till death of deceased Nisha Devi and respondent Ajay Kumar used to visit her house till death of her daughter. She admitted that on account of poverty, deceased was married to Ajay and she had also stated that accused Ajay Kumar had agreed for marriage by saying that he will not demand any dowry because of their poverty.

6. PW-2 Darshan Singh, uncle of deceased Nisha Devi stated that PW-1 and deceased Nisha Devi used to tell him that accused beat her for demand of dowry. However in cross-examination he stated that he did not know that deceased Nisha Devi did not like accused Ajay, but had married on account of poverty. He admitted that respondent Ajay Kumar used to visit house of in laws till death of his wife Nisha Devi.

7. PW-3 Shambu Singh is silent about the maltreatment and demand of dowry by respondents to deceased Nisha Devi or her mother.

8. Statement of PW-4 Tripta Devi is general in nature and she is not specific about time, place and date of dowry demand and torture as she has not stated any specific instance disclosed by deceased Nisha Devi to her in this regard. Her allegations are vague which cannot be basis for conviction for want of corroboration by substantial evidence on record.

9. In view of admission of PW-1 in her cross-examination, allegations of demand of dowry and maltreatment to deceased Nisha Devi by respondents stand shattered. There is no convincing and confidence inspiring evidence on record proving allegations of maltreatment by respondents for dowry.

10. Document Ex. PW-1/B relied upon by prosecution is alleged to be written at the instance of deceased Nisha Devi. PW-1, Surestha Devi in her examination-in-chief has stated that deceased Nisha Devi was taken to the house of her sister Nimo Devi and along with Nimo Devi, they went to the house of somebody, where this complaint was written. The name of that somebody was never disclosed nor Nimo Devi was examined by the prosecution, rather she was given up to avoid repetition. There was no evidence on record to show that in whose house, PW-1and Nimo Devi along with deceased Nisha Devi had visited and who scribed the document Ex. PW-1/B. Therefore, there was no question of repetition of the fact, rather Nimo Devi was a necessary witness to be examined to prove the fact, which was not stated by any other witnesses examined by the prosecution. PW-1 in her cross-examination has also admitted that this complaint (Ex. PW-1/B) was not disclosed to the police at the time of lodging of FIR.

11. Perusal of Ex. PW-1/B indicates that alleged signatures of Nisha Devi are not at a place where the same should have been in normal course after scribing application/complaint Ex. PW-1/B but the application appears to be manipulated or fabricated on blank paper already available with signature of Nisha Devi. There is suspicion about the genuineness of this document. Even PW-1, Surestha Devi, mother of deceased has not stated that this complaint was scribed at the instance of deceased Nisha Devi in her presence and even she did not disclose that who scribed this complaint. At the bottom of the document, copy of this document has been stated to be forwarded to Pradhan Gram Panchayat, Sunet, Police Post Fatehpur and also to Police Station, Jawali, but no corresponding evidence has been led to corroborate or to prove the genuineness of this document by calling record from Gram Panchayat Sunet or Police Station, Jawali, therefore, this document cannot be considered to be reliable to infer that document/complaint Ex. PW-1/B was written at the instance of deceased Nisha Devi for respondents were maltreating or beating deceased for want of dowry or otherwise.

12. There is another fact which renders document Ex. PW-1/B doubtful. The inquest report Ex. PW-7/A was prepared immediately after death of deceased Nisha Devi in presence of PW-1, her relatives and villagers accompanying her. PW-2 Darshan Singh has been cited as a witness in inquest report as relative of deceased, who identified the deceased before sending her dead body for post mortem. It was the case of the prosecution that respondents did not disclose cause of death as poisoning immediately after death and had stated that deceased died because of stomach pain. However in inquest report, it has been clearly mentioned that deceased Nisha Devi had informed one Sarla that she had consumed some poison and had asked to save her and to call her husband. At that time no complaint was lodged regarding beating or maltreatment to deceased Nisha Devi for want of dowry, despite the fact that PW-1, PW-2 and other villagers were present on the spot. Sarla was an important witness, who was neither cited as a witness nor

examined by the prosecution and her non-examination definitely invites adverse inference against the prosecution.

13. The prosecution has failed to explain the reasons for registration of FIR after three days of the death, particularly when there is no reference of any maltreatment and demand of dowry in inquest report Ex. PW-7/A, which was prepared immediately after death of deceased Nisha Devi before sending her dead body for post mortem. It indicates that registration of FIR against the respondents was an afterthought for extraneous reasons, best known to the prosecution. It is a case of no specific and conclusive evidence against the respondents with regard to maltreatment or demand of dowry from deceased, her parents or relatives.

14. Learned Deputy Advocate General contended that in present case, death has taken place within seven years of the marriage and that too for demand of dowry and he further argued that even if the demand of dowry is not proved, then provisions of Sections 113-A and 113-B of the Indian Evidence Act, 1972 (for short the 'Act') for drawing presumption for abetment of suicide to deceased Nisha Devi by subjecting her to cruelty are attracted.

15. In our opinion Section 113-B is not attracted in the present case because for drawing presumption under Section 113-B of the Act, initial burden lies upon the prosecution to prove demand of dowry and only thereafter Court shall presume that respondents had caused dowry death. In present case, there is no confidence inspiring evidence on record to prove that respondents had ever made any demand of dowry or had maltreated deceased for such demand or otherwise. Therefore, Section 113-B of the Act is not applicable in the present case.

16. In so far as Section 113-A is concerned, under this Section the Court may presume having regard to all the other circumstances of the case that respondents had abetted deceased Nisha Devi for committing suicide. Scrutiny of statements of PW-1, PW-2, PW-3 and PW-4 do not disclose any cruelty on the part of respondents for want of dowry or otherwise and the evidence led by prosecution is not sufficient to hold that deceased Nisha Devi was ever subjected to any cruelty by respondents for want of dowry or otherwise. Therefore, the provision of Section 113-A of the Act is also not attracted in the present case.

17. Respondents have been acquitted by learned trial Court and presumption of innocence of respondents has been fortified. In such case burden of proving guilt of respondents heavily lies upon prosecution.

18. In view of above discussion, prosecution has failed to prove the case against the respondents by leading cogent, reliable, trustworthy and confidence inspiring evidence. Learned trial Court has correctly and completely appreciated the evidence on record and has rightly acquitted the respondents. No case for interference is made out in the present appeal, therefore, the same being devoid of any merit, is dismissed. Personal bail and surety bonds of respondents are discharged. Record be sent back to the trial Court.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J.

National Insurance Company Ltd. through its Divisional Manager ….Appellant
Versus
Rajveer Kaur d/o Sh. Major Singh and others ….Non-appellants

FAO No. 441/2011-D
Order Reserved on 22.09.2016
Date of Decision : 22.12.2016

Motor Vehicles Act, 1988- Section 166- Deceased was travelling with N on motorcycle – a truck being driven by respondent No.1 in a rash and negligent manner came from the opposite side and hit the motorcycle – the deceased and pillion rider fell down and sustained multiple injuries –

deceased was taken to hospital but succumbed to the injuries – compensation of Rs.6,01,000/- was awarded by the Tribunal jointly and severally along with interest @ 7% per annum- held in appeal that monthly income was assessed as Rs.3,600/- per month- 1/3rd amount was to be deducted towards personal expenses – the loss of dependency would come out as Rs.2,400/- per month- the age of the deceased was 24 years and Tribunal had applied multiplier of 17 – the burden to prove the breach of the terms and conditions of the policy was upon the insurance company- no evidence was led by the insurer to discharge the burden- the Insurance Company was rightly held liable to indemnify the insured- appeal dismissed. (Para-12 to 21)

Cases referred:

Vidyadhar Vs. Mankikrao & Another, AIR 1999 Apex Court 1441
Ishwarbhai C. Patel alias Bachu Bhai Patel Vs. Harihar Behera and another, AIR 1994 Apex Court 1341
Sarla Verma & Others Vs. Delhi Transport Corporation and another, 2009(6) SCC 121
Reshma Kumari and others Vs. Madan Mohan and another, AIR 2013 SCW 3120
United India Insurance Co. Ltd. Vs. Lehru, AIR 2003 Apex Court 1292
Pepsu Road Transport Corporation Vs. National Insurance Company, AIR 2014 Apex Court 305

For appellant : Mr. Lalit K. Sharma, Advocate
For non-appellants No.1 to 4 : Mr. N.K. Thakur, Sr.Advocate with Ms. Sneh Lata, Advocate.
For non-appellants No.5 to 7 : None

The following order of the Court was delivered:

P. S. Rana, J.

Decision:

Present appeal is filed against award dated 31.08.2011 passed by learned Motor Accident Claims Tribunal Fast Track Court Una (H.P.) announced in M.A.C. Petition No.14/09 title Rajveer Kaur and others Vs. Naresh Kumar & Others.

Brief facts of case:

2. Rajveer Kaur and others filed petition under section 166 of Motor Vehicles Act 1988 pleaded therein that on dated 10.03.2009 deceased Major Singh s/o Sh. Balkar Singh alongwith pillion rider Mandeep Singh s/o Sh. Hardeep Singh were travelling on motor cycle No.A/F. It is pleaded that at about 5.30 PM when motor cycle No.A/F reached near petrol pump at village Baruhi Tehsil Amb Distt. Una (H.P.) a truck having registration No.HP-12A-9281 came from opposite side which was driven in rash and negligent manner by co-respondent No.1 without observing traffic rules. It is further pleaded that truck struck with the motorcycle and deceased as well as pillion rider of the motorcycle fell down on the road and sustained multiple grievous injuries on their body and deceased became unconscious. It is further pleaded that accident took place due to rash and negligent driving of truck No.HP-12A-9281 driven by Naresh Kumar s/o Sh. Dharam Pal. It is further pleaded that after accident deceased was shifted to Regional Hospital Una by local people in unconscious condition where deceased was medically examined by Medical Officer. It is further pleaded that after first aid deceased was referred to PGI Chandigarh for better treatment. It is further pleaded that deceased was admitted in PGI where he remained admitted w.e.f. 11.03.2009 to 12.03.2009 and died on 12.03.2009 at about 9.00 PM in PGI. It is further pleaded that petitioners have spent about Rs.50,000/- on the treatment of deceased and postmortem of deceased was conducted at PGI on 13.03.2009 vide postmortem report No.12979. It is further pleaded that accident occurred due to rash and negligent driving by co-respondent No.1. Age of the deceased pleaded as 25 years. Occupation of deceased pleaded as agriculture and monthly income of the deceased pleaded as Rs.15,000/- per month from agriculture and Rs.5,000/- per month by way of selling milk. It is further pleaded that FIR

No.35/2009 dated 10.03.2009 under sections 279/337/304A IPC was registered. It is further pleaded that deceased sustained multiple grievous injuries on various parts of the body including head injury. It is further pleaded that petitioners No.1 & 2 are children and petitioner No.3 is widow and petitioners No.4 & 5 are mother and father of deceased respectively. Compensation to the tune of Rs.15 lacs alongwith interest @9% per annum from the date of filing petition till its realization sought.

3. Per contra response filed on behalf of co-respondents No.1 & 2 pleaded therein that present claim petition is not maintainable and petition is bad for non-joinder of necessary parties. It is pleaded that false case under sections 279/337/304A IPC registered against co-respondent No.1. It is further pleaded that motorcycle which was driven by deceased was coming from Amb side in rash and negligent manner and struck with backside of truck. Death of deceased is admitted. It is further pleaded that death was caused due to own negligence of deceased. Prayer for dismissal of appeal sought.

4. Per contra response filed on behalf of co-respondent No.3 pleaded therein that petitioners have no cause of action. It is pleaded that deceased himself was driving motorcycle. It is pleaded that accident occurred due to rash and negligent driving by deceased. It is further pleaded that petition is bad for non-joinder of necessary parties. It is pleaded that driver of alleged vehicle No.HP-12A-9281 was not having valid and effective driving licence at the time of accident. It is further pleaded that vehicle was used in violation of terms and conditions of insurance policy. Prayer for dismissal of appeal sought.

5. As per pleadings of parties learned Motor Accident Claims Tribunal framed following issues on dated 23.02.2010:

(1) Whether deceased Major Singh died because of rash and negligent driving of truck having registration No.HP-12A-9281 driven by Naresh Kumar co-respondent No.1 on dated 10.03.2009 at about 5.30 PM at village Baruhi? …….OPP.

(2) Whether petitioners are entitled to compensation if so how much and from whom? ……OPP

(3) Whether petition is not maintainable? ……..OPR.

(4) Whether petition is bad for non-joinder of necessary parties? ……..OPR.

(5) Whether driver of truck No.HP-12A-9281 was not having valid and effective driving licence at the time of accident. If so its effect?……..OPR.

(6) Whether vehicle in question was used in violation of terms and conditions of insurance policy?……..OPR.

(7) Relief.

6. Learned Motor Accident Claims Tribunal decided issues No.1 & 2 in affirmative and decided issues No.3, 4, 5 & 6 in negative. Learned Motor Accident Claims Tribunal allowed the petition and granted compensation to the tune of Rs.6,01,000/- jointly and severally. Learned Motor Accident Claims Tribunal also awarded interest @7% per annum from the date of filing petition till realization. Learned Motor Accident Claims Tribunal further held that insurance company being insurer of the truck is under legal obligation to indemnify the owner of the vehicle with regard to compensation. Learned Motor Accident Claims Tribunal further directed that compensation will be shared by the petitioners equally. Learned Motor Accident Claims Tribunal further directed that share of minor petitioners would be deposited in Nationalized Bank till they attain the age of majority. Feeling aggrieved against the award passed by Learned Motor Accident Claims Tribunal insurance company filed present petition under section 173 of Motor Vehicle Act 1988.

7. Court heard learned Advocates appearing on behalf of parties and also perused the entire record carefully.

8. Following points arises for determination:

1) Whether appeal filed by insurance company is liable to be accepted as mentioned in memorandum of grounds of appeal?

2) Relief.

Findings upon Point No.1 with reasons:

9. PW-1 HC Puran Bhagat has stated that he has brought the summoned record and copy of FIR is Ext.PW1/1 which is correct as per original record. He has stated that challan was filed in the Court on 27.06.2009. He has denied suggestion that false FIR registered.

10. PW-2 Smt. Gurpreet Kaur has tendered into evidence affidavit Ext.PW2/A in examination-in-chief. There is recital in the affidavit that on dated 10.03.2009 her deceased husband namely Major Singh was travelling upon motorcycle. There is further recital in the affidavit that at about 5.30 evening when deceased reached near Petrol Pump Baruhi then truck having registration No.HP-12A-9281 came from opposite side in fast speed and in negligent manner. There is further recital in the affidavit that Naresh Kumar was driving truck No.HP-12A-9281 in opposite direction in rash and negligent manner and struck with motorcycle. There is further recital in the affidavit that husband of deceased fell down upon road and sustained grievous injuries. There is further recital in the affidavit that deceased became unconscious. There is further recital in the affidavit that accident took place due to rash and negligent driving of truck No.HP-12A-9281. There is further recital in the affidavit that injured was brought to Una hospital for medical treatment and thereafter deceased was referred to PGI Chandigarh for medical treatment. There is further recital in the affidavit that husband of deponent remained admitted in hospital w.e.f. 11.03.2009 to 12.03.2009. There is further recital in the affidavit that on dated 12.03.2009 at 9.00 PM husband of deceased died. There is further recital in the affidavit that petitioners have spent Rs.50,000/- upon medical treatment of deceased. There is further recital in the affidavit that postmortem of deceased was conducted. There is further recital in the affidavit that deponent has two minor daughters. There is further recital in the affidavit that Gurdeep Kaur and Balkar Singh are mother-in-law and father-in-law of deponent. There is further recital in the affidavit that deponent is owner of 80 kanals of land and is also owner of truck. There is further recital in the affidavit that profession of deceased was agriculture. There is further recital in the affidavit that all the petitioners were dependent upon deceased. In cross-examination PW-2 has stated that accident did not take place in her presence. She has stated that she has no documentary evidence relating to income of deceased. She has stated that she is not in possession of any pass book issued by the bank. She has stated that her deceased husband was truck driver. She has stated that land is in ownership of her father-in-law. She has stated that she has two brothers-in-law also. She has denied suggestion that she has claimed excessive compensation.

11. PW-3 Sh. Mandeep Singh has tendered into evidence affidavit Ext.PW3/A in examination-in-chief. There is recital in the affidavit that on dated 10.03.2009 he was travelling with deceased upon motorcycle. There is further recital in the affidavit that at about 5.30 evening when motorcycle reached near Petrol Pump Baruhi then truck having registration No.HP-12A-9281 came from opposite side in fast speed and in negligent manner and struck with motorcycle. There is further recital in the affidavit that due to accident deceased sustained injuries upon his head and other parts of body. There is further recital in the affidavit that deponent also sustained injuries. There is further recital in the affidavit that accident took place due to rash and negligent driving of truck. There is further recital in the affidavit that deceased was not at fault. There is further recital in the affidavit that deceased Major Singh died due to accident. In cross-examination he has denied suggestion that motorcycle was driven in fast speed. He has also denied suggestion that deceased could not control motorcycle. He has denied suggestion that deceased died due to his own negligence.

12. RW-1 Sh. Naresh Kumar has tendered into evidence affidavit Ext.RW1/A in examination-in-chief. There is recital in the affidavit that on dated 10.03.2009 he was driving

truck having registration No.HP-12A-9281. There is further recital in the affidavit that deceased struck his motorcycle from the back portion of truck. There is further recital in the affidavit that accident took place due to fault of motorcycle driver. There is further recital in the affidavit that driver was holding valid licence. He has admitted that investigating agency visited the spot. He has admitted that case under sections 279/304A IPC is pending against him before criminal Court. He has admitted that his truck was taken into possession by investigating agency. He has denied suggestion that he was not in possession of valid driving licence. He has denied suggestion that he has obtained false licence from Mathura. He has denied suggestion that he has got renewed driving licence in illegal manner.

13. RW-2 Sh. Shiv Dayal has tendered into evidence affidavit Ext.RW2/A. He has stated that copy of route permit is Ext.RW2/B. He has stated that he is owner of truck having registration No.HP-12A-9281. He has stated that driver told him that accident took place due to fault of driver of motorcycle. He has stated that truck was duly insured with insurance company w.e.f. 19.10.2008 to 18.10.2009.

14. Following documents filed by parties: (1) Ext.PW-1/A is first information report. (2) Ext.PW-2/A is post mortem report of deceased. (3) Ext.RW-1/A is driving licence. (4) Ext.P-1 is identity card issued by Election Commission of India. (5) Ext.P-2 is copy of revenue record. (6) Ext.P-3 is copy of certificate of registration. (7) Ext.RW-2/A is copy of certificate of registration. (8) Ext.RW-2/B is copy of route permit. (9) Ext.RW-2/C is copy of insurance policy. (10) Ext.RX is copy of insurance policy.

15. Submission of learned Advocate appearing on behalf of insurance company that driver of truck No.HP-12A-9281 was not holding valid and effective driving licence at the time of accident and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.5 was upon insurance company. No official on behalf of insurance company appeared in witness box in order to prove issue No.5. Hence adverse inference under section 114(g) of Indian Evidence Act 1872 is drawn against insurance company. See AIR 1999 Apex Court 1441 ***Vidyadhar*** Vs. ***Mankikrao & Another.*** Also see AIR 1994 Apex Court 1341 **Ishwarbhai C. Patel alias Bachu Bhai Patel** Vs. **Harihar Behera and another.** Hence plea of insurance company that driver was not holding valid and effective driving licence at the time of accident is defeated on the concept of ipse dixit (An assertion made without proof).

16. Submission of learned Advocate appearing on behalf of insurance company that vehicle was driven in violation of terms and conditions of insurance policy is rejected being devoid of any force for reasons hereinafter mentioned. Onus to prove issue No.6 was upon insurance company. No official on behalf of insurance company appeared in witness box for the purpose of cross examination. Hence adverse inference under section 114(g) of Indian Evidence Act 1872 is drawn against insurance company. Plea of insurance company that vehicle involved in accident was driven in violation of terms and conditions of insurance policy is defeated on the concept of ipse dixit (An assertion made without proof).

17. Submission of learned Advocate appearing on behalf of insurance company that petition is bad for non-joinder of necessary parties is also rejected being devoid of any force for reasons hereinafter mentioned. Petitioners have impleaded driver of truck No.HP-12A-9281 and owner of truck as co-party in present petition. Petitioners have also impleaded insurance company as co-party in present petition. It is held that petition is not bad for non-joinder of necessary parties.

18. Submission of learned Advocate appearing on behalf of insurance company that accident took place due to fault of driving of motorcycle by deceased is also rejected being devoid of any force for reasons hereinafter mentioned. PW-3 Sh. Mandeep Singh eye witness of the accident has specifically stated that deceased had died due to rash and negligent driving of truck No.HP-12A-9281. Testimony of PW-3 Sh. Mandeep Singh is trustworthy, reliable and inspires confidence of the Court. There is no reason to disbelieve the testimony of PW-3 Sh. Mandeep

Singh. There is no evidence on record in order to prove that PW-3 Sh. Mandeep Singh has hostile animus against the owner and driver of truck No.HP-12A-9281.

19. Submission of learned Advocate appearing on behalf of insurance company that excessive compensation is awarded to petitioners and on this ground appeal be allowed is rejected being devoid of any force for reasons hereinafter mentioned. Learned Motor Accident Claims Tribunal has assessed monthly income of deceased as Rs.3600/- per month. Learned Motor Accident Claims Tribunal has detected 1/3rd personal expenses of deceased. Learned Motor Accident Claims Tribunal has assessed dependency of petitioners to the tune of Rs.2400/- per month. Age of deceased at the time of death was 25 years. Learned Motor Accident Claims Tribunal has rightly applied multiplier of 17 in accordance with law. **See 2009(6) SCC 121 Sarla Verma & Others Vs. Delhi Transport Corporation and another, See AIR 2013 SCW 3120 Reshma Kumari and others Vs. Madan Mohan and another.**

20. Submission of learned Advocate appearing on behalf of insurance company that learned Motor Accident Claims Tribunal has committed grave illegality by way of not summoning licencing clerk from Mathura is also rejected being devoid of any force for reasons hereinafter mentioned. On dated 10.02.2011 dealing clerk of RLA Una was present but learned Advocate V.K. Dharmani appearing on behalf of insurance company has given statement that he does not want to examine dealing clerk RLA Una as per separate statement placed on record. Licence was renewed from Licencing Authority Una. It is held that insurance company did not examine official of Licencing Authority Una who has renewed licence. Learned Motor Accident Claims Tribunal has rightly closed evidence of insurance company. No satisfactorily explanation given by insurance company that why insurance company did not examine licencing clerk Una when he was present in the Court on 10.02.2011. It is well settled law that when licence is renewed by the competent authority in accordance with law then insurance company is under legal obligation to indemnify the owner of the vehicle relating to third party claim. In the present case it is proved on record that truck No.HP-12A-9281 was duly insured with insurance company as per insurance policy Ext.RX placed on record w.e.f. 19.10.2008 to 18.10.2009 and premium to the tune of Rs.14,038/- was also received by insurance company relating to vehicle No.HP-12A-9281. It is held that insurance company is under legal obligation to indemnify the owner of the vehicle against third party claim. **See AIR 2003 Apex Court 1292 United India Insurance Co. Ltd. Vs. Lehru, See AIR 2014 Apex Court 305 Pepsu Road Transport Corporation Vs. National Insurance Company.** In view of above stated facts point No.1 is answered in negative. .

Point No.2 (Relief).

21. In view of findings upon point No.1 present appeal filed by insurance company is dismissed. Parties are left to bear their own costs. File of learned Motor Accident Claims Tribunal be sent back forthwith alongwith certified copy of the decision. FAO No.441/2011-D is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ... Appellant
Versus
Darshan Lal ... Respondent

Criminal Appeal No. 436 of 2011
Reserved on : 17.11.2016
Date of judgment : 22.12.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.540 kg. charas – he was tried and acquitted by the Trial Court- held in appeal that the prosecution version that accused was apprised of his right to be searched before a Magistrate or a Gazetted Officer was not proved

– no independent witness was associated – there are contradictions in the statements of other prosecution witnesses – the Trial Court had rightly acquitted the accused- appeal dismissed.
(Para-8 to 26)

Cases referred:

K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the Appellant: Mr. Virender Verma, Additional Advocate General.
For the respondent: Mr. Vivek Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present appeal is preferred by the appellant/State under Section 378 of the Code of Criminal Procedure assailing the judgment of acquittal, dated 31.5.2011, passed by the learned Special Judge, Fast Track Court, Chamba, District Chamba,H.P., in Sessions Trial No.11 of 2011, whereby the accused was acquitted of the charges framed against him under Section 20 of the Narcotic Drugs & Psychotropic Substances Act,1985 (hereinafter referred to as 'the Act").

2. Briefly stating, as per prosecution story, facts giving rise to the present appeal are that on 26.2.2011, at about 1.00 p.m., a secret information was received by ASI, Jeet Singh that the accused deals in smuggling of Charas and has gone towards Chamba side for bringing Charas and if nakka is laid at Bonkhari mor (curve), the accused can be nabbed with Charas. To this effect, a daily diary report Ex.PW-6/A, was entered and sent to the Superintendent of Police, Chamba, through Constable, Subhash Chand No.572. After sending information, Investigating Officer/ASI, Jeet Singh took out I.O. kit and proceeded to the spot alongwith Constable, Anuj Kumar and Home Guard, Palwinder. The witnesses Vijay Kumar and Surinder were found standing at Toll Tax Barrier, where they were waiting for bus. He apprised Vijay and Surinder about the secret information of possession of Charas by the accused and whether or not they were ready to accompany him to Bonkhari mor. Thereafter, they both agreed to accompany him to Bonkhari mor and, as such, they were made to sit in the vehicle (Alto Car) No.HP-20D-0997, belonging to the Investigating Officer. The Investigating Officer, alongwith these witnesses and Constable, Anuj Kumar and Home Guard, Palwinder reached at Bonkhri mor at about 1.45 p.m. and laid a nakka there and started waiting for the accused by concealing their presence below the road. It has been averred that at about 3.00 pm, as per the description given by the secret source, the accused having same description, was seen coming on Chakra road, who was stopped by the Investigating Officer, who disclosed his name, as Darshan Lal son of Prithi, resident of near Kali Mata Mandir, Pathankot. The accused was intimated that he was being suspected of carrying Charas and his personal search was required to be taken. He was also apprised of his legal right to be searched before some Gazetted Officer or Magistrate, in writing, but the accused agreed to be searched by the police at spot, per memo Ex.PW-2/A. Thereafter, all the police officials and witnesses Vijay and Surinder gave their search to the accused, per memo. Ex.PW-1/A. Thereafter, personal search, of the accused was taken and during search, a polythene packet was recovered from him, which had been concealed by the accused below the belt of his trouser on the front side. The word 'Sahajada garments' was printed on the said polythene packet and on opening it, one more packet of Khakhi colour was recovered, containing black coloured hard substance in the shape of candles and balls, which, on smell and experience, was found to be Charas. Thereafter, the Charas was weighed, which was found 1kg.540 grams, with polythene packet. The Charas, so recovered, was put in the Khakhi colour packet, which in turn, was put in the packet of *'Sahajada garments'* and then the same was parceled and sealed in a piece of cloth by affixing three seals of impression **'K'.** Sample seal Ex.PW-1/B, was taken separately. NCB forms Ex.PW-10/F were completed in triplicate and seal was embossed thereon and the seal was handed over to witness Surinder and thereafter the case property was taken into

possession vide memo Ex.PW-1/C. Thereafter, rukka Ex.PW-13/A (mark B) was written and sent to the Police Station, through Constable, Anuj Kumar for registration of the case on the basis of which F.I.R. Ex.PW-10/A was registered. On the spot inspection, map Ex.PW-13/B was prepared. The accused was arrested and communicated about the grounds of his arrest, vide memo Ex.PW-1/D and his personal search was taken per memo Ex.PW-1/E. Thereafter, statements of the witnesses were recorded, as per their versions. Thereafter, the accused, case file and the case property brought to the Police Station for resealing the same and produced to the S.I. Vishwas Kumar, Additional S.H.O., who also resealed the parcel in the presence of Constable Hem Raj by affixing two seals of seal impression **'T'** and also took sample seal of 'T' on Ex.PW-1/B and embossed two seals of 'T' in NCB forms and filled relevant columns of NCB forms Ex.PW-10/F and prepared reseal memo Ex.PW-7/A and, thereafter, handed over the case file to the Investigating Officer and deposited the case property i.e. parcel NCB forms, sample seals with MHC and the accused was taken into custody. MHC entered the case property in the Malkhana register, vide Ex.PW-10/B. Special report of the case, Ex.PW-3/B, was prepared and sent to the Superintendent of Police, through Constable, Anil Kumar, who deposited the same with Head Constable Subhash Chand, Reader to the Superintendent of Police at about 3.45 p.m., which was produced before the Superintendent of Police, Chamba at 3.50 p.m. On 27.2.2011, at about 1.00 p.m., MHC, Indu Balla entrusted the aforesaid parcel, sample seals, NCB forms and copy of seizure memo and copy of FIR along with document to Constable, Suresh Kumar No.338, vide R.C. No.22/11, Ex.PW-10/C for being deposited in F.S.L., which he deposited in F.S.L. on 28.2.2011 and handed over the receipt to her. Daily diary report No.26-A, Ex.PW-10/D and daily diary report No.27-A, dated 26.2.2011, Ex. PW-10/E, were procured. Statements of witnesses were also recorded. The report of Chemical Analyst, F.S.L., Junga Ex.PX was received that the quantity of resin found in the Charas was 28.88% w/w and the same were extract of cannabis and sample of Charas.

3. A copy of the challan and other documents were supplied to the accused. On consideration, the accused was charged for the commission of offence under Section 20 of the NDPS Act, to which he pleaded not guilty and claimed trial. To prove its case, the prosecution examined, as many as, thirteen witnesses, in order to substantiate the charge against the accused.

4. After completion of the prosecution evidence, the accused was separately examined under Section 313 Cr.PC. The accused denied the prosecution case in its entirety and had not led any evidence in defence. After the completion of the trial, the learned trial Court acquitted the accused of the charges framed against him.

5. Heard. Mr. Virender Verma, Additional Advocate General has vehemently argued that the Court below has committed illegality in acquitting the accused and has not appreciated the evidence correctly and to its true perspective. The learned Court below has failed to appreciate that the prosecution has proved the guilt of the accused conclusively and beyond reasonable doubt and so the judgment of acquittal may be set-aside and the accused be convicted.

6. On the other hand, Mr. Vivek Singh Thakur, learned counsel for the respondent, has argued that the accused is innocent and the only conclusion, after appreciating the evidence on record, leads towards the innocence of the accused and there is no merit in the appeal and the same be dismissed and the accused be acquitted.

7. To appreciate the arguments of the learned counsel for the parties, we have gone through the record of the case in detail.

8. PW-1, Surinder Singh has stated that he was posted as Chowkidar in Gram Panchayat, Belly. He has further stated that he, along with police officials and one Home Guard and Vijay Kumar went with them to Bonkhari Mod. He has also stated that they were sitting below the road and at about 3.00 p.m., a person appeared from Chakra road side. The accused disclosed his name, as Darshan Lal, resident of Pathankot. The accused was told that a secret

information was gathered regarding possession of Charas by him and his search was required to be taken. During search, a polythene packet was recovered from him, which had been concealed by the accused below the belt of his trouser on the front side, which was found containing Charas. He has further deposed that before recovering Charas, no document was prepared and the documents were prepared simultaneously at the time of recovery of Charas. He has also identified his signatures and admitted that his statement was recorded by the police. He has denied that the accused had been apprised that he has a legal right to give his search before a Magistrate or Gazetted Officer. He admitted that before taking search of the accused, the police officials had given search to the accused, and he and Vijay also gave their search to the accused and memo. Ex.PW-1/A to this effect was prepared. He did not remember whether '*Sehjada Garments'* was written on the polythene packet, which was recovered from the accused. In his cross-examination, he admitted that Vijay Kumar, who was resident of village Bathari, was known to him since his childhood. He has also deposed that he was not aware about the profession of Vijay Kumar and that Village Belli is on the Banikhet-Pathankot Road towards Pathankot, whereas Bathari is on Banikhet- Chamba road towards Chamba. He has further deposed that ASI, Jeet Singh had come down on foot from Police Post, but a car was waiting for him where he was waiting for the bus. The car was of red colour, but he was not aware of the number. He also deposed that Pradhan of the Panchayat and many respectable persons reside at Banikhet and there were many houses and shops there. Benkunth is also adjacent to Banikhet on Banikhet-Chamba road and 10-12 houses and shops were situated at Benkunth Nagar. Sukdain Bain was the next destination from Benkunth Nagar towards Chamba. He has also deposed that there were 10-12 shops and houses at Bonkhari mod besides a Bus Stop. He remained at spot till 8.00 pm. Further that so long he remained present, none of the police officials left the place of occurrence. He has deposed that the parcel was prepared at the spot from cloth and the same was not stitched in his presence. He further deposed that he kept on signing the documents in the manner he was asked by the police to sign. He deposed that he was not aware of the metal of the seal and he could not depose whether the same was of rubber or wood. He also deposed that he lost the seal after 5-7 days of the incident and he did not report the authority regarding the loss of the seal. He admitted that the police officials were in uniform. He also did not disclose to the police in his statement that secret information regarding possession of the Charas by the accused had been gathered. He denied the suggestion that he had not accompanied the police to the spot and that Charas was not recovered in his presence and in the presence of Vijay. He also denied the suggestion that no documents were prepared in his presence.

9. PW-2, Constable, Anuj Kumar stated that he, alongwith other police officials, were sitting for nakka at Chakara Road and at about 3.00 p.m. one person came on foot on the Chakara road, who was stopped by ASI, Jeet Singh. On asking him, the accused disclosed his name as Darshan Lal. The accused was told that he being suspected of carrying contraband and his search was required to be taken, the accused was apprised of his legal right to be searched before a Magistrate, Gazetted Officer or the police present at the spot. However, the accused gave his consent to be searched before the police present on the spot, qua which memo. Ex.PW-2/A, was prepared, which was signed by the accused at circle 'B'. He admitted his signatures at circle 'A' on it. He has further stated that before taking search of the accused, he, along with other police officials, Vijay and Surinder gave their search to the accused person per memo. Ex.PW-1A. Thereafter, personal search of the accused was taken and a polythene packet was recovered from him, which had been concealed by him below the trouser beneath the belt. He further stated that the said polythene packet was containing words 'Shahaza garments' which was containing black coloured hard substance in the shape of balls and candles, which on experience and smell, was found Charas. The Charas, so recovered, was weighed with scales and weight, which was found 1kg.540 grams and thereafter, the same was put in the same Khakhi colour packet, which in turn, was put in the packet of *Shazada garments* and thereafter, the same was parceled and sealed in a piece of cloth with three seals of impression 'K'. Sample seal, Ex.PW-1/B was separately taken on a piece of cloth and seal was handed over to witness Surinder. NCB forms were filled in at the spot and seal was embossed thereon and thereafter, the case property was

taken into possession, vide memo, Ex.PW-1/C, which bears his signatures. He has further stated that the accused also signed the same. Thereafter, the Investigating Officer prepared rukka mark 'B' at 4.50 pm for being taken to the Police Station for registration of case, which he handed over to MHC, Police Station, Dalhousie, at 6.15 pm. He has further stated that at about 6.45 p.m. the case file was given to him by the MHC, which he delivered to the Investigating Officer at the spot at 8.30 p.m. He also identified the parcel Ex.P-1, polythene packets, Ex.P-2 and P-3 and Charas P-4 to be the same. In his cross-examination, he has stated that Vijay was known to him for the last about 1½ years, but he was not aware about his profession. He also deposed that witness Surinder Kumar was also known to him, as he used to come to the Police Post in connection with summons. He further deposed that the accused had stated that he was illiterate but knows how to sign. The accused had been explained the meaning of Magistrate and Gazetted Officer. He further stated that he has disclosed to the police in his statement that meaning of Magistrate or Gazetted Officer had been explained by him to the accused, but confronted with mark 'D' wherein it was not so recorded. He admitted that the Court of J.M.I.C. and his residence was situated at a distance of 10 kms from Chakra road. He had not read the rukka. Rukka had been sent in the presence of Surinder Singh. He has further admitted that he was having I-Card, mobile, purse pen and handkerchief and that the parcel was stitched by him on the spot in the presence of Surinder and Vijay. He further deposed that three sides of the parcel were already stitched by them and fourth side was stitched by him at the spot. He further deposed that the cloth was in the kit of the Investigating Officer and that the search of the I.O. kit was also given to the accused. He denied the suggestion that the accused was not apprehended in his presence.

10. PW-3, HC, Subhash Chand has stated that he was posted as Reader to the Superintendent of Police at the relevant time. He entered the information vide Sr. No.2935/VD on 26.2.2011. He has also admitted that Special Report Ex.PW-3/A, was given to him by Constable Anil Kumar in the office of Superintendent of Police. He produced the same before the Superintendent of Police and the concerned Superintendent of Police, after perusing the same, returned to him after appending his signatures. Said report is Ex.PW-3/B.

11. PW-4, Constable Anil Kumar stated that the Special report was given to him by ASI, Jeet Singh.

12. PW-5, Constable Subhash stated that a copy of daily diary report No.7, dated 26.2.2011, was given to him by ASI, Jeet Singh for being delivered to S.P. Chamba.

13. PW-6, HHC, Chaman Singh stated that daily diary report No.7 was entered in PP by ASI, Jeet Singh, which is Ex.PW-6/A.

14. PW-7, Constable Hem Raj stated that on 26.2.1011, ASI, Jeet Singh produced one parcel sealed with three seals of impression 'K', NCB forms, in triplicate and sample seal for resealing to SI/Addl. SHO, Vishwas Balli, who resealed the parcel by affixing two seals of impression 'T' in his presence and embossed seal 'T' in NCB forms and sample seal of seal 'T' was also taken on record Ex.PW-1/B. Reseal memo Ex.PW-7/A, was prepared and seal was handed over to him. Thereafter, the case property was handed over by Addl. SHO to MHC. He has also admitted his signatures on Memo Ex.PW7/A.

15. PW-8, Constable, Suresh Kumar stated that on 27.2.2011, MHC, Police Station, Dalhousie had handed over to him a sealed parcel sealed with three seals of impression 'K' and two seals of impression 'T' alongwith copy of FIR, sample seal, docket, NCB forms vide road certificate No.22/11, for being deposited in F.S.L., which he deposited in FSL on 28.2.2011, in safe condition and also handed over the receipt thereof to LHC Indu Balla. He admitted that so long case property remained in his custody, no tampering was done by him.

16. PW-9, ASI Surjeet Singh has stated that he prepared special report, Ex.PW-3/B and sent the same to the Superintendent of Police, Chamba, through Constable, Anil Kumar.

17. PW-10, MHC Indu Balla has stated that she was officiating as MHC, Police Station, Dalhousie. She further stated that on receipt of rukka, she entered FIR Ex.PW-10/A, which contained the signatures of Addl.SHO, Vishwas Balli. She also handed over the case file to Constable Anuj Kumar for delivering the same to the Investigating Officer. She also entered in the malkana register, at Sr. No.77, the parcel duly sealed with three seals of seal impression 'K' and two seals of 'T' alongwith NCB forms in triplicate, articles of *jamatalashi,* copy of seizure memo and sample seal at about 9.40 P.M. She also received the receipt issued by F.S.L. She further admitted that till the time the case property remained in her custody, no one tampered with it. She also admitted that she entered report No.26 (A), Ex.PW-10/D and daily diary report No.27 (A), Ex.PW-10/E, which are correct as per record.

18. PW-11, S.I., Vishwas Kumar stated that on the basis of a rukka, received by him through Constable, Anuj Kumar, FIR Ex.PW-10/A, was registered, which bears his signatures and, thereafter, case file was handed over to Constable, Anuj Kumar and endorsement on the rukka was also made by him, vide Ex.PW-11/A. He has further stated that on the same day, at about 9.30 PM, ASI, Jeet Singh deposited with him the case file along with accused and a parcel duly sealed with three seals of impression **'K',** containing 1kg.540 grams Charas, alongwith sample seals and NCB forms for resealing the same. He resealed the parcel in the presence of Constable, Hem Raj by affixing two seals of seal impression 'T' and NCB forms and completed relevant columns of NCB forms Ex.PW-10/F and prepared reseal memo Ex.PW-7/A. He also deposited the relevant case property with MHC and articles of *jamatalashi* to him and the case file was returned to the Investigating Officer and accused was sent in the custody. In his cross-examination, he has deposed that the vehicular distance of Police Station and place of the recovery of Charas was approximately one hour. He has further deposed that it took about ten minutes to complete the resealing process and he also instructed the witness to preserve the seal. He denied the suggestion that no resealing was done by him.

19. PW-12, Vijay Kumar stated that he has a Karyana shop at Bathari and while he was waiting for some lift to Bathari from Banikhet at a place where Surinder was also standing, at about 1.30/2.00 p.m., some police official appeared there and they called him and asked him to associate them so, he along with Surinder, were made to board the vehicle of the police officials, which was of red colour, but he does not know its number. The police officials stopped the vehicle at Bonkhari mor. When he started to proceed towards Bathari, after alighting from the vehicle, he was asked to stop by the police officials. In the meantime, the police officials told him that a person was caught with Charas and he was made to sign certain papers, but neither said person was nabbed in his presence nor Charas was recovered. He has further stated that he was not in a position to identify the said person/accused. He also could not depose that the accused was the same person. He has also deposed that his statement was recorded by the police. Witness was declared hostile and in his cross-examination, he has deposed that the police officials had laid a nakka at Chakra road. He denied the suggestion that at about 3.00 pm, the accused appeared in Chakra road and was nabbed by the police. However, some person was nabbed by the police at 3.00 p.m. He also denied the suggestion that the said person had disclosed his name, as Darshan Lal, resident of Pathankot. He denied the suggestion that the police had apprised the accused that he was being suspected of carrying Charas and his search was required to be taken. He also denied that the accused was also apprised by the police about his legal right to be searched before a Magistrate or Gazetted Officer. He has also denied that accused consented to be searched by the police party or consent memo Ex.PW-2/A, was prepared at the spot. He also admitted his signatures on Ex.PW-2/A, but admitted that he had signed six papers. He has denied the suggestion that during search of the accused in his presence, a polythene packet was recovered from the accused, which had been concealed beneath the belt. He admitted that polythene packets Ex.P-2 and P-3 and Charas Ex.P-4 had been recovered from the said person and that the parcel Ex.P-1, also bears his signatures. He has denied that Charas was weighed in his presence, but he was told that Charas recovered, was 1 Kg.540 grams. He also denied that the Charas was parceled and sealed in his presence, but three seals of impression **'K'** had been affixed in the parcel. He denied that the accused nabbed in his presence

and in the presence of Surinder. He deposed that he had not seen accused Darshan Lal at the spot, as such, he could not say about the colour of his dress. He further deposed that the police officials Jeet Ram and two other constables had asked him to board their vehicle. He has also admitted that he had also been kept, as a witness, in one another case of Charas, by the police official, namely Jeet Ram.

20. PW-13, ASI, Jeet Singh stated that he had received a secret information from some source that one Darshan Lal (accused) deals in smuggling of Charas and had gone towards Chamba side for bringing the Charas. He entered a daily diary report Ex.PW-6/A, on the basis of secret information and sent a copy to the Superintendent of Police, Chamba through Constable Subhash Chand. Thereafter, he took out I.O. Kit and proceeded to the spot alongwith Constable Anuj Kumar, Home Guard Palwinder and at Toll Tax Barrier, witnesses Vijay and Surinder were found standing, who were waiting for a bus. He apprised them about the secret information of possession of Charas by the accused and whether or not they are ready to accompany him to Bonkhari mor and they both agreed to accompany him to Bonkhari mor and, as such, they were made to sit in the vehicle (Alto) Car No.HP-20D-0997. They reached at Bonkhri mor at about 1.45 p.m. and laid a nakka there. They also started waiting for the accused by concealing their presence below the road. It has been averred that at about 3.00 pm, as per the description given by the secret source, the accused having same description, was seen coming on Chakra road, who was stopped by him, who disclosed his name, as Darshan Lal son of Prithi resident of near Kali Mata Mandir, Pathankot. The accused was intimated by him that he was being suspected of carrying Charas and that his personal searched was required to be taken. He was also apprised of his legal right to be searched before some Gazetted Officer or Magistrate, in writing, but the accused agreed to be searched by the police at spot, per memo, Ex.PW-2/A. Thereafter, all the police officials and witnesses Vijay and Surinder gave their search to the accused per memo Ex.PW-1/A. Thereafter, personal search of the accused was taken and during search, a polythene packet was recovered from him, which had been concealed by the accused below the belt of his trouser on the front side. The word *'Sahajada garments'* was printed on the said polythene packet and on opening it, one more packet of Khakhi colour was recovered, which was containing black coloured hard substance in the shape of candles and balls, which on smell and experience, was found to be Charas. Thereafter, the charas was weighed, which was found 1kg. 540 grams, with polythene packet. The Charas, so recovered, was put in the Khakhi colour packet, which was put in the packet of 'Sahajada garments' and then the same was parceled and sealed in a piece of cloth by affixing three seals of impression 'K'. Sample seal Ex.PW-1/B was taken separately. NCB forms Ex.PW-10/F were completed in triplicate and seal was embossed thereon and the seal was handed over to witness Surinder and thereafter the case property was taken into possession, vide memo, Ex.PW-1/C. Thereafter, he scribed rukka Ex.PW-13/A (mark B) and thereafter, sent the same to the Police Station for registration of the case through Constable, Anuj Kumar. Accused was arrested. The personal search of the accused was also taken after arrest memo Ex.PW-1/E. He has also recorded the statements of the witnesses, namely Vijay and Surinder. Case file was also handed over to him by Constable Anuj Kumar at the spot at about 8.30 p.m. He has further stated that after resealing the case property at the Police Station, the same was deposited by the Station House Officer to the M.H.C. Thereafter, he became busy in another case and handed over the case file to ASI, Surjeet Singh. He returned the file after investigation to him. He presented the file to SHO for preparation of challan. He further stated that the daily diary report Ex.PW-10/D was entered when the case property was presented by him for resealing purpose. In his cross-examination, he has deposed that witness Vijay Kumar was not known to him prior to 26.2.2011. He has also denied the suggestion that it becomes dark at 5.00 pm during the month of February at Bonkhari mor. Self stated that it becomes dark at about 6.30 pm during February. He has also admitted that the statements of the witnesses, was recorded by him on the road with the reflection of light from the shop of Sadhu Ram and other lights, which were on the road. He also denied the suggestion that he had not written in the statements of the witnesses that Vijay and Surinder met him at Toll Tax Barrier and that he had received secret information about possession of Charas by the accused and they should not accompany him. He has also admitted that the secret source had not been disclosed about the

colour of clothes of the accused. He also denied the suggestion that Bonkhari Mod was a busy highway. He has also deposed that the accused was wearing shirt and trouser, but was not aware about the colour thereof. He had not entered number of the vehicle in the departure report. He has deposed that after complying with Section 50 of the Act, he gave personal search of the police officials and witnesses to the accused and effected the recovery. He further denied the suggestion that consent memo was prepared after sending the rukka. He had written in the rukka that accused was apprised about his legal rights to be searched before a Magistrate or Gazetted Officer. He denied the suggestion that accused did not appear at Chakra road. He has also denied that witnesses were not present with him at the spot. He denied the suggestion that no Charas was recovered from the accused and the accused was not apprised of his legal right of search before Magistrate or Gazetted Officer. He has also denied the suggestion that no proceedings were conducted at the spot and that parcel and other case property were not produced for resealing by him before the Station House Officer.

21. There were two independent witnesses, namely Surinder Singh (PW1) and Vijay Kumar (PW12). The prosecution story is that in the presence of the independent witnesses, accused was informed that the Police has suspicion that he was carrying narcotics and the accused has legal right to be searched before a Magistrate or Gazetted Officer, but the accused gave his consent to be searched before the Police at the spot. Now, Surinder Singh, the independent witness (PW1) has stated that on 26.2.2011, he was waiting for the bus alongwith Vijay Kumar near Police Post, Banikhet, at about 1-30/1-45 PM, when ASI, Jeet Singh and Constable, Anuj and one Home Guard came to him and requested him and Vijay Kumar to accompany them to Bonkhari curve (Mor) and accordingly, they reached at Bonkhri Mod at 1-45 PM and were sitting below the road and at about 3-00 PM, accused appeared from Chakra road-side whose identity and whereabouts were ascertained and accused disclosed his name as Darshan Lal. According to him, accused was told about the secret information received qua him regarding possession of Charas and that his search is to be taken and on search, a polythene packet was recovered which had been concealed by the accused below his trouser near stomach which was found containing Charas. However, he has not stated anything that the accused had been apprised of his legal right to be searched before a Magistrate or Gazetted Officer before carrying out his search. Rather, he stated that before recovery of Charas, no documents whatsoever were prepared and the documents were prepared simultaneously at the time of recovery of Charas. Though, this witness was declared hostile by the prosecution but nothing favourable to the prosecution has come. He has specifically denied that accused had been apprised of his legal right to be searched before a Magistrate or Gazetted Officer. Though, he admitted that the accused had stated that he was ready to be searched by the police at the spot, but once the accused was not apprised of his indefeasible legal right to be searched before a Magistrate or Gazetted Officer, the whole search and recovery becomes doubtful. So, as the witness has not stated anything with regard to the fact that the accused had been apprised about his legal right to be searched before a Magistrate or Gazetted Officer, the prosecution story becomes suspicious with regard to the recovery and the benefit of it is always required to be given to the accused. At the same point of time when this witness was cross-examined by the defence counsel, he stated that he know the Investigating Officer, as he used to go to the Police Post in connection with the service of summons, as he was the Chowkidar of the Panchayat. He has further stated that the distance of his village and the Police Post was 10 Kms from his village and many other persons were there and there were 10-12 shops. It has also come in the prosecution story that the alleged recovery was effected at 3.00 PM. It is surprising why any resident of Bonkhari Mor was not associated by the police. This witness has also not supported the sealing of the samples at the spot. In his statement, he stated that no police official departed from the spot till 8.00 PM, the same is in contradiction to the contents of the F.I.R.

22. The another independent witness namely Vijay Kumar, who appeared as PW12, has also not supported the prosecution story and stated that he alongwith Surinder was taken to Bonkhari Mod from where he was about to go to his house, but was stopped by the police and in the meanwhile, he was apprised by the police that accused has been found in possession of the

Charas and was made to sign certain papers. In these circumstances, he too was declared hostile, but without any assistance to the prosecution. No doubt, he stated that the person nabbed by the police had disclosed his name as Darshan Lal and witness has identified his signatures on memo Ex.PW-2/A encircled **A** and that the parcel was also sealed in his presence, but he has denied rest of the prosecution story. He also categorically denied that the accused had been apprised of his legal right to be searched before a Magistrate or Gazetted Officer or that the accused had consented to be searched by the police party at the spot or consent memo Ex.PW-2/A was prepared at the spot. He also denied that search of the accused was carried out in his presence and a polythene packet had been recovered which had been concealed below the belt or that Charas was weighed in his presence or sample seal was taken or NCB forms were completed on the spot or rukka was sent from the spot or accused was arrested. During his cross-examination, he has stated that witness Surinder was known to him for the last about 4-5 years, but witness Surinder has stated that this witness was known to him from childhood and that he was also associated as witness in one another case after 26.2.2011. He further stated that he was not resident of Bonkhari Mor, as such, he was not required to be associated. So, he was a stock witness and, as such, his signatures were obtained somewhere else and it was projected that the accused had been nabbed in his presence. Once he has categorically stated that neither Charas was recovered in his presence nor accused had been apprised of his legal right to be searched before a Magistrate or Gazetted Officer nor the accused consented to be searched by the police, the entire prosecution case falls to ground and it is not substantiated that mandatory provisions of Section 50 of the NDPS Act have been complied.

23. Constable, Anuj (PW2) was present with the Investigating Officer and corroborated the prosecution story. As per him, rukka was written by the Investigating Officer and handed over to him at 4-50 PM, which he took to the Police Station for registration of the case and handed over to MHC at 6-15 PM and at 6-45 PM, case file was given to him by the MHC, which he further delivered to the Investigating Officer at the spot at 8.30 PM. So far as his version regarding depositing the rukka is concerned, PW1 has categorically stated that he remained at the spot till 8.00 PM and so long he remained there, no police official departed from the spot. PW-12 Vijay Kumar has also stated that no rukka was sent in his presence. PW-1 and PW-12, are also not the residents of Bonkhari Mor and belong to far off places and appear to be stock witnesses. If so, it is also doubtful that the rukka had been dispatched in the manner projected and possibility of completing all the papers lateron cannot be ruled out. According to him, accused had been explained the meaning of Magistrate or Gazetted Officer, but when confronted with his statement under Section 161 Cr.P.C. Ex.PW-13/A, said statement was silent that the accused had been explained such meaning as such an inference arises that the accused was not apprised of his legal right as projected by the independent witnesses. He has further stated that the Court of Judicial Magistrate and residence was at a distance of 10 Kms. from the spot. He also stated that the parcel was stitched in the presence of Vijay and Surinder but PW-1 has denied the same. Apparently, he was under the influence of Investigating Officer. Since the independent witnesses have not rendered assistance to the prosecution story and his version regarding explaining the meaning of the Magistrate or Gazetted Officer is silent in his statement under Section 161 Cr.P.C., possibly of deposing falsely to cover up the lacuna left by PW-1 cannot be ruled out. Therefore, his version without corroboration of independent witnesses cannot be believed.

24. Further, though the independent witness PW-1, has stated that that the accused was not informed that he has a right to be searched before a Magistrate or Gazetted Officer, meaning thereby that the provision was not complied with. At the same point of time, even PW-2, Constable Anuj Kumar has stated that the accused was apprised of his legal right to be searched before a Magistrate, Gazetted Officer or the police officials present on the spot and even this is also not a proper compliance of the mandatory provisions under the law. In these circumstances also, the findings of the Court below cannot be said to be against the law while convicting the accused.

25. It has been held in **K. Prakashan** vs. **P.K. Surenderan (2008) 1 SCC 258**, that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

26. The Hon'ble Supreme Court in **T. Subramanian** vs. **State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

27. In these circumstances, as the prosecution has failed to prove the guilt of the accused conclusively and beyond shadow of doubt. This Court finds that the learned trial Court has rightly dealt with the evidence and found the same to be not worthy of credence. We, thus, find no merit and substance to interfere with the well reasoned judgment, passed by learned Appellate Court and the appeal filed by the appellant is accordingly dismissed.

28. In view of the aforesaid decision of the Hon'ble Supreme Court and discussion made hereinabove, we find no merit in this appeal and the same is accordingly dismissed.

29. All the pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh … Appellant
Versus
Pawan Kumar and others. … Respondents

Criminal Appeal No. 480 of 2009
Reserved on : 17.11.2016
Date of judgment : 22.12.2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 505 grams charas- he was tried and acquitted by the Trial Court- held in appeal that the independent witness has not supported the prosecution version – other independent witness was given up by the prosecution – there are contradictions in the statements of official witnesses – the trial Court had rightly refused to rely upon the testimonies of the official witnesses – appeal dismissed.(Para-7 to 24)

Cases referred:
K. Prakashan vs. P.K. Surenderan (2008) 1 SCC 258
T. Subramanian vs. State of Tamil Nadu (2006) 1 SCC 401

For the Appellant: Mr. Virender Verma, Additional Advocate General.
For the respondents: Mr. V.S. Rathore,Advocate, for respondent No.1.
Mr. Rajesh Mandhotra, Advocate for respondent No.2.
Mr. Chaman Negi, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge

The present appeal is preferred by the appellant/State under Section 378 of the Code of Criminal Procedure assailing the judgment of acquittal, dated 15.5.2009, passed by the learned Special Judge(3), Kangra at Dharamshala, District Kangra, H.P., in Sessions Trial No.29-

D/VII/2006, of 2010, whereby the accused persons have been acquitted of the charges framed against them under Section 20 of the Narcotic Drugs & Psychotropic Substances Act,1985 (hereinafter referred to as 'the Act").

2. Briefly stating, as per prosecution story, facts giving rise to the present appeal are that on 13.4.2005, a Police Party consisting of ASI, Kamal Chand, HC, Bhag Chand No.69, HC, Uttam Chand No.142, HHC, Janam Singh No.377, HHC, Tungal Singh No.733, Constable, Santosh Kumar No.279 and one Ramesh Kumar son of Harbans Lal r/o countryside House, Bhagsunag, laid a naka near Jogibara on Kharadanda Road and at about 7.30 AM a Maruti Van bearing No.HP-01-0654, came which was checked by them. The vehicle was driven by Tek Chand resident of Bhagyara, P.O. Jari, District Kullu, HP and other occupants disclosed their names, as Pawan Kumar resident of Mamleeg, District Solan, who was residing at Dharamkot, District Kangra and Ganga Ram resident of Malana, Tehsil and District Kullu. It has been alleged that Pawan Kumar had a bag in his lap and on suspicion, the bag was opened, which was containing Charas in polythene packets in the shape of tablets and balls and on weighing, it was found 505 grams. In another packet of the bag, an agreement, dated 19.10.2004,containing two sheets, which was between Kala Ram and Pawan Kumar, a copy of Jamabandi of Mohal Chohla qua Khatauni No.165 to 169, dated 6.10.2004, Jamabandi for the year 1997-98, Khatauni No.261, Mohal Chohla, dated 14.10.2004 were found. Two samples of Charas, each containing 25 grams, were drawn and put in two empty cigarette packets, which were sealed with seal impression **'M'** (with 6 seals each) and the remaining 455 grams Charas was put in polythene packet and placed in the same very bag, which was put in a cloth parcel and sealed with seal impression '**M'.** It has been averred that ASI, Kamal Chand filled in NCB-I, in triplicate, and specimen impression of seal was also obtained separately and seal was handed over to Ramesh Kumar. The contraband material and other documents besides the vehicles were seized vide separate memorandum in the presence of the witnesses and a copy thereof was handed over to the accused persons. All the accused admitted the contraband, as Charas and ASI, Kamal Chand prepared rukka and sent the same to the Police Station through Constable Santosh Kumar where FIR No.78/05, dated 13.4.2005, was registered. Site plan was prepared and the statements of the witnesses were recorded by ASI, Kamal Chand, who handed-over the case property to the Station House Officer, Onkar Nath, who, in turn, resealed the same and sample seal impression **"A"** was taken and handed-over the same along with documents to MHC, Sushil. The sample was sent to the Laboratory for analysis and report was obtained. After completion of the investigations, the challan against the accused persons was put in the Court under Section 20 of the NDPS Act.

3. The accused persons in their statements, under Section 313 Cr.PC denied the prosecution case in its entirety and had not led any evidence in defence. After the completion of the trial, the learned trial Court acquitted the accused of the charges framed against them.

4. Heard. Mr. Virender Verma, Additional Advocate General has vehemently argued that the Court below has committed illegality in acquitting the accused persons and has not appreciated the evidence correctly and to its true perspective. The learned Court below has failed to appreciate that the prosecution has proved the guilt of the accused persons conclusively and beyond reasonable doubt and so the judgment of acquittal may be set aside and the accused persons be convicted.

5. On the other hand, learned counsel for the respondents/accused (hereinafter called the 'accused') have argued that the accused persons are innocent and the only conclusion, after appreciating the evidence on record, leads towards the innocence of the accused persons and there is no merit in the appeal and the same be dismissed and the accused persons be acquitted.

6. To appreciate the arguments of the learned counsel for the parties, we have gone through the record of the case in detail.

7. PW-1, ASI Bhag Chand stated that he remained posted as HC in Police Post, Forystgang. He further deposed that on 13.4.2005 at about 2.20 a.m., he alongwith ASI Kamal

Chand, HC Uttam Chand and HHC Tungal Singh and HHC Dharam Singh and Constable, Santosh Kumar were at Khara Danda Road Jogibara and performing the nakka bandi by checking the vehicles. At about 7.30 a.m., a taxi (Van) bearing No.HP-01K-0654 came from Dharamshala side and on checking the same, it was found that two persons were sitting in the rear seat and the occupants of the Car became perplexed during checking. On asking, they disclosed their names, as Pawan Kumar and Ganga Ram, resident of Solan and Kullu, respectively. The vehicle was being driven by Tek Chand. On checking the bag, it was found containing polythene packet, which was containing Charas and on weighing, it was found 505 grams and two samples were drawn, 25 grams each. The Charas was in the shape of tablets and balls. He has further stated that each sample was put in a packet and sealed with seal impression **'M'** and the remaining Charas was also put in a packet and sealed with seal impression 'M' and was taken into possession vide memo Ex.PW1/A, which was signed by accused persons and Chander Bahadur, Uttam Chand and Ramesh Chand respectively. PW1 also identified Charas as P1, sample P2 and bag P3. He also admitted that nearby the nakka/place of occurrence, there were various houses and establishments and no person from the locality was associated.

8. PW-2, Constable Santosh Kumar stated that he was posted in the Police Post, Forsythgang and accompanied ASI, Kamal Chand and was one of the members of the police party and saw Taxi HP-01K-0654, which was stopped at the time of naka at Jogibara and saw the accused persons in that vehicle. He further stated that Pawan Kumar had a bag in which was a polythene bag, which on opening found containing Charas, which was 505 grams and samples were drawn in his presence and sealed on the spot. He further stated that samples were taken in his presence and he was deputed by said Kamal Chand with the rukka, which he handed-over to the Incharge, Police Station, Dharamshala. He also identified the accused persons and bag (P3) and Charas (P1). He further stated that various vehicles were checked and they remained at nakka for about 4-5 hours. He has also admitted that nearby the place of nakka, there were many houses and establishments. He also stated that Ramesh Kumar had come on the spot and he had brought weighing scale from the shop of a goldsmith.

9. PW-3, Chander Bahadur, who was running a shop of Goldsmith at Cantt. Road, Dharamshala Cantt. since his birth, has stated that he identified his signatures at place Ex.PW3/A on seizure memo Ex.PW1/A, but denied to have seen the occurrence and seizure of the contraband material. He also did not support the prosecution case.

10. PW-4, Ramesh Kumar stated that he was running a Guest House at Bhagsunag and he did not join the proceedings on 13.4.2005 at Jogibara. He also did not support the prosecution case even when he was cross-examined by the learned P.P. after being declared hostile.

11. PW-5, ASI Subhash Chand stated that he received Special report through HHC Gungal Singh on 14.4.2005, while he was working as a Reader to Superintendent of Police and he handed over the same to Kapil Sharma, the then Superintendent of Police and that the report has been exhibited as Ex.PW5/A and extract of register as Ex.PW5/B.

12. PW-6, HC Tungal Singh has stated that he was posted in Police Station, Dharamshala since the year 2006. He had handed-over the special report Ex.PW5/A to the office of Superintendent of Police, on 14.4.2005.

13. PW-7, SHO Prem Dass was posted at Police Station, Banjar and has prepared the challan.

14. PW-8, ASI Onkar Nath has stated that he was working as Investigating Officer at Police Station, Dharamshala. He has further stated that ASI, Kamal had handed-over three packets sealed with seal impression **'M'** along NCB form along with same seal. After that, he had handed-over the material to PW10, Sushil Kumar, MHC. In his cross-examination, he stated that his seal was made of lead. He, at his own, prepared it and the seal was not allotted by the Government to him and he had lost the seal.

15. PW-9, Kamal Chand was the Investigating Officer, who headed the police party on 13.4.2005 and had laid a naka at Jogi Bara on Khara danda Road. He also proved copy of report Ex.PW9/A. He further stated that at about 7.30 a.m., a taxi Maruti Van bearing No. HP-01K-0654, which was driven by Tek Chand and two other persons, one Ganga Ram were sitting in rear seat. Pawan Kumar had on bag in his lap, which contained a polythene packet. On opening the same, Charas was found in the shape of tablets and balls. He further stated that he asked Chander Bahadur to bring weighing scale and weights. Charas was weighed, it was found 505 grams. He had deposed that Ramesh Kumar was already with the police party. Two samples, 25 grams each, were drawn. Each sample part was put in empty cigarette packet and each packet was put in a cloth packet and sealed with seal impression **'M'**. The remaining Charas was put in the polythene bag and thereafter put in a cloth parcel and was sealed with seal impression 'M'. The material was taken into possession vide memo Ex.PW1/A, and the same was signed by the accused persons, Ramesh Kumar, Chander Bahadur, Bhag Chand and Uttam Chand. Specimen impression of seal 'M', Ex.PW9/B, was obtained by him and he also filled NCB forms Ex.PW9/C. He handed over the seal to Ramesh Kumar. The report of the Chemical Examiner is Ex.PW9/D. He also prepared ruka, Ex.PW9/F and site Plan Ex.PW9/E. He also sent Special report Ex.PW5/A, through Tungal Singh, HHC. He also proved statement of Chander Bahadur Ex.PW9/G. He handed over the case property along with other documents to PW8 Onkar Nath, SHO. He also identified the Charas P1, sample P2 and Bag P3. The other documents found in the bag were Ex.A1 to A3. He has deposed that F.I.R. **(A4)** was written by Sushil Kumar and also identified his signatures on the same. He also admitted that nearby the place of nakka, there were many houses and establishments. He has also admitted that he had not associated any witness from the locality nor tried to associate any Executive Magistrate. The Chemical Report is Ex.PW9/D. He denied that he had any prior information that the accused were bringing Charas in a vehicle.

16. PW-10, Sushil Kumar, has stated that he was posted as MHC at Police Station, Dharamshala. He has further stated that PW9, Karam Chand had deposited three packets sealed with seal impression 'M' with him and further resealed it with seal impression 'A' alongwith NCB forms. He has also admitted that he made entry in the Malkhana Register and sent the sample alongwith documents to the F.S.L. He further admitted that there was no entry in the Malkhana Register about the deposit of the NCB forms.

17. It has come on record that near the alleged place of recovery, there are many houses and shops and further at a distance of 1- 2 Kms., there is Officer's Colony at Chilgarhi, Dharamshala, where Executive Magistrates and high police officers are residing. No one amongst them was associated. PW-4, Chander Bahadur has specifically stated that he did not join the proceedings and no Charas was recovered by the police in his presence, though he was cross-examined at length by the learned Public Prosecutor after being declared hostile, but he denied all the suggestions put to him by the learned Public Prosecutor. PW-4, Uttam Chand was given-up by the prosecution. PW-3, Chander Bahadur has also stated that he is running a shop of Goldsmith at Cantt. Road, Dharamshala, since his birth. He also did not support the prosecution case and he has specifically stated that neither he was called by the police nor he knows what was recovered by the police. He was cross-examined at length by the learned Public Prosecutor after being declared hostile, but nothing favourable to the prosecution has come. He has also specifically stated that he has put his signatures due to the reason that he was having affinity with the police, as his shop was situated near the Police Station. He has also not identified any accused person and he has specifically denied that the seal was handed over to Ramesh Kumar by the police when he was cross-examined. Meaning thereby that he has not supported the recovery, sealing and taking of the samples by the police on the spot.

18. In these circumstances, when the independent persons, who were associated by the police have not supported the case of the prosecution at all, we have to consider whether the learned Court below has committed illegality in not convicting the accused persons on the basis of statements of the police witnesses to this effect. It is found that A.S.I., Bhag Chand has stated that the police party consisted ASI, Kamal Chand, HC, Uttam Chand, HHC Tungal Singh, HHC

Dharam Singh and Constable Santosh Kumar, but he did not state that PW-3 and PW-4 were also with them. PW-2, Santosh Kumar, stated that he has gone to call Goldsmith and thereafter, he went to the Police Station. Even PW-4, Ramesh Kumar has denied his signature on Ex.PW-1/A. From the statement of the Police witnesses, the presence of PW3 and PW4 also becomes doubtful, resulting that the prosecution story with respect to search and seizure becomes suspicious. Further, it is in evidence of PW-8, ASI, Onkar Nath that he had resealed the samples and the remaining Charas with his own seal 'A', but he had not stated that he had also taken the specimen seal impression separately and handed over the same to the MHC. PW-10, ASI, Sushil Kumar has stated that the case property and samples were given to him by PW-9, ASI, Kamal Chand. Further, PW-10, Sushil Kumar has admitted that there is no mention in the Malkhana register that NCB forms were also deposited with him.

19. In these circumstances, the learned Court below has committed no illegality in not basing the conviction on the statement of police witnesses alone as their statements were contradictory and not inspiring confidence.

20. The result of the above discussion is that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

21. It has been held in **K. Prakashan** vs. **P.K. Surenderan (2008) 1 SCC 258**, that when two views are possible, appellate Court should not reverse the judgment of acquittal merely because the other view was possible. When judgment of trial Court was neither perverse, nor suffered from any legal infirmity or non consideration/mis-appreciation of evidence on record, reversal thereof by High Court was not justified.

22. The Hon'ble Supreme Court in **T. Subramanian** vs. **State of Tamil Nadu (2006) 1 SCC 401,** has held that where two views are reasonably possible from the very same evidence, prosecution cannot be said to have proved its case beyond reasonable doubt.

23. In these circumstances, as the prosecution has failed to prove the guilt of the accused conclusively and beyond shadow of reasonable doubt, this Court finds that the learned trial Court has rightly dealt with the evidence and found the same to be not worthy of credence. We, thus, find no merit and substance to interfere with the well reasoned judgment, passed by learned Appellate Court and the appeal filed by the appellant is accordingly dismissed.

24. In view of the aforesaid decision of the Hon'ble Supreme Court and discussion made hereinabove, we find no merit in this appeal and the same is accordingly dismissed.

25. All the pending application(s), if any, also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Vinod Kumar and others. …Petitioners.
Versus
State of H.P. and others. …Respondents.

CMPMO No. 487/2016
Decided on: 22.12.2016

Land Acquisition Act, 1894- Section 18- Reference petition was ordered to be dismissed in default- held, that the reference petition cannot be dismissed in default and the reference Court had wrongly ordered the dismissal – direction issued to restore the reference petition to its original number and to decide the same in accordance with law. (Para-2 to 5)

Cases referred:
Khazan Singh (dead) by L.Rs. v. Union of India, AIR 2002 SC 726

Thakur Dass vs. Land Acquisition Collector and others, Latest HLJ 2003 (HP) 13
Yogesh Verma and others vs. State of H.P. and others, 2004 (1) Shim. L.C. 16

For the Petitioners: Mr. B.S. Chauhan, Sr. Advocate with Mr. Manish Datwalia, Advocate.
For the Respondents: Mr. Meenakshi Sharma, Addl. A.G. with Mr. J.S. Guleria, Asstt. A.G.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral):

It is rather unfortunate that even after the legal position of law having been settled more than one and a half decade back, this Court is once again called upon to answer the question as to whether Reference Petition under section 18 of the Land Acquisition Act (for short the 'Act'), can be ordered to be dismissed in "***default***".

2. The impugned order reads thus:

> "19.11.2015: Present : None for the petitioners.
>
> Sh. Sudhir Sharma, Ld. Dy.D.A. for the state/respondents.
>
> Petition called time and again, neither petitioners, nor any counsel appeared on their behalf. It is 3.55 P.M. Hence, the petition is hereby dismissed in default. File after its due completion be consigned to the records."

3. As far back as in the year 2002 (precisely 24.1.2002), the Hon'ble Supreme Court in ***Khazan Singh (dead) by L.Rs.*** v. ***Union of India***, AIR 2002 SC 726, had made it absolutely clear that reference made under section 18 of the Act cannot be dismissed in default. It would be apt to reproduce the relevant observations, which read thus:

> "[7] The provisions above subsumed would thus make it clear that the Civil Court has to pass an award in answer to the reference made by the Collector under S. 18 of the Act. If any party to whom notice has been served by the Civil Court did not participate in the inquiry it would only be at his risk because an award would be passed perhaps to the detriment of the concerned party. But non-participation of any party would not confer jurisdiction on the Civil Court to dismiss the reference for default."

4. This settled proposition of law was thereafter repeatedly followed and reiterated by this Court. Reference in this regard can conveniently be made to:

i) ***Thakur Dass*** vs. ***Land Acquisition Collector and others***, Latest HLJ 2003 (HP) 13; and

ii) ***Yogesh Verma and others*** vs. ***State of H.P. and others***, 2004 (1) Shim. L.C. 16

5. In view of the above said well settled position of law, impugned order dated 19.11.2015 cannot be sustained and is accordingly set aside. Learned Additional District Judge (CBI), Circuit Court at Theog, Shimla, shall restore the Reference Petition to its original number and decide the same in accordance with law. The parties/their counsel are directed to cause appearance before the learned Additional District Judge (CBI), Circuit Court at Theog on **6.1.2017**.

6. The petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Meemo Devi …..Petitioner/Defendant.
Versus
Saroj Kumari …..Respondent/plaintiff.

CMPMO No.207 of 2016.
Date of decision: 23.12.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff/applicant filed an application seeking an ad interim injunction, which was partly allowed by the Trial Court and the defendant/respondent was restrained from mortgaging or creating charge over the suit land – however, relief of injunction for restraining the defendant/respondent from interfering with the suit land was declined on the ground that defendant/respondent was in possession of the suit land - an appeal was filed, which was allowed and the defendant/respondent was restrained from interfering with the suit land – held, that the Appellate Court had not upset the findings recorded by the Trial Court that defendant/respondent was in possession and therefore, could not have granted injunction for restraining the defendant/respondent from interfering with the suit land – petition allowed and order of Appellate Court set aside. (Para-4 to 7)

For the Petitioner : Mr.Ajay Sharma, Advocate.
For the Respondent : Mr.Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

The petitioner/defendant (hereinafter referred to as the petitioner) has filed this petition under Article 227 of the Constitution of India against the judgment dated 21.03.2016 passed by the learned Additional District Judge-II, Kangra at Dharamshala, Camp at Jawali.

2. It is not in dispute that the plaintiff/respondent (hereinafter referred to as the respondent) alongwith suit for declaration and injunction had filed an application under Order 39 Rules 1 and 2 CPC which was partly allowed by the learned trial Court and the petitioner was restrained from mortgaging or creating charge over the land comprised in Khata No.137, Khatauni No.179, Khasra No.103, land measuring 0-40-23 HMs. to the extent of 3449/4023 shares i.e. 0-34-49 HMs., situated in Mohal Bhanyari, Mauza Bhali, Tehsil Jawali, District Kangra, H.P. during the pendency of the suit. However, as regards the relief of injunction restraining the petitioner from dispossessing the respondent or from transferring it by way of sale, gift or exchange the same was declined.

3. This constrained the respondent to file an appeal before the learned first appellate Court, who vide impugned judgment dated 21.03.2016 has allowed in entirety the application filed by the respondent and thereby has restrained the petitioner from dispossessing the respondent from suit land and also from alienating the suit land or creating charge over it in any manner whatsoever. It is this judgment which has been assailed by way of instant petition mainly on the ground that once the learned trial Court had found the petitioner to be in possession of the suit land, then no injunction could have been granted in favour of the respondent without first upsetting these findings.

I have heard the learned counsel for the parties and gone through the material placed on record.

4. At the outset, I may observe that the manner, in which the order passed by the learned trial Court has been set aside, is not at all satisfactory as the first appellate Court has virtually gone astray without appreciating the real controversy in issue. It was on the basis of the

material placed on record that the learned trial Court had arrived at a finding that it was the petitioner, who was in possession of the suit land and had, therefore, granted injunction to that extent, as would be clear from para-7 of the order which reads thus:-

> *"7. In regard to relief of injunction restraining the respondent from dispossessing the applicant, perusal of record shows that the applicant is herself residing at Pragpur which is clear from Marriage Certificate and copy of Parivar Register of Ramesh Chand due to which at this stage it appears that the applicant is herself out of possession due to which she cannot be dispossessed from the suit land. Further, when applicant is appearing out of possession of the suit land then in said case relief in regard to injunction restraining respondent from dispossessing the applicant cannot be granted in her favour at this stage."*

5. Evidently, the learned first appellate Court without discussing the aforesaid findings and further without even arriving at an independent conclusion that the respondent is in possession of the suit land restrained the petitioner from dispossessing the respondent, who was not even in possession of the suit land. To say the least, the findings recorded by the learned first appellate Court are perverse and, therefore, cannot be sustained in the eyes of law.

6. Consequently, this petition is partly allowed and the impugned judgment is set aside to the extent it restrains the petitioner from interfering with the possession of the respondent, who otherwise is not in possession of the suit land.

7. It is clarified that though the respondent is directed not to interfere in the peaceful possession of the petitioner over the suit land, however, at the same time, the petitioner is restrained from mortgaging, transferring the suit property by way of sale, gift or exchange or creating charge over it during the pendency of the suit.

8. The petition is allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Gian Chand & ors. ...Appellants.

Versus

M/s Mohan Transport Company and others ...Respondents.

FAO No.405 of 2011.
Reserved on : 30.11.2016.
Decided on: 26.12.2016.

Motor Vehicles Act, 1988- Section 166- The vehicle fell down on the house of the claimant and caused damage to the same – MACT awarded compensation – it was pleaded that liability of the insurance company is restricted to Rs. 6,000/- and no extra premium was paid – compensation is excessive- held, that damages sustained by the petitioner were not specified in the valuation report- photographs do not show damage to the residential house – the report Ex.RW-1/A shows the damage to the extent of Rs. 17,200/- - this report was prepared by an independent person/expert – compensation was rightly assessed by the MACT- appeal dismissed.

(Para-10 to 12)

For the appellants Mr. J.R. Poswal, Advocate.
For the respondents Mr. Dinesh Thakur, Advocate, for respondent No.1.
Respondent No.2 already ex-parte.
Mr. Deepak Bhasin, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1988, is maintained by the appellants/claimants/petitioners (hereinafter referred to as the 'petitioners') for enhancing the amount awarded by learned Motor Accident Claims Tribunal, Bilaspur, District Bilaspur, H.P, in MAC Petition No.10 of 2007, vide impugned award dated 20.7.2011.

2. Brief facts giving rise to the present appeal are that on 8.10.2006 at about 11:00 PM, the offending vehicle Bulkar bearing No.HP-24-5740 came from Swarghat side in a very high speed and straightway struck against the STD booth and house of the petitioners and fell down on two latrines at village Chehari on National Highway-21, as a result of which, residential house, STD booth and two latrines of the petitioners were damaged. The wall of the house consisting of three storey residential building sustained cracks. It is further averred in the petition that at the time of accident, the bulkar vehicle was being driven by its driver, respondent No.2, in a very high speed and in a rash and negligent manner. There was a P.C.O machine, three telephones and the apparatus installed in the S.T.D booth, which stood completely damaged due to which the daily income earned by the petitioners from this booth has been completely stopped. The petitioners are poor persons and cannot afford expenditure to repair and rebuild the damaged portion of their house.

3. The respondents contested the claim petition. In reply on behalf of respondent No.1 preliminary objections has been raised that the petition is not maintainable and the petitioners have no locus standi to file the claim petition. On merits, it has been denied that the amount as claimed is highly excessive and exorbitant. In reply on behalf of respondent No.2, it has been submitted that no damage has been caused to the house, STD booth and other structure of the petitioners nor any accident took place due to rash and negligent driving of respondent No.2. It has been further submitted that the amount of compensation as claimed is highly excessive and exorbitant. Respondent No.2 further submitted that at the relevant time, suddenly a cow came in front of the bulker of the replying respondent and then respondent No.2 applied immediate brakes, due to which the vehicle slightly struck with the STD booth and no damage has been caused to the structure, as alleged. In reply on behalf of respondent No.3, preliminary objections have been taken that the petition is not maintainable, the petition does not disclose any cause of action against the replying respondent, the replying respondent had not issued any policy of the insurance insuring or contracting to indemnify respondent No.1 for any loss, the vehicle was being driven without relevant documents i.e. Registration Certificate, Route permit, fitness certificate, the liability of the Insurance Company is limited to the extent of Rs. 6000/-. On merits, the replying respondent submitted that no particulars of the policy of insurance have been supplied by the concerned parties.

4. The learned Tribunal below framed the following issues on 27.11.2007 :

"1. Whether on 8.10.2006 at about 11:00 PM at village Chehri, the property of the petitioner i.e. residential house etc. was damaged due to the rash and negligent driving of bulker/truck No.HP-24-5740 being driven by respondent No.2, as alleged ? OPP.

2. If Issue No.1 is proved in affirmative, to what amount of compensation, the petitioner is entitled to and from whom ? OPP.

3. Whether respondent No.2 was not possessed of a valid and effective driving licence, at the relevant time ? OPR-3.

4. Whether the offending truck/bulker was being plied without valid documents at the relevant time in contravention of provisions of Motor Vehicles Act ? OPR-3.

5. Whether the liability of respondent No.3 is limited to the extent of Rs. 6000/-only ? OPR-3.

6. Relief."

5. After deciding Issue Nos.1 and 2 in favour of the petitioners, Issue Nos.3 to 5 against the respondents No.3. Learned tribunal below allowed the claim petition, as per operative portion of the award.

6. Learned counsel appearing on behalf of the petitioners has argued that the learned Tribunal below has not taken into consideration the report given by an independent person and has given the findings which are perverse. On the other hand, learned counsel appearing on behalf of respondent No.1 has argued that it is the insurance company, who is liable to pay the compensation, as the vehicle of respondent No.1 insured with respondent No.3.

7. Learned counsel appearing on behalf of respondent No.3 has argued that the third party liability of Insurance Company under the Act, is to the tune of Rs. 6000/- and respondent No.1 has not paid extra premium for making the liability to the extent of rupees seven lacs. He has further argued that the learned Tribunal below has awarded an amount of Rs. 17,200/-, the Insurance Company has not chosen to file an appeal, as the amount was meager.

8. In rebuttal, learned counsel appearing on behalf of the petitioners has argued that the Insurance Company/respondent No.3 is liable to make the payment to the extent of full damages to the tune of Rs. 1,75,000/-.

9. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record of the case carefully.

10. The only question involved in the present case is with respect to the damages. In his statement PW-2, petitioner has deposed that as a result of the accident his S.T.D booth, latrines, bathroom and septic tank were damaged, his house sustained cracks and he had sustained loss. However, no cogent and satisfactory evidence has been led by the petitioners to prove the amount of loss sustained by them. In the valuation report Mark-A, the damages sustained by the petitioner has not been specified. The petitioners have failed to explain as to on what basis, the amount of damages have been assessed in the valuation report. In photographs Ex.PW3/A to Ex.PW3/D, it is not clear as to whether the latrines, bathrooms and septic tank have also been damaged. The damage allegedly sustained to the residential house has not been also shown in the photographs. PW-5 Mangal Nath, an eye witness had only stated that the S.T.D booth of the petitioners has been damaged and thereafter the bulkar fell down on the latrines and septic tank, however, he had not stated that the latrines and septic tank have been completely damaged. It was incumbent upon the petitioners to have led cogent and satisfactory evidence on record with respect to the damages sustained by him. On the other hand, RW-1 Sita Ram, the surveyor of the Insurance company has categorically admitted in his cross-examination that in the alleged accident one P.C.O, one bathroom at the road level and one bathroom below the road level had sustained damages and no damage was caused to the latrines and septic tank. He has further deposed that he had assessed the damages in the presence of petitioner Gian Chand. In his report, Ex.RW1/A, he has stated that the P.C.O, one bathroom at the road level and one bathroom below the road level sustained damages, but no damage has been caused to the joint bathroom and septic tank. The report of Surveyor is an important document and it cannot be brushed aside unless satisfactory evidence to the contrary is brought on record. The petitioners have failed to lead any satisfactory evidence on record contrary to the report of Surveyor and also regarding the fact that he had sustained damages with respect to latrines and septic tank, the valuation report Mark-A cannot be accepted. Hence, in the facts and circumstances of the case, report Ex.RW1/A, it can be safely held that the petitioner has sustained damages in the sum of Rs. 17,200/- only. The petitioner also claimed damages in respect of the consequential loss of business, as it has been pleaded in the petition that the daily income of the petitioner from the S.T.D booth has completely stopped.

11. The only evidence which has come on record is the report of surveyor, who was an independent person and an expert, whose report is on record, who was assessed the damages to the tune of Rs. 17,200/-. So, I find no illegality or irregularity with the impugned award

passed by the learned Tribunal below, hence the same needs no interference. As far as the liability of respondent No.3/Insurance Company is concerned, no findings are required to be given on this point, as no appeal/cross objections are maintained by the Insurance Company. No other points argued so, needs no consideration.

12. The net result of the above discussion is that the appeal is devoid of any merit deserves dismissal and the same is accordingly dismissed. In the peculiar facts and circumstances of the case, parties are left to bear their own costs. Pending application (s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

CWP No. 3077 of 2016 alongwith
CWP No. 3079 of 2016
Reserved on: 21.12.2016
Date of Decision: December 26, 2016

1 CWP No. 3077 of 2016

Smt. Pratibha Singh …Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & another. …Respondents.

2. CWP No. 3079 of 2016

Sh. Virbhadra Singh …Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & another. ..Respondents.

Income Tax Act, 1961- Section 147 and 148- Petitioner filed a return showing the income from rent, salary and interest from deposits- a notice was issued by the Income Tax Authorities – the petitioner tried to explain the source of investment as being agricultural income from Hindu undivided family- proceedings were initiated against the petitioner under Section 147 of the Act- held in the writ petition that the assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year and if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax – the original return was not subjected to assessment – however, the Assessing Officer is not precluded to re-open assessment on the basis of his finding of fact so made on the basis of fresh material so discovered in the course of assessment of next assessment year –the order rejecting objections was not cryptic – the objections were considered and rejected – the action is not ex-facie illegal – it is not a case of lack of jurisdiction – the Writ Court is not a fact finding authority- writ petition dismissed. (Para-14 to 89)

Cases referred:

Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others, AIR 1964 SC 1419
The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co., AIR 1968 SC 49
Bellary Steels & Alloys Ltd. V. CCT, (2009) 17 SCC 547
Indo Asahi Glass Co. Ltd. v. ITO, (2002) 10 SCC 444
K.S. Rashid and Son v. Income Tax Investigation Commission, AIR 1954 SC 207
Union of India Versus Guwahati Carbon Ltd., (2012) 11 SCC 651
Munshi Ram Versus Municipal Committee, Chheharta, (1979) 3 SCC 83
Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calcutta and another, AIR 1961 SC 372
S. Narayanappa and others v. Commissioner of Income-Tax, Bangalore, (1967) 63 ITR 219 : [AIR 1967 SC 523]

Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calutta and another, AIR 1961 SC 372
M/s S. Ganga Saran and sons (Pvt.) Ltd., Calcutta v. Income Tax Officer & ors, (1981) 3 SCC 143
Income Tax Officer, Cuttack and others v. Biju Patnaik, 1991 Supp. (1) SCC 161
M/s Niranjan & Co. Pvt. Ltd. v. Commissioner of Income Tax, West Bengal-I and others, 1986 (Supp) SCC 272
Sreelekha Banerjee V. Commissioner of Income Tax, (1963) 49 ITR (SC) 112
CIT v. United Commercial and Industrial Co. P. Ltd., (1991) 187 ITR 596)
Income Tax Officer, A-Ward, Lucknow v. Bachu Lal Kapoor, AIR 1966 SC 1148

For the Petitioner: M/s Vishal Mohan, Pranay Pratap Singh, Sushant Keprate and Aditiya Sood, Advocates, for the petitioner.
For the Respondents Mr. Vinay Kuthiala, Sr.Advocate with Ms Vandana Kuthiala, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Invoking Extra Ordinary Writ jurisdiction of this Court, petitioner lays challenge to the impugned notice dated 22.3.2016 (Annexure P-2) and order dated 24.11.2016 (Annexure P-6), whereby proceedings for assessment stands initiated by the Revenue under the provisions of Income Tax Act, 1961 (hereinafter referred to as the Act).

2. Petitioner Sh. Virbhadhra Singh (CWP No. 3079 of 2016) by way of separate petition also lays challenge to similar notice/order. As prayed for, by the learned counsel, these petitions were heard together and in principle, only facts of CWP No. 3077 of 2016, were argued before us, for difference pertains only to the amount of income declared and the dates of filing of returns under Section 139 of the Act. Hence we proceed to discuss the facts of CWP No. 3077 of 2016.

3. The issues, which this Court is called upon to consider, are: (a) whether an order passed by an authority under the Act, in view of availability of equally efficacious remedy, is amenable to interference by way of writ jurisdiction, (b) whether exercise of power by the jurisdictional authority, in initiating action for assessment of escaped income, is justiciable by a Writ Court, (c) whether the jurisdictional authority had sufficient material to form reasons of belief, (d) whether such reasons do exist and if so, can this Court go into sufficiency thereof, (e) whether sanction accorded by the appropriate authority is in accordance with law, (f) whether the order passed by the authority is in conformity with the settled procedure of law, and (g) whether action of the authorities below can be said to be arbitrary, whimsical or capricious.

4. Petitioner, a permanent resident of Himachal Pradesh is regularly assessed to income tax. On 28.07.2009, she filed a return, declaring her net taxable income for the assessment year 2009-10 (hereinafter referred to as the relevant year), to be Rs. 4,81,340/- (Annexure P-1, page 13), and the source mainly being rent, salary and interest from deposits. Prima facie, finding certain income to have escaped assessment, on 22.03.2016 she received a notice, under Section 148 of the Act, issued by the Deputy Commissioner of Income Tax, Shimla (Annexure P-2, page 16).

5. Pursuant thereto vide communication dated 25.04.2016 (Annexure P-3, page 17), petitioner chose the return already filed to be considered as the one having filed under Section 148 of the Act. Her request for supply of “reasons” for re-opening the case was acceded to vide communication dated 09.05.2016 (Annexure P-4, page 19). Her further request for supply of “approval” (sanction) of the superior officer, so made vide communication dated 02.06.2016 (page 18) was promptly met by the Department, which led to her filing detailed objections vide

communication dated 16.06.2016 (Annexure P-5, page 25) and 21.06.2016 (page-32) which now stands rejected by the Assessing Officer in terms of order dated 24.11.2016 (Annexure P-6, page 40).

6. Perusal of aforesaid communications reveals that on 22.03.2016, the Assessing Officer, forwarded his reasons of belief to the superior officer i.e. Principal Commissioner of Income Tax, Shimla and the very same day, the said officer, after expressing his satisfaction thereupon, on finding the case fit for issuance of notice under Section 148 of the Act, returned the file and same day, notice issued by the Assessing Officer, was served upon the petitioner.

7. For better appreciation, reasons so recorded by the Assessing Officer, prompting him to initiate action under Section 147 of the Act, with respect to the present petitioner are extracted as under:-

> " Reasons for issue of Notice u/s. 148 of the Income Tax Act, 1961 for Assessment Year, 2009-10 in the case of Smt. Pratibha Singh.
>
> 1. Smt. Pratibha Singh is filing her income tax return in the capacity of an individual. The assessee filed her return for the Assessment Year 2009-10 on 28.07.2009 showing net income of Rs.4,81,340/-. Such income consisted of salary of Rs. 1,20,952/- and income from other source of Rs. 3,60,388/-. The return has not been scrutinized u/s 143(3) of the Income Tax Act, 1961.
>
> 2. As per the information available with the department obtained from Life Insurance Corporation (LIC), Smt Pratibha Singh invested in Life Insurance Policy in Assessment Year 2009-10 as per the details given below:-

Name of the beneficiary of the Life Insurance Policy	Date on which investment made	Amount invested (Rs.)	Policy particulars
Smt. Pratibha Singh	15.11.2008	50,00,000/-	LIC policy no. 153158575 (Growth fund)

> 3. Information obtained from LIC in relation to investment by Smt. Pratibha Singh is placed as Annexure –A to this note.
>
> 4. Summary of findings
>
> 4.1 I have carefully perused the return of income of Smt. Pratibha Singh (Assessment Year 2009-10) and documents obtained from LIC.
>
> 4.2 Smt. Pratibha Singh has shown her return of income of Rs. 4,81,340/- only in her return of income.
>
> 4.3 Smt. Pratibha Singh has invested Rs. 50,00,000/- in insurance policy during Financial Year 2008-09.
>
> 4.4 The gross total income of Rs. 4,81,340/- disclosed in her return was not sufficient to invest Rs. 50,00,000/- in LIC policy made by her in Financial Year 2008-09.
>
> 5. From the information obtained and analysis of return of income, it is clear that Smt. Pratibha Singh had made investments amounting to Rs. 50,00,000/- in insurance policy during Financial Year 2008-09. Smt. Pratibha Singh was the beneficiary of the investment made in the insurance policy. The meager income shown in the return for the

Financial Year 2008-09 or such income shown in previous 5 years was not sufficient to justify availability of fund for investment of Rs. 50,00,000/- in LIC policy as discussed above. Therefore, the unexplained investments made into the insurance policy needs to be assessed in the hands of Smt. Pratibha Singh, the beneficiary of the investment made.

6. Reasons forming belief

In view of the above, I have reasons to believe that an amount of at least Rs. 50,00,000/- has escaped assessment in the case of Smt. Pratibha Singh for Assessment Year 2009-10 within the meaning of section 147/148 of the Income Tax Act, 1961." (Emphasis supplied)

8. Significantly, while admitting, petitioner tried to explain the source of such investment, being an agricultural income, from a Hindu Undivided Family (HUF), a separate legal entity, inter alia comprising of herself and her husband Shri Virbhadra Singh, owner of the agricultural land in the State of Himachal Pradesh.

9. Prima facie finding her explanation not to be satisfactory, objections filed by the petitioner came to be rejected by the Assessing Officer, relevant portion whereof is extracted as under:-

"(iii) The assessee is a member of M/s Virbhadra Singh, HUF is a matter of record and needs further verification. Moreover, it has not been proved that the HUF has earned agriculture income of this large extent during the financial year 1999-2000 to 2008-09, which is more clearly established from the fact that the HUF had declared income of Rs. 16,38,940/- plus agriculture income of Rs.7,35,000/- in the assessment year 2009-10, which has been assessed as such in the original assessment order passed u/s 143(3) on 29.07.2011 by the Addl. CIT, Shimla Range, Shimla. Agricultural income of the HUF was declared as per the details given below:

Sr.No.	A.Y.'s	Agriculture Income Declared
1.	2000-01	4,50,000
2.	2001-02	5,00,000
3.	2002-03	4,50,000
4.	2003-04	6,00,000
5.	2004-05	8,00,000
6.	2005-06	9,00,000
7.	2006-07	12,05,000
8.	2007-08	16,00,000
9.	2009-10	7,35,000

So far, no other assessment/appellate order has been passed in the case of HUF for Asstt. Year 2009-10 or any previous assessment years, in which agriculture income, more than the above amounts, have been worked out by any of the Assessing Officer or Appellate authorities. Therefore, the submissions that the investment for purchase of LIC worth Rs. 50.00 lac. made during the financial year 2008-09 relevant to the assessment year 2009-10, is made out of agriculture income of the HUF is not proved and thus, can't be accepted.

(iv) From the above details, it is noticed that the HUF has earned net agriculture income of Rs. 72.40 lacs only during the period of above nine assessment years.

Thus, it can't be said that investment for purchase of LIC Policy for Rs. 50.00 Lacs in your case was made out of agriculture income of the HUF."

(Emphasis supplied)

10. It is the pleaded case of the petitioner that (a) reopening of the case is bad in law and facts, (b) there is no escapement of any income, for investment came to be made by the HUF, which fact, was known to the Assessing Officer, as very same action also stood initiated against the said entity, (c) there was no material before the Assessing Officer enabling him to form reasons of belief of escapement of any income, (d) sanction accorded is in a mechanical manner, much less without any application of mind, (e) order rejecting the objections is non speaking, (f) by exceeding jurisdiction, the Assessing Officer committed grave illegality in initiating the impugned action.

11. On the other hand, it is the pleaded case of the Revenue that (i) though in the original return, petitioner declared her income to be Rs. 4,81,340/-, but none was from agricultural source. (ii) Factum of purchase of Insurance Policy, never came to be reflected in the return filed for the relevant year. (iii) Only on receipt of information from the Office of Life Insurance Corporation of India, Shimla, such fact came to be discovered. (iv) Even in response to the notice under Section 148 of the Act, source of such investment never came to be disclosed. (v) As such on 23.05.2006, in compliance of Section 142(1) of the Act, a detailed questionnaire was issued to her. (vi) Proceedings initiated with respect to the HUF could not be completed, for on her asking, further proceedings are stayed by this Court. (vii) The income still remains un-assessed.

12. During the course of hearing, learned counsel cited following decisions which we have considered. The need to clarify such fact arises only for the reason that in the pleadings and/or proceedings conducted so far by the Assessing Officer, parties have referred to several decisions.

Mr. Vishal Mohan, learned counsel cited:

(i) GKN Driveshafts (India) Ltd. V. Income-Tax Officer and others, (2003) 259 ITR 19 : (2003) 1 SCC 72; (ii) Ajanta Pharma Ltd. v. Assistant Commissioner of Income-Tax and others, (2004) 267 ITR 200 (Bombay);(iii) Income-Tax Officer, I Ward, Distt. VI, Calcutta, and others v. Lakhmani Mewal Das, (1976) 103 ITR 437 : (1976) 3 SCC 757; (iv) Sagar Enterprises v. Assistant Commissioner, (2002) 257 ITR 335 (Guj); (v) M/s Chhugamal Rajpal v. S.P. Chaliha and others, (1971) 1 SCC 453; (vi) S.P. Agarwalla alias Sukhdeo Prasad Agarwalla v. Income-Tax Oficer, E-Ward, Dist. III(2), Calcutta and others, (1983) 140 ITR 1010 (Calcutta); (vii) Arjun Singh, Ajay Singh v. Assistant Director of Income-Tax (Investigation), (2000) 246 ITR 363 (Madhya Pradesh); (viii) Central India Electric Supply Co. Ltd. v. Income-Tax Officer, (2011) 333 ITR 237 (Delhi); and (ix) ITA No.45 of 2007, decided on 14.3.2012, titled as Commissioner of Income Tax, Shimla v. M/s Sahil Knit Fab.

Mr. Vinay Kuthiala, learned Senior Counsel cited:

(i) CWP No.347 of 2014, decided on 4.7.2014, titled as Joint Commissioner of Income Tax v. Kalanithi Maran; (ii) Commissioner of Income Tax, Gujarat v. Vijaybhai N. Chandrani, (2013) 14 SCC 661; (iii) Commissioner of Income Tax and others v. Chhabil Dass Agarwal, (2014) 1 SCC 603; (iv) Lalji Haridas v. Income-Tax Officer and another, (1961) 43 ITR 387; (v) Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Private Limited, (2008) 14 SCC 208 = (2007) 291 ITR 500; (vi) Raymond Woolen Mills Ltd. vs. ITO (1999) 236 ITR 34 (SC) : 2008 (14) SCC 218; (vii) Phool Chand Bajrang Lal and another v. Income-Tax Officer and antoher, (1993) 203 ITR 456 : (1993) 4 SCC 77; (viii) Ess Ess Kay Engineering Co. P. Ltd. v. Commissioner of Income Tax, 247 ITR 818; (ix) Decision dated 04.03.2016, rendered by the Calcutta High Court in ITA No.297 of

2006, titled as Prem Chand Shaw (Jaiswal) V. Assistant Commissioner, Circle-38, Kolkata & Anr; (x) Sunil Kumar Jain v. CIT, 284 ITR 626 (Allahabad); (xi) Mangilal Jain V/S Income Tax Officer, (2009) 315 ITR 105 (Mad); (xii) Shankar Industries v. Commissioner of Income Tax, Central, 114 ITR 689 (Cal); (xiii) Civil Misc. Writ Petition No. 181 (Tax) of 2004, decided on 16.09.2006, by Allahabad High Court, titled as M/s Ema India Ltd. Versus Asstt. Commissioner of Income Tax Central Circle-I; (xiv) Sasi Enterprises v. Assistant Commissioner of Income Tax, (2014) 5 SCC 139; and (xv) Commissioner of Income tax v. Sophia Finance Ltd., (1994) 205 ITR 98.

13. The relevant provisions, to which our attention is invited are Sections 68, 147 to 153 of the Act.

14. Section 147 is evidently clear. Insofar as its application to the instant facts are concerned, what is required is, fulfillment of essential ingredient(s) that: (i) The Assessing Officer (ii) must have reason(s) to believe, (iii) that any income chargeable to tax has escaped assessment (iv) for any assessment year, (v) which he is empowered to (vi) may assess, and (vii) if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax having escaped assessment.

15. However, for initiating such action, in compliance of Section 148, the Assessing Officer has to (i) record his reasons (ii) forward the same to an authorized officer, as the case may be, so mentioned in Section 151, (iii) who, shall record his satisfaction, on the reasons recorded by the Assessing Officer that it is a fit case for issuance of such notice, and only thereafter, (iv) the Assessing Officer shall issue notice to the assessee requiring him/her to furnish within a specified period, return of his/her income, in a prescribed form.

16. In view of the statutory mandate, so contained in Section 153, in the given facts and circumstances, assessment proceedings are necessarily required to be completed before 31.12.2016.

17. Section 68, which deals with the concept of deemed income, provides that where any sum is found credited in the books of an assessee maintained for any previous year, and he offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee.

18. As a matter of abandoned caution, in a tabulated form we reproduce facts relevant to each one of the petitioners:

Assessment Year 2009-10	CWP 3077 of 2016, Smt. Pratibha Singh (Wife)	CWP 3079 of 2016, Shri Virbhadra Singh. (Husband) (Karta of HUF)
Date of filing of Return	Rs. 4,81,340/- on 28.7.2009 (P-1)	Rs. 5,03,330/- on 24.7.2009 (P-1)
Date of notice u/s 148 of the Act	22.3.2016 (P-2)	22.3.2016 (P-2)
Date when request for supply of reasons was made	25.4.2016	27.4.2016
Reasons supplied on	9.5.2016 (P-4)	9.5.2016 (P-4)
Objections filed on	16.6.2016 (P-5)	29.6.2016 (page 21)
Investment in LIC Policy	Rs. 50,00,000/-	Rs. 75,00,000/-

Date of rejection of objections on same ground in both the cases.	24.11.2016	24.11.2016

19. It is a common case of parties that original return filed by the petitioner, in compliance of Section 139, was not subjected to assessment under sub-section (3) of Section 143. Return dated 28.07.2009, came to be processed only under sub-section (1) of Section 143, in which there is no reference of such investment. Thereafter, the first communication inter se the parties, is the notice dated 22.03.2016, so issued by the Assessing Officer under Section 148 of the Act.

Scope of jurisdiction

20. Scope of interference with an order passed by an authority under a Statute, providing an equally alternate and efficacious remedy is now well settled. The issue is no longer res integra, hence we restrict the discussion only to the decisions pertaining to the Statute in issue.

21. A Constitution Bench of the apex Court in Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others, AIR 1964 SC 1419, observed that:

> "7………The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Art. 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."
>
> (Emphasis supplied)

22. A three-Judge Bench of the apex Court in The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co., AIR 1968 SC 49, held that:

> "6. The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income-tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income-tax Officer had in his possession any information: the Court may also determine whether from that information the Income-tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment, must be decided

by the Income-tax Officer and not by the High Court. The Income-tax Officer alone is entrusted with the power to administer the Act; if he has information from which it may be said prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice for reassessment on a re-appraisal of the evidence."

(Emphasis supplied)

23. In Raymond Woolen Mills (supra), their Lordships of the Supreme Court rejected challenge to the issuance of notice for reassessment by observing that at the stage of notice, court can only consider whether there is a prima facie case for reassessment. Reopening of proceedings cannot be quashed by going into the "sufficiency" or "correctness" of the material relied upon by the assessing authority.

24. In Vijaybhai N. Chandrani (supra), the Apex Court while reversing the view taken by the High Court in quashing a notice of reassessment issued under Section 153-C of the Act, by relying upon its earlier decisions, in Bellary Steels & Alloys Ltd. V. CCT, (2009) 17 SCC 547; and Indo Asahi Glass Co. Ltd. v. ITO, (2002) 10 SCC 444, directed the assessee to first exhaust alternate remedies provided under the Act, by filing reply to the notice and take consequential action, if any, before the jurisdictional forum.

25. In Chhabil Dass Aggarwal (supra), in somewhat similar circumstances, where notice issued under Section 148 of the Act and the ex-parte assessment proceedings came to be quashed by a writ Court, the Apex Court, by referring to its several judicial pronouncements, including that of the Constitution Bench (Five Judges) in K.S. Rashid and Son v. Income Tax Investigation Commission, AIR 1954 SC 207, observed that restriction of not entertaining a writ petition, when an efficacious and alternate remedy is available, is self imposed. It is essentially a rule of policy, convenience and discretion, rather than the rule of law. Only where an exceptional case warranting interference; existence of sufficient grounds; for invoking extra ordinary jurisdiction, is made out, power, which is discretionary in nature, must be exercised. Where hierarchy of appeal is provided by a statute, party must exhaust the statutory remedies before invoking the writ jurisdiction. The right or liability created by a statute giving a special remedy for enforcing it must be availed of. The Court reiterated the principle laid down in Union of India Versus Guwahati Carbon Ltd., (2012) 11 SCC 651 and in Munshi Ram Versus Municipal Committee, Chheharta, (1979) 3 SCC 83, that when a statute provides for a person aggrieved, a particular remedy to be sought in a particular Forum and in a particular way, it must be sought in that manner, to the exclusion of all other modes and Forums. But it did recognize certain exceptions to this rule and that, inter alia being, where the action of the statutory authority is not in accordance with the statutory provisions; in defiance of fundamental principles of judicial procedure; and in total violation of principle of natural justice.

26. Justifying the action of the petitioner in bypassing the statutory remedy and directly assailing the notice for reassessment, Mr. Vishal Mohan, learned counsel, seeks reliance on the decision rendered by the Bombay High Court, in Ajanta Pharma Ltd. (supra). The decision came to be rendered in the given facts and circumstances, where reason for reassessment being non-discloser of invoice/details of the purchase of the trading goods exported and failure to co-relate the trading exports with the trading goods exported was found to have been non-existent, in fact contradicted from the record rendering the reasons of the Assessing Officer to be totally "flimsy" and not "sufficient to draw conclusion about the escapement of income" and there being "no material" before the Assessing Officer, entitling him to reopen the case of assessment, the Court found the notice so issued to be ex-facie, bad in law. Hence it exercised its discretionary power in quashing such action. Significantly, the Court observed that a writ would lie only if the impugned action is ex-facie without jurisdiction or again in excess of the jurisdiction vested in the authority or the action being totally arbitrary. It cautioned that extra ordinary jurisdiction cannot be allowed to be availed as a matter of course and while deciding the issue of jurisdiction,

finding of the authority on the factual aspect may be necessary, in which case, necessarily the assessee would be required to approach the Assessing Officer.

27. Mr. Vinay Kuthiala, learned Senior Counsel, also invites our attention to a decision dated 16.09.2006, rendered in Ema India Ltd. (supra), which we need not discuss in view of the settled position of law.

28. Thus it cannot be said that jurisdiction of this Court, in entertaining a petition even when an equally efficacious remedy is available to a party, is totally ousted. Notwithstanding the statutory remedies available to the aggrieved party, restriction imposed by a writ Court is more in the nature of restraint. With the ever increasing and growing scope of judicial review, exercise of extraordinary writ jurisdiction cannot be circumscribed.

29. But however, in the given facts and circumstances, for reasons to follow, we do not find the petitioner to have made out a case warranting interference in a petition filed under Article 226 of the Constitution of India.

30. While contending that this Court has no jurisdiction to quash the order of rejection of objections by the Assessing Officer, Shri Vinay Kuthiala, learned Senior Advocate, seeks reliance on the decision rendered by the High Court of Madras in Kalanithi Maran (supra). We are unable to persuade ourselves to agree with such submission. The procedure for filing the objections and obligations to decide the same, came to be evolved with following observations made by the apex Court in GKN Driveshafts (supra), wherein it is held as under:

> "5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."

31. Since then, the practice has been in vogue. The mechanism evolved is only a safeguard, a protection from harassment of the assessee, for avoiding unwarranted harassment, from undesirable adjudicatory process, so initiated, perhaps on jurisdictional error or such material which ex-facie may be false or reason(s) which prima facie appears to be baseless or without any cause or justification. The object being, affording an opportunity to an assessee of putting across its case, by placing authentic and undisputed material, satisfying no escapement of income from assessment, enabling the authority to consider, and if so required, drop the proceedings. There can be a fact situation where out of malice or for extraneous reasons, an Assessing Officer may decide the objections, in a palpably illegal manner. What if it is against the mandate of the said decision? In any event, orders passed by a Statutory authority are always amenable for challenge in a writ Court which power, perhaps the Court may exercise, when warranted, in the attending facts and circumstances.

Non Cooperative Attitude

32. Non cooperative attitude and conduct of the petitioner is vehemently pressed as a primary ground for rejection of the petition. Specific attention is drawn to the affidavit filed in response to the petition: (a) petitioner failed to furnish information during the entire period of 8½ months. (b) Save and except for filing of photocopies of few bank accounts; unverified and unauthenticated statement of account of the loaner and the order of reassessment so passed qua him, no information privy only to the petitioner, stands furnished. (c) No response to a detailed questionnaire dated 23.5.2016 is furnished. (d) Endeavour of the revenue in having a centralized investigation and assessment of all parties concerned, has, yet not, yielded any result, for such order came to be quashed by this Court and now the matter is pending before the Apex Court. (e)

On the petitioner's asking, proceedings of assessment relating to financial year 2009-10 and 2012-13 in relation to the HUF, a separate legal entity, also stand stayed by this Court.

33. Much emphasis is laid on the following observations made by the Apex Court in Sasi Enterprises (supra):-

> "17. We are, in these appeals, concerned with the question of non- filing of returns by the appellants for the assessment year 1991-92, 1992-93 and 1993-94. Each and every order passed by the revenue as well as by the Courts were taken up before the higher courts, either through appeals, revisions or writ petitions. The details of the various proceedings in respect of these appeals are given in paragraph 30 of the written submissions filed by the revenue, which reveals the dilatory tactics adopted in these cases. Courts, we caution, be guarded against those persons who prefer to see it as a medium for stalling all legal processes. We do not propose to delve into those issues further since at this stage we are concerned with answering the questions which have been framed by us." (Emphasis supplied)

34. In the given facts and circumstances, we are not inclined to dismiss the petition on such a ground. However, on this issue, we refrain from making any observation, save and except that petitioner is duty bound to fully cooperate in the expeditious adjudication of all proceedings.

35. But at this point of time, we do wish to express our anguish on a particular fact. Neither in the petition nor in response, it stands mentioned that with respect to similar proceedings initiated against the HUF, of which petitioner is a member, on her asking, this Court in CWP No. 2029 of 2015, by way of interim order dated 26.03.2015, had stayed the same. In fact, it was only when submissions on merits were ending and that too on a query put by the Court, after going through the response so filed during the course of hearing, to which no opportunity of filing rejoinder was sought, that it came to be disclosed. Though the petition is pending adjudication before this Court, but neither was any request for postponement of the present petition nor tagging it with the same was made. On a specific query as to why no steps for expeditious disposal of the said petition were taken by either of the parties, Court was simply informed that interim order is subject matter of challenge before the Apex Court. Significantly proceedings have not been stayed. Still further, no request for adjournment of the present petition was made. In fact, learned counsel vehemently proceeded to end their submissions with the judgment being reserved. We refrain from saying anything more.

Reasons to believe

36. The expression "reasons to believe" stands adequately elaborated by the Apex Court in its various pronouncements. The issue is no longer debatable.

37. By relying upon its earlier decision, rendered by a Constitution Bench (five-Judge) judgment, in Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calcutta and another, AIR 1961 SC 372, a Three-Judge Bench of the apex Court in S. Narayanappa and others v. Commissioner of Income-Tax, Bangalore, (1967) 63 ITR 219 : [AIR 1967 SC 523], held that:

> "if there are in fact some reasonable grounds for the Income-tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notice under S. 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the Income-tax Officer to act is not a justiciable issue. It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief.

> Again the expression "reason to believe" in S. 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith: it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the Section. To this limited extent, the action of the Income-tax Officer in starting proceedings under S. 34 of the Act is open to challenge in a Court of law".
>
> (Emphasis supplied)

38. The position came to be reiterated by a two-Judge Bench of the apex Court in Lakhmani (supra), wherein the Court held that the grounds or reasons which lead to the formation of belief must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly, all material facts.

39. Later on in Phool Chand (supra), it stood clarified that decision to quash the action in Lakhmani Mewal Das (supra), was based on its given fact situation, where information received by the Assessing Officer was wholly vague, indefinite, farfetched, remote and without any basis for holding a reasonable belief, warranting action, under Section 147. It further observed that:

> "19.........Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the same facts and material which was available with the I.-T.O. at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the "true" and "full" facts in the case and the I.-T.O. would have the jurisdiction to reopen the concluded assessment in such a, case. It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under S. 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the I.-T.O. acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific."
>
> … … …
>
> "26... ...One of the purposes of S. 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing." It would be travesty of justice to allow the assessee that latitude."
>
> (Emphasis supplied)

40. The Apex Court also had an occasion to deal with the amended provisions in Rajesh Jhaveri (supra). The Court found the scope and effect of section 147 to 148 as substituted with effect from April 1, 1989, to be substantially different from the earlier provisions. For conferment of jurisdiction under original section 147(a), two conditions required satisfaction (i) the Assessing Officer must have reason to believe that the income profits or gains chargeable to income tax have escaped assessment, and (ii) he must also have reason to believe that such

escapement occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. However, under the substituted section 147, only the first condition required satisfaction of reason to believe, that the income had escaped assessment. It further observed that:-

> "19. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers."

> "20..........At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction." (Emphasis supplied)

41. It is also the law that the Assessing Officer is not precluded to reopen assessment of an earlier year on the basis of his finding of fact, so made on the basis of fresh material, so discovered, in the course of assessment of next assessment year [Ess Ess Kay Engineering (supra)].

42. In Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calutta and another, AIR 1961 SC 372, the apex Court held that:

> "9. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - "I have produced the account books and the documents : You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them - including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed."
>
> (Emphasis supplied)

43. The Apex Court in M/s S. Ganga Saran and sons (Pvt.) Ltd., Calcutta v. Income Tax Officer and others, (1981) 3 SCC 143 has observed as under:

> "6......... (a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief, entertained by the Income-tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income-tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147 (a). If there is no rational and intelligible nexus between the reasons and the belief, so that on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income-tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid." (Emphasis supplied)

44. The Apex Court in Income Tax Officer, Cuttack and others v. Biju Patnaik, 1991 Supp. (1) SCC 161, observed that while examining the existence of reasons, record can be looked into.

45. In M/s Niranjan & Co. Pvt. Ltd. v. Commissioner of Income Tax, West Bengal-I and others, 1986 (Supp) SCC 272, the apex Court held that:

> "21. It was contended on behalf of the assessee/appellant relying on the observations of this Court in Commr. of Income-tax, Gujarat v. A. Raman and Co., (AIR 1968 SC 49) (supra), that the Income-tax Officer must have had reason to believe and in consequence of information he must have that reason to believe and it was submitted that the information was already there and there was no new information from which the Income-tax Officer could have formed the belief. Having regard to the facts of this case as discussed above and the nature of the information indicated before, we are of the opinion that there was information in the form of a revised return and since the information mentioned before came to the knowledge of the Income-tax Officer subsequent to the making of the first assessment and the information being such from which a reasonable person could have formed the belief that there was escapement of income or under-assessment of income, it cannot be said that there was no jurisdiction of the Income-tax Officer to re-open the assessment. Whether in fact the reassessment to be made pursuant to the notice issued, the income assessed would be more by Re, 1/- or less than the income already assessed is not material or relevant for the question of jurisdiction to issue the notice under S. 147 of the Act."
>
> (Emphasis supplied)

46. Mr. Vishal Mohan, learned counsel, has referred to a decision of this Court in Sahil Knit Fab (supra). So far as the ratio of law is concerned, there is no dispute and we need not discuss in view of our discussion (supra). On facts, we find the decision of the Appellate Authority, so rendered in favour of the assessee, to be affirmed in the peculiar facts and circumstances, for it was found that there was no plausible reason available with the Assessing Officer, forming a belief of escapement of income. Though the assessee had claimed deduction on the basis of loss(s) in business but after five years, the Assessing Officer worked out profit at the rate of 14%, by comparing the profit of another company engaged in similar business, which approach was considered to be illogical and unrealistic. The jurisdictional issue was sought to be raised after a gap of five years, without considering the change of business environment.

47. It is not in dispute that reasons of belief came to be placed before the sanctioning authority. Though initially, in vain, an attempt was made to argue that notice (Annexure P-2) came to be issued without obtaining any prior sanction and/or no reasons of belief were ever prepared or placed before the sanctioning authority, but when confronted, Shri Vishal Mohan, learned counsel, in all fairness did not press the point any further.

48. The factum of investment came to the notice of the Revenue only upon receipt of information from the office of L.I.C. Shimla.

49. From the pleadings of the parties and the material placed on record, it is evidently clear that in the nine preceding years, income of the HUF, cumulatively from agricultural source is Rs. 73.40 lacs. In the relevant year, income from such source is also not more than Rs. 16,00,000/- and even from other source it is Rs. 16.38 lacs (approx.). Undisputedly, petitioner is member of the HUF.

50. For the relevant year (2009-10) Smt. Pratibha Singh declared her individual income, from all sources, to be Rs. 4,81,340/- and Sh. Virbhadra Singh, declared his income from all sources to be Rs. 5,03,330/-. It is not argued before us that prior to the filing of objections (dated 16.6.2016), petitioner(s) ever disclosed either the factum of investment or the source of purchase of such policies.

51. Though specifically not pleaded but from communication dated 21.6.2016 (Page 32) it can be inferred that the factum of purchase of policy from another source, i.e. HUF came to be disclosed by the Karta, i.e. Shri Virbhadra Singh on 15.1.2014. Quite apparently, similar proceedings also came to be initiated against the said HUF, for in the relevant year, income declared from agricultural source was not more than Rs. 7,35,000/-. In the said proceedings, Karta tried to explain the source in the following manner:

> "That no new FDR's have been purchased by the assess except renewal of old FDR's. During the referred year the assessee had purchased LIC policies of worth Rs. 25,00,000/- in his own name. The assessee has issued cheques of Rs. 15,00,000/- i.e. (Rs.10,00,000/- vide No. "500256" dated 18/06/2008 and Rs. 5,00,000/- vide no. "632173" dated 18/06/2008 payable at ICICI Bank, shimla and UCO Bank, Shimla respectively) and the source of remaining Rs. 10,00,000/- was agricultural income from orchard being managed by Sh. Anand Chauhan. Out of the same agriculture income, two more LIC policies of Rs. 50,00,000/- each were purchased in the name of assessee and his wife Mrs. Pratibha Singh. The LIC premium paid receipts of the said policies are enclosed herewith for your kind verification (Annexure A-5).
>
> (Emphasis supplied)

52. Adjudicatory proceedings pertaining to the HUF could not be completed. To ensure that proceedings of assessment with respect to the petitioner do not become time barred, rendering it to be fait accompli, the Assessing Officer rightly questioned the source of such huge investment. The undisputed claim of the petitioner being purchase of such policies only from the agricultural income of the HUF. It is in this backdrop, we find reasoning adopted by the Assessing Officer in Paras (ii), (iii) and (iv) of order dated 24.11.2015 to be clear, cogent and reasonable.

53. Significantly petition is conspicuously silent about the exact amount of income of the HUF from the said agricultural source.

54. In the instant case, based on the information supplied by LIC, finding the income disclosed by the Assessee to be far less than the subscribed amount, which information, prima facie, was not found to be true and also the assessee's justification, prima facie not emanating from the record, the Assessing Officer, based on certain definite information, decided to carry on with the assessment, both by assigning reasons and affording opportunity to the petitioner.

55. To contend that the department was aware purchase of policies out of the funds of HUF would still not make the case any better, for: (i) material placed on record reveals income of the HUF, from the agricultural source, to be not more than Rs. 72.40 lacs (approximately); (ii) which fact is also not disputed in the petition; (iii) in any case, it was the only adjudicated amount, to be accepted to be correct, considering the petitioner herself impugning the action of assessment of the said assessee.

56. The petitioner may have justifiable explanation for the said amount, but from the material placed before us, it cannot be said that the reasons of belief are ex facie false, incorrect, untenable or that objections raised by the petitioner stand rejected only on flimsy grounds, in an arbitrary manner.

57. The burden to prove the income which stands accounted for, is on the assessee. In Sreelekha Banerjee V. Commissioner of Income Tax, (1963) 49 ITR (SC) 112, the Court held that:

> "It seems to us that the correct approach to questions of this kind is this. If there is an entry in the account books of the assessee which shows the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked; what the source of that money is and to prove that it does not bear the nature of income. The department is not at this stage required to prove anything. It can ask the assessee to bring any books of account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the receipt was not. of an income nature, the department cannot act unreasonably and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source. The department does, not then proceed on no evidence, because the fact that there was receipt of money is itself evidence against the assessee. There is thus, prima facie, evidence against the assessee which he fails to rebut, and being unrebutted, that evidence can be used against him by holding that it was a receipt of an income nature. The very words 'an undisclosed source' show that the disclosure must come from the assessee and not from the department. In cases of high denomination notes, where the business and the state of accounts and dealings of the assessee justify a reasonable inference that he might have for convenience kept the whole or a part of a particular sum in high denomination notes, the assessee prima facie discharges his initial burden when he proves the balance and that it might reasonably have been kept in high denomination notes. Before the department rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof."

58. When an assessee claims to have borrowed money, onus to establish such fact lies upon him. But discharged such onus, would still not preclude the Assessing Officer to otherwise examine the genuineness of the transaction, as an independent and unbiased fact finding authority.

59. What is required to be proved by the assessee is not only identity but also creditworthiness and genuineness of the transaction, beyond reasonable doubt, as held in Mangilal Jain (supra); CIT v. United Commercial and Industrial Co. P. Ltd., (1991) 187 ITR 596); and Shankar Industries (supra).

60. We find existence of reasonable ground, enabling the Assessing Officer to form a belief, with regard to the non-disclosure/escapement of income. The belief cannot be said to be

arbitrary, capricious or without any basis. It is neither pretentious. There is rational connection between the material and the reasons. Doubt stands raised with regard to the transactions being bogus in nature. Whether, at the first instance, assess was obliged to disclose receipt of such huge amounts, or not is definitely a matter, which requires consideration by the Assessing Officer, during the course of proceedings. The principle of 'cause and justification' so laid in Rajesh Jhaveri (supra), stands fully substantiated by the Revenue.

61. The Assessing Officer has rejected the objections on the grounds, which appear to be reasonable on the basis of material before him.

62. It cannot be said that the belief is arbitrary or irrational or there is not intelligible nexus between the reasons and the belief "so that on such reasons, no one properly instruct on facts and law, could reasonably entertain the belief", as held by the apex Court in Ganga Saran (supra).

63. Also, the belief of the Assessing Officer, on the information so received by him, is not such that "from which a reasonable person could have formed the belief that there was" no escapement of income or underassessment of income, as held by the apex Court in A. Raman (supra).

Undue haste and non application of mind

64. Submission that process of recording of reasons, obtaining sanction, and issuance of notice, was carried out without application of mind and in undue haste is factually incorrect.

65. Reasons for belief, were placed before the Principal Commissioner of Income Tax, Shimla, who wrote "Yes, it is a fit case for issuing notice under Section 148". Prescribed performa was filled up with the requisite information before the matter came up for consideration by such authority.

66. From the affidavit, so filed in response to the petition, which goes unrebutted, it is evident that the Assessing Officer had been applying his mind for quite some time, it being a different matter that he could have expedited the process. Be that as it may, information which came to be received was processed and placed before the appropriate authority on 22.3.2016. It is not that the sanctioning authority had no material before according sanction. Only after perusing the reasons of belief, so recorded by the Assessing Officer, and finding it to be a case fit for issuance of notice, did the authority accord its sanction. It is brought to our notice that offices of the Assessing Officer and the Sanctioning Authority are in the very same building and petitioner is also a local resident. It was convenient for the authority to have dealt with the matter the very same day. It is not a herculean, much less an impossible task to accomplish.

67. Significantly, no malafides stand alleged, much less against any one the concerned officers.

68. While contending that the sanctioning authority acted mechanically by simply stating "Yes", rendering the impugned action to be wholly illegal, Mr. Vishal Mohan, learned counsel, invites our attention to the decision rendered by the Apex Court in Chhugamal Rajpal (supra). In the said case, the Court specifically observed total non application of mind by the Assessing Officer, whose reasons were not only vague but in the realm of uncertainty, warranting investigation pertaining to the loans, allegedly made by certain persons. It is in this backdrop, Court observed that the Assessing Officer himself was not sure about the truth of alleged transactions. The Court found that there was no material with the Assessing Officer, enabling him to record reasons of belief, that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his/her assessment for the accounted year in question, income chargeable to tax had escaped assessment for that year. The exercise of power by the authority was found to be mechanical in nature, for had he applied his mind, he would'nt have formed satisfaction, in according sanction, and also as a result of non application of mind, noted the word "Yes" and affixed his signatures thereunder.

69. Our attention is invited to the decision rendered by the Calcutta High Court in S.P. Agarwalla (supra), wherein it is observed that the Commissioner has to consider and apply his mind to the material relied upon by the Assessing Officer and that such power is not to be exercised mechanically. Commissioner can consider sufficiency and relevancy of the material while refusing or granting such sanction.

70. Also attention is invited to the decision rendered by the Madhya Pradesh High Court in Arjun Singh (supra), wherein it was observed that exercise of power by the sanctioning authority, in less than 24 hours indicated non application of mind. On first brush, it appears to be like that. But closer scrutiny reveals the decision distinguishable on facts. The jurisdictional authority was trying to reopen assessment, on the basis of alleged escapement of income, in relation to which, after registration of the F.I.R., not only the Court of competent jurisdiction discharged the assessee but even the jurisdictional officer, after investigation had concluded the adjudicatory proceedings, ten years prior to the initiation of impugned action. The Court found the Assessing Officer not possessing any material, enabling him to record reasons of belief. Also simultaneous issuance of notices of inquiry and reassessment came to be initiated against the assessee who was called upon to furnish information of money spent on the construction of a house and much prior to conclusion of such inquiry, the Assessing Officer, by pre-judging the issue, without any basis or material, proceeded to reassess the income declared by the assessee. It is in this backdrop, the Court found the revenue to have acted with undue haste.

71. On this count, our attention is also invited to the decision rendered by the Delhi High Court in Central India Electric Supply (supra), where the sanctioning authority had simply appended its signature below the word “Yes” so affixed by a rubber stamp. In the given facts, the Court found the decision taken to be purely mechanical in manner.

72. However the instant case is not that of mere rubber stamping, for the competent authority, in principle, was in agreement with the reasons assigned by the Assessing Officer, so placed before him, which came to be considered and sanction accorded, with proper application of mind. He himself wrote “Yes, it is a fit case for issuing notice u/s 148”.

73. Hence, in the given facts and circumstances, we do not find such action to be illegal, raising suspicion or doubt, with regard to proper application of mind by the authorities concerned.

Protective and Precautionary Principle

74. While contending that revenue was not sure as to whether the alleged escaped income was to be assessed qua the present petitioner or the said HUF, Mr. Vishal Mohan, learned counsel, invites our attention to the decision rendered by a Division Bench of Gujarat High Court in Sagar Enterprises (supra). The said decision is clearly distinguishable on facts. Considering the fact that undisclosed income of the assessee came to be added by way of protective addition in the previous assessment year, the Court found that it was not open for the revenue to account for the same in the succeeding financial years. It is in this backdrop, it held the revenue itself, not sure of the year of its taxability, hence such income could not be deemed to be chargeable to tax, having escaped assessment.

75. In fact, the principle of protective precautionary assessment came up for consideration before the apex Court in Lalji Haridas (supra), wherein by upholding, action of reassessment initiated by the Revenue, they observed that “In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B. That being so, we do not think that Mr. Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No.1 in pursuance of the impugned notice issued by him against the appellant. Under these circumstances we do not propose to deal with the point of law sought to be raised by Mr. Nambiar”.

76. In Income Tax Officer, A-Ward, Lucknow v. Bachu Lal Kapoor, AIR 1966 SC 1148, the apex Court reiterated the aforesaid principle.

77. In Sunil Kumar Jain (supra), the Court affirmed the action of the Jurisdictional Officer in reopening assessments even in case where such income came to be assessed in the hands of another. In this backdrop, it was observed that:-

> "Going to the merits of the case, we find that it is not in dispute that the cash amount of Rs. 2,19,000 and the pawned articles valued at Rs. 10,506 have been claimed by the petitioners as belonging to them. Merely because it has been taxed at the hands of Sri Prem Chandra Jain will not preclude the Income-tax Officer from assessing the same at the hands of the right person. From the reason recorded for reopening of the assessment which has been reproduced above it will be seen that the basis for initiating proceedings is the claim made by the petitioners on the basis of the alleged will executed by Smt. Shyama Devi, thus it cannot be said that there was no relevant material for taking proceedings under section 147 of the Act."
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> "In the case of Lalji Haridas [1961] 43 ITR 387 the apex court has held that in cases where it appears to the income-tax authorities that certain income has been received during the relevant year but it is not clear who has received that income; and, prima facie, it appears that the income may have been received by A or by B or by both together, it would be open to, the income-tax authorities to determine the question who is responsible to pay tax by taking assessment proceedings both against A and B.
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> In the case of S. Gyani Ram and Co. [1963] 47 ITR 472 this court has held that the mere fact that a particular income has been assessed in the hands of a particular person as his income will not prevent the Income-tax Officer from coming to the conclusion on fresh materials that that income is the income of another person and taking proceedings under section 34 of the Act for reassessment against the latter on the ground that this income had escaped assessment in his assessment.
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> In the case of Sidh Gopal Gajanand [1969] 73 ITR 226 this court has held that the validity of notice under section 34 of the Indian Income-tax Act, 1922 cannot be impugned on the ground that the assessment proceeding was already pending in respect of the same income against another entity and where it appears that the income may have been received either by A or by B or by both together, it would be open to the income-tax authorities to determine the said question by taking appropriate proceedings against both A and B.
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> In the case of R. Dalmia [1972] 84 ITR 616 the Delhi High Court has held that where the items of escaped income in respect of which the assessment is proposed is specific but the question as to whether the income, if earned, was earned by one person singly or by him along with others is a matter of inquiry, if the Income-tax Officer has reason to believe that it could have been earned either by one person singly or by him along with others there is nothing to prevent him from initiating proceedings against the concerned assessees in both capacities. In such a case where it appears to the Income-tax Officer, that certain income had been received during a particular year but it is not clear who has received that income it is open to the Income-tax Officer to start proceedings against all the persons individually or collectively to ascertain the correct position. In the case of Sohan Singh [1986] 158 ITR 174 the Delhi High Court has taken a similar view.
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> In the case of Smt. Durgawati Singh [1998] 234 ITR 249 this court has held that it is settled that when there is a doubt as to which person amongst two was liable to be assessed, parallel proceedings may be taken against both and alternative assessments may also be framed. It is also equally true that while a protective assessment is permissible, it is not open to the income-tax appellate authorities

constituted under the Act to make a protective order. The law does not permit assessment of the same income successively in different hands. The tax can only be levied and collected in the hands of the person who has really earned the income and is liable to pay tax thereon.

In the case of Banyan and Berry [1996] 222 ITR 831 the Gujarat High Court has held that where there is doubt or ambiguity about the real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to have recourse to making a protective assessment in the case of one and a regular assessment does not affect the validity of the other assessment inasmuch as if ultimately one of the entities is really found to be liable to assessment, then the assessment in the hands of the entity alone remains the effective assessment and the other becomes infructuous. The levy is enforceable only under one assessment and not under both."

78. The principle squarely applies in the facts of instant case, which for brevity we need not reiterate.

79. Reliance on a decision dated 04.03.2016, rendered by the Calcutta High Court in Prem Chand Shaw (supra), is only for the purpose of pressing the provisions of Section 292-B of the Act, which, in the instant case, we do not find to be applicable.

80. While drawing our attention to the decision rendered by the Full Bench of Delhi Court in Sophia Finance Ltd. (supra), Shri Vinay Kuthiala wants us to adjudicate the merits of the matter, which under these proceedings is impermissible. The decision can be of help only to the extent that the authority would be empowered to examine the transaction, which in his belief required explanation.

81. In the instant case, we find that the petitioner seeks adjudication, on merits, of the fact in issue, which is impermissible in law. In the absence of definite and authentic information, this Court cannot as a fact finding authority, by way of a roving inquiry examine the matter, holding the proceedings initiated under Section 148 of the Act to be untenable on merits. Assessee is always open to make all such submissions before the appropriate authority.

82. At this stage, what is required to be considered by the jurisdictional authority is only reasons to believe and not "the established fact of escapement of income", in lines of Rajesh Jhaveri (supra).

83. We further find the order rejecting the objections to be a reasoned one. It is certainly not cryptic. Every issue raised by the assessee stands considered and dealt with, with a rider that it is open for the assess to appear before the Jurisdictional Officer and place all material for just determination and conclusion of the proceedings. The view expressed by the Assessing Officer is only prima facie. It is not a case of change of opinion.

84. Thus in the given facts and the circumstances, we do not find the impugned action to be illegal, arbitrary, whimsical or capricious. It cannot be said that there was no material before the Assessing Officer to proceed in accordance with law. It also cannot be said that there was no basis for the Assessing Officer to have formed reasons of belief. We do not find it to be a fit case, warranting interference by this Court, for the action cannot be said to be ex facie illegal or based on extraneous reasons and circumstances. This Court is not required to go into the correctness or sufficiency of reasons. It definitely is not a case where the Assessing Officer lacked jurisdiction. It is also not a case of jurisdictional error. It also cannot be said that he exceeded such jurisdiction. Also, exercise of such power, statutory in nature, cannot be said to be either arbitrary or based on extraneous factors, consideration or circumstances. No malafides stands alleged against anyone.

85. We are quite convinced that reasons to believe formed by the Assessing Officer emanate from the record, having material bearing on the question of jurisdictional fact, so raised by him.

86. Perusal of material placed on record does not reflect the impugned action to be ex-facie illegal or not borne out from the record. This Court is not required to go into the sufficiency of material which led to the formation of reasons of belief, more so, when reasons are relevant and emanate from the record and are also germane for just adjudication of facts in issue. There is proper compliance of procedure. Also the assessee can adequately represent herself before the authority which otherwise has jurisdiction to initiate the impugned action.

87. Repetitive though it may sound, but we reiterate that it is not a case of lack of jurisdiction. It is also not a case where the authority has exceeded its jurisdiction or the action is based on no material or that no reasons are recorded by the Assessing Officer or that reasons assigned are absolutely irrelevant or based on extraneous factors/circumstances. It also cannot be said that the impugned action is not bonafide or is based on vague , irrelevant or unspecific information. It is not that the Assessing Officer has prejudged the issue and proceeded to initiate action with a predetermined mind. In fact, there is no such assertion in the petition. Also no malafides stand alleged.

88. It cannot be said that rejection of the objections are based on frivolous or extraneous factors and circumstances. There is complete and proper application of mind to the attending facts and circumstances. The objections rejected, by a speaking order also stand duly communicated to the petitioner. Mere rejection of objections would not lead to formation of opinion about the Assessing Authority under all circumstances deciding the matter in favour of the revenue. No material stands placed before us justifying investment of huge amount out of the declared income of HUF. It is not that the assess is precluded from producing such material before the Assessing Officer.

89. Significantly, before this Court, what is the other stand of the HUF, vis-a-vis its transaction with said Anand Chauhan or Shrikand Orchard in Tehsil Rampur, District Shimla, in relation to the agricultural land, is a closely guarded secret. Whether such fact is relevant or not is a subject matter of consideration by the fact finding authority.

90. No other point is urged.

91. It stands clarified that we have not expressed any opinion on the merits of the case, which, the authority below, shall adjudicate, in accordance with law, uninfluenced of any observations made by this Court.

92. Hence in view of our aforesaid discussion, we find no merit in the present petitions, which stand dismissed.

93. Since no interim order was passed, no further order or direction is required to be passed in the miscellaneous application which also stands dismissed alongwith the main petition.

In view of the aforesaid, present petition, stands disposed of accordingly, as also pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Cr. Revision No.4186 of 2013 &
Cr. Revision No.139 of 2014.
Reserved on : 28.11.2016.
Decided on : 26.12.2016.

1. Cr. Revision No.4186 of 2013.

Sudershan Singh …Petitioner.

Versus

State of Himachal Pradesh & ors. …Respondents.

2. Cr. Revision No.139 of 2014.

Rakesh Kumar …Petitioner.

Versus

State of Himachal Pradesh & ors. …Respondents

Code of Criminal Procedure, 1973-Section 133- Petitioner is co-owner in possession of the land – the villagers requested the petitioner to allow them to construct the road – petitioner gave an undertaking to provide land for the construction of the road – the retaining wall was damaged during the construction of the road – when Gram Panchayat did not construct the wall, the petitioner himself erected the same – it was claimed that the obstruction was caused to the road- proceedings were initiated against the petitioner and notice was issued to him- held, that obstruction has been caused to the road –SDM had rightly passed the order after visiting the spot and verifying the facts- petition dismissed. (Para- 6 to 8)

For the petitioner Mr. T.S. Chauhan, Advocate, in Cr. Revision No.4186 of 2013 and Ms. Bhavna Dutta, Advocate, in Cr. Revision No.139 of 2014.

For the respondent : Mr. Virender Kumar Verma, Addl. Advocate General with Mr. Rajat Chauhan, Law Officer, for respondents No.1 & 2.

Ms. Bhavna Dutta, Advocate, for respondent No.3 in Cr. Revision No.4186 of 2013 and Mr. T.S. Chauhan, Advocate, for respondent No.3 in Cr. Revision No.139 of 2014.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

Both the Criminal Revision arise out of one and the same judgment and common questions of law and facts are involved in the same, hence, both the revisions were taken up for hearing together and are being disposed of by this common judgment.

The present Criminal Revision under Section 397 read with Section 401 of the Code of Criminal Procedure is maintained by the petitioner Sudershan Singh in Criminal Revision No.4186 of 2013 (hereinafter referred to as 'the petitioner') and Rakesh Kumar in Criminal Revision No.139 of 2014 (hereinafter referred to as 'respondent No.3.') to quash and set aside the impugned order dated 19.11.2013, passed by learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, H.P.

2. The facts giving rise to this petition are that the petitioner is co-owner-in-possession of Khasra No.2391 and 2478, situated in Village Mohal Sandhiar (Baradh) P.O Chhat, Tehsil Ghumarwin, District Bilaspur, H.P. It is averred in the petition that the villagers requested the petitioner to allow them to construct a road from Barud to Paneta and petitioner gives an undertaking that he is ready to provide his land for construction of road, as per the survey and allowed the construction of the road over his land, as per the survey. The 'Kachha' road was constructed at the spot, in the year 2006, after erecting a retaining wall to give support to the residential house of the petitioner, so that it may not collapse due to the construction of the road. In the year 2011, the wall constructed for giving support to the residential house of the petitioner was collapsed due to the use of JCB by Gram Panchayat and due to the collapse of the wall certain creaks were developed in the house of the petitioner. Thereafter, the road was closed on account of the collapsed retaining wall, the matter was also brought to the notice of Gram Panchayat, an agreement took place between the members of Gram Panchayat and the petitioner. The Gram Panchayat, has agreed to re-erect the damaged wall, vide agreement dated 20.3.2011. The Gram Panchayat, in pursuance to the agreement dated 20.3.2011 did not re-erect the retaining wall, which was damaged by them till 2013, when the house of petitioner again developed more creaks. The petitioner erected the retaining wall, which are two feet in length and one feet in height to support his house. It is further averred that when the respondents threatened to damage the entire wall forcibly, the petitioner Sudershan Kumar filed a suit before the learned Court below, thereafter respondent No.3 reported the matter to the police on 4.2.2013, on the basis of which complaint/'Kalendera' under Section 133 of Cr. P.C, was prepared by the Station House Officer, Police Station, Ghumarwin and the same was sent to

respondent No.2/Sub Divisional Magistrate, Ghumarwin, thereafter the proceedings were initiated and passed the impugned order dated 19.11.2013.

3. Learned counsel appearing on behalf of the petitioner has argued that the impugned order passed by the learned Sub Divisional Magistrate, Ghumarwin, is contrary to law, as the learned Magistrate has no power to pass an order under Section 133 Cr. P.C, as the Civil Suit was pending adjudication. On the other hand, learned counsel appearing on behalf of respondent No.3 has argued that the impugned order passed by the learned Magistrate, is just and reasoned. He has further argued that whole of the parapet was required to be removed and the impugned order may be modified accordingly by allowing the revision petition of respondent No.3.

4. In rebuttal, learned counsel appearing on behalf of the petitioner has argued that the impugned order is required to be set aside with a direction to the parties to get their case decided in a proper manner in the Civil Court.

5. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

6. The petitioner led his evidence in the learned Court below by producing five witnesses. On the other hand, respondent (now petitioner) has produced two witnesses. CW-1 Geeta Devi has deposed that the pillar and wall raised on the road be removed, so that road become wider for 108 Ambulance. In her cross-examination, she has stated that this road is open for small vehicles and large vehicles cannot pass through this road. CW-2 Giatri Devi, has stated that due to narrow road, heavy vehicles cannot pass through the road. In her cross-examination, she has stated that she does not know whether the tractor pass through the road or not. She has also stated that she does not know how much land has been given by Sudarshan Singh for the road. CW-3 Gian Chand, has deposed that the respondent has raised two feet wall and has narrowed the road. CW-4 Rakesh Kumar, has stated that the road was constructed in the year 2006 by Gram Panchayat and after six years Sudarshan Singh, has narrowed it by raising a wall. In his cross-examination, he has stated that the trucks do not pass through this road. He has stated that he does not know how much land Sudharshan Singh, has given for road. CW-5 Piar Chand, has stated that Sudharshan Singh, has blocked the road by raising parapet. On the spot, there is a pillar due to which small vehicles cannot cross. In his cross-examination, he has stated that he does not know whether the road/path is in Government land or in private land. He has stated that earlier tractor use to pass through this road. He has stated that he does not know whether the tractor of Nanda Pradhan, goes through this way or not. Petitioner Sudershan Singh, has stated that he is working as Forest Guard and deposed that he has not blocked any road. Earlier a false complaint was registered, thereafter Gram Panchayat visited the spot. He has stated that he has filed a Civil Suit against the State of Himachal Pradesh and Gram Panchayat, Chhat. In his cross-examination, he has stated that he has given written consent to make the road. He has stated that he has given consent to small vehicles not to heavy vehicles and JCB etc.

7. From the above, it is clear from the record that the public nuisance has been caused by the petitioner and the impugned order passed by the learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, dated 19.11.2013, is just, reasoned and as per the Section of 133 Cr. P.C, the obstruction/public nuisance is required to be removed immediately, as it was obstructing the public passage. The learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, has passed the impugned order dated 19.11.2013, after visiting the spot and verifying the fact with regard to the passing of the vehicles and the impugned order asking for the removal of the parapet to the extent of two feet in length and one feet in width is seems to be just and reasoned, after appreciating the evidence and facts. The order of learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, is as per law and he has taken into consideration that after removing a portion of parapet, there will be a smooth turning of vehicles. So, I do not find any illegality or infirmity with the order (s) passed by the learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, directing the removal of a portion of the parapet. The order

passed by the learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur, is after appreciating the evidence, which has come on record and law has been applied correctly. So, no interference is required in the impugned order dated 19.11.2013, passed by the learned Sub Divisional Magistrate, Ghumarwin, District Bilaspur.

8. With these observations, both these revisions are requires dismissal and are accordingly dismissed. No orders as to costs. Pending applications, if any shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Surat Ram and another. ...Appellants.

Versus

Himachal Gramin Bank, Churag Branch, Tehsil Karsog, District Mandi, H.P. ...Respondent.

RSA No.466 of 2007.
Reserved on : 23.11.2016.
Decided on : 26.12.2016.

Code of Civil Procedure, 1908- Section 100- Plaintiff had advanced a sum of Rs. 6,500/- to the defendant No. 1 for running a karyana shop – defendant No. 2 stood guarantor- the loan was not repaid and the suit was filed for the recovery of the amount – the suit was dismissed by the Trial Court- an appeal was preferred, which was allowed- held in appeal that the case of the plaintiff was proved by oral and documentary evidence- Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para-8 to 11)

For the appellants Mr. G.R. Palsra, Advocate.
For the respondent Mr. Ramakant Sharma, Sr. Advocate with Ms. Anita Dogra, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present Regular Second Appeal is maintained by the appellants against the judgment and decree passed by learned Addl. District Judge, Mandi, H.P, camp at Karsog, in Civil Appeal No.56 of 2006, dated 9.8.2007, whereby the learned Addl. District Judge, Mandi, H.P, camp at Karsog, had set aside the judgment and decree passed by learned Civil Judge (Senior Division), Karsog, District Mandi, in Civil Suit No.6 of 2005, dated 31.3.2006.

2. Briefly stating facts giving rise to the present appeal are that respondent/plaintiff (hereinafter referred to as 'the plaintiff') filed a suit for recovery of Rs. 64,597/- against the appellants/defendants (hereinafter referred to as 'the defendants') alleging that defendant No.1 availed loan from the plaintiff-bank for a sum of Rs. 6500/- on 4.3.1987, for running his 'Karyana shop". Plaintiff-bank agreed to provide loan of Rs. 6500/- i.e. Rs. 5000/- for shed and Rs. 1500/- for 'Karyana goods" at the rate of 14% per annum with quarterly rests on providing at least one guarantor for the said loan and interest. On 24.3.1987, defendant No.1 executed demand promissory note, agreement and other requisite documents for a sum of Rs. 6500/- payable with interest thereon, at the rate of 14% quarterly rests. Defendant No.2 stood guarantor for defendant No.1, both are jointly and severally liable for the payment of the aforesaid loan amount. Defendant No.1 was sanctioned Rs. 6500/-, out of which Rs. 5000/-, was paid to Sant Ram, who prepared the shed and Rs. 1500/- were paid to Churamani and sons, as per terms and conditions of the loan agreement. Defendant No.1 placed on record the balance confirmation letters and acknowledged his liability on different dates i.e. balance confirmation letters dated

23.1.1989, 20.11.1991, 15.5.1993, 27.10.1993, 12.6.1996, 16.7.1997, 29.2.2000 and 10.2.2003, but defendants failed to pay the amount, in accordance with the terms and conditions laid down in the agreement, as such the plaintiff-bank recalled the entire amount and issued notices to the defendants. The total amount due alongwith interest upto 7.1.2005 becomes Rs. 64597/- alongwith interest at the rate of 12% per annum from the date of institution of the suit till its realization of the total amount.

3. The suit has been resisted and contested by the defendants by filing written statement and has taken the preliminary objections qua maintainability, estoppel and cause of action. It has been contended by the defendant that he has never applied for the loan nor any loan was provided by the said bank to defendant No.1. Defendant No.1 stood guarantor of defendant No.2. Defendant further denied the execution of demand promissory note, agreement and other documents for the alleged loan of Rs. 6500/-, when defendant No.1 stood guarantee for defendant No.2. Plaintiff-bank obtained the signatures on the bank documents of defendant No.1, on the pretext of guarantor of defendant No.2. Defendant further averred that at that time Rajinder Sachdeva, was Manager of Himachal Gramin Bank, Churag, numerous fake and fraud loan cases had been made by him and has been convicted by the learned Court below. The Manager was absconded and declared as Proclaimed Offender in FIR No.163/89, FIR No.44/90, FIR No.47/1990 etc. under Sections 420, 467, 468 of the Indian Penal Code. Defendant further averred that Sant Ram never prepared the shed and fake and fraud bills were collected by the bank.

4. The learned trial Court framed following issues :

"1. Whether the plaintiff is entitled for the recovery of Rs. 64597/- along with interest at the rate of 14% p.a. with quarterly rests, as prayed for ? OPP.

2. Whether the present suit is not maintainable ? OPD.

3. Whether the plaintiff is estopped by his act, conduct and deeds to file the present suit ? OPD.

4. Whether the plaintiff has no cause of action ? OPD.

5. Whether the defendant No.1 never applied for the loan and defendant No.2 has never given guarantee for defendant No.1 ? OPD.

6. Relief."

5. The learned trial Court after deciding Issue No.1 against the plaintiff, Issue Nos.2 to 4 in favour of the defendants, Issue No.5 against the defendant dismissed the suit. However, the learned lower Appellate Court set aside the findings of the learned Court below and decreed the suit of the plaintiff and thereafter the present appeal was admitted on the following substantial questions of law :

"1. Whether the learned First Appellate Court has misread and misconstrued the oral as well as documentary evidence of parties especially documents Ex.D1 to Ex.D4 which has materially prejudice the case of the appellants ?

2. Whether the learned First Appellate Court has fallen into error by not considering this fact that the then Branch Manager Shri Rajinder Sachdev has prepared false and fake loan cases and criminal case has been registered against him and the first Appellate Court has not taken note of previous judgment and decree in Civil Suit No.12/89 dated 19.4.1990 and due to this fact the case of the appellants have been materially prejudiced ?

3. Whether the judgment and decree of the learned First Appellate Court is not sustainable in the eyes of law because of the fact that amount of

Rs. 6500/- has been shown as loan case in the present case as well as in Civil Suit No.12/89 which fact has been totally ignored by the learned First Appellate Court which has materially prejudiced the case of the present appellants ?"

6. Learned counsel appearing on behalf of the appellant has argued that the judgment and decree passed by the learned Court below is against the law. On the other hand, learned counsel appearing on behalf of the respondent has argued that the judgment and decree passed by the learned Court below is just, reasoned and after appreciating the facts, which have come on record, to its true perspective.

7. To appreciate the arguments of learned counsel for the parties, I have gone through the record in detail.

8. It is proved that on 4.3.1987, defendant No.1 Surat Ram, applied for a loan of Rs. 6500/- to the plaintiff-bank for running his "Karyana" business and loan of Rs. 6500/- was sanctioned and advanced in favour of defendant No.1. The shed was constructed by defendant No.1 through Sant Ram and amount of Rs. 5000/-, was paid at the instance of defendant No.1 to Sant Ram. Defendant No.1 also purchased the goods worth of Rs. 1500/- from Churamani and sons and amount of Rs. 1500/-, was paid to Churamani and sons at the instance of defendant Surat Ram. PW-1 Maninder Jistu, Branch Manager, Churag Branch of the plaintiff-bank has deposed that he had been authorized on behalf of the plaintiff-bank to institute and plead the case vide General Power of Attorney Ex.PW1/A. He has stated that at the time of institution of the suit, the plaintiff-bank was entitled to recover an amount of Rs. 64,597/- from the defendants. In his cross-examination, he showed his ignorance about a criminal case registered against Rajinder Sachdeva, the then Manager of the plaintiff-bank. PW-2 Mast Ram, employee of the plaintiff-bank, who remained posted as Clerk-cum-Cashier in Churag Branch, has stated that defendant No.1 had applied for a loan of Rs. 6500/-, for running "Karyana" business out of which Rs. 5000/-, were transferred in favour of Sant Ram at the instance of defendant Surat Ram, as Sant Ram had constructed shed of Surat Ram worth of Rs. 5000/-. Surat Ram had also purchased goods worth of Rs. 1500/- from Churamani & Sons. He has further stated that defendant No.1 had executed consideration voucher Ex.PW2/A, transfer vouchers Ex.PW2/B, Ex.PW2/C, demand promissory note Ex.PW2/D, agreement Ex.PW2/E, receipt Ex.PW2/F, letter of authority Ex.PW2/H. Letter of witness Ex.PW2/B, loan application Ex.PW2/K. He has also deposed that defendant No.2 had stood guarantor, who had executed the guarantee deed Ex.PW2/L. In his cross-examination, he has shown his ignorance that Rajinder Sachdeva was posted as Branch Manager of the plaintiff-bank in the year 1987 and had prepared the fake loan case. He has also stated that he does not know if Rajinder Sachdeva stood tried in a criminal case for preparing false and fake loan cases and that said Rajinder Sachdeva absconded and was declared as Proclaimed Offender. PW-3, Ashok Thakur, has deposed that Rajinder Sachdeva was posted as Branch Manager of Churag Branch of the plaintiff-bank in the year 1987, but he has denied that Rajinder Sachdeva had prepared the documents pertaining to the false loan cases. PW-4 R.K. Sharma, remained posted as Branch Manager at Churag Branch of the plaintiff-bank from June 1994 to June 1998 and as per his statement, defendant No.1 Surat Ram had signed the balance confirmation letter Ex.PW4/A, in his presence. In his cross-examination, he has shown his ignorance about the documents pertaining to false loan cases by Rajinder Sachdeva, the then Manager of the plaintiff-bank. PW-5 Anil Sharma, has also admitted that in the year 1987, Rajinder Sachdeva was Manager of the Churag Branch of the plaintiff-bank, but he has stated that said Rajinder Sachdeva, had not prepared the false documents pertaining to the false loan cases. PW-6 Swaroop Singh, also remained posted in Churag Branch of the plaintiff-bank from August 1993 to June 1995 and as per his statement, Surat Ram had executed balance confirmation letter Ex.PW6/A in his presence. PW-7 B.R. Kaundal, has deposed that balance confirmation letter Ex.PW7/A was executed by defendant Surat Ram in his presence on 29.2.2000. He has also shown his ignorance that Rajinder Sachdeva, Branch Manager of Churag Branch, had prepared the document of false loan cases. DW-1, Surat Ram, has deposed that he had not applied for loan to the plaintiff-bank nor he had received the same. He had only stood as

guarantor of Geeta Ram at that time and his signatures was procured by the bank employee on several papers. He has also deposed that later on bank employee procured his signatures on papers and he had told them that he had not applied for the loan nor received the same. He has also deposed that a case of cheating was registered against the then Branch Manager, who had prepared false documents of several loan cases. The Manager had absconded and declared as Proclaimed Offender. In his cross-examination, he has admitted that his signatures on pronote Ex.PW1/D, balance confirmation letters Ex.PW2/B, Ex.PW2/C, Ex.PW7/A and Ex.PW5/A. DW-2 Devi Ram has proved on record the statement of account Ex.DW2/A of defendant Surat Ram. DW-3 Krishan Lal, has deposed that defendant Surat Ram, had purchased goods amounting to Rs. 1500/- from him, vide bill Ex.PW2/G and amount of Rs. 1500/- was paid by him to the plaintiff-bank. PW-2 has also deposed that Surat Ram had applied for loan of Rs. 6500/-, to the plaintiff-bank vide application Ex.PW2/K. The loan of Rs. 6500/- was sanctioned by the bank in favour of defendant Surat Ram and defendant Surat Ram had executed documents Ex.PW2/A, Ex.PW2/B, Ex.PW2/D, agreement Ex.PW2/A, revival letters Ex.PW2/H and statement of Surat Ram Ex.PW2/D. PW-2 has proved on record that the loan of Rs. 6500/- was sanctioned in favour of the defendant Surat Ram and has executed the aforementioned documents. Ex.PW2/E agreement whereby the defendant had agreed to return loan of Rs. 6500/-, to the plaintiff-bank with interest at the rate of 14% per annum with quarterly rests in installment of Rs. 150/- per month. Defendant No.2 had stood as guarantor of defendant No.1, who had executed the guarantee deed Ex.PW2/L. As per the statement of PW-3, it is proved that defendant Surat Ram had acknowledged his liability by executing balance confirmation letter Ex.PW3/A to Ex.PW3/D. Similarly, PW-4 has proved on record balance confirmation letter Ex.PW4/A. PW-5 has also proved on record the balance confirmation letters Ex.PW5/A. PW-6 and PW-7 have also proved on record the balance confirmation letters Ex.PW6/A and Ex.PW7/A, respectively. Defendant No.1 had acknowledged his liability by executing the balance confirmation letter and thus, the period of limitation was extended from time to time till institution of the suit.

9. The case of the plaintiff is also corroborated by DW-3, who is owner of shop M/s Churamani & sons. As per his statement, he has sold goods worth of Rs. 1500/- to defendant Surat Ram, vide bill Ex.PW2/G and then amount of Rs. 1500/- was paid to him by the plaintiff-bank.

10. The net result of the above discussions is that the findings arrived at by the learned lower Appellate Court are just, reasoned and after appreciating the facts, which have come on record, to its true perspective. Substantial question of law No.1 is answered accordingly holding that the learned lower Appellate Court below has not misconstrued the oral as well as documentary evidence, which has come on record. As far as substantial question of law No.2 is concerned, the learned lower Appellate Court below has not committed any error, as in the present suit, the judgment and decree has been passed, after appreciating the fact, which has come on record in the present case to its true perspective. The learned Court below has decided the present case in the facts and circumstances and the evidence, which has come on record in the present case is rightly appreciated, so the findings of the learned lower Appellate Court does not suffer from any illegality and infirmity, as it has been proved on record that the defendant has taken a loan of Rs. 6500/- from the plaintiff-bank.

11. In view of the above discussion, there is no illegality and infirmity in the judgment and decree passed by the learned lower Appellate Court, so no interference of this Court is required. In these circumstances, the appeal of the appellant is without merit and deserves dismissal, hence the same is dismissed. However, in the peculiar facts and circumstances of this case, parties are left to bear their own cost (s). Pending application (s), if any, shall also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

The New India Insurance Company, through its Divisional Manager. …Appellant.
Versus
Smt. Hiravati Sharma and others. …Respondents.

FAO No.407 of 2011.
Cross Objection: 327 of 2012.
Reserved on : 30.11.2016.
Decided on: 26.12.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was travelling in the vehicle with the goods – vehicle fell down due to the rashness and negligence of the driver – deceased sustained grievous injuries and died – compensation of Rs. 3 lacs was awarded by the Tribunal- held, that income of the deceased was rightly taken to be Rs. 3,500/- per month and compensation was rightly assessed as Rs. 3 lacs- there was no proof that accident had taken place due to the mechanical defect – the deceased was owner of goods and insurance company cannot escape from liability – appeal dismissed. (Para- 10 and 11)

For the appellant Mr. B.M. Chauhan, Advocate.
For the respondents Mr. N.S. Shandil, Advocate, for respondents No.1 & 2.
Nemo for respondents No.3.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal under Section 173 of the Motor Vehicles Act, 1994, is maintained against the award dated 26.7.2011, passed by learned Motor Accident Claims Tribunal, Shimla, in MAC Petition No.18-S/2 of 2009, whereby the learned Tribunal below has awarded compensation of Rs. 3,00,000/- to the petitioners alongwith interest at the rate of 8% per annum.

2. The brief facts giving rise to the present appeal are that respondents No.1 & 2, who are the claimants/cross objectors in present the appeal (hereinafter referred to as the 'petitioner') maintained a petition for compensation on account of the death of their son in an accident caused due to the rash and negligent driving of respondent No.4 (hereinafter referred to as 'respondent No.3') while driving the vehicle owned by respondent No.3 (hereinafter referred to as 'respondent No.1') and insured by the appellant herein (hereinafter referred to as 'respondent No.2').

3. As per the petitioner, on 14.2.2009, Deepak Sharma was travelling in the vehicle i.e. Mahindra Pick Up bearing registration No.CH-23T-9715 (Engine No.21794 and Chassis No.41974), as owner of goods was going from Koti to Dhalli and thereafter to Kotkhai, when the vehicle reached near Karyalghati, it met with an accident and the vehicle went down the highway. Deepak Sharma, received grievous injuries and died at the spot. The accident has taken place due to the rash and negligent driving of the driver of vehicle. After the death of Deepak Sharma, the petitioners had been left high and dry. The petitioners had claimed compensation of Rs. 5,00,000/-, on account of the death of their son. Respondent No.1 was registered owner of Mahindra Pick Up bearing No. CH-23T-9715. Respondent No.1 was vicariously liable for rash and negligent act of his driver. Respondent No.2 had provided comprehensive insurance cover to the vehicle for the period from 31.8.2008 to 30.8.2009. The respondent No.2 was liable to indemnify the insured.

4. Respondent No.1 had resisted and contested the claim petition. He had admitted his ownership and possession of vehicle bearing No. CH-23T-9715. Respondent No.1 had

purchased the vehicle from registered dealer at Chandigarh on 31.8.2008. Respondent No.2 had provided comprehensive insurance cover to the vehicle. On 14.2.2009, respondent No.3 had been on the wheel of the vehicle. Respondent No.3 had been taking Deepak Sharma and his goods to Kotkhai. The charge of rash and negligent driving against the driver had been denied. The accident had taken place due to sudden mechanical brake down of the vehicle. Respondent No.1 had expressed ignorance about the age, income and occupation of the deceased. The petitioners were not dependent for maintenance on their son. They were not entitled to compensation from respondent No.1.

5. Respondent No.2 had also resisted and contested the claim petition. It had admitted having provided insurance cover to vehicle bearing No. CH-23T-9715 at the time of accident. Further alleged that respondent No.1 had contravened the terms and conditions of the insurance policy. Respondent No.3 had not been in possession of a valid and effective driving licence. Deepak Sharma had been travelling in the vehicle as gratuitous passenger. Risk of carriage of gratuitous passenger had not been covered by the insurance policy provided by respondent No.2. It is alleged that respondent No.1 was required to get the vehicle registered within one month of sale thereof. Temporary registration No.CH-23T-9715 could not be treated valid at the time of accident. The petitioners were parents of respondent No.3. The deceased had not been in receipt of income of Rs. 5000/- per month. Respondent No.2 was not liable to pay compensation to the petitioners.

6. The learned Tribunal below framed the following issues :

> "1. Whether Sh. Deepak Sharma died due to rash and negligent driving of Mahindra Pick Up bearing temporary No.CH-23T-9715 by respondent No.3? OPP.
>
> 2. In case No. (i) is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom ? OPP.
>
> 3. Whether Sh. Deepak Sharma was travelling in vehicle in question at the time of accident as an unauthorized or gratuitous passenger ? OPR.
>
> 4. Whether the vehicle in question was being driven in contravention of terms and conditions of the insurance policy ? OPR-2.
>
> 5. Whether the respondent No.3 was not holding valid and effective driving licence at the time of accident ? OPR- 2.
>
> 6. Whether the petition is result of collusion between the petitioners and respondent No.1 and 3 ? OPR-2.
>
> 7. Relief."

7. After deciding Issue Nos.1 & 2 in favour of the petitioners, Issue Nos.3 to 6 against the respondents, the learned Tribunal below awarded an amount of Rs. 3,00,000/- to the petitioner and against the respondents, as the vehicle was insured by respondent No.2, the liability was to be fixed by respondent No.2 to pay the amount of compensation. The petitioner who is respondent No.1 in the present case has also maintained cross objections under Order 41 Rule 22 CPC, for enhancement of the compensation. These cross objections are also dealt with the present appeal.

8. Learned counsel appearing on behalf of the appellant has argued that the learned Tribunal below has not taken into consideration the fact that the deceased was gratuitous passenger and so, the Insurance Company was having no liability. On the other hand, learned counsel appearing on behalf of the petitioner, who are the respondents in the present appeal and who maintained cross objections has argued that the deceased was owner of the goods, as he was carrying the manure in his vehicle for selling to the owners of the apples orchard, which is generally business of the people in the area from where the deceased belongs. He has further argued that the amount of compensation as awarded by the learned Tribunal below is too much on the lower side and requires to be enhanced.

9. In rebuttal, learned counsel appearing on behalf of the appellant has argued that the amount of compensation as awarded by the learned Tribunal below is already on the excessive side and the question of enhancement does not arise. He has further reiterated that as the deceased was gratuitous passenger, no amount is required to be paid by the Insurance Company, as the vehicle was plied in violation of the terms and conditions of the Insurance Policy.

10. To appreciate the arguments of learned counsel appearing on behalf of the parties, I have gone through the record of the case carefully.

11. PW-1 Head Constable Prem Chand, had tendered in evidence copy of FIR No.29/09 under Sections 279 and 304-A of the Indian Penal Code, Police Station, Dhalli, Ex.PW1/A. Respondent No.3 had been booked on charges of rash and negligent driving by the local police. PW-2 Krishan Dutt, has deposed that his son Deepak Sharma had been looking after his household and property. Petitioner No.2 had been owner-in-possession of property, as per jamabandi Ex.PW2/A. Deepak Sharma, had been cultivating vegetables and had been earning Rs. 5000/- per month from all sources. On 14.2.2009, Deepak Sharma, had been carrying his goods to Kotkhai and had boarded the vehicle of respondent No.1. The driver had been driving the vehicle rashly and negligently, as a result of which vehicle had gone down the highway in the area of Karyalghati. Deepak Sharma had suffered fatal injuries in the accident. After the death of their son, the petitioners had been left high and dry. Ex.PW2/B was death certificate of Deepak Sharma, Ex.PW2/C, postmortem report of the dead body of Deepak Sharma. The date of birth of Deepak Sharma was 2.8.1989. Deepak Sharma had left the School from 8th standard. The petitioners were from B.P.L family and Ex.PW4/A was BPL card of the petitioners. Bishan Singh while appearing as PW-3 has stated that on 15.2.2009, he had been on way from his house to Shimla. When PW-3 had been passing through Karyalghati, he had noticed marks of the accident. PW-3 had stopped and found one vehicle having gone down the highway. PW-3 had found the dead body of Deepak Sharma, at some distance from the vehicle. The respondent examined Sanjay Sharma as RW-1, who has stated that on 14.2.2009, he had been on the wheel of the vehicle. Deepak Sharma had boarded the vehicle alongwith his goods for Kotkhai. When the vehicle was in the area of Karyalghati, shaft of the vehicle had suddenly broken down. The vehicle had gone down the highway. Deepak Sharma had suffered fatal injuries, but there is no proof of mechanical defect as stated by RW-1. He was interested person to say so and the learned tribunal below has rightly held that the accident has occurred due to rash and negligent driving of respondent No.1, who is driving the vehicle and appeared before the learned tribunal below as RW-1. RW-2 Lokeshwar Dutt, who has stated having purchased the vehicle from registered dealer at Chandigarh on 31.8.2008. The dealer had got the vehicle insured, as per the insurance policy, Ex.PW2/B. Respondent No.1 had produced the driving licence of respondent No.3. The accident had taken place on 14.2.2009 at about 9:30 PM. So, the learned Tribunal below has rightly held that the accident has occurred due to the rash and negligent driving of the driver of the vehicle. As far as the status of the deceased was concerned, it has come on record that he was owner of the goods. Further, the Insurance Company has charged the premium for two workmen also. It has also come on record that the manure belongs to the deceased. The Insurance Company cannot escape his liability for the owner of the goods. In this case, the Insurance Company has already charged premium for two workmen also. As far as the compensation amount is concerned, the learned tribunal below has rightly taken the income of the petitioner at the rate of Rs. 3500/- per month, as there was no specific proof with regard to his income as alleged by the petitioners. I find no illegality in the compensation as worked out by the learned tribunal below.

12. The net result of the above discussion is that the findings arrived at by the learned Tribunal below holding that the Insurance Company is liable, needs no interference, as the same are just, reasoned and after appreciating the fact, which has come on record, to its true perspective. Further, this Court finds that there is no infirmity and perversity with the impugned award passed by the learned Tribunal below awarding Rs. 3,00,000/-, to the petitioner, as the

learned Tribunal below has taken into consideration the income of the deceased earning about Rs. 3500/- per month. No other points argued needs no consideration.

13. With these observations, the appeal as well cross objections requires dismissal and accordingly dismissed. Pending application (s), if any, shall also stands disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE VIVEK SINGH THAKUR, J.

CWP No. 3072 of 2016 alongwith
CWP No. 3078 of 2016 and
CWP No. 3080 of 2016
Reserved on: 22.12.2016
Date of Decision: December 26, 2016

1. CWP No. 3072 of 2016
Sh. Virbhadra Singh …Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & others. ...Respondents.
2. CWP No. 3078 of 2016
Smt. Pratibha Singh …Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & others. ...Respondents.
3. CWP No. 3080 of 2016
Sh. Vikramaditya Singh …Petitioner.
Versus
Deputy Commissioner, Circle Shimla, Income Tax Office & others. ...Respondents.

Income Tax Act, 1961- Section 147 and 148- Petitioner filed a return showing the income from salary and house property- a notice was issued by the Income Tax Authorities – the petitioner filed a fresh return – proceedings were initiated against the petitioner under Section 147 of the Act- a survey was conducted with respect to the affairs of V and it was found that he had given loan to the petitioner, which was held to be unexplained credit in the hands of the petitioner- the petitioner filed a reply stating that the amount was re-paid with interest – the notice was the result of non-application of mind and there was no dispute regarding the identity of the person, genuineness of the transaction or creditworthiness of the loaner- held in the writ petition that the objections were rejected by the Assessing Officer – Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year and if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax – the original return was not subjected to assessment – however, the Assessing Officer is not precluded to re-open assessment on the basis of his finding of fact so made on the basis of fresh material so discovered in the course of assessment of next assessment year – it is not disputed that investigations were conducted against V and it was found that loan was advanced to the petitioner and his family members – the petitioner and family members admitted the receipt of money in response to the notice- the order rejecting objection was not cryptic – the objections were considered and rejected – the action is not ex-facie illegal – it is not a case of lack of jurisdiction – the Writ Court is not a fact finding authority- writ petition dismissed.
(Para-11 to 89)

Cases referred:

Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others, AIR 1964 SC 1419
The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co., AIR 1968 SC 49
Bellary Steels & Alloys Ltd. V. CCT, (2009) 17 SCC 547

Indo Asahi Glass Co. Ltd. v. ITO, (2002) 10 SCC 444
K.S. Rashid and Son v. Income Tax Investigation Commission, AIR 1954 SC 207
Union of India Versus Guwahati Carbon Ltd., (2012) 11 SCC 651
Munshi Ram Versus Municipal Committee, Chheharta, (1979) 3 SCC 83
Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calcutta and another, AIR 1961 SC 372
S. Narayanappa and others v. Commissioner of Income-Tax, Bangalore, (1967) 63 ITR 219 : [AIR 1967 SC 523]
Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calutta and another, AIR 1961 SC 372
M/s S. Ganga Saran and sons (Pvt.) Ltd., Calcutta v. Income Tax Officer & ors, (1981) 3 SCC 143
Income Tax Officer, Cuttack and others v. Biju Patnaik,1991 Supp. (1) SCC 161
M/s Niranjan & Co. Pvt. Ltd. v. Commissioner of Income Tax, West Bengal-I and others, 1986 (Supp) SCC 272
Sreelekha Banerjee V. Commissioner of Income Tax, (1963) 49 ITR (SC) 112
CIT v. United Commercial and Industrial Co. P. Ltd., (1991) 187 ITR 596)
Income Tax Officer, A-Ward, Lucknow v. Bachu Lal Kapoor, AIR 1966 SC 1148

For the Petitioner: M/s Vishal Mohan, Pranay Pratap Singh, Sushant Keprate, Aditiya Sood and Jai Vardhan Khurana, Advocates, for the petitioner(s).

For the Respondents: Mr. Vinay Kuthiala, Sr.Advocate with Ms Vandana Kuthiala, Advocate and Mr. Diwan Singh Negi, Advocate, for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Invoking Extra Ordinary Writ jurisdiction of this Court, petitioner Sh. Virbhadra Singh lays challenge to the impugned notice dated 29.3.2016 (Annexure P-2) and order dated 24.11.2016 (Annexure P-5), whereby proceedings for assessment stands initiated by the Revenue under the provisions of Income Tax Act, 1961 (hereinafter referred to as the Act).

2. Petitioners Smt. Pratibha Singh (CWP No. 3078 of 2016) and Sh. Vikramaditya Singh (CWP No. 3080 of 2016) by way of separate petitions also lay challenge to similar notice/order. As prayed for, by the learned counsel, these petitions were heard together and in principle, only facts of petitioner Sh. Virbhadra Singh (CWP No. 3072 of 2016), were argued before us, for the difference pertained to the amount of income declared and the dates of filing of returns under Section 139 of the Act. Hence we proceed to discuss the facts of CWP No. 3072 of 2016.

3. The issues, which this Court is called upon to consider, are: (a) whether an order passed by an authority under the Act, in view of availability of equally efficacious remedy, is amenable to interference by way of writ jurisdiction, (b) whether exercise of power by the jurisdictional authority, in initiating action for assessment of escaped income, is justiciable by a Writ Court, (c) whether the jurisdictional authority had sufficient material to form reasons of belief, (d) whether such reasons do exist and if so, can this Court go into sufficiency thereof, (e) whether sanction accorded by the appropriate authority is in accordance with law, (f) whether the order passed by the authority is in conformity with the settled procedure of law, and (g) whether action of the authorities below can be said to be arbitrary, whimsical or capricious.

4. Petitioner, a permanent resident of Himachal Pradesh, is regularly assessed to income tax. On 02.08.2012, he filed a return, declaring his net taxable income for the assessment year 2012-13 (hereinafter referred to as the relevant year), to be Rs. 17,60,090/- (Annexure P-1, page 11), and the source mainly being salary and income from house property.

Prima facie, finding certain income to have escaped assessment, on 29.03.2016 he received a notice, under Section 148 of the Act, so issued by the Deputy Commissioner of Income Tax, Shimla (Annexure P-2, page 15).

5. Pursuant thereto, on 20.04.2016, petitioner filed a fresh return declaring the very same income. Also a request for supply of "reasons" for re-opening the case was made, which was duly complied with vide communication dated 09.05.2016 (Annexure P-3, page 16). Objections thereto, so filed by the petitioner on 29.06.2016 (Annexure P-4, page 59), stand rejected by the Assessing Officer in terms of order dated 24.11.2016 (Annexure P-5, page70).

6. Perusal of aforesaid communications reveals that on 29.03.2016, the Assessing Officer, forwarded his reasons of belief to the superior officer i.e. Joint Commissioner of Income Tax, Shimla, and the very same day, the said officer, after expressing his satisfaction thereupon, on finding the case fit for issuance of notice under Section 148 of the Act, returned the file and same day, notice issued by the Assessing Officer, was served upon the petitioner.

7. It was the information received from the Deputy Director of Income Tax (Investigation), Faridabad, vide communication dated 15.12.2015, which led the Assessing Officer initiate action against the petitioner under Section 147 of the Act.

8. Survey conducted with respect to the affairs of one Vakamulla Chandrashekhar (hereinafter referred to as the loaner) revealed that in the relevant year, following payments were made: (i) Rs. 2.4 Crores to Sh. Virbhadra Singh; (ii) Rs. 1.5 Crore to Smt. Pratibha Singh; and (iii) Rs. 2 Crores to Sh. Vikramaditya Singh. The loaner stated such payments to be interest free loans, made out of his "agricultural income" and "unsecured loans" so received by him from third parties. *Prima facie,* such plea was found to be not true, hence on careful appreciation of material before him, the Assessing Officer, formed reasons of belief, relevant portion whereof, is extracted herein under:-

> "4. Summary of findings
>
> I have carefully perused the return of income of Sh. Virbhadra Singh (Assessment Year 2012-13) and information received from and copies of the statements recorded by the Investigation Wing and the following facts emerge:-
>
> 4.1 Sh. Virbhadra Singh is showing his return with gross total income of Rs.18,66,089/- from salary and income from other sources.
>
> 4.2 Sh. Virbhadra Singh has received interest free unsecured loans of Rs. 2.4 Crores from Sh. Vakamulla Chandrashekhar in Financial Year 2011-12.
>
> 4.3 Sh. Vakamulla Chandrashekhar submitted that he advanced the above mentioned loans to Sh. Virbhadra Singh out of his agricultural income of Rs. 3.4 Crores in Financial Year 2011-12 and out of unsecured loans taken by him from Sh.Gurusharan Singh (Rs. 0.49 Crores), Jai Bharat Foods (Rs. 0.73 Crores) etc.
>
> 4.4 However, it was proved that Sh. Vakamulla Chandrashekhar was not having sufficient agricultural land to substantiate his claim.
>
> 4.5 Sh. Ram Parakash Bhatia, who was controlling various paper entities including Jai Bharat Foods, admitted on oath that he had provided accommodation entries to Sh. Vakamulla Chandrashekhar in lieu of unaccounted cash. He also stated on oath that no actual agriculture produce were purchased by him from Sh. Vakamulla Chandrashekhar.
>
> 4.6 Sh. Gurusharan Singh denied giving any loan to Sh. Vakamulla Chandrashekhar.
>
> 4.7 Thus, the creditworthiness of Sh. Vakamulla Chandrashekhar remain unproved to advance such huge amount of Rs. 2.4 Crores as interest free unsecured loan to Sh. Virbhadra Singh in Assessment Year 2012-13.

4.8 From the discussion made above, it is clear that Rs. 2.4 Crores received by Sh. Virbhadra Singh in Assessment Year 2012-13 from Sh. Vakamulla Chandrashekhar was unexplained credit in the hand of Sh. Virbhadra Singh and needs to be assessed in the hands of Sh. Virbhadra Singh u/s 68 of the Income Tax Act, 1961.

5. Reasons forming belief

In view of the above, I have reasons to believe that an amount of Rs. 2.4 Crores which was received by Sh. Virbhadra Singh from Sh. Vakamulla Chandrashekhar in Assessment Year 2012-13 as interest free unsecured loan is actually unexplained credit in the hand of Sh. Virbhadra Singh, which has escaped assessment in the case of Sh. Virbhadra Singh for Assessment Year 2012-13 within the meaning of section 147/148 of the Income Tax Act, 1961."

(Emphasis supplied)

9. Though factum of receipt of such payments came to be admitted by the petitioner, only in the objections filed in response to a notice issued under Section 148 of the Act, but he justified the same by raising a plea that: (i) In the year 2014, the amount stood repaid alongwith interest @ 10%; (ii) There was no dispute about (a) identity of the person, (b) genuineness of the transaction, (c) creditworthiness of the loaner; (iii) In the relevant year, the loaner had himself disclosed an income of Rs. 65,59,020/-, which was in addition to "huge agricultural income". (iv) The relevant jurisdictional authority, vide order dated 27.03.2015 had already assessed the amount in question, in the hands of the loaner (v) As assessee was not obliged to maintain books of accounts, provisions of Section 68 of the Act were not applicable. (vi) Impugned action was a result of total non-application of mind.

10. In the writ petition no additional ground stands pleaded.

11. *Prima facie* finding the explanation not to be satisfactory, such objections came to be rejected by the Assessing Officer by *inter alia* observing that: (i) Parties contradicted with regard to the nature of loan; (ii) in the absence of any proof or evidence, justifying income from agricultural source or unsecured loans, creditworthiness of the creditor remained to be examined; (iii) Though in the hands of the loaner, a sum of Rs. 3,40,85,000/-, so claimed as income from agriculture was assessed as an income from undisclosed source, under Section 68 of the Act, yet genuineness of the transaction required examination. More so, when such assessment was subject matter of challenge in an appeal before the appropriate jurisdictional authority; (iv) Even though assessee was not maintaining books of accounts, but however, information to which only he had access, in the nature of bank accounts etc. required submission and examination, in deciding a jurisdictional issue of fact; (v) In the absence of any prior assessment, there is no jurisdictional error in the Assessing Officer, calling upon the assessee to place all material in its power and possession, enabling the officer to decide the fact in issue; (vi) There was proper application of mind by the sanctioning authority; and (vii) Assessee's participation in the assessment proceedings would also help proper adjudication of the case on merits.

12. In response to the petition, Revenue justifies its action by (i) expressing doubts about the creditworthiness of the loaner; (ii) the nature of transaction; (iii) Revelation of a fact that in the relevant year, certain investments for purchase of a Farm House at Delhi, were made by the children of the petitioner in the name of M/s Maple Destination and Dreambuilt Pvt. Ltd. Company; (iv) Non-cooperative attitude of the assessee in: (a) not furnishing information and placing on record material within his power and possession of which only he had access; (b) not responding to a detailed questionnaire dated 23.05.2016; (c) placing on record only unauthenticated photocopies of few bank accounts; (v) Uncertainty with regard to the order of assessment made in the case of the loaner by the jurisdictional authority; (vi) Reasons of belief being only *prima facie* in nature; and (vii) The assessee having ample opportunity of placing all material and substantiating his case.

13. During the course of hearing, learned counsel cited following decisions which we have considered. The need to clarify such fact arises only for the reason that in the pleadings and/or proceedings conducted so far by the Assessing Officer, parties have referred to several decisions.

Mr. Vishal Mohan, learned counsel cited:-

(i) *GKN Driveshafts (India) Ltd. V. Income-Tax Officer and others*, (2003) 259 ITR 19 : (2003) 1 SCC 72; (ii) *Ajanta Pharma Ltd. v. Assistant Commissioner of Income-Tax and others*, (2004) 267 ITR 200 (Bombay); (iii) *Income-Tax Officer, I Ward, Distt. VI, Calcutta, and others v. Lakhmani Mewal Das,* (1976) 103 ITR 437 : (1976) 3 SCC 757; (iv) *Sagar Enterprises v. Assistant Commissioner*, (2002) 257 ITR 335 (Guj); (v) *M/s Chhugamal Rajpal v. S.P. Chaliha and others*, (1971) 1 SCC 453; (vi) *S.P. Agarwalla alias Sukhdeo Prasad Agarwalla v. Income-Tax Oficer, E-Ward, Dist. III(2), Calcutta and others*, (1983) 140 ITR 1010 (Calcutta); (vii) *Arjun Singh, Ajay Singh v. Assistant Director of Income-Tax (Investigation)*, (2000) 246 ITR 363 (Madhya Pradesh); (viii) *Central India Electric Supply Co. Ltd. v. Income-Tax Officer*, (2011) 333 ITR 237 (Delhi); and ITA No.45 of 2007, decided on 14.3.2012, titled as *Commissioner of Income Tax, Shimla v. M/s Sahil Knit Fab.*

Mr. Vinay Kuthiala, learned Senior Counsel cited:-

(i) CWP No.347 of 2014, decided on 4.7.2014, titled as *Joint Commissioner of Income Tax v. Kalanithi Maran*; (ii) *Commissioner of Income Tax, Gujarat v. Vijaybhai N. Chandrani*, (2013) 14 SCC 661; (iii) *Commissioner of Income Tax and others v. Chhabil Dass Agarwal*, (2014) 1 SCC 603; (iv) *Lalji Haridas v. Income-Tax Officer and another*, (1961) 43 ITR 387; (v) *Assistant Commissioner of Income Tax vs. Rajesh JhaveriStock Brokers Private Limited*, (2008) 14 SCC 208 = (2007) 291 ITR 500; (vi) *Raymond Woolen Mills Ltd. vs. ITO* (1999) 236 ITR 34 (SC) : 2008 (14) SCC 218; (vii) *Phool Chand Bajrang Lal and another v. Income-Tax Officer and another*, (1993) 203 ITR 456 : (1993) 4 SCC 77; (viii) *Ess Ess Kay Engineering Co. P. Ltd. v. Commissioner of Income Tax*, 247 ITR 818; (ix) Decision dated 04.03.2016, rendered by the Calcutta High Court in ITA No.297 of 2006, titled as *Prem Chand Shaw (Jaiswal) V. Assistant Commissioner, Circle-38, Kolkata & Anr;* (x) *Sunil Kumar Jain v. CIT*, 284 ITR 626 (Allahabad); (xi) *Mangilal Jain V/S Income Tax Officer*, (2009) 315 ITR 105 (Mad); (xii) *Shankar Industries v. Commissioner of Income Tax, Central*, 114 ITR 689 (Cal); (xiii) Civil Misc. Writ Petition No. 181 (Tax) of 2004, decided on 16.09.2006, by Allahabad High Court, titled as *M/s Ema India Ltd. Versus Asstt. Commissioner of Income Tax Central Circle-I;* (xiv) Sasi Enterprises v. Assistant Commissioner of Income Tax, (2014) 5 SCC 139; and (xv) *Commissioner of Income tax v. Sophia Finance Ltd.,* (1994) 205 ITR 98.

14. The relevant provisions, to which our attention is invited are Sections 68, 147 to 153 of the Act.

15. Section 147 is evidently clear. Insofar as its application to the instant facts is concerned, what is required, is fulfillment of essential ingredient(s) that: (i) The Assessing Officer (ii) must have reason(s) to believe, (iii) that any income chargeable to tax has escaped assessment (iv) for any assessment year, (v) which he is empowered to (vi) may assess, and (vii) if the income is understated by the assessee, it shall be deemed to be an income chargeable to tax having escaped assessment.

16. However, for initiating such action, in compliance of Section 148, the Assessing Officer has to (i) record his reasons (ii) forward the same to an authorized officer, as the case may be, so mentioned in Section 151, (iii) who, shall record his satisfaction on the reasons recorded by the Assessing Officer that it is a fit case for issuance of such notice, and only thereafter, (iv) The Assessing Officer shall issue a notice to the assessee, requiring him/her to furnish within a specified period, return of his/her income, in a prescribed form.

17. In view of the statutory mandate, so contained in Section 153, in the given facts and circumstances, assessment proceedings are necessarily required to be completed before 31.12.2016.

18. Section 68, which deals with the concept of deemed income, provides that where any sum is found credited in the books of an assessee maintained for any previous year, and he offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee.

19. As a matter of abandoned caution, in a tabulated form, we reproduce facts, relevant to each one of the petitioners:

Assessment Year **2012-13**	CWP 3072 of 2016 Shri Virbhadra Singh (Karta of HUF)	CWP 3078 of 2016 Smt. Pratibha Singh (Wife)	CWP 3080 of 2016 Shri Vikramaditya Singh. (Son)
Net income disclosed in original return	**Rs. 17,60,090/-**	**Rs. 12,97,055/-**	**Rs. 1,97,150/-**
Date of filing Return	2.8.2012 (P-1)	28.7.2012 (P-1)	7.8.2013 (P-1)
Date of Notice u/s 148 of the Act	29.3.2016 (P-2)	29.3.2016 (P-2)	29.3.2016 (P-2)
E. Return refiled	20.4.2016 after receipt of notice u/s 148 of the Act.	28.3.2013 for amount of Rs. 14,33,200/-	28.4.2016 for amount of Rs. 1,97,150/-
Date on which request for supply of reasons was made	27.4.2016	25.4.2016	28.4.2016
Reasons supplied on	9.5.2016	9.5.2016	9.5.2016
Objections filed on	29.6.2016 (P-4)	16.6.2016 (P-4)	29.6.2016 (P-5).
Rejection of Objections is same in all petitions except CWP 3080, Page 70	24.11.2016 (P-5)	24.11.2016 (P-5)	24.11.2016 (P-6)
Loan Advanced by Vakamulla Chandershekhar	**2.4 crores**	**1.5 crore**	**2 crores**

20. It is a common case of parties that original return dated 02.08.2012 filed by the petitioner, in compliance of Section 139 was not subjected to assessment under sub-section (3) of Section 143. Return dated 02.08.2012, came to be processed only under sub-section (1) of Section 143, in which there is no reference of these transactions. Thereafter, the first communication *inter se* the parties, is the notice dated 29.03.2016, issued by the Assessing Officer under Section 148 of the Act.

SCOPE OF JURISDICTION

21. Scope of interference with an order passed by an authority under a Statute, providing an equally alternate and efficacious remedy, is now well settled. The issue is no longer *res integra,* hence we restrict the discussion only to the decisions pertaining to the Statute in issue.

22. A Constitution Bench of the apex Court in *Thansingh Nathmal v. The Superintendent of Taxes, Dhubri and others,* AIR 1964 SC 1419, observed that:

> "7.........The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Art. 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Art. 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."
>
> (Emphasis supplied)

23. A three-Judge Bench of the apex Court in *The Commissioner of Income-tax, Gujarat v. M/s A. Raman and Co.,* AIR 1968 SC 49, held that:

> "6. The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income-tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income-tax Officer had in his possession any information: the Court may also determine whether from that information the Income-tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment, must be decided by the Income-tax Officer and not by the High Court. The Income-tax Officer alone is entrusted with the power to administer the Act; if he has information from which it may be said prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice for reassessment on a re-appraisal of the evidence."
>
> (Emphasis supplied)

24. In *Raymond Woolen Mills Ltd. (supra)*, their Lordships of the Supreme Court rejected challenge to the issuance of notice for reassessment by observing that at the stage of notice, court can only consider whether there is a prima facie case for reassessment. *Reopening of proceedings cannot be quashed by going into the "sufficiency" or "correctness" of the material relied upon by the assessing authority.*

25. In *Vijaybhai N. Chandrani (supra)*, the Apex Court while reversing the view taken by the High Court in quashing a notice of reassessment issued under Section 153-C of the Act, by relying upon its earlier decisions, in *Bellary Steels & Alloys Ltd. V. CCT,* (2009) 17 SCC 547; and *Indo Asahi Glass Co. Ltd. v. ITO,* (2002) 10 SCC 444, directed the assessee to first exhaust

alternate remedies provided under the Act, by filing reply to the notice and take consequential action, if any, before the jurisdictional forum.

26. In *Chhabil Dass Aggarwal (supra)*, in somewhat similar circumstances, where notice issued under Section 148 of the Act and the *ex-parte* assessment proceedings came to be quashed by a writ Court, the Apex Court, by referring to its several judicial pronouncements, including that of the Constitution Bench (Five Judges) in *K.S. Rashid and Son v. Income Tax Investigation Commission,* AIR 1954 SC 207, observed that restriction of not entertaining a writ petition, when an efficacious and alternate remedy is available, is self imposed. It is essentially a rule of policy, convenience and discretion, rather than the rule of law. Only where an exceptional case, warranting interference; existence of sufficient grounds; for invoking extra ordinary jurisdiction, is made out, power, which is discretionary in nature, must be exercised. Where hierarchy of appeal is provided by a statute, party must exhaust the statutory remedies before invoking the writ jurisdiction. The right or liability created by a statute giving a special remedy for enforcing it must be availed of. The Court reiterated the principle laid down in *Union of India Versus Guwahati Carbon Ltd.,* (2012) 11 SCC 651 and in *Munshi Ram Versus Municipal Committee, Chheharta,* (1979) 3 SCC 83, that when a statute provides for a person aggrieved, a particular remedy to be sought in a particular Forum and in a particular way, it must be sought in that manner, to the exclusion of all other modes and Forums. But it did recognize certain exceptions to this rule and that, *inter alia* being, where the action of the statutory authority is not in accordance with the statutory provisions; in defiance of fundamental principles of judicial procedure; and in total violation of principle of natural justice.

27. Justifying the action of the petitioner in bypassing the statutory remedy and directly assailing the notice for reassessment, Mr. Vishal Mohan, learned counsel, seeks reliance on the decision rendered by the Bombay High Court, in *Ajanta Pharma Ltd. (supra).* The decision came to be rendered in the given facts and circumstances, where reason for reassessment being non-discloser of invoice/details of the purchase of the trading goods exported and failure to co-relate the trading exports with the trading goods exported was found to have been non-existent, in fact contradicted from the record rendering the reasons of the Assessing Officer to be totally "flimsy" and not "sufficient to draw conclusion about the escapement of income" and there being "no material" before the Assessing Officer, entitling him to reopen the case of assessment, the Court found the notice so issued to be *ex-facie,* bad in law. Hence it exercised its discretionary power in quashing such action. Significantly, the Court observed that a writ would lie only if the impugned action is *ex-facie* without jurisdiction or again in excess of the jurisdiction vested in the authority or the action being totally arbitrary. It cautioned that extra ordinary jurisdiction cannot be allowed to be availed as a matter of course and while deciding the issue of jurisdiction, finding of the authority on the factual aspect may be necessary, in which case, necessarily the assessee would be required to approach the Assessing Officer.

28. Mr. Vinay Kuthiala, learned Senior Counsel, also invites our attention to a decision dated 16.09.2006, rendered in *Ema India Ltd. (supra),* which we need not discuss in view of the settled position of law.

29. Thus it cannot be said that jurisdiction of this Court, in entertaining a petition even when an equally efficacious remedy is available to a party, is totally ousted. Notwithstanding the statutory remedies available to the aggrieved party, restriction imposed by a writ Court is more in the nature of restraint. With the ever increasing and growing scope of judicial review, exercise of extraordinary writ jurisdiction cannot be circumscribed.

30. But however, in the given facts and circumstances, for reasons to follow, we do not find the petitioner to have made out a case warranting interference in a petition filed under Article 226 of the Constitution of India.

31. While contending that this Court has no jurisdiction to quash the order of rejection of objections by the Assessing Officer, Mr. Vinay Kuthiala, learned Senior Advocate, seeks reliance on the decision rendered by the High Court of Madras in *Kalanithi Maran(supra).*

We are unable to persuade ourselves to agree with such submission. The procedure for filing the objections and obligation to decide the same, came to be evolved with the following observations made by the apex Court in *GKN Driveshafts (supra)*, wherein it is held as under:

> "5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five assessment years."

32. Since then, the practice has been in vogue. The mechanism evolved is only a safeguard, a protection from harassment of the assessee, for avoiding unwarranted harassment, from undesirable adjudicatory process, so initiated, perhaps on jurisdictional error or such material which *ex-facie* may be false or reason(s) which *prima facie* appears to be baseless or without any cause or justification. The object being, affording an opportunity to an assessee of putting across its case, by placing authentic and undisputed material, satisfying no escapement of income from assessment, enabling the authority to consider, and if so required, drop the proceedings. There can be a fact situation where out of malice or for extraneous reasons, an Assessing Officer may decide the objections, in a palpably illegal manner. What if it is against the mandate of the said decision itself? In any event, orders passed by a Statutory authority are always amenable for challenge in a writ Court which power, perhaps the Court may exercise, when warranted, in the attending facts and circumstances.

NON COOPERATIVE ATTITUDE

33. Non cooperative attitude and conduct of the petitioner is vehemently pressed as a primary ground for rejection of the petition. Specific attention is drawn to the affidavit filed in response to the petition: (a) petitioner failed to furnish information during the entire period of 8½ months. (b) Save and except for filing of photocopies of few bank accounts; unverified and unauthenticated statement of account of the loaner and the order of reassessment so passed qua him, no information privy only to the petitioner, stands furnished. (c) No response to a detailed questionnaire dated 23.5.2016 is furnished. (d) Endeavour of the revenue in having a centralized investigation and assessment of the loaner and the loanee, has, yet not, yielded any result, for such order came to be quashed by this Court and now the matter is pending before the Apex Court. (e) On the petitioner's asking, proceedings of assessment relating to financial year 2009-10 and 2012-13 in relation to the HUF, a separate legal entity, also stand stayed by this Court.

34. Much emphasis is laid on the following observations made by the Apex Court in *Sasi Enterprises (supra)*:-

> "17. We are, in these appeals, concerned with the question of non- filing of returns by the appellants for the assessment year 1991-92, 1992-93 and 1993-94. Each and every order passed by the revenue as well as by the Courts were taken up before the higher courts, either through appeals, revisions or writ petitions. <u>The details of the various proceedings in respect of these appeals are given in paragraph 30 of the written submissions filed by the revenue, which reveals the dilatory tactics adopted in these cases. Courts, we caution, be guarded against those persons who prefer to see it as a medium for stalling all legal processes.</u> We do not propose to delve into those issues further since at this stage we are concerned with answering the questions which have been framed by us." (Emphasis supplied)

35. In the given facts and circumstances, we are not inclined to dismiss the petition on such a ground. However, on this issue, we refrain from making any observation, save and except that petitioner is duty bound to fully cooperate in the expeditious adjudication of all proceedings.

REASONS TO BELIEVE

36. The expression "reasons to believe" stands adequately elaborated by the Apex Court in its various pronouncements. The issue is no longer debatable.

37. By relying upon its earlier decision, rendered by a Constitution Bench (five-Judge) judgment, in *Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calcutta and another,* AIR 1961 SC 372, a Three-Judge Bench of the apex Court in *S. Narayanappa and others v. Commissioner of Income-Tax, Bangalore,* (1967) 63 ITR 219 : [AIR 1967 SC 523], held that:

> "if there are in fact some reasonable grounds for the Income-tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notice under S. 34. Whether these grounds are adequate or not is not a matter for the Court to investigate. In other words, the sufficiency of the grounds which induced the Income-tax Officer to act is not a justiciable issue. It is of course open for the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. Again the expression "reason to believe" in S. 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith: it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the Section. To this limited extent, the action of the Income-tax Officer in starting proceedings under S. 34 of the Act is open to challenge in a Court of law".
>
> (Emphasis supplied)

38. The position came to be reiterated by a two-Judge Bench of the apex Court in *Lakhmani Mewal Das (supra)*, wherein the Court held that the grounds or reasons which lead to the formation of belief must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly, all material facts.

39. Later on in *Phool Chand (supra)*, it stood clarified that decision to quash the action in *Lakhmani Mewal Das (supra)*, was based on its given fact situation, where information received by the Assessing Officer was wholly vague, indefinite, farfetched, remote and without any basis for holding a reasonable belief, warranting action, under Section 147 of the Act. It further observed that:

> "19………Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the same facts and material which was available with the I.-T.O. at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the "true" and "full" facts in the case and the I.-T.O. would have the jurisdiction to reopen the concluded assessment in such

a, case. It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under S. 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the I.-T.O. acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific."

… … …

"26… …One of the purposes of S. 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing." It would be travesty of justice to allow the assessee that latitude."

(Emphasis supplied)

40. The Apex Court also had an occasion to deal with the amended provisions in *Rajesh Jhaveri (supra).* The Court found the scope and effect of section 147 to 148 as substituted with effect from April 1, 1989, to be substantially different from the earlier provisions. For conferment of jurisdiction under original section 147(a), two conditions required satisfaction (i) the Assessing Officer must have reason to believe that the income profits or gains chargeable to income tax have escaped assessment, and (ii) he must also have reason to believe that such escapement occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. However, under the substituted section 147, only the first condition required satisfaction of reason to believe, that the income had escaped assessment. It further observed that:-

"19. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification.If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers."

"20……….At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction." (Emphasis supplied)

41. It is also the law that the Assessing Officer is not precluded to reopen assessment of an earlier year on the basis of his finding of fact, so made on the basis of fresh material, so discovered, in the course of assessment of next assessment year [*Ess Ess Kay Engineering Co. (supra)*].

42. In *Calcutta Discount Co. Ltd., v. Income-tax Officer, Companies District I, Calutta and another,* AIR 1961 SC 372, the apex Court held that:

"9. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - "I have produced the account books and the documents : You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them - including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed."

(Emphasis supplied)

43. The Apex Court in *M/s S. Ganga Saran and sons (Pvt.) Ltd., Calcutta v. Income Tax Officer and others,* (1981) 3 SCC 143 has observed as under:

"6……… (a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief, entertained by the Income-tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income-tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147 (a). If there is no rational and intelligible nexus between the reasons and the belief, so that on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income-tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid." (Emphasis supplied)

44. The Apex Court in *Income Tax Officer, Cuttack and others v. Biju Patnaik,*1991 Supp. (1) SCC 161, observed that while examining the existence of reasons, record can be looked into.

45. In *M/s Niranjan & Co. Pvt. Ltd. v. Commissioner of Income Tax, West Bengal-I and others,* 1986 (Supp) SCC 272, the apex Court held that:

"21. It was contended on behalf of the assessee/appellant relying on the observations of this Court in Commr. of Income-tax, Gujarat v. A. Raman and Co., (AIR 1968 SC 49) (supra), that the Income-tax Officer must have had reason to believe and in consequence of information he must have that reason to believe and it was submitted that the information was already there and there was no new information from which the Income-tax Officer could have formed the belief.

> Having regard to the facts of this case as discussed above and the nature of the information indicated before, we are of the opinion that there was information in the form of a revised return and since the information mentioned before came to the knowledge of the Income-tax Officer subsequent to the making of the first assessment and the information being such from which a reasonable person could have formed the belief that there was escapement of income or under-assessment of income, it cannot be said that there was no jurisdiction of the Income-tax Officer to re-open the assessment. Whether in fact the reassessment to be made pursuant to the notice issued, the income assessed would be more by Re, 1/- or less than the income already assessed is not material or relevant for the question of jurisdiction to issue the notice under S. 147 of the Act."
>
> (Emphasis supplied)

46. Mr. Vishal Mohan, learned counsel, has referred to a decision of this Court in *Sahil Knit Fab (supra).* So far as the ratio of law is concerned, there is no dispute and we need not discuss in view of our discussion (supra). On facts, we find the decision of the Appellate Authority, so rendered in favour of the assessee, to be affirmed in the peculiar facts and circumstances, for it was found that there was no plausible reason available with the Assessing Officer, forming a belief of escapement of income. Though the assessee had claimed deduction on the basis of loss(s) in business but after five years, the Assessing Officer worked out profit at the rate of 14%, by comparing the profit of another company engaged in similar business, which approach was considered to be illogical and unrealistic. The jurisdictional issue was sought to be raised after a gap of five years, without considering the change of business environment.

47. It is not in dispute that reasons of belief came to be placed before the sanctioning authority. Though initially, a vain attempt was made to argue that notice (Annexure P-2) came to be issued without obtaining prior sanction and/or no reasons of belief were ever prepared or placed before the sanctioning authority, but when confronted, Shri Vishal Mohan, learned counsel, in all fairness did not press the point any further.

48. Now in the instant case, the fact that investigation came to be conducted against the "Tarini Group" owned by Vakamulla Chandershekhar (loaner) is not disputed in the petition. The Assessing Officer, as is evident from the reasons of belief and response filed to the petition, was in receipt of information from the Deputy Director of Income Tax (Investigation), Faridabad, which revealed that out of his agricultural income and advances received from his friends, loaner had advanced payments as interest free unsecured loan to the petitioner and his family members.

49. The factum of advancement of such money came to be admitted only in response to the notice. Prior thereto, both the petitioner and his family members maintained stoic silence.

50. Also, the source from which the loaner itself received such income, prima facie, was found to be false, which fact surfaced only during the course of investigation conducted under Section 131-133A of the Act. There were only paper transactions. Neither did the loaner receive any unsecured advance from anyone, much less the three entities, particulars whereof were disclosed by him, nor did he have sufficient income from agricultural source. Such fact also stood substantially corroborated with the disclosure of his income in the previous years. Further Smt. Tripurana Ahalya Devi, whom loaner claimed to be his Aunt, on oath, denied having know him at all, much less entered into any transaction with him, monetary or otherwise. Even transactions of unsecured loans were discovered to be bogus, for being mere paper entries taken from Ram Prakash Bhatia,who allegedly owned 17 concerns, including the ones so disclosed by the loaner, from a small room at C-48/3A-1, Lawrence Road, Delhi-35. Similarly Gurcharan Singh also denied having either known or entered into any transaction of any nature with the loaner, and that for making false entries of unsecured loans, someone had opened an account in his name.

51. Noticeably, as already observed, prior to issuance of notice dated 29.03.2016 under Section 148 of the Act, neither the petitioner nor anyone of his family members ever

disclosed having received such huge amount of Rs. 5.9 crores from the loaner. Even with the filing of fresh return, factum of such transaction never came to be disclosed. Such admissions came only with the filing of statement of objections dated 29.06.2016. Whether obliged in law to do so or not, petitioner also chose not to answer the questionnaire.

52. But what really acquires significance is the very nature of transaction raising reasonable doubt about its genuineness. Whereas petitioner contends the transaction to be interest bearing, the loaner terms it as a non interest bearing loan. Also, from the record so made available to us, *prima facie,* even the petitioners appear to have taken a divergent view. No authentic documents of payment of interest stand filed. What is the special relationship which the petitioner held with the loaner remains undisclosed. Are they family members? Friends? or have any business relationship? Nothing remains disclosed. Disclosure of such information would only enable the Assessing Officer in proper adjudication of fact in issue.

53. Whether there is contradiction in the stand taken by the petitioner before us, itself is a question which needs to be examined by the Assessing Officer, for the writ petitioner wants the Court to believe that loan was repaid with interest at the rate of 10%. No authentic document of such transaction stands placed before us. In fact qua payment of interest no document stands placed either by the petitioner's wife or his son. In the case of petitioner, the document annexed does not conclusively establish payment of interest. The Assessing Officer, in our considered view, has considered the entire material while forming its prima facie view with regard to the alleged payments of interest. Also what was the purpose of loan and what was the source from where it came to be returned is a question, which being a jurisdictional fact requires adjudication by the Assessing Officer. The petitioner may also have justifiable explanation of repayment, but from the material placed before us, it cannot be said that either the initiation of process of assessment or rejection of objections is on flimsy grounds or in an arbitrary manner.

54. The burden to prove the income which stands accounted for, is on the assessee. In *Sreelekha Banerjee V. Commissioner of Income Tax,* (1963) 49 ITR (SC) 112, the Court held that:

> "It seems to us that the correct approach to questions of this kind is this. If there is an entry in the account books of the assessee which shows the receipt of a sum on conversion of high denomination notes tendered for conversion by the assessee himself, it is necessary for the assessee to establish, if asked; what the source of that money is and to prove that it does not bear the nature of income. The department is not at this stage required to prove anything. It can ask the assessee to bring any books of account or other documents or evidence pertinent to the explanation if one is furnished, and examine the evidence and the explanation. If the explanation shows that the receipt was not. of an income nature, the department cannot act unreasonably and reject that explanation to hold that it was income. If, however, the explanation is unconvincing and one which deserves to be rejected, the department can reject it and draw the inference that the amount represents income either from the sources already disclosed by the assessee or from some undisclosed source. The department does, not then proceed on no evidence, because the fact that there was receipt of money is itself evidence against the assessee. There is thus, prima facie, evidence against the assessee which he fails to rebut, and being unrebutted, that evidence can be used against him by holding that it was a receipt of an income nature. The very words 'an undisclosed source' show that the disclosure must come from the assessee and not from the department. In cases of high denomination notes, where the business and the state of accounts and dealings of the assessee justify a reasonable inference that he might have for convenience kept the whole or a part of a particular sum in high denomination notes, the assessee prima facie discharges his initial burden when he proves the balance and that it might reasonably have been kept in high denomination notes. Before the department

> rejects such evidence, it must either show an inherent weakness in the explanation or rebut it by putting to the assessee some information or evidence which it has in its possession. The department cannot by merely rejecting unreasonably a good explanation, convert good proof into no proof."

55. It is a matter of record that order reassessing income of the loaner came to be passed by the jurisdictional authority, i.e. Assessing Officer at New Delhi only on 27.3.2015. Before us there is nothing on record to show that prior to initiation of impugned action, the present jurisdictional officer was aware of passing of any such order. Perhaps for this reason, such fact is missing in the reasons recorded by the Assessing Officer.

56. Assuming hypothetically that order of assessment against the loaner, which is subjudice, attains finality, even then what would be its effect on the nature of transactions and creditworthiness of the loaner would be a matter of consideration by the Assessing Officer. Whether such order itself would be sufficient establishing creditworthiness of the loaner, particularly when in the last six preceding years, he disclosed income from agricultural source to be less than Rs. 3,00,000/-and its unusual increase to Rs. 85,00,000/-only in the year in question, is again a matter to be considered by the Jurisdictional Officer. *Prima facie* it stands noticed by the officer that income of the loaner, cumulative from all sources, for the last five preceding years, is far less than Rs. 5.9 Crores, the amount lent to the petitioner and his family member.

57. Also, according to the loaner, in the recent years by understating its value, a company closely held by the petitioner's children, had purchased a Farm House at New Delhi, for a sum of Rs. 6.61 crores.

58. When an assessee claims to have borrowed money, onus to establish such fact lies upon him. But discharge of such onus, would still not preclude the Assessing Officer in otherwise examining the genuineness of the transaction, as an independent and unbiased fact finding authority.

59. We find existence of reasonable ground, enabling the Assessing Officer to form a belief, with regard to the non-disclosure/escapement of income. The belief cannot be said to be arbitrary, capricious or without any basis. It is neither pretentious. There is rational connection between the material and the reasons. Doubt stands raised with regard to the transactions being bogus in nature. Whether, at the first instance, assessee was obliged to disclose receipt of such huge amounts, or not is definitely a matter, which requires consideration by the Assessing Officer, during the course of proceedings. The principle of 'cause and justification' so laid in *Jhaveri (supra),* stands fully substantiated by the Revenue.

60. The Assessing Officer has rejected the objections on the grounds, which appear to be reasonable on the basis of material before him.

61. It cannot be said that the belief is arbitrary or irrational or there is no intelligible nexus between the reasons and the belief "so that on such reasons, no one properly instruct on facts and law, could reasonably entertain the belief", as held by the apex Court in *Ganga Saran (supra).*

62. Also, the belief of the Assessing Officer, on the information so received by him, is not such that "from which a reasonable person could have formed the belief that there was" no escapement of income or underassessment of income, as held by the apex Court in *A. Raman (supra).*

63. What is required to be proved by the assessee is not only identity but also creditworthiness and genuineness of the transaction, beyond reasonable doubt, as held in *Mangilal Jain (supra)*; *CIT v. United Commercial and Industrial Co. P. Ltd.,* (1991) 187 ITR 596); and *Shankar Industries (supra).*

EXERCISE OF UNDUE HASTE AND NON APPLICATION OF MIND BY THE JURISDICTIONAL AUTHORITIES

64. Submission that process of recording of reasons, obtaining sanction, and issuance of notice, was carried out without application of mind and in undue haste is factually incorrect.

65. From the affidavit, so filed in response to the petition, which goes unrebutted, and for which no opportunity was sought, it is evident that the Assessing Officer had been applying his mind for more than three months, it being a different matter that he could have expedited the same. Be that as it may, information which came to be received by him in December, 2015, was processed and placed before the appropriate authority on 29.3.2016. It is not that the sanctioning authority had no material before according sanction. Only after perusing the reasons of belief, so recorded by the Assessing Officer, and finding it to be a case fit for issuance of notice, did the authority accord its sanction. It is brought to our notice that offices of the Assessing Officer and the Sanctioning Authority are in the very same building and petitioner is also a local resident. It was convenient for the authority to have dealt with the matter the very same day. It is not a herculean, much less an impossible task to accomplish.

66. Significantly, no malafides stand alleged, much less against any one the concerned officers.

67. Hence, in the given facts and circumstances, we do not find such action to be illegal, raising suspicion or doubt, with regard to proper application of mind by the authority concerned.

68. We further find the order rejecting the objections to be a reasoned one. It is certainly not cryptic. Every issue raised by the assessee stands considered and dealt with, with a rider that it is open for the assessee to appear before the Jurisdictional Officer and place all material for just determination and conclusion of the proceedings. The view expressed by the Assessing Officer has been held to be a prima facie one. It is not a case of change of opinion.

69. While contending that the sanctioning authority acted mechanically by simply stating "Yes", rendering the impugned action to be wholly illegal, Mr. Vishal Mohan, learned counsel, invites our attention to the decision rendered by the Apex Court in *Chhugamal Rajpal (supra)*. In the said case, the Court specifically observed total non application of mind by the Assessing Officer, whose reasons were not only vague but in the realm of uncertainty, warranting investigation pertaining to the loans, allegedly made by certain persons. It is in this backdrop, Court observed that the Assessing Officer himself was not sure about the truth of alleged transactions. The Court found that there was no material with the Assessing Officer, enabling him to record reasons of belief, that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his/her assessment for the accounted year in question, income chargeable to tax had escaped assessment for that year. The exercise of power by the authority was found to be mechanical in nature, for had he applied his mind, he would'nt have formed satisfaction, in according sanction, and also as a result of non application of mind, noted the word "Yes" and affixed his signatures thereunder.

70. Our attention is invited to the decision rendered by the Calcutta High Court in *S.P. Agarwalla (supra)*, wherein it is observed that the Commissioner has to consider and apply his mind to the material relied upon by the Assessing Officer and that such power is not to be exercised mechanically. Commissioner can consider sufficiency and relevancy of the material while refusing or granting such sanction.

71. Also attention is invited to the decision rendered by the Madhya Pradesh High Court in *Arjun Singh (supra)*, wherein it was observed that exercise of power by the sanctioning authority, in less than 24 hours indicated non application of mind. On first brush, it appears to be so. But closer scrutiny reveals the decision to be distinguishable on facts. The jurisdictional authority was trying to reopen assessment, on the basis of alleged escapement of income, in

relation to which, after registration of the F.I.R., not only the Court of competent jurisdiction discharged the assessee but even the jurisdictional officer, after investigation had concluded the adjudicatory proceedings, ten years prior to the initiation of impugned action. The Court found the Assessing Officer not possessing any material, enabling him to record reasons of belief. Also simultaneous issuance of notices of inquiry and reassessment came to be initiated against the assessee who was called upon to furnish information of money spent on the construction of a house and much prior to conclusion of such inquiry, the Assessing Officer, by pre-judging the issue, without any basis or material, proceeded to reassess the income declared by the assessee. It is in this backdrop, the Court found the revenue to have acted with undue haste.

72. On this count, our attention is also invited to the decision rendered by the Delhi High Court in *Central India Electric Supply (supra)*, where the sanctioning authority had simply appended its signature below the word "Yes" so affixed by a rubber stamp. In the given facts, the Court found the decision taken to be purely mechanical in manner.

73. However, the instant case is not that of mere rubber stamping, for the competent authority, in principle, was in agreement with the reasons assigned by the Assessing Officer, so placed before him, which came to be considered and sanction accorded, with proper application of mind. He himself wrote "I am satisfied that it is a fit case for issue of notice u/s 148".

PROTECTIVE AND PRECAUTIONARY PRINCIPLE

74. Capacity/creditworthiness of the creditor and genuineness of the transaction is a question of fact, which we afraid cannot be allowed to be agitated or adjudicated in the present proceedings. Whether assessment of income in the hands of loaner would conclusively establish genuineness and nature of the transaction or his creditworthiness, in our view, is a question of fact to be considered only by the Assessing Officer, after going through the relevant material, which the parties may choose to place, more so in the light of Explanation 2(b) of Section 147 and Section 68 the Act. Whether it is a case of double taxation; protective and precautionary assessment or whether income assessed in the hands of one can be assessed as an income in the hands of another, in the given facts and circumstances, is yet to be considered and decided by the adjudicating authority, based on settled principles of law.

75. While contending that revenue was not sure as to whether the alleged escaped income was to be assessed qua the present petitioner or loaner, Mr. Vishal Mohan, learned counsel, invites our attention to the decision rendered by a Division Bench of Gujarat High Court in *Sagar Enterprises (supra)*. The said decision is clearly distinguishable on facts. Considering the fact that undisclosed income of the assessee came to be added by way of protective addition in the previous assessment year, the Court found that it was not open for the revenue to account for the same in the succeeding financial years. It is in this backdrop, it held the revenue itself, not sure of the year of its taxability, hence such income could not be deemed to be chargeable to tax, having escaped assessment.

76. In fact, the principle of protective precautionary assessment came up for consideration before the apex Court in *Lalji Haridas (supra)*, wherein by upholding, action of reassessment initiated by the Revenue, they observed that "In cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B. That being so, we do not think that Mr. Nambiar would be justified in resisting the enquiry which is proposed to be held by respondent No.1 in pursuance of the impugned notice issued by him against the appellant. Under these circumstances we do not propose to deal with the point of law sought to be raised by Mr. Nambiar".

77. In *Income Tax Officer, A-Ward, Lucknow v. Bachu Lal Kapoor,* AIR 1966 SC 1148, the apex Court reiterated the aforesaid principle.

78. In *Sunil Kumar Jain (supra),* the Court affirmed the action of the Jurisdictional Officer in reopening assessments even in case where such income came to be assessed in the hands of another. In this backdrop, it was observed that:-

> "Going to the merits of the case, we find that it is not in dispute that the cash amount of Rs. 2,19,000 and the pawned articles valued at Rs. 10,506 have been claimed by the petitioners as belonging to them. Merely because it has been taxed at the hands of Sri Prem Chandra Jain will not preclude the Income-tax Officer from assessing the same at the hands of the right person. From the reason recorded for reopening of the assessment which has been reproduced above it will be seen that the basis for initiating proceedings is the claim made by the petitioners on the basis of the alleged will executed by Smt. Shyama Devi, thus it cannot be said that there was no relevant material for taking proceedings under section 147 of the Act."
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> "In the case of *Lalji Haridas* [1961] 43 ITR 387 the apex court has held that in cases where it appears to the income-tax authorities that certain income has been received during the relevant year but it is not clear who has received that income; and, prima facie, it appears that the income may have been received by A or by B or by both together, it would be open to, the income-tax authorities to determine the question who is responsible to pay tax by taking assessment proceedings both against A and B.
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> In the case of *S. Gyani Ram and Co.* [1963] 47 ITR 472 this court has held that the mere fact that a particular income has been assessed in the hands of a particular person as his income will not prevent the Income-tax Officer from coming to the conclusion on fresh materials that that income is the income of another person and taking proceedings under section 34 of the Act for reassessment against the latter on the ground that this income had escaped assessment in his assessment.
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> In the case of *Sidh Gopal Gajanand* [1969] 73 ITR 226 this court has held that the validity of notice under section 34 of the Indian Income-tax Act, 1922 cannot be impugned on the ground that the assessment proceeding was already pending in respect of the same income against another entity and where it appears that the income may have been received either by A or by B or by both together, it would be open to the income-tax authorities to determine the said question by taking appropriate proceedings against both A and B.
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> In the case of *R. Dalmia* [1972] 84 ITR 616 the Delhi High Court has held that where the items of escaped income in respect of which the assessment is proposed is specific but the question as to whether the income, if earned, was earned by one person singly or by him along with others is a matter of inquiry, if the Income-tax Officer has reason to believe that it could have been earned either by one person singly or by him along with others there is nothing to prevent him from initiating proceedings against the concerned assessees in both capacities. In such a case where it appears to the Income-tax Officer, that certain income had been received during a particular year but it is not clear who has received that income it is open to the Income-tax Officer to start proceedings against all the persons individually or collectively to ascertain the correct position. In the case of Sohan Singh [1986] 158 ITR 174 the Delhi High Court has taken a similar view.
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> In the case of *Smt. Durgawati Singh* [1998] 234 ITR 249 this court has held that it is settled that when there is a doubt as to which person amongst two was liable to be assessed, parallel proceedings may be taken against both and alternative assessments may also be framed. It is also equally true that while a protective assessment is permissible, it is not open to the income-tax appellate authorities constituted under the Act to make a protective order. The law does not permit

assessment of the same income successively in different hands. The tax can only be levied and collected in the hands of the person who has really earned the income and is liable to pay tax thereon.

In the case of *Banyan and Berry* [1996] 222 ITR 831 the Gujarat High Court has held that where there is doubt or ambiguity about the real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to have recourse to making a protective assessment in the case of one and a regular assessment does not affect the validity of the other assessment inasmuch as if ultimately one of the entities is really found to be liable to assessment, then the assessment in the hands of the entity alone remains the effective assessment and the other becomes infructuous. The levy is enforceable only under one assessment and not under both."

79. While drawing our attention to the decision rendered by the Full Bench of Delhi Court in *Sophia Finance(supra)*, Shri Vinay Kuthiala wants us to adjudicate the merits of the matter, which under these proceedings is impermissible. The decision can be of help only to the extent that the authority would be empowered to examine the transaction, which in his belief required explanation.

80. If the reasons assigned by the Assessing Officer for initiating action are considered in the light of law laid down by the Supreme Court, it is not possible to hold that he did not have any material before him for entertaining a belief, that the income of the petitioner had escaped assessment.

81. Perusal of material placed on record does not reflect the impugned action to be *ex-facie* illegal or not borne out from the record. This Court is not required to go into the sufficiency of material which led to the formation of reasons of belief, more so, when reasons are relevant and emanate from the record and are also germane for just adjudication of facts in issue. There is proper compliance of procedure. Also the assessee can adequately represent himself before the authority which otherwise has jurisdiction to initiate the impugned action.

82. It is not a case of lack of jurisdiction. It is also not a case where the authority has exceeded its jurisdiction or the action is based on no material or that no reasons are recorded by the Assessing Officer or that reasons assigned are absolutely irrelevant or based on extraneous factors/circumstances. It also cannot be said that the impugned action is not bonafide or is based on vague , irrelevant or unspecific information. It is not that the Assessing Officer has prejudged the issue and proceeded to initiate action with a predetermined mind. In fact, there is no such assertion in the petition. Also no malafides stand alleged.

83. It cannot be said that rejection of the objections are based on frivolous or extraneous factors and circumstances. There is complete and proper application of mind to the attending facts and circumstances. The objections rejected, by a speaking order, also stands duly communicated to the petitioner. Mere rejection of objections cannot lead to formation of an opinion about the Assessing Authority, under all circumstances, deciding the matter in favour of the revenue.

84. In the instant case, we find that the petitioner seeks adjudication, on merits, of the fact in issue, which is impermissible in law. In the absence of definite and authentic information, this Court cannot as a fact finding authority, by way of a roving inquiry examine the matter, holding the proceedings initiated under Section 148 of the Act to be untenable on merits. Assessee is always open to make all such submissions before the appropriate authority.

Reliance on a decision dated 04.03.2016, rendered by the Calcutta High Court in *Prem Chand Shaw (supra),* is only for the purpose of pressing the provisions of Section 292-B of the Act, which, in the instant case, we do not find to be applicable.

85. Thus in the given facts and the circumstances, we do not find the impugned action to be illegal, arbitrary, whimsical or capricious. It cannot be said that there was no

material before the Assessing Officer to proceed in accordance with law. It also cannot be said that the there was no basis for the Assessing Officer to have formed reasons of belief. We do not find it to be a fit case, warranting interference by this Court, for the action cannot be said to be ex facie illegal or based on extraneous reasons and circumstances. This Court is not required to go into the correctness or sufficiency of reasons. It definitely is not a case where the Assessing Officer lacked jurisdiction. It is also not a case of jurisdictional error. It also cannot be said that he exceeded such jurisdiction. Also, exercise of such power, statutory in nature, cannot be said to be either arbitrary or based on extraneous factors, consideration or circumstances. No malafides stands alleged against anyone.

86. We are quite convinced that reasons to believe formed by the Assessing Officer emanate from the record, having material bearing on the question of jurisdictional fact as also fact in issue so raised by him.

87. At this stage, what is required to be considered by the jurisdictional authority is only reasons to believe and not "the established fact of escapement of income", on the lines of *Rajesh Jhaveri (supra).*

88. It stands clarified that we have not expressed any opinion on the merits of the case, which, the authority below, shall adjudicate, in accordance with law, uninfluenced of any observations made by this Court.

89. No other point is urged.

90. Hence in view of our aforesaid discussion, we find no merit in the present petitions, which stand dismissed.

91. Since no interim order was passed, no further order or direction is required to be passed in the miscellaneous application which also stands dismissed alongwith the main petition.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Yudh Chand Saklani …..Petitioner.

Vs.

State of Himachal Pradesh and others …..Respondents.

CWP No.: 4895 of 2015
Reserved on: 30.11.2016
Date of Decision: 26.12.2016

Constitution of India, 1950- Article 226- A proposal was prepared to notify Ner Chowk Panchayat as Municipal Corporation – objections were invited from the inhabitants who opposed the formation of municipality – a notification was issued declaring the areas of Ner chowk as Municipal Corporation – present writ petition was filed challenging the decision – respondents replied that Nagar Panchayat fulfilled the criteria required for the constitution of new Municipality – the town was a hub of Industrial and Business activities – there was a considerable floating population of workers in the area which required civic amenities- these amenities could only be provided by a Municipality – the procedure prescribed by the law was followed and it was prayed that writ petition be dismissed – held, that allegations of malafides were made against a member of legislative assembly- it was incumbent to implead that person as a party – the proposal fulfilled the criteria laid down in the Act- objections were invited and considered – the proposal was approved by the Cabinet – mere error in the nomenclature by mentioning Nagar Parishad instead of Nagar Panchayat will not invalidate the notification- no record was produced to show that notification was not in a public interest or was issued with some ulterior motive – the Courts are

not to interfere with the legislative function unless the decision was not in public interest but was taken with ulterior motive at the behest of some interested persons – petition dismissed.
(Para- 11 to 43)

Cases referred:
Tulsipur Sugar Co. Ltd. Vs. The Notified Area Committee, Tulsipur, (1980) 2 SCC 295
Baldev Singh and Ors. Vs. State of Himachal Pradesh, (1987) 2 SCC 510
Sundarjas Kanyalal Bhathiaja and ors. Vs. The Collector, Thane, Maharashtra and ors., AIR 1990 SC 261
Karnail Singh and another Vs. Darshan Singh and Ors., 1995 Supp.(1) SCC 760
Solapur Midc Industries Association and ors. Vs. State of Maharashtra & ors., (1996) 9 SCC 621
Nagar Panchayat Kurwai and another Vs. Mahesh Kumar Singhal and ors., (2013) 12 SCC 342

For the petitioner: Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Digvijay Singh, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Rupinder Thakur, Additional Advocate General and Mr. Kush Sharma, Deputy Advocate Generals, for respondents No. 1 to 5.
Ms. Nishi Goel, Advocate, for respondent No. 6.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge **:**

This writ petition has been filed by the petitioner as a *pro bono publico* praying for the following reliefs:

> *"(i) A writ of certiorari may be issued and the impugned notifications Annexure P-9 dated 07.01.2015 and Annexure P-10 dated 19.01.2015 declaring Nerchowk as Municipal Council may be quashed and set aside being illegal, arbitrary and unconstitutional.*
>
> *(ii) A writ of certiorari may be issued setting aside and quashing Annexure P-16 dated 26.09.2015 which includes Gram Sabha area for inclusion into Municipal Council Ner Chowk.*
>
> *(iii) Any other or further writ, order or direction which this Hon'ble Court may deem fit in the facts and circumstances of the present case may also be passed in favour of the petitioner.*

2. As per the petitioner, in the year 2013, Excise and Taxation Minister of Himachal Pradesh, who was also Member of Legislative Assembly from Balh constituency in District Mandi desired that Ner Chowk Panchayat of District Mandi, which falls in Balh constituency be notified as Municipal Council under Section 3 of the Himachal Pradesh Municipal Act, 1994. It is further the case of the petitioner that "in order to satisfy such desire" of the MLA concerned, respondents No. 1 to 3 prepared a proposal and thereafter respondent No. 3, i.e. Director, Urban Development to the Government of Himachal Pradesh directed Deputy Commissioner, Mandi (respondent No. 5) to examine the proposal after taking into consideration the criteria laid down to notify an area as Municipal Council, vide communication dated 01.02.2013 (Annexure P-1). As per the petitioner, the entire proposed area comprised of villages having "arable lands" and both inhabitants of the area as well as livestock were dependent thereupon and in fact there was no need or requirement of specifying Ner Chowk either as a Municipal Council or as a Nagar Panchayat.

3. As per the petitioner, the proposal of the respondent-State to classify Ner Chowk as Municipal Council, which was "swayed only by Hon'ble Excise & Taxation Minister's desire" was strongly opposed by the affected inhabitants including the petitioner during the stage of investigation conducted by the authorities. Resolutions were passed by Gram Sabhas of Gram

Panchayat Kasarla, Gram Panchayat Bhangrotu, Gram Panchayat Dador and Gram Panchayat Ner against the said proposal.

4. Further as per the petitioner, to satisfy the desire of Excise and Taxation Minister, respondent No. 2 vide notification dated 04.06.2014, proposed that areas of Dador, Ner, Kasarla, Malthed and Bhangrotu Panchayats be declared as municipal areas. According to the petitioner, this notification was issued without considering the objections filed by the local inhabitants. Further as per the petitioner, respondent No. 3 also invited objections vide Notification dated 04.06.2014 (Annexure P-4) from the inhabitants of the area as per the provisions of Sub-section (5) of Section 4 of the Himachal Pradesh Municipal Act, 1994. Vide notification dated 04.06.2014, proposal was to classify the specified area as “Nagar Panchayat” and not as “Municipal Council”. Again, inhabitants of the affected area opposed the formation of municipality by filing written objections, however, respondents without properly and legally considering the written objections of the inhabitants of the proposed area and without affording any reasonable opportunity of being heard to them, issued notification dated 07.01.2015 (Annexure P-9), declaring areas of Ner Chowk specified in the schedule enclosed as Nagar Panchayat Ner Chowk, District Mandi, Himachal Pradesh, in exercise of powers conferred by Section 4 of the Himachal Pradesh Municipal Act, 1994. Further as per the petitioner, since Excise & Taxation Minister of Himachal Pradesh, i.e. the local Member of the Legislative Assembly had desired that Ner Chowk be notified as Municipal Council and not as Nagar Parishad, therefore, respondent-State by-passed the procedure prescribed in Sub-section (2) of Section 3 of the Himachal Pradesh Municipal Act, 1994 and vide corrigendum dated 19.01.2015 (Annexure P-10) converted Ner Chowk from “Nagar Panchayat” to “Nagar Parishad”, i.e. Municipal Council. As per the petitioner, while doing so, neither any notice was issued nor any objections or suggestions were invited. Further as per the petitioner, thereafter respondent No. 2 on 18.03.2015 issued a notification under Sub-sectio (2) of Section 3 of the Himachal Pradesh Panchayati Raj Act for excluding the Gram Sabha areas proposed to be included in the Nagar Parishad Ner Chowk and invited suggestions and objections, which were duly filed by the affected persons, however, without considering the suggestions/objections and even before the report of respondent No. 5 being available on record, respondent No. 3 vide notification dated 26.09.2015 excluded the areas of Gram Sabhas for inclusion in Municipal Council. As per the petitioner, the said exclusion was on the basis of notification dated 07.01.2015 and not on the basis of objections raised by the affected people and report submitted by respondent No. 5 in public hearing. Further as per the petitioner, without finalization of the objections, State divided Ner Chowk municipality into wards and respondent No. 5 vide notification dated 03.10.2015 invited objections, which were not yet finalized at the time of filing of the petition. In this background, the petitioner has filed this petition praying for the reliefs already mentioned above.

5. Respondents No. 1 to 3 in their reply denied the allegations made in the petition. It was mentioned in the reply that information/proposal received from the Deputy Commissioner, Mandi vide letter No. 7666, dated 07.01.2014, as per which, annual income of proposed Nagar Panchayat was Rs. 14,075,912/- and tentative population was 15161, was forwarded to the State Government vide letter dated 19.02.2014 with the observation that as per the provisions of Section 3 of the H.P. Municipal Act, 1994, proposed Nagar Panchayat fulfilled both criteria required for constitution of new Municipality. It was further mentioned in the reply that as per the report furnished earlier by the Deputy Commissioner, dated 13.02.2002, Gram Panchayat Dador vide resolution No. 16 dated 01.07.2001 had submitted its No Objection Certificate for constitution of Nagar Panchayat, Ner Chowk as the adjoining area and the said town was a hub of industrial and business activities, and there was a considerable floating population of workers in the area, which required civic amenities, which could only be provided by a Municipality. It was further mentioned in the reply that for providing proper civic facilities to the inhabitants of the area, the constitution of Nagar Panchayat was necessary for the development of the same. It was further mentioned in the reply that Section 4 of the Himachal Pradesh Municipal Act, 1994 empowered the State Government to issue notification by proposing any local area to be Municipal area after observing the procedure laid down therein. As per the

respondents, the procedure so laid down was followed, which included affixing the notification of the proposal at some conspicuous place in the office of Deputy Commissioner within whose jurisdiction the proposed local area existed for inviting objections as well as taking into consideration the objections which were so received. It was further mentioned in the reply that the objections which were received through Deputy Commissioner, Mandi were placed before the competent authority and after going through the same, it was found that inhabitants had raised objections regarding deprivation of benefits of Gram Panchayat area, i.e. MANREGA, levying of Municipal Charges etc. and burden of taxes on BPL families. It was further mentioned in the reply that after taking into consideration the report of the Deputy Commissioner which was to the effect that Ner Chowk area fulfilled the criteria laid down in law to be declared a Municipality and further keeping in view the fact that it was a hub of Industries and urbanization in the said area was giving rise to problems related to urbanization which could be handled only by way of urban development schemes of the Government of India and State Government, the objections so raised by the inhabitants were not found sustainable. It was further mentioned in the reply that the matter for constitution of Nagar Parishad Ner Chowk was placed before Council of Ministers for necessary approval and thereafter, after obtaining approval of the Council of Ministers, notification dated 07.01.2015 was issued. It was further mentioned in the reply that as per the approval accorded by the Council of Ministers, Nagar Parishad, Ner Chowk, i.e. Municipal Council was constituted by including certain areas/Panchayats, however, while issuing notification dated 07.01.2015, by mistake it was shown as Nagar Panchayat instead of Nagar Parishad and this was lateron rectified by issuing corrigendum dated 19.01.2015. As per the respondent-State, this was a bonafide mistake and the same did not require inviting objections being an administrative matter. On these bases, respondents No. 1 and 3 opposed the petition.

6. Remaining respondents in their respective replies also supported the plea of the State and it was mentioned in their respective replies that the procedure as contemplated both under the Himachal Pradesh Municipal Act, 1994 as well as Himachal Pradesh Panchayati Raj Act was followed in issuance of notifications which were impugned by way of the present writ petition. It was also mentioned in their respective replies that there was no illegality committed by the State in the issuance of the notifications subject matter of the writ petition.

7. Rejoinder was filed to the reply filed to the reply filed by respondents No. 1 to 3, however, no rejoinder(s) were filed to the replies so filed by the remaining respondents.

8. Mr. Sanjeev Bhushan, learned Senior Counsel for the petitioner primarily argued that the entire exercise undertaken by the respondents was in violation of the statutory provisions provided both in the Himachal Pradesh Municipal Act, 1994 as well as Himachal Pradesh Panchayati Raj Act. As per Mr. Bhushan, the procedure contemplated in Sections 3 and 4 of the Himachal Pradesh Municipal Act, 1994 was not followed and further even otherwise as the process was initiated by the respondents to convert Ner Chowk into a Nagar Panchayat, the subsequent act of declaring/converting the same into a Nagar Parishad without inviting any objections etc. in this regard was *per se* illegal and not permissible in law. Mr. Bhushan also argued that there was no public interest involved in the declaration of areas of Ner Chowk specified in Schedule appended with notification dated 07.01.2015 as Nagar Parishad, because this entire exercise in fact had been undertaken by the respondent-State to appease the local member of Legislative Assembly from Balh constituency, who also happened to be the Excise and Taxation Minister. On these grounds, Mr. Bhushan prayed that the petition be allowed and the notifications impugned by way of this petition be quashed and set aside.

9. On the other hand, Mr. Shrawan Dogra, learned Advocate General has argued that there was no merit in the contention of the petitioner that the exercise of declaring Ner Chowk as Nagar Parishad Ner Chowk was done to satisfy the whims of the local MLA as alleged or that the issuance of impugned notification was in violation of the statutory provisions contemplated and laid down in Sections 3 and 4 of the Himachal Pradesh Municipal Act, 1994 or the provisions of the Himachal Pradesh Panchayati Raj Act. Mr. Dogra argued that the entire process was undertaken by the respondent-State strictly in accordance with the provisions by

duly notifying the proposal and thereafter inviting objections and dealing with the objections objectively. It was further submitted by Mr. Dogra that the petition so filed by the petitioner could not be termed as a public interest litigation because no public spirited person would ever oppose the conversion of a "Panchayat" into a "Nagar Parishad" when the proposed area was fulfilling the criteria contemplated in Himachal Pradesh Municipal Act, 1994 to be declared a "Nagar Parishad". According to Mr. Dogra, by declaring the areas specified in the Schedule appended with notification dated 07.01.2015 as Nagar Parishad, these areas were to get all the facilities of urbanization, which was in larger public interest. It was also argued by Mr. Dogra that the petition in fact was not maintainable as the person against whom malafides were alleged to the effect that the entire process was undertaken by the Government at the behest of said person, was not impleaded as party respondent in the case. Mr. Dogra argued that even otherwise in the entire writ petition, the petitioner could not point out as to what was the personal advantage which the local MLA was to gain in case the area in issue was declared as a Nagar Parishad. According to Mr. Dogra, it was the duty of the representative of the people of an area to work for the welfare of the people of that area and in case a local MLA moves a proposal for converting Panchayat areas into a Nagar Parishad, if the area in issue fulfills the condition contemplated in the Himachal Pradesh Municipal Act, 1994, then there is nothing wrong in it until and unless it could be proved that the same was being done by the person concerned with an ulterior motive. Mr. Dogra also argued that petitioner was not able to demonstrate as to what prejudice was caused to him by issuance of corrigendum vide which the proposed areas were declared as Nagar Parishad instead of Nagar Panchayat, because the factum remained that the entire formalities which were contemplated to be undertaken in declaring the proposed areas to be a Nagar Parishad were in fact undergone and undertaken by the department. Mr. Dogra also argued that it was not a case where Nagar Panchayat was converted as Nagar Parishad, but it was a case where Panchayat areas were converted into Municipality, be it Nagar Panchayat or Nagar Parishad. On these counts Mr. Dogra prayed that there was no merit in the petition and the same be dismissed.

Ms. Nishi Goel, learned counsel appearing for respondent No. 6 has adopted the arguments of learned Advocate General.

10. We have heard the learned counsel for the parties and have also gone through the pleadings as well as the records of the case, which were directed by this Court to be made available vide order dated 15.07.2016.

11. Before dealing with the case on merit, we would like to deal with the issue raised by learned Advocate General with regard to maintainability of the petition that the same was not maintainable as the person against whom allegations of malafides were made was not impleaded as a party respondent.

12. A perusal of the averments made in the petition clearly demonstrate that there are allegations of *malafide* made in paras-4 & 7 of the same, which are being reproduced hereinbelow:

> *"4. That in the year 2013, the present Hon'ble Excise and Taxation Minister of Himachal Pradesh, who is also MLA from Balh constituency, desired that Nerchowk Panchayat of District Mandi, which falls in Balh constituency, may be notified as Municipal Council under Section 3 of the H.P. Municipal Act, 1994. In order to satisfy such desire, the respondents No. 1 and 3 prepared a proposal. The respondent No. 3 vide communication dated 01.02.2013 directed respondent No. 5 to examine the proposal after taking into consideration the criteria laid down to notify an area as Municipal Council. The communication dated 01.02.2013 is appended herewith and marked as Annexure P-1. The perusal of the same will reveal that the respondent No. 5 was directed to take into consideration the following instructions:-*
>
> *(a) The population as latest census should exceed five thousands;*

(b) The revenue general for local administration should exceed Rs.Ten lakhs; and

(c) The resolution passed by concerned Gram Panchayats in favour of constitution of Municipal Council.

7. That in order to satisfy the desire of the Hon'ble Excise and Taxation Minister of the State, the respondent No. 2, vide notification dated 04.06.2014 proposed that the areas of Dador Panchayat, Ner Panchayat, Kasarla Panchayat, Malthed Panchayat and Bhangrotu Panchayat should be declared as municipal area. It is submitted that this impugned notification was issued without considering the abovestated objections filed by local inhabitants. However, vide this notification the respondent No. 3 invited objections from the inhabitants of the areas specified as required under Section 4(5) of the Act. The notification dated 04.06.2014 alongwith specified area is appended herewith and marked as Annexure P-4."

13. Incidentally, the said Member of Legislative Assembly has not been impleaded as a party respondent in the petition. In other words, allegations have been made and malafides have been alleged against a person, who has not been impleaded as a party respondent in the petition. In our considered view, when petitioner was leveling allegations of nepotism against the Member of the Legislative Assembly, who also happened to be holding the office of Minister, then it was incumbent upon the petitioner to have had impleaded the said person as party respondent in the case. Said person was not only a property party, but he was also a necessary party as the allegations leveled against him were not innocuous but were serious. Therefore, in our considered view, there is considerable force in the said contention of Mr. Dogra and the petition in fact is bad for non-joinder of necessary parties, however, we will not dwell on this issue any further and will now proceed to adjudicate the case on merit.

14. Sections 3 and 4 of Himachal Pradesh Municipal Act, 1994 provide as under:

*"**3. Classification of municipalities**.- (1) There shall be constituted three classes of municipalities in accordance with the provisions of this section as specified below :-*

(i) "Nagar Panchayat" for a transitional area with population exceeding two thousand and generating annual revenue exceeding rupees five lakhs for the local administration;

(ii) "Municipal Council" for a smaller urban area with population exceeding five thousand and generating the annual revenue exceeding rupees [ten] lakhs for the local administration;

(iii) "Municipal Corporation" for a larger urban area with population exceeding fifty thousand and generating annual revenue exceeding rupees two crores for the local administration and which has been declared to be a municipal area under section 3 of the Himachal Pradesh Municipal Corporation Act, 1994 (12 of 1994) :

Provided that a municipality under this section may not be constituted in such urban areas or part thereof as the State Government may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as it may deem fit, by notification, specify to be an industrial township:

Provided further that no cantonment or part of a cantonment shall form part of a municipality.

Explanation.- In this sub-section, " a transitional area", "a smaller urban area" or "a larger urban area" means such area as the State Government may, having regard to the population of the area, the density of the population therein, the revenue generated for local administration, the percentage of employment in non-agricultural activities, the economic importance or such other factors as the

State Government may deem fit, specify, by notification for the purpose of this section.

(2) The State Government shall, by notification, constitute the municipalities and specify the class to which a municipality shall belong in accordance with the provisions of this section after observing the procedure as laid down in section 4: Provided that the municipalities existing at the commencement of this Act and listed as Nagar Panchayat or as Municipal Council in the Schedule to this Act, would be deemed to have been constituted and notified as such, under and in accordance with the provisions of this section:

Provided further that the State Government may, after giving a reasonable notice of not less than thirty days of its intention to do so, amend the schedule, by notification and declare any Nagar Panchayat as a Municipal Council or any Municipal Council as a Nagar Panchayat.

***4. Procedure for declaring municipal area**.- (1) The State Government may, by notification, propose any local area to be a municipal area under this Act.*

(2) Every such notification under sub-section (1) shall define the limits of the local area to which it relates.

(3) A copy of every notification under this section, with a translation thereof in such language as the State Government may direct shall be affixed at some conspicuous place in the office of the Deputy Commissioner, within whose jurisdiction the local area to which the notification relates lies, and at one or more conspicuous places in that local area.

(4) The Deputy Commissioner shall certify to the State Government the date on which the copy and translation were so affixed and the date so certified shall be deemed to be the date of publication of the notification.

(5) If any inhabitant desires to object to a notification issued under sub-section (1), he may, within six weeks from the date of its publication submit his objection in writing through the Deputy Commissioner to the State Government and the State Government shall take his objection into consideration.

(6) When six weeks from the date of publication have expired, and the State Government has considered and passed orders on such objections as 22 may have been submitted to it, the State Government may, by notification, declare the local area for the purposes of this Act, to be a municipal area.

(7) The State Government may, by notification, direct that all or any of the rules which are in force in any municipal area shall, with such exceptions and adaptations as may be considered necessary, apply to the local area declared to be a municipal area under this section, and such rules shall forthwith apply to such municipal area without further publication.

(8) When a local area, the whole or part of which was a notified area under the Himachal Pradesh Municipal Act, 1968 (19 of 1968) or a Nagar Panchayat under this Act, is declared to be Municipal Council under this section, the Municipal Council shall be deemed to be a perpetual successor of such notified area committee or of Nagar Panchayat, as the case may be, and in respect of all its rules, bye-laws, taxes, and all other matters, whatsoever and the Nagar Panchayat shall continue in office and shall notwithstanding anything contained in this Act be deemed to be the Municipal Council until the appointment and election of members is notified by the State Government under section 27.

(9) A municipality shall come into existence on such day as the State Government may, by notification, appoint in this behalf."

15. A perusal of these provisions demonstrate that as per Section 3 of the Act, three classes of Municipality are contemplated, i.e., Nagar Panchayat, Municipal Council and Municipal Corporation. Municipal Council or Nagar Parishad is contemplated for a smaller urban area with population exceeding five thousand and generating the annual revenue exceeding rupees ten lakhs for the local administration.

16. Section 4 of the Himachal Pradesh Municipal Act, 1994 lays down the procedure for declaring Municipal areas. As per this Section, State Government may by notification propose any local area to be a municipal area under the Act. A copy of such notification has to be affixed at some conspicuous place of the office of Deputy Commissioner, within whose jurisdiction the local area to which notification relates lies and at one or more conspicuous places in that local area. It further contemplates that Deputy Commissioner shall certify to the State Government the date on which the copy and translation were so affixed and the date so ordered shall be deemed to be the date of publication of the notification and if any inhabitant desires to object the notification, he may within six weeks from the date of its publication, submit his objections in writing to the State Government through the Deputy Commissioner and the State Government shall take the objections into consideration. This Section further contemplates that after expiry of six weeks from the date of publication and after State Government has considered and passed orders on objections as have been submitted to the notification, the State Government may by notification declare the local area for the purposes of this Act to be a municipal area.

17. Therefore, now it has to be gathered from the records as to whether the procedure contemplated in Section 4 of the Himachal Pradesh Municipal Act, 1994 has been followed in letter and spirit by the respondents before the issuance of impugned notification or not, to consider the allegations of the petitioner that the procedure has not been followed.

18. As per the records, Secretary (Urban Development) to the Government of Himachal Pradesh issued notification dated 04.06.2014 proposing areas as specified in the Schedule enclosed thereto to be declared as municipal area under Section 4 of the Himachal Pradesh Municipal Act, 1994 in order to constitute a municipality under Sub-section (2) of Section 3 of the Act to be classified as Nagar Panchayat at Ner Chowk for better development and improved arrangement in the said area.

19. Vide this notification, inhabitants of the area specified in the Schedule were called upon to submit their objections/suggestions, if any, to the proposed declaration to Secretary (Urban Development) in writing through Deputy Commissioner within a period of six weeks from the date of publication of the notification in the Rajpatra. There is a communication available on record dated 19.02.2014 from Director, Urban Development, Himachal Pradesh to Secretary (Urban Development) to the Government of Himachal Pradesh, on the subject "Proposal regarding constitution of Nagar Panchayat Nerchowk" to the effect that as per the proposal received from Deputy Commissioner, Mandi, the figures of population and annual revenue were as under

1.	Total income of proposed N.P. Nerchowk (revenue generation from own source)	14075912-00
2	Total population (Tentative population in the proposed area)	15161 souls

20. This demonstrates that the proposal fulfilled the criteria contemplated under Sub-clause (ii) of Sub-section (1) of Section 3 of the Himachal Pradesh Municipal Act, 1994, as per which, "Municipal Council/Nagar Parishad" means a smaller urban area with population exceeding five thousand and generating annual revenue exceeding rupees ten lakhs for local administration.

21. Records also demonstrate that the Council of Ministers on 19.02.2014 approved the constitution of "Nagar Panchayat" at Ner Chowk and thereafter, notification dated 04.06.2014

was issued by the Government. The factum of issuance of notification dated 04.06.2014 is not disputed by the petitioner nor inviting objections on the proposal by the authorities is disputed. What is disputed by the petitioner is that the objections which were filed by the affected persons pursuant to the said notification were neither considered nor decided by the authorities before issuing notification declaring Ner Chowk initially as a "Nagar Panchayat" and thereafter as a "Nagar Parishad" by way of corrigendum.

22. Records demonstrate that after the issuance of notification dated 04.06.2014, objections were received from various quarters, which are available on record. Records further demonstrate that vide notification dated 07.01.2015, respondent-State in exercise of powers conferred by Section 4 of the Himachal Pradesh Municipal Act, 1994, declared the areas of Ner Chowk specified in the Schedule enclosed with said notification as Nagar Panchayat, Ner Chowk, District Mandi. This was followed by issuance of a corrigendum dated 19.01.2015 to the effect that words "Nagar Panchayat", Nerchowk published vide notification dated 07.01.2015 be read as "Nagar Parishad", Nerchowk.

23. Records also demonstrate that before issuance of notification dated 07.01.2015, the matter was placed before the Cabinet on 25.11.2014. What was approved by the Cabinet is as under:

"Approved the constitution of Nagar Parishad, at Nerchowk".

24. Pursuant to this, notification dated 07.01.2015 was issued in which as per respondent-State, inadvertently instead of words "Nagar Parishad", the words "Nagar Panchayat" were mentioned, which mistake was corrected/rectified vide corrigendum dated 19.01.2015.

25. The above discussion demonstrates that the area which was proposed to be declared Municipality, fulfilled the criteria for being declared as a Nagar Panchayat as well as Nagar Parishad. Besides this, both for declaring the proposed area either as "Nagar Panchayat" or as "Nagar Parishad", the statutory requirement was issuance of a notice under Section 4 of the Himachal Pradesh Municipal Act, 1994 and inviting objections from the inhabitants desirous to object to the said notification. It is not the case of the petitioner that had the initial proposed notification dated 04.06.2014 been issued for Nagar Parishad Nerchowk instead of Nagar Panchayat Nerchowk, then either its tone and tenor would have been different or its contents would have had been different or the procedural formalities which were required to be fulfilled would have been different. Probably, the only difference would have been that instead of words "Nagar Panchayat", the proposal would have contained the words "Nagar Parishad". Be that as it may, fact of the matter still remains that the proposal was to convert areas of Panchayat specified in the proposal into a Municipality.

26. We have already discussed above that inviting of objections is not disputed by the petitioner and during the course of arguments, learned counsel for the petitioner could not objectively point out as to what would have been substantive difference in the objections invited, had the initial proposal itself been for Nagar Parishad instead of Nagar Panchayat. The objections on record demonstrate that the objections against the proposed Nagar Panchayat, as invited vide notification, dated 04.06.2014, were not to this effect that the proposal should not be for Nagar Panchayat, but should be for Nagar Parishad. The objections were to this effect that the Panchayat areas should be allowed to remain as Panchayat areas only. Besides this, it is evident from the reply filed by respondents No. 1 to 3 that the objections so received were taken into consideration and they were not found to be sustainable, as primarily the objections demonstrated that the objectors therein were aggrieved by the fact that if the area was permitted to be converted into a Municipality, then it would deny the inhabitants of the area benefits of Gram Panchayat area, MANREGA and the inhabitants would be subjected to levy of Municipal charges etc. The objections so filed, as is evident from the reply filed by respondents No. 1 and 3, were overruled in larger public interest taking into consideration the benefits which otherwise the inhabitants were to gain once this area was declared as Municipality. Therefore, it cannot be said

that the objections were either not considered or decided before the impugned notifications were issued by the department.

27. A perusal of notification dated 07.01.2015 also demonstrates that it is mentioned therein that before issuance of this notification, objections/suggestions received from inhabitants of Gram Panchayat Nerchowk, District Mandi within the prescribed limit were considered and decided by the Government. There is no reason for us to disbelieve the same as nothing has been placed on record to the contrary by the petitioner.

28. Records also demonstrate that these objections/suggestions were placed before the Urban Development Minister for consideration, however, the same did not find favour with the Minister concerned as it was decided that "notification of constituting Ner Chowk as N.P. may be issued as it is the fastest growing urban area in the State".

29. Therefore, in view of above, there is no merit in the contention of the petitioner that the objections which were received against the proposal were neither considered nor decided before the issuance of impugned notification. At the cost of repetition, we are re-stating that during the course of arguments, learned counsel for the petitioner could not point out as to what would have been the qualitative difference in objections submitted by the objectors had the initial proposal not been for Nagar Panchayat, but the same had been for a Nagar Parishad.

30. Now coming to the argument of learned counsel for the petitioner that this entire exercise was undertaken by the State Government not in public interest but at the behest of local MLA to satisfy his whims, according to us, this argument is also not sustainable on merit. First of all, as we have already observed above, the MLA against whom malafides have been alleged has not been impleaded as party respondent in the petition. Be that as it may, the petitioner has not produced on record any material from which it could be inferred that the proposal so made by the local MLA was made either with an ulterior motive or the same was not in public interest. It is not a case where the proposal was moved by a person, who had no relation with the area and was a stranger qua the area which was proposed to be declared as a Municipality. In the present case, the proposal was mooted by the local MLA, who, in our considered view, in his capacity as public representative, is duty bound to make efforts to ensure the larger benefit of the people in the area, which he is representing. Further, the petitioner has not been able to demonstrate that after the proposal was mooted by the Local MLA, the State declared the area as Nagar Parishad either by not following the procedure or by flouting the procedure laid down in Section 4 of the Himachal Pradesh Municipal Act, 1994. Therefore, in our considered view, there is no force in this argument of the learned counsel for the petitioner.

31. Coming to the factum of initial notification dated 07.01.2015, having been issued for declaring the proposed area as Nagar Panchayat and thereafter the words "Nagar Panchayat" have been substituted with words "Nagar Parishad" vide corrigendum dated 19.01.2015, in our considered view, the issuance of neither of these two notifications can be faulted with on the basis of grounds taken in the petition. We have already held that the procedure contemplated for declaring the area as a Municipality was strictly followed by the Government before issuance of notification dated 07.01.2015. Respondent-State has duly explained the need to issue corrigendum dated 19.01.2015. Replies filed by the respondents as well as records demonstrate that after fulfilling all the formalities as are contemplated in Section 4 of the Himachal Pradesh Municipal Act, 1994, when the matter was placed before the Cabinet for its approval on 25.11.2014, the approval granted by the Cabinet is as follows:

"Approved the constitution of Nagar Parishad at Nerchowk".

This was followed by issuance of notification dated 07.01.2015, however, inadvertently in this notification, instead of "Nagar Parishad", the words published were "Nagar Panchayat". To correct/rectify this mistake, corrigendum dated 19.01.2015 was issued, in which the words "Nagar Panchayat", Nerchowk were substituted with words "Nagar Parishad", Nerchowk. It is also pertinent to observe that before issuance of corrigendum, there was no requirement to serve a notice of not less than 30 days, as is contemplated in second proviso to Sub-section(2) of Section

3 of the Himachal Pradesh Municipal Act, 1994, because pursuant to notification dated 07.01.2015, the procedure contemplated in Sub-Section (2) of Section 3 of the Himachal Pradesh Municipal Act, 1994 had not yet been completed and corrigendum was issued by the State Government before that. Therefore, there is no merit in the contention of the learned counsel for the petitioner that corrigendum dated 19.01.2015 is not sustainable in law as it is in violation of second proviso to Sub-section(2) of Section 3 of the Himachal Pradesh Municipal Act, 1994.

34. Now coming to notification dated 26.09.2015, vide which Gram Sabha areas have been excluded for the purpose of including them into Municipal Council, respondents No. 2 and 4 in their reply have stated that in view of final notification issued by the Department of Urban Development Annexure P-9, dated 07.01.2015 and corrigendum Annexure P-10, dated 19.01.2015 regarding Nagar Parishad, Ner Chowk, Panchayati Raj Department had issued final notification for exclusion of the areas from respective Gram Panchayats/Gram Sabhas taking into consideration the opinion of the Law Department, wherein it was mentioned that the provisions of the second proviso to Sub-section(2) of Section 3 of the Himachal Pradesh Municipal Act, 1994 have precedence over the Himachal Pradesh Panchayati Raj Act. It was also mentioned in the reply that proposal for the inclusion of areas of the respective Gram Panchayats/Gram Sabhas was initiated and notified by the Department of Urban Development at first instance as per the provisions of the Himachal Pradesh Municipal Act, 1994 and, therefore, Panchayati Raj Department had issued final notification vide Annexure P-16, 26.09.2015 for exclusion of areas from the respective Gram Panchayats/Gram Sabhas and role of the Panchayati Raj Department was limited to follow the provisions of Panchayati Raj Act where the Urban Development Department had notified the Gram Panchayat areas to be included in Municipal limits. Incidentally, the stand so taken by the Panchayati Raj Department to justify the issuance of notification dated 26.09.2015 (Annexure P-16) has not been rebutted by the petitioner by filing any rejoinder etc. We otherwise also find considerable merit in the averments so made in the reply for the reason that the fact of the matter remains that the affected inhabitants of Gram Panchayats/Gram Sabhas, who were excluded from Gram Panchayats/Gram Sabhas vide notification dated 26.09.2015 (Annexure P-16) were otherwise heard under the provisions of the Himachal Pradesh Municipal Act, 1994, as they were given due opportunity of filing their objections vide notification dated 04.06.2014. Therefore, it cannot be said that the affected parties were not given an opportunity of being heard, as is being tried to be portrayed by the petitioner.

35. Even otherwise, declaration of Municipalities is a legislative function, which is undertaken by the Government in larger public interest and ordinarily Courts are not to interfere in the decisions so undertaken by the State Government until and unless the judicial conscious of the Court is satisfied that the decision so taken is not in public interest, but has been taken with ulterior motive at the behest of some interested person or persons who personally stand to gain by the declaration of such Municipality. In this case, the petitioner has not been able to demonstrate or prove the same. Petitioner has not been able to demonstrate or prove that the declaration of area subject matter of the writ petition into a Nagar Parishad is either not in public interest or this decision has not been taken by the Government in larger interest of inhabitants of the area, but the same has been taken by the State Government to help a few individuals or the declaration was not done by following statutory requirements of the Himachal Pradesh Municipal Act, 1994.

36. It is settled law that function of the Government while establishing a Municipality is neither executive nor administrative, but it is a legislative process.

37. In **Tulsipur Sugar Co. Ltd**. ***Vs.*** **The Notified Area Committee, Tulsipur**, ***(1980) 2 SCC 295,*** the Hon'ble Supreme Court while dealing with U.P. Town Areas Act, 1914 has held that power of the State Government to make a declaration under the same is legislative in character.

38. The Hon'ble Supreme Court in **Baldev Singh and Ors.** ***Vs.*** **State of Himachal Pradesh**, ***(1987) 2 SCC 510,*** has held that affording of hearing to affected persons is essential

prerequisite for constituting notified area, however, hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way.

39. The Hon'ble Supreme Court in **Sundarjas Kanyalal Bhathiaja and ors.** ***Vs.*** **The Collector, Thane, Maharashtra and ors.,** ***AIR 1990 SC 261,***has also held that rules of natural justice are not applicable to legislative action plenary or subordinate. The Hon'ble Supreme Court in para-23 of the judgment has held:

> *"23. Reverting to the case, we find that the conclusion of the High Court as to the need to reconsider the proposal to form the Corporation has neither the attraction of logic nor the support of law. It must be noted that the function of the Government in establishing a Corporation under the Act is neither executive nor administrative. Counsel for the appellants was right in his submission that it is legislative process indeed. No judicial duty is laid on the Government in discharge of the statutory duties. The only question to be examined is whether the statutory provisions have been complied with. If they are complied with,, then, the Court could say no more. In the present case the Government did publish the proposal by a draft notification and also considered the representations received. It was only thereafter, a decision was taken to exclude Ulhasnagar for the time being. That decision became final when it was notified under Section 3(2). The Court cannot sit in judgment over such decision. It cannot lay down norms for the exercise of that power. It cannot substitute even "its juster will for theirs."'"*

40. In **Karnail Singh and another** ***Vs.*** **Darshan Singh and Ors.,** ***1995 Supp.(1) SCC 760,*** the Hon'ble Supreme Court has held that amalgamation of two gram sabhas into one is an administrative decision taken by the authorities in public interest and the Court would not interfere unless the same is vitiated with malafides.

41. The Hon'ble Supreme Court in **Solapur Midc Industries Association and ors.** ***Vs.*** **State of Maharashtra and ors.,** reported in ***(1996) 9 SCC 621,***has held:

> *"3. It is not disputed that since the State Government has not yet withdrawn the industrial estate/industrial area concerned from the hold of the Corporation, the provisions of the 1961 Act continue to apply. The Preamble thereof is suggestive of its objects sought to be achieved namely the orderly establishment in industrial areas and industrial estates of industries, and to assist generally in the organisation thereof, and for that purpose to establish the Industrial Development Corporation and for purposes connected with the matters therewith. The purpose of the 1949 Act on the other hand, as is suggestive from its Preamble, is to provide for the establishment of Municipal Corporations with a view to ensure a better municipal government of the cities in which municipal corporations are set up. These being the basic differences as to the ambit of the two statutes, the High Court, in our view, rightly arrived at the conclusion that there was inter se no conflict between the two. There may be certain areas such as provision for civil amenities in which there is identity of purpose but these are ancillary and incidental to the main purpose of the respective two statutes. The suggestion drawn from the Assembly debates, to which our attention has been drawn, while passing the 1961 Act, suggestive of the fact that the industrial estates or industrial areas on ripening were meant to be kept under the purview of the 1961 Act until some civic administration in the form of a Panchayat or Municipality could take over is not supported by any statutory provision available in the respective two Acts. As said before the topics of legislation being different, there was no question of their rubbing against each other because being enacted under two different legislative fields."*

42. The Hon'ble Supreme Court in **Nagar Panchayat Kurwai and another** ***Vs.*** **Mahesh Kumar Singhal and ors.,** reported in ***(2013) 12 SCC 342,*** has held that Nagar Panchayat, is a unit of self-government, which is a sovereign body having both constitutional and

statutory status and considerable powers are conferred on it to carry out various schemes for economic development and social justice at the local level.

43. In view of above discussion as well as law laid down by the Hon'ble Supreme Court, we do not find any merit in the petition, which is accordingly dismissed, so also the pending application(s), if any. Interim order, if any, stands vacated. No order as to costs.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

HPSEB & Another ….Appellants-Defendants

Versus

Shri Babu Ram ….Respondent-Plaintiff

RSA No.61 2007

Date of decision: 27.12.2016

Code of Civil Procedure, 1908- Order 33 Rule 2- Plaintiff filed a suit for compensation of Rs.2 lacs for electrocution due to the negligence of the defendants – the defendants denied the claim of the plaintiff – suit was dismissed by the Trial Court- an appeal was filed, which was allowed and the suit was decreed for recovery of Rs.1,66,000/- along with interest @ 6% per annum- held in second appeal that Plaintiff had examined himself and two witnessesto prove his version- documentary evidence also proved his version – there was no distance between the roof of the house of the plaintiff and the HT line, whereas distance of 12 feet is required to be maintained as per rules – thus, the negligence was duly proved.(Para-16 to 29)

For the Appellant: Mr. Satyan Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

For the Respondents: Mr.Surender Kumar Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Regular Second Appeal filed under Section 100 of the Code of Civil procedure, is directed against the judgment and decree dated 17.11.2006, passed by learned District Judge, Mandi, H.P., in Civil Appeal No.8 of 2006, reversing the judgment and decree dated 24.11.2005, passed by learned Civil Judge(Senior Division), Sundernagar, District Mandi, H.P. in Civil Suit No.70/2002, whereby suit for compensation having been filed by respondent-plaintiff (hereinafter referred to as 'plaintiff') was dismissed.

2. Briefly stated facts, as emerged from the record, are that plaintiff-respondent filed a suit as an indigent person under Order 33 Rule 2 of the Code of Civil Procedure for compensation amounting to Rs.two lacs alongwith interest @ 8% against appellant-defendant averring therein that on 16.2.1998, when he was sleeping on the roof of his house at village Jarol, then all of sudden at 9.00 A.M. there was a dazzling spark and a big mass of fire got discharged from the electric wire, passing above the house of the plaintiff, and the said mass of the fire engulfed the plaintiff, as a result of which his body was badly burnt. Plaintiff further averred that in the aforesaid incident he was suffered injury to his right arm, fingers and right leg. It is further averred by the plaintiff in the plaint that his muscles from left leg were removed and planted on the right side of the whole body. Plaintiff further averred that due to electrocution, he was unable to walk, sit and sleep properly and suffered pain continuously. Plaint further reveals that after aforesaid incident, plaintiff became unconscious and was taken to Primary Health Centre, Jarol and thereafter to Civil Hospital, Sundernagar, but doctors at Civil Hospital, Sundernagar referred the plaintiff to PGI, Chandigarh, where he remained admitted for 3½ months. Plaintiff further alleged that after having taking treatment from PGI, Chandigarh, he again remained as indoor

patient at Civil Hospital, Sundernagar for 3½ months and in this process, his entire savings were spent on his treatment. Plaintiff also claimed that he was accompanied by two attendants and was given three bottles of blood and 500 bottles of glucose and in this process he spent more than Rs.two lacs on his treatment. Plaint further suggests that at the time of accident, plaintiff was a qualified carpenter and used to earn Rs.200/- per day, but by the said accident he has now been deprived of doing any physical work. It is further averred in the plaint that there is a history of longevity in his family, since his father is still alive and his grand-father expired at the age of 90 years and at that relevant time he was 25 years of age. In the aforesaid background, the plaintiff claimed compensation to the tune of Rs.two lacs with interest from the defendants.

3. Defendants, by way of detailed written statement refuted the version having been put forth by the plaintiff on the ground of maintainability, estoppel, cause of action, non-joinder and mis-joinder of necessary parties and lack of jurisdiction. Apart from above, defendant also contested the case of the plaintiff on merits by stating that he is not a poor person, rather, he has handsome income from the land and other sources. Defendants admitted that they have installed 33 KV H.T. line, which passes through village Jarol in the year 1965, and the same is well maintained having rail polls of iron and none of the house come underneath the line at the time of its erection. Defendants further claimed that no accident from electricity wires has taken place and as such the plaintiff is not entitled for any compensation. Defendants further averred that no complaint, whatsoever, was received by the staff of the defendants nor any FIR was lodged. Defendants further claimed that at the time of alleged accident, plaintiff was not owner of house at Jarol, rather he had one small *khokha* from where he used to sell beedies, cigrates and toffees etc. Defendants further claimed that there was no house underneath the electricity line, as claimed by the plaintiff, and if any person constructs anything under the line then that person himself is responsible for the same and no compensation, if any, can be claimed against the defendants. In nutshell, defendants stated that since there was no accident, as alleged by the plaintiff, there is no question of negligence on the part of defendants and plaintiff was not entitled to any compensation. Defendants further stated that they have maintained the electricity line and there was neither complaint of loose sagging of line nor it ever touched the ground and the line was erected as per law. It is further alleged by the defendants that requisite height as well as vertical and horizontal distances are maintained from the ground level as well as from the houses. In the aforesaid background, defendants sought dismissal of the suit.

4. Learned trial Court, on the pleadings of the parties, framed the following issues:-

"1. Whether on 16.2.1995 there was discharge from electric wires passing over the houses of the plaintiff as alleged? OPP.

2. Whether this discharge from the electric wires was on account of negligent act/omission on behalf of officials of defendants as alleged, if so, to what effect? OPP.

3. Whether the plaintiff suffer on accout of electrocution and as such he is entitled for damages? If so, to what extent? OPP.

4. Whether the plaintiff is also entitled to interest? If so, at what rate? OPP.

5. Whether the suit is not maintainable? OPD.

6. Whether the suit is barred by limitation? OPD.

7. Whether the plaintiff is estopped by his act and conduct from filing the suit? OPD.

8. Whether the suit is bad for non-joinder of necessary parties? OPD.

9. Whether the court has no jurisdiction to entertain the suit as alleged? OPD.

10. Whether the plaint is not properly valued as alleged? OPD.

11. Whether the suit of the plaintiff is liable to be dismissed with special cost U/S 35-A of the CPC? OPD.

12. Whether the plaintiff has suppressed the material facts from the court as alleged? If so, to what effect?

13. Relief."

5. Subsequently, learned trial Court on the basis of pleading of the parties, vide judgment dated 24.11.2005 dismissed the suit having been filed by the plaintiff seeking therein compensation on account of electrocution suffered by him due to negligence of the defendants.

6. Being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court, plaintiff preferred an appeal under Section 96 of the Code of Civil Procedure in the Court of learned District Judge, Mandi, which came to be registered as Civil Appeal No.8 of 2006. Learned District Judge, taking note of the pleadings as well as evidence adduced on record by respective parties, allowed the appeal, set aside the judgment and decree passed by learned trial Court and decreed the suit of the plaintiff for Rs.1,66,000/- alongwith interest at the rate of 6% per annum from the date of filing of the suit till its realization.

7. In the aforesaid background, appellant-defendant filed instant Regular Second Appeal laying therein challenge to the judgment and decree passed by learned District Judge, Mandi, whereby suit of the plaintiff was decreed with a prayer to quash and set aside the same.

8. This Regular Second Appeal was admitted on the following substantial question of law:-

"(1) Whether the plaintiff was entitled to compensation without the negligence having been proved and as such, there has been misreading of evidence by the first appellate Court?

9. Mr.Satyan Vaidya, learned Senior Advocate, vehemently argued that judgment passed by the learned District Judge, whereby suit having been filed by the present plaintiff was decreed, is not sustainable as the same is not based upon correct appreciation of evidence adduced on record by respective parties and as such same deserves to be quashed and set aside. Mr.Vaidya further contended that learned District Judge, while coming to the conclusion that plaintiff suffered injury on account of electrocution, miserably failed to appreciate the evidence in its right perspective, as a result of which great prejudice has been caused to the appellant, who in no manner could be termed to be negligent as has been held by the Court below. With a view to substantiate his aforesaid argument, Mr.Vaidya contended that there is nothing on record suggestive of the fact that plaintiff was able to prove the manner/circumstances in which he suffered electricity shock because as per evidence led on record by the plaintiff, electricity lines in question were in existence for many years and similarly the slab covered house was also in existence for many years. Mr.Vaidya, while specifically inviting the attention of this Court to the statement, having been made by the plaintiff PW-2, wherein he claimed that on that ill-fated day, he was basking in the sun at around 9.00 A.M., when the plaintiff claimed to have suffered electric shock, while sleeping over the slap on account of dazzling spark coming from overhead electric wires in the form of a round ball of fire. Mr.Vaidya forcefully contended that it is impossible to believe that there was dazzling spark in the electric wires, because no positive evidence worth the name was led on record by the plaintiff from where it could be inferred that spark, if any, was caused due to joining of the electric wires.

10. Mr.Vaidya, while referring to the judgment passed by learned trial Court, strenuously argued that the same is based upon correct appreciation of evidence adduced on record and as such there was no occasion, whatsoever, for the first appellate Court to set aside the same that too on very flimsy grounds and as such impugned judgment having been passed by learned first appellate Court deserves to be quashed and set a side. Mr.Vaidya, further contended that no definite opinion with regard to dazzling spark allegedly coming from the overhead electric wires could be given without there being examination, if any, of technical expert, who would have proved the possibility of generation of such spark and the consequent possibility and capability of causing injury to human being by such spark and as such findings recorded by the learned District Judge in the absence of such evidence has rendered judgment

and decree passed by learned Court below vitiated and as such same deserves to be quashed and set aside.

11. While concluding his arguments, Mr.Vaidya invited the attention of this Court to medical evidence on record to suggest that even nature of injury suffered by the plaintiff was not properly appreciated by learned District Judge, because, if for the sake of arguments it is accepted that dazzling spark came from overhead electric wires, the possible nature of the injuries, which could have been inflicted on the person of the plaintiff are not proved and as such, judgment passed by learned first appellate Court, whereby appellants-defendants have been held to be negligent, is not sustainable being contrary to the material available on record.

12. Mr.Vaidya further contended that learned District Judge has brushed aside the legal evidence led by the defendants, particularly, positive evidence led on record that there is automatic tripping of electricity in case of any fault on the line or fault, as alleged by the plaintiff and as such version of plaintiff is doubtful that there was some dazzling spark emanated from the electricity wires at the relevant point of time. Mr.Vaidya further contended that learned District Judge assessed the compensation on higher side because otherwise also plaintiff would have been entitled to compensation to the extent of 40% loss of income suffered by him. In the aforesaid background, Mr.Vaidya prayed that the present appeal may be accepted and the suit filed by the plaintiff may be dismissed after setting aside the impugned judgment passed by learned District Judge.

13. Mr.Surinder Verma, learned counsel representing the respondents, supported the judgment passed by the learned District Judge. Mr.Verma, while referring to the judgment passed by learned District Judge, strenuously argued that bare perusal of the same suggests that same is based upon correct appreciation of evidence adduced on record by the respective parties and as such there is no scope of interference of this Court, especially in view of the fact that Court below has dealt with each and every aspect of the matter very meticulously. Mr.Verma further contended that bare perusal of the judgment passed by learned trial Court, whereby the suit having been filed by the present plaintiff was dismissed, clearly suggests that evidence led on record by the plaintiff was not read in its right perspective, as a result of which erroneous finding had come on record which was rightly set aside by the learned first appellate Court in the appeal having been preferred by the plaintiff.

14. Mr.Verma further contended that bare perusal of the evidence led on record by the plaintiff clearly suggests that he was electrocuted due to negligence on the part of the defendants and as such he was rightly compensated by the learned District Judge, while decreeing the suit of the plaintiff for compensation. With a view to substantiate aforesaid arguments, Mr.Verma invited the attention of this Court to the oral as well as documentary evidence led on record by the plaintiff to demonstrate that plaintiff successfully proved on record that when he was sleeping on the roof of his house, there was dazzling spark and a big mass of fire got discharged from the electric wire, passing above the house of the plaintiff and said mass of the fire engulfed the plaintiff, as a result of which he suffered injuries on his body and he was unable to walk, sit and sleep properly. He invited the attention of this Court to the medical evidence led on record by the plaintiff to suggest that plaintiff successfully proved on record that in the aforesaid incident he was rendered 40% disable and as such he was entitled to be compensated qua the amount which he actually spent on his treatment.

15. In the aforesaid background, Mr.Verma strenuously argued that there is no illegality and infirmity in the impugned judgment passed by first appellate Court, whereas judgment passed by learned trial Court clearly suggests that same is not based upon proper appreciation of evidence, as such, the same was rightly set aside by the first appellate Court. Mr.Verma further prayed that the appeal filed by the appellant may be dismissed.

16. Minute scrutiny of impugned judgment vis-à-vis evidence, be it ocular or documentary, adduced on record by respective parties, nowhere suggests that there has been misreading and mis-appreciation of evidence by the learned first appellate Court, while decreeing

the suit of the plaintiff after setting aside the judgment and decree passed by learned trial Court below. Rather, this Court is of the view that plaintiff successfully proved on record that he suffered injuries on his person after being electrocuted while he was sleeping on the roof/slab of his house.

17. Plaintiff, with a view to prove his case, examined himself as PW-1 and successfully proved on record the version put forth by him in the plaint by stating that on 16.2.1998, when he was sleeping on the roof of his house, a dazzling spark came from High Tension Wires passing over his house, as a result of which he suffered injuries on his body. He also stated that he was taken to Chandigarh for treatment for such burnt injury on his right arm and leg. He also stated that he suffered 40% disability in the aforesaid accident as was assessed by the doctor. Cross-examination conducted upon this witness suggests that appellants-defendants were not able to extract anything contrary to what he stated in his examination-in-chief, rather plaintiff admitted in his cross-examination that High Tension Line is existing for the last 30-40 years and he has one house at Jarol. The aforesaid statement cannot be read in isolation, especially in view of further statement having been given by plaintiff, wherein he stated that said house was purchased by him from PW-2 Balak Ram. Plaintiff specifically stated that the house in which he is living is in existence for the last 40 to 45 years and the same is *pucca* house. Perusal of cross-examination conducted on the aforesaid plaintiff witness nowhere, suggests that any suggestion worth the name regarding negligence, if any, on his part was put to him, rather question with regard to existence of property and its ownership were put to plaintiff, who successfully proved on record that at the time of accident he was living in the house which was in existence for more than last 40 to 45 years.

18. With a view to prove his case, plaintiff also examined PW-2 Balak Ram and PW-3, Bangalu, who also corroborated the version put forth by the plaintiff. PW-2 specifically stated that earlier he was living in the said house for the last 4-5 years prior to purchase made by the plaintiff. It has also come in his statement that on the date of accident, Balak Ram was sleeping on the roof of the house and accident took place due to sparking of the wires. In his cross-examination, he corroborated the version put forth by the plaintiff that the house, which was sold by him to the plaintiff, was constructed by his ancestors about 30 to 35 years back. Interestingly, cross-examination conducted on this witness, nowhere suggests that suggestion, if any, was put to him that it was only after 1998-99, plaintiff raised fresh construction of the house over the purchased land/ house, rather question with regard to income of the plaintiff were put to this witness.

19. PW-3 specifically stated that he saw dazzling light coming from High Tension Line in the shape of balloon, which fell on the plaintiff Babu Ram. He also stated that thereafter Babu Ram was shifted to local dispensary. Like PW-2, he also stated in his cross-examination that electric wires passing through Jarol are quite old and Balak Ram sold his house to the plaintiff.

20. Apart from above oral evidence, plaintiff also led on record documentary evidence in shape of sale deed Ex.PW-2/A, whereby PW-2 Balak Ram had sold his land comprised in Khasra Nos.2324/1117 and 2324/1117/1, measuring 0-0-9 bigha for total consideration of Rs.50,000/- on 6.8.1999. Perusal of aforesaid sale deed clearly suggests that there is/was a house existing over the land referred hereinabove. Similarly, Jamabandi for the year 1997-98 annexed with sale deed also suggests that Khasra No.2624/1117, measuring 0-1-0 bigha is recorded as ***'Gair Mumkin Makan'*** and as such version put forth by the defendants in their written statement that there is no house of the plaintiff over the disputed land was rightly rejected by learned first appellate Court in appeal having been preferred by the plaintiff.

21. Conjoint reading of the statements of aforesaid plaintiff witnesses, coupled with the documentary evidence led on record by the plaintiff, clearly proves on record that High Tension Lines passes over the house of the plaintiff, which is in existence for more than 35-40 years. It also stands proved on record that at the time of incident, house was owned and possessed by plaintiff, who had purchased it from Balak Ram PW-2.

22. Aforesaid plaintiff witness is unequivocally stated that on that day when plaintiff was sleeping on the roof of this house, dazzling light came from High Tension line in the shape of balloon and engulfed the plaintiff, as a result of which he sustained injuries on his person.

23. Defendant, with a view to refute the claim of the plaintiff, examined one Garza Ram as DW-1, who happened to be Foreman at that relevant time. He in his statement stated that 33 KV HT line is under his supervision and no complaint, whatsoever, was received in the year 1998 from any person. He also stated that there is no house at Jarol, but in his cross-examination stated that High Tension line was installed in the year 1965. In his cross-examination he also admitted that plaintiff suffered burn injuries though exact cause is not known to him. He also stated that he cannot say that the plaintiff was sleeping on 16.2.1998 on the roof of his house. He also stated that he was not aware that the house of the plaintiff is under High Tension line. It has also come in his statement that High Tension line has to be 22 feet from the ground, but he feigned ignorance about the height of the said line from the roof of the house of the plaintiff.

24. DW-2 Surender Kumar, T-mate with Sub Division, Sundernagar, stated that in the event of any fault of the High Tension line, there is automatic tripping. He further stated that plaintiff has built his house in the year 1998, whereas High Tension line was laid much prior to that. In his cross-examination, he also admitted that High Tension line passes over the house of the plaintiff. He further admitted that a person standing on the house of the plaintiff can even touch the said standing person.

25. Perusal of aforesaid statements having been made by the defendant witnesses clearly suggests that there are material contradictions in the stand having been taken by both the aforesaid witnesses with regard to existence of the house of the plaintiff on the spot. DW-1 in his statement stated that there is no house of the plaintiff in Jarol, whereas DW-2 though admitted that the plaintiff has house at Jarol, but, the same was built in the year 1998, whereas High Tension line was laid much prior to that. DW-2 further admitted that High Tension line passes over the house of the plaintiff. As has been discussed above, DW-2 in his statement categorically admitted that person standing on the roof of the house of the plaintiff can even touch the High Tension line, which clearly belies the stand taken by the appellants-defendants in their written statement that there is no house of the plaintiff below the High Tension line and the height of the High Tension line has been properly maintained under the H.P. Electricity Act. Evidence led on record, be it ocular or documentary, nowhere suggests that defendants were able to prove on record that plaintiff raised construction of his house in the year 1998-99, as claimed by DW-2 in his statement. Similarly, no evidence worth the name has been led on record by the defendants to prove the averments contained in the written statement that there is no house of the plaintiff at Jarol below HT line. Perusal of the impugned judgment passed by the learned first appellate Court clearly suggests that court below while concluding that defendant-department was negligent in maintaining the HT line passing over the house of the plaintiff, carefully examined the provisions contained in Indian Electricity Act and Rules, wherein under Rule 80, height of 12 feet is/ was required to be maintained from the upper portion of the roof of the building, but in the instant case, as emerged from the statement of DW-2, there was no distance at all between the roof of the plaintiff and the HT line because he categorically stated that HT line passing over the roof of the plaintiff could even touch the head of the person. Aforesaid statement having been made by DW-2 coupled with the fact that defendants failed to maintain height in terms of Rule 80 of the Indian Electricity Act, as reproduced in the impugned judgment of the trial Court, this Court is unable to accept the contention having been made by Shri Vaidya, learned Senior counsel representing the appellants-defendants, that plaintiff was not able to prove any negligence on the part of the appellants-defendants and as such he was not entitled to any compensation.

26. Conjoint reading of the evidence led on record by the plaintiff as well as defendant clearly proves on record that on ill-fated day plaintiff suffered injuries on his person after being electrocuted. Plaintiff successfully proved on record that house in question was in

existence prior to laying of HT line by the defendants and as such by no stretch of imagination it can be concluded especially, in view of the evidence led on record by the defendant that construction, if any, was raised by the plaintiff after laying of the HT line. Medical evidence led on record by the plaintiff clearly proves on record injuries suffered by the plaintiff during aforesaid incident. PW-4 Dr.L.D. Vaidya specifically proved disability certificate Ex.PW-4/A. Ghanshayam Gupta, also proved on record that on 16.2.1998 plaintiff was admitted in the hospital and thereafter referred to PGI, Chandigarh for better treatment. Prescription slip made at the time of admission of the plaintiff after accident also suggests that the plaintiff had suffered electric shock injuries and even after getting back from the PGI, he was periodically checked up by doctors at Sundernagar. Dr.Anil Chauhan PW-5 also supported the version put forth by the plaintiff that he was treated for electric burn injury and he proved on record discharge certificate Ex.PW-5/A. Cross-examination conducted upon these witnesses nowhere suggests that defendants-appellants were able to extract anything contrary to what they stated in their examination-in–chief. Similarly, there is no mention, if any, with regard to other reason, if any, of injuries allegedly suffered by the plaintiff.

27. Hence, this Court sees no illegality and infirmity in the judgment passed by learned first appellate Court, which is admittedly based upon correct appreciation of evidence adduced on record by the plaintiff. This Court, after carefully examining the entire evidence led on record, has no hesitation to conclude that plaintiff successfully proved on record that he suffered injuries on his body after being electrocuted by the HT wire passing over his house, whereas no positive evidence has been led on record by the defendants, which could persuade this Court to conclude that appellants-defendants were not negligent in maintaining the HT wire, which was admittedly in existence prior to construction of the house in question. Substantial question of law is answered accordingly.

28. Consequently, in view of the aforesaid detailed discussion, this Court sees no illegality and infirmity in the judgment passed by learned first appellate Court and as such the same is upheld and that of the learned trial Court is set aside. Hence, present appeal fails and the same is, accordingly dismissed.

29. Interim direction, if any, is vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Kewal Ram ….Appellant-Defendant
Versus
Murat Singh ….Respondent-Plaintiff

Regular Second Appeal No.253 of 2008
Judgment Reserved on: 23.12.2016
Date of decision: 27.12.2016

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a civil suit for the recovery of Rs.27,000/- pleading that the defendant had offered to purchase apple crop of the orchard of the plaintiff for a sum of Rs.1,01,000/- - defendant paid Rs.76,000/- and remaining amount of Rs.25,000/- was to be made after the sale of the apple- the amount was not paid – hence, the suit was filed – the suit was decreed by the Trial Court – an appeal was filed, which was dismissed- held in second appeal that the plaintiff examined himself and two witnesses to prove his version- oral evidence was corroborated by documents – the defendant denied the version of the plaintiff but did not lead any evidence to prove his version – the evidence was correctly appreciated- appeal dismissed. (Para-18 to 30)

Cases referred:
Rajasthan State Road Transport Corporation and Another vs. Bajrang Lal, 2014 (4) SCC 693
D.R. Rathna Murthy vs. Ramappa, 2011(1) SCC 158
Life Insurance Corporation of India and Another vs. Ram Pal Singh Bisen, 2010(4) SCC 491
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellant: Mr.Y.P. Sood, Advocate.
For the Respondent: Mr.B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

Instant Regular Second Appeal is directed against the judgment and decree dated 25.2.2008 passed by learned District Judge (Forest), Shimla in Civil Appeal No.43-S/13 of 2007/06, affirming the judgment and decree dated 29.11.2005, passed by Civil Judge(Senior Division), Chopal, District Shimla in Civil Suit No.22-1 of 2005, whereby suit for recovery having been filed by the plaintiff-respondent *(hereinafter referred to as the `plaintiff')* has been decreed.

2. Briefly stated the facts, as emerged from the record, are that the plaintiff filed a suit for recovery of a sum of Rs.27,000/- against the defendant in the Court of learned Civil Judge(Senior Division), Chopal, District Shimla, stating therein that the defendant approached him and offered to purchase the apple crop in the apple season of the year 2004 from the apple orchard of plaintiff. Plaintiff further averred that deal was settled between plaintiff and defendant for full and final consideration amounting to Rs.1,01,000/- only. As per plaintiff, defendant made payment of Rs.76,000/- to the plaintiff being part payment of the cost of apple crop but remaining balance payment of Rs.25,000/- was to be made after sale of entire apple crop in the market. Plaintiff further claimed that defendant had agreed in writing and had undertaken to make the remaining payment of the sale of apples in the market. Plaintiff averred in the plaint that defendant acknowledged the liability to pay the balance amount of Rs.25,000/- in favour of plaintiff on 31.8.2004 and beside above, defendant-appellant acknowledged the liability to make payment to the plaintiff on 11.7.2004, on which day he admitted the payment of Rs.11,000/- made by him to the plaintiff on 10.7.2004 and Rs.11,000/- earlier to 10.7.2004. Plaintiff further averred in the plaint that defendant-appellant acknowledged the liability to pay an amount of Rs.25,000/-, being balance payment, payable to the plaintiff, which is still recoverable from the defendant. Since defendant failed to make the payment within the stipulated period, plaintiff claimed an amount of Rs.27,000/- alongwith pending and future interest @ 8% per annum for one year i.e. w.e.f. 11th July, 2004 to 10th July, 2005.

3. Defendant by way of written statement refuted the aforesaid claim of the plaintiff as set up in the plant in toto by stating that he neither approached the plaintiff nor offered to purchase his apple crop. He further stated that no deed was finally settled between him and plaintiff and as such there is no question of payment of Rs.27,000/- and remaining balance of Rs.25,000/-. Defendant also denied that he ever acknowledged the liability to pay the balance amount of Rs.25,000/- to the plaintiff on 31.8.2004.

4. By way of replication, plaintiff reasserted his claim as set up in the plaint controverting the stand taken by the defendant in the written statement in toto.

5. On the basis of aforesaid pleadings learned trial Court below framed following issues:-

"1. Whether the plaintiff is entitled for the relief of recovery of Rs.27,000/- as prayed for? OPP.

2. Whether the suit is not maintainable in the present form? OPD.

3. *Whether the plaintiff has no locus-standi and cause of action to file the present suit? OPD.*

4. *Relief."*

6. Subsequently, learned trial Court vide judgment dated 29.11.2005 decreed the suit of the plaintiff for a sum of Rs.27,000/- and held him entitled for recovery of Rs.27,000/- from defendant with future interest @ 8% per annum from 11th July, 2004 to 10th July, 2005 till the realization of total decreetal amount with entire costs of the suit.

7. Appellant-defendant being aggrieved and dissatisfied with the aforesaid judgment and decree passed by learned trial Court filed an appeal in the Court of learned District Judge, Shimla, which came to be registered as Civil Appeal No.43-S/13 of 2007/06. Further, fact remains that aforesaid appeal, having been preferred by the defendant, was dismissed, as a result of which, judgment and decree passed by learned trial Court came to be upheld.

8. In the aforesaid background, appellant-defendant approached this Court by way of filing instant Regular Second Appeal praying therein for quashing and setting aside the judgments and decrees passed by both the learned Courts below.

9. This Court vide order dated 10.7.2009 admitted the instant appeal on the following substantial question of law:-

> *"Whether the findings recorded by the courts below in the absence of proof of execution and signatures of the appellant on Exhibit PW-1/A and PW-1/B are sustainable in view of the fact that the first appellate court below itself has come to the conclusion that the engtries made in PW-1/A and PW-1/B have not been proved in accordance with Section 67 of the Evidence Act?"*

10. Mr.Y.P. Sood, learned counsel representing the appellant, vehemently argued that the judgments and decrees passed by both the Courts below are not sustainable in the eyes of law as the same are not based upon correct appreciation of evidence. Mr.Sood, while referring to the judgment passed by both the Courts below, further contended that both the Courts below, while decreeing the suit of plaintiff, mis-appreciated and mis-read the entire pleadings and evidence, as a result of which great prejudice has been caused to the appellant-defendant who successfully proved on record that at no point of time he had purchased apple crop of the plaintiff, as alleged in the plaint.

11. With a view to substantiate his arguments that Courts below have failed to appreciate that there has been complete variance in the pleadings and evidence led by the plaintiff, Mr.Sood strenuously argued that bare perusal of plaint suggests that respondent had specifically alleged that out of alleged amount of Rs.1,01,000/-, Rs.76,000/- were paid to him and Rs.25,000/- were agreed to be paid by the appellant lateron. But in evidence, respondent alleged that he had made payment of Rs.11,000/- in two installments; first of Rs.10,000/- and second of Rs.1,000/- and remaining amount of Rs.65,000/- was paid by the defendant on 10th July, 2004. Mr.Sood, while referring to the variance allegedly made by the plaintiff in the plaint as well as in the replication, contended that Courts below miserably failed to appreciate the material variance between the pleadings and proof and as such failed to exercise jurisdiction vested in it in accordance with law, as a result of which findings returned by the appellate Court are vitiated and cannot be allowed to sustain.

12. Mr. Sood, further contended that diary Ex.PW-1/A and pages of the diary Ex.PW-1/B could not be relied upon by the Courts below while fastening the liability on the appellant, especially when entries made in the same were not proved in accordance with Section 67 of the Indian Evidence Act. He further argued that no transaction could be proved, if any, between the parties by placing reliance upon the aforesaid diary Ex.PW-1/A and Ex.PW-1/B and no decree, whatsoever, could be passed by Courts below on the basis of self-created evidence. Mr.Sood, further contended that learned Courts below miserably erred in recording findings on the basis of inadmissible evidence i.e. diary Ex.PW-1/A. He further contended that contents of Ex.PW-1/B

were never proved to have been recorded at the instance of appellant; neither the signatures of the same have been proved to be that of appellant. Since respondent-plaintiff did not lead any evidence as to in whose presence and when entries Ex.PW-1/B were made at the instance of appellant, no decree for recovery of amount as claimed in plaint could be passed against the defendant by the Courts below while placing reliance upon the aforesaid documents and as such judgments passed by both the Courts below deserve to be quashed and set aside.

13. While concluding his arguments, Mr.Sood invited the attention of this Court to the observations/findings returned by first appellate Court that, ***"Though the writing and signatures of the defendant on 12.7.2004 have not been proved in accordance with the provisions of Section 67 of the Indian Evidence Act, yet it appears that this diary was maintained by the plaintiff in the regular course of business",*** to suggest that even first appellate Court was convinced that no reliance, if any, could be placed upon the writings and signatures allegedly made in Diary Ex.PW-2/A and Ex.PW-2/B by the defendant, but despite that, judgment and decree passed by trial Court was upheld, which clearly suggests that there is no application of mind by the learned first appellate Court while analyzing and examining the genuineness and correctness of impugned judgment and decree passed by learned trial Court. In the aforesaid background, Mr.Sood prayed that appeal may be accepted and the judgment and decree passed by the Courts below may be quashed and set aside.

14. In support of his contention Mr.Sood, also placed reliance on the judgments of Hon'ble Apex Court in ***Rajasthan State Road Transport Corporation and Another vs. Bajrang Lal, 2014 (4) SCC 693, D.R. Rathna Murthy vs. Ramappa, 2011(1) SCC 158*** and ***Life Insurance Corporation of India and Another vs. Ram Pal Singh Bisen, 2010(4) SCC 491.***

15. Mr.B.C. Verma, learned counsel representing the respondent supported the judgments and decrees passed by both the Courts below. Mr.Verma vehemently argued that bare perusal of the judgments and decree passed by both the Courts below, nowhere suggests that the same are not based upon correct appreciation of the evidence available on record by the respective parties, rather, close scrutiny of same suggests that Courts below have dealt with each and every aspect of the matter meticulously and as such, there is no scope of interference, whatsoever, by this Court in the concurrent findings of fact and law returned by both the Courts below.

16. With a view to refute the contentions having been made by the counsel representing the appellant, Mr.Verma, invited the attention of this Court to the statements having been adduced on record by the plaintiff witnesses to demonstrate that apart from documentary evidence, Ex.PW-1/A and Ex.PW-1/B, there was overwhelming evidence led on record by the plaintiff to prove that defendant had purchased standing apple crop of the orchard of the plaintiff and in this regard he had paid an amount of Rs.75,000/- to the plaintiff and remaining Rs.25,000/- was agreed to be paid by the defendant after sale of the apple crop. He also refuted the contention put forth on behalf of Mr.Sood, learned counsel representing the appellant-defendant, that no reliance could be placed upon the documentary evidence i.e. Ex.PW-2/A and Ex.PW-2/B since it was not proved in accordance with law. As per Mr.Verma, both the Courts below rightly placed reliance upon the documentary evidence adduced on record by the plaintiff to conclude that an amount of Rs.25,000/- was payable by the defendant to the plaintiff on account of his liability to pay the balance sale consideration to the plaintiff.

17. Mr.B.C. Verma, learned Counsel appearing for the respondent-plaintiff, supported the judgments passed by both the Courts below and vehemently argued that no interference, whatsoever, is warranted in the present facts and circumstances of the case, especially in view of the fact that both the Courts below have meticulously dealt with each and every aspect of the matter. He also urged that scope of interference by this Court is very limited, especially when two Courts have recorded concurrent findings on the facts as well as law. In this regard, to substantiate his aforesaid plea, he placed reliance upon the judgment passed by

Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,* (2015)4 SCC 264.**

18. Perusal of pleadings as well as evidence led on record by respective parties to substantiate their pleadings clearly establish on record that there was a deal between the plaintiff and defendant with regard to apple crop in the apple season of year 2004. As per deal, plaintiff sold entire apple crop in the apple season of year 2004 to the defendant for full and final consideration/costs of Rs.1,01,000/- only. Plaintiff specifically stated in the plaint that out of aforesaid agreed amount, defendant made part payment of Rs.76,000/-, whereas remaining amount of Rs.25,000/- was to be paid after sale of entire apple crop in the market, which was agreed by the defendant in writing and he had undertaken to make the same good after sale of the apple in the market.

19. With a view to substantiate his aforesaid claim, plaintiff examined himself as PW-1 and reiterated the version put forth by him in the plaint by stating that he sold the apple orchard to defendant in the year 2004 for a sale consideration of Rs.1,01,000/-. He further stated that out of agreed amount, an amount of Rs.76,000/- was paid to him by the defendant and remaining amount of Rs.25,000/- was agreed to be paid lateron. It has also come in his statement that Rs.11,000/- were paid in the month of June and an amount of Rs.65,000/- was paid by the defendant on 10th of July. He also stated that he had made entry in his diary on 10.7.2004 and on 11.7.2004 it was acknowledged by the defendant that he has still to make payment of Rs.25,000/- to the plaintiff. Plaintiff further stated before the Court below that on 31.8.2004, one deed was scribed by Jhinu Ram, wherein it was again agreed by the defendant to make payment of Rs.25,000/- to him. Plaintiff also stated before the Court that on 12.7.2005, he deposited an amount of Rs.65,000/- in shape of FDR in the bank at Jhiknipul. He also stated that since defendant failed to make balance amount of Rs.25,000/- to him, he filed a suit for recovery of an amount of Rs.25,000/- alongwith interest. During his statement, he also proved entry allegedly made by him as well as by defendant on 10th and 11th July, 2004 in his diary Ex.PW-1/A. Cross-examination conducted upon this witness, nowhere suggests that defendant was able to extract anything contrary to what plaintiff stated in his examination-in-chief. He specifically denied that no transaction to sell the Orchard to the defendant was ever entered into between him and the defendant for an amount of Rs.1,01,000/-. He also denied the suggestion that no payment of Rs.65,000/- was made by the defendant on 10.7.2004. He further denied the suggestion put to him by the defendant that an amount of Rs.25,000/- is not outstanding against the defendant. Close scrutiny of aforesaid statement having been made by PW-1 clearly proves on record the contents of plaint having been filed by the plaintiff.

20. With a view to substantiate his aforesaid claim, plaintiff also examined PW-2 Sham Singh and PW-3 Jhinu Ram. PW-2 also corroborated the version put forth by the plaintiff with regard to sale of apple orchard to the defendant by the plaintiff for a total consideration of Rs.1,01,000/-. He also supported the version put forth by PW-1 that out of aforesaid amount an amount of Rs.10,000/- was paid in advance in his presence. Similarly, in his cross-examination, defendant was not able to extract anything contrary to what he stated in examination-in-chief, rather he specifically denied the suggestion put to him that no advance payment of Rs.10,000/- was paid by the defendant to the plaintiff.

21. PW-3 Jhinu Ram admitted that he scribed document Ex.PW-3/A, wherein defendant undertook to make balance payment of Rs.25,000/- to the plaintiff. He admitted his signatures on the document Ex.PW-3/A encircled 'B'. He also admitted that defendant acknowledged all the terms and conditions laid down in document Ex.PW-3/A. Cross-examination conducted upon this witness also nowhere, suggests that defendant was able to extract anything contrary to what he stated in his examination-in–chief. He also denied the suggestion put to him by the defendant that apples from the orchard of the plaintiff were not forwarded to the defendant and defendant was not an apple contractor. Aforesaid plaintiff witnesses PW-2 and PW-3 clearly proved the stand of the plaintiff that he had sold apple crop in the year 2004 from his apple orchard to defendant for a total consideration of Rs.1,01,000/-.

Both the aforesaid witnesses categorically stated that an amount of Rs.75,000/- was received by the plaintiff as an advance payment, whereas remaining amount of Rs.25,000/- was to be paid by the defendant after sale of the apple crop. True, it is that to substantiate aforesaid claim, plaintiff also placed reliance upon documentary evidence Ex.PW-1/A and Ex.PW-1/B and stated that in the month of June, 2004, defendant had made payment of Rs.11,000/- and on 10th July, 2004, he had made payment of Rs.65,000/-. Similarly, plaintiff also stated that he had made entry in his diary Ex.PW-2/A, wherein defendant acknowledged that he still to make payment of Rs.25,000/- to the plaintiff. As has been noticed above, that apart from documentary evidence, as discussed above, plaintiff by way of leading cogent and convincing evidence in shape of PW-2 and PW-3 successfully proved on record that he had sold his apple crop to defendant for total consideration of Rs.1,01,000/-, out of which he received Rs.75,000/- in total and as such, it cannot be concluded by trial Court below, while decreeing the suit of the plaintiff, solely placed reliance upon entry made in the diary i.e. Ex.PW-1/A and Ex.PW-1/B. Rather, plaintiff by way of leading oral evidence, as has been discussed above, successfully proved that there was deal between him and defendant with regard to apple crop in the year 2004 and just to substantiate his aforesaid claim, he placed reliance upon documentary evidence, which certainly corroborated oral version put forth by the plaintiff as well as his witnesses.

22. Apart from above, factum with regard to payment of Rs.65,000/- on 10.7.2004 stands duly proved from the statement of PW-4 i.e. Incharge, H.P. State Cooperative Bank, Jhiknipul, who corroborated the version put forth by the plaintiff that on 12.7.2004 he deposited Rs.65,000/- in shape of FDR i.e. Ex.PW-1/D in the name of Murat Singh i.e. plaintiff. There is nothing in cross-examination of this witness, which could be beneficial in any way to the case of defendant. Hence, this Court after conjoint reading of aforesaid statements of plaintiff witnesses has no hesitation to conclude that plaintiff successfully proved on record that defendant owed him Rs.25,000/- as balance payment towards total consideration of Rs.1,01,000/- in terms of oral agreement entered into between him and the plaintiff.

23. At the cost of repetition, it may be stated that oral evidence led on record was sufficient for courts below to conclude that defendant owed Rs.25,000/- to plaintiff on account of balance payment out of total consideration and reliance, if any, placed on record by the courts below, while decreeing the suit of the plaintiff on documentary evidence as discussed above, is only of corroborative nature. If plaint of plaintiff as well as his statement made before the Court is read in its entirety, it nowhere suggests that entire claim of the plaintiff was based upon documentary evidence i.e. diary Ex.PW-2/A and Ex.PW-2/B, rather, same was entered in evidence in support of his claim which he otherwise proved successfully by leading cogent and convincing oral evidence. To the contrary, if the written statement having been filed by the defendant as well as his statement is perused and examined carefully, it is total case of denial. He denied that no payment of Rs.65,000/- was ever made by him to the plaintiff. He also denied that he ever gave undertaking in writing on 31.8.2004, 10.7.2004 and 11.07.2004.

24. Apart from this, defendant did not examine any witness in support of his aforesaid claim, whereas, plaintiff by leading convincing evidence ,as has been discussed above, successfully proved his claim as set up in the plaint. PW-3 Jhinu Ram, who scribed document Ex.PW-3/A successfully proved on record that 31.8.2004 defendant Kewal Ram had acknowledged his liability to pay balance amount of Rs.25,000/- to the plaintiff. Cross-examination conducted upon the aforesaid witness, nowhere suggests that any suggestion was put to him that he had some motive to falsely depose against the defendant. Rather, in cross-examination, he was put a suggestion that the plaintiff never offered his orchard to the defendant for sale which was specifically denied by PW-3 Jhinu Ram. There was no suggestion worth name with regard to document Ex.PW-3/A, which certainly compel this Court to conclude that on 31.8.2004, defendant acknowledged his liability to pay Rs.25,000/- to the plaintiff. Similarly, if document Ex.PW-3/A is taken into consideration, it certainly gives support to the contention of PW-1 that he had made certain entries on 10th and 11th July, 2004, wherein defendant had acknowledged balance payment of Rs.25,000/- payable by him to the plaintiff.

25. This Court, with a view to ascertain the genuineness and correctness of findings returned by the Courts below that "perusal of signatures of defendant appended in diary Ex.PW-1/A are similar to his signatures appended by him on the summons", also perused both the documents which clearly suggests that there is striking similarity between both the signatures allegedly appended by the defendant on both the documents. There cannot be any quarrel with regard to the observation having been made by the learned first appellate Court while rejecting the appeal preferred by the appellant-defendant that writing and signatures of defendant on11.7.2004 have not been proved in accordance with Section 67 of the Indian Evidence Act, but, as has been discussed in detail above, the aforesaid assertion/stand may not have any bearing on the other findings returned by the Courts below, which are otherwise based upon correct appreciation of evidence adduced on record by the plaintiff. Certainly record suggests that writings and signatures of the defendant, as contained in the documentary evidence Ex.PW-2/A, were not proved in accordance with the provisions of Section 67 of the Indian Evidence Act, but as has been observed above, plaintiff, apart from placing reliance upon aforesaid documentary evidence, successfully proved on record by leading oral cogent and convincing evidence that he sold his apple crop to defendant for a total consideration of Rs.1,01,000/-, out of which he had received an amount of Rs.75,000/- from defendant. Since defendant was unable to shatter the testimony of aforesaid plaintiff witnesses, claim set up by the plaintiff could not be defeated merely on the averments contained in the written statement having been filed by the defendant.

26. At this stage, it may be noticed that case of the defendant was of total denial and he, apart from himself, failed to examine any witness in support of his claim. If defendant was seriously aggrieved with the assertion/claim of the plaintiff that defendant appended his signatures on the diary Ex.PW-1/A on 11.7.2004 and acknowledged balance payment, definitely he had option to move an appropriate application before appropriate Court of law for getting his signatures compared from the handwriting expert or Government Examiner of Questioned Documents, but, unfortunately, there is nothing on the file suggestive of the fact that any steps were ever taken by the defendant in this regard. Similarly, if defendant was prejudiced with the observation, if any, made by the learned Court below while recording the statement of PW-1, he had remedy of assailing the same by way of appropriate proceedings before the appropriate court of law.

27. This Court is fully satisfied that both the Courts below have very meticulously dealt with each and every aspect of the matter and there is no scope of interference, whatsoever, in the present matter. Since both the Courts below have returned concurrent findings, which otherwise appear to be based upon proper appreciation of evidence, this Court has very limited jurisdiction/scope to interfere in the matter. In this regard, it would be apt to reproduce the relevant contents of judgment rendered by Hon'ble Apex Court in ***Laxmidevamma's*** case supra, wherein the Court has held as under:

> "16. Based on oral and documentary evidence, both the courts below have recorded concurrent findings of fact that the plaintiffs have established their right in A schedule property. In the light of the concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for reappreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the A schedule property for road and that she could not have full-fledged right and on that premise proceeded to hold that declaration to the plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 CPC, concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."***(p.269)***

28. Hence, this Court after carefully examining the evidence available on record has no hesitation to conclude that apart from documentary evidence Ex.PW-1/A, there was ample evidence led on record by the plaintiff to prove his claim and as such Courts below rightly decreed the suit of the plaintiff for an amount of Rs.27,000/- and there is no illegality and infirmity in the judgments having been passed by both the Courts below. Though writings contained in the document Ex.PW-1/B were not proved in accordance with Section 67 of the Indian Evidence Act, but, oral evidence led on record clearly corroborates the entries made in the diary Ex.PW-1/A. Substantial question is answered accordingly.

29. As far as judgments relied upon by the learned counsel appearing for the appellant-defendant are concerned, this Court is of the view that the same are not applicable in the present facts and circumstances of the case, especially in view of the law laid down by the Hon'ble Apex Court in ***Laxmidevamma's*** case *(supra).*Moreover, this Court, while examining the correctness and genuineness of submissions having been made by the learned counsel representing the appellant, has perused evidence led on record by the respective parties, perusal whereof clearly suggests that the same have been appreciated in its right perspective.

30. In the facts and circumstances discussed above, this Court is of the view that findings returned by the trial Court below, which were further upheld by the first appellate Court, do not warrant any interference of this Court as findings given on the issues framed by the trial Court below as well as specifically taken up by this Court to reach the root of the controversy, appears to be based upon correct appreciation of oral as well as documentary evidence. Hence, the present appeal fails and is dismissed, accordingly. There shall be no order as to costs.

31. Interim order, if any, is vacated. All the miscellaneous applications are disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Parkash Chand & Others ….Appellants-Plaintiffs
Versus
State of H.P. & Others ..Respondents-Defendants

Regular Second Appeal No.436 of 2006.
Judgment Reserved on: 05.12.2016.
Date of decision: 27.12.2016

Code of Civil procedure, 1908- Section 100- Plaintiffs pleaded that their land was acquired for the construction of Chamera Hydro Electric Project Stage-II (NHPC) – Government decided to award Rs.2,50,000/- to the affected families, who were not given employment as per the agreement entered at the times of acquisition – employment or the compensation was not paid to the plaintiffs – hence, the suit was filed for the recovery of compensation- defendants denied the claim of the plaintiffs and asserted that requisite compensation was paid to the plaintiffs – the suit was decreed by the Trial Court- an appeal was preferred, which was allowed and the judgement and decree passed by the Trial Court were set aside – held in second appeal that acquisition was not disputed – it was also not disputed that one member of the family of the ousted was to be provided employment and in the alternative compensation – it is admitted that plaintiffs had received compensation of Rs.2,50,000/- regarding 3-2 bighas of land – plaintiff asserted that they are entitled to financial package regarding 17 biswas of land– record shows that 17 biswas of land was not independent but part of the acquired land – financial package was received by all the legal representatives of P, the previous owner- plaintiffs are not entitled to separate compensation – appeal dismissed. (Para-17 to 28)

For the Appellants: Mr.Anand Sharma, Advocate.

For Respondents 1 & 2: Mr.P.M. Negi, Additional Advocate General with Mr.Ramesh Thakur, Deputy Advocate General.

For Respondent No.3: Mr.Sameer Thakur, Advocate vice Mr.Rajnish Maniktala, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 22.6.2006, passed by the learned District Judge, Chamba, District Chamba, H.P., reversing the judgment and decree dated 5.8.2005, passed by learned Civil Judge(Senior Division), Chamba, District Chamba, whereby the suit filed by the appellants-plaintiffs has been decreed.

2. Briefly stated facts of the case are that the appellant-plaintiffs *(herein after referred to as the `plaintiffs'),* filed a suit for recovery of Rs.2,50,000/- from the defendants being compensation amount in lieu of employment which was to be offered to the family members of oustees of Chamera Hydro Electric Project, Stage-II (NHPC). It is averred by the plaintiffs that the land belonging to them had been acquired on behalf of defendant No.3, Chamera Hydro Electric Project, Stage-II (NHPC) vide notification under Section 4 of the Land Acquisition Act dated 28.4.1988 and during the process of acquisition through private negotiation list of 120 families, whose land had been acquired, was prepared by defendant No.3 as *'oustees'*. It is further averred by the plaintiffs that their names figured at Sr.No.11 of the list of oustees, whereas name of Smt.Ghimo, mother of the plaintiffs, figured at Sr.No.21. It is stated that on 18.11.2002 a High Power Committee constituted by the Government decided that a sum of Rs.2,50,000/- be awarded to the affected families, who were not given any employment as agreed at the time of negotiation between the claimants and Chamera Project Authorities. It is averred by the plaintiffs that uniform rate of compensation i.e. at the rate of Rs.40,000/- per bigha was decided to be paid by defendant No.3, whereas the land valued about Rs.4,00,000/- per bigha. It is further alleged in the plaint that defendant No.3 had deposited Rs.2,50,000/- for each of the 120 families, whose names figured in the list of oustees, and the said amount was deposited on 21.7.2003 with defendant No.2 for payment. It is alleged by the plaintiffs that they approached defendant No.2 for release of Rs.2,50,000/-, but the same was refused without assigning any valid reason. It is further alleged by the plaintiffs that their parents were having land in the same area to the extent of 3-2 bighas, which was also acquired and their names figured at Sr.No.21 in the list, as referred to above, but as their father, namely, Premo had died on 28.3.1994, the name of their mother Smt.Ghimo was shown as one of the oustees in place of their father being widow. It is further averred by the plaintiffs that their mother Smt.Ghimo had died on 7.3.2002, leaving behind Class-I legal heirs. It is also averred by the plaintiffs that since they were not given amount of Rs.2,50,000/-, despite being oustees, as stated above, they were constrained to file Civil Writ Petition No.673/2003, which was withdrawn by them on 23.9.2003 with permission to file Civil Suit in the competent Court of law. Suit in question has been filed by the plaintiffs claiming recovery of Rs.2,50,000/- with costs and interest at the rate of 12% per annum w.e.f. 22.7.2003 with the prayer that the same be decreed.

3. Defendants No.1 and 2, by way of filing written statement, raised various preliminary objections qua maintainability, suppression of material facts and locus standi. On merits, defendants admitted the plaintiffs to be resident of village Jukhradi and owners of land measuring 3-2-16 bighas. It is averred by the defendants that the above said land was owned by the father of plaintiffs, namely, Premo son of Madho son of Paraga, which had been acquired through private negotiation during 1988 vide award No.2/1988, dated 31.12.1988 in Mohal Karian by NHPC Chamera Project6-II. It is further averred by the defendants that the plaintiffs were not owners of the land measuring 4-9-0 bighas, as this land was infact owned by one another Premo son of Mussadi son of Kundan resident of village Karian. Thus, the plaintiffs have

no locus standi as they are suppressing the true facts just to take this benefit twice. It is also alleged that the plaintiffs alongwith their sisters, who are legal heirs of deceased Premo son of Madho, have already been paid sufficient package of Rs.2,50,000/-, which were acknowledged by them and other legal heirs. It is further alleged that at the time of disbursement of package, an amount of Rs.2,50,000/- has been disbursed against Sr.No.21 in the list of oustees to the plaintiffs being legal heirs of Sh.Premo son of Madho. The defendants admitted that matter was discussed in the State Level Meeting held under the Chairmanship of Chief Minister and thereafter High Level Committee was constituted in which 120 families had been identified, who were the land owners and were given sufficient package of Rs.2,50,000/- each in lieu of employment. It is further asserted that perusal of list of oustees clearly shows that the land measuring 4-9-0 bighas was owned by Premo son of Mussadi son of Kundan, which has no concern with the plaintiffs and that the names of plaintiffs No.1 and 2 have been wrongly mentioned in the list of oustees due to typing mistake against entry made at Sr.No.11. In the aforesaid background the defendants prayed for dismissal of the suit.

4. Defendant No.3 also, by way of filing written statement, resisted the suit by raising preliminary objections of jurisdiction and that there was no cause of action against defendant No.3, since the entire amount of land acquired by defendant No.3 has been deposited with defendants No.1 and 2 with regard to land acquired for Chamera Stage-II. It is further alleged by defendant No.3 that no cause of action arose by filing of CWP No.673/2003 by the plaintiffs and subsequently withdrawal thereof. In view of above, defendant No.3 prayed for dismissal of the suit filed by the plaintiffs.

5. The plaintiffs filed replication, whereby they again reaffirmed their own case and refuted the case of defendants as pleaded in the written statement.

6. On the pleadings of the parties, the learned trial Court framed the following issues:-

> "1. Whether the plaintiffs are entitled for recovery of Rs.2.50 lacs from the defendants as alleged? OPP.
>
> 2. Whether the suit is not maintainable as alleged? OPD 1 and 2.
>
> 3. Whether the plaintiffs have no locus standi to file the present suit as alleged? OPD.
>
> 4. Whether this Court has no jurisdiction to try this case as alleged? OPD.
>
> 5. Relief."

7. Learned trial Court vide judgment and decree dated 5.8.2005 decreed the suit of the plaintiffs against defendants No.1 and 2 for recovery of Rs.2,50,000/-, however, dismissed against defendant No.3

8. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, appellants-defendants No.1 and 2 filed an appeal under Section 96 of the Code of Civil Procedure *(for short `CPC')* read with Section 21 of the H.P. Courts Act, assailing therein judgment and decree dated 5.5.2008 passed by learned Civil Judge(Senior Division), Chamba, in the Court of learned District Judge, Chamba.

9. Learned District Judge, Chamba vide impugned judgment and decree dated 22.6.2006 accepted the appeal preferred by the defendants by setting aside the judgment and decree passed by the learned trial Court.

10. In the aforesaid background the present appellants-plaintiffs filed this Regular Second Appeal before this Court.

11. This second appeal was admitted on the following substantial question of law:

"(1) Whether the findings of the learned lower appellate court are based upon misreading of evidence and calls for an interference by this court?

12. Mr.Anand Sharma, learned counsel representing the appellants-plaintiffs, vehemently argued that the judgment passed by the learned first appellate Court is not sustainable in the eyes of law as the same is not based upon correct appreciation of evidence adduced on record by the appellants-plaintiffs and as such same deserves to be quashed and set aside. Mr.Sharma, while referring to the evidence available on record, contended that learned first appellate Court while reversing the judgment and decree passed by the learned trial Court has mis-read and mis-construed the record and has returned the erroneous findings that the plaintiffs are not entitled for compensation to the tune of Rs.2,50,000/- on account of financial package announced by the defendants payable to the oustees in lieu of employment to their family members. Mr.Sharma further contended that it stands duly proved on record that the names of plaintiffs were figuring at Sr.No.11 of the list of oustees prepared by the Department, on the basis of information submitted by the Authorities who had acquired the land on behalf of NHPC. Mr.Sharma furthercontended that learned first appellate Court failed to appreciate that the names of the plaintiffs were included in the list of oustees at Sr.No.11 in the independent capacity since their land measuring 17 biswas was also acquired by the respondents on behalf of NHPC for construction of Dam.

13. With a view to substantiate the aforesaid contentions, Mr.Sharma invited the attention of this Court to Ex.PA i.e.; Jamabandi for the year 1988-89, wherein names of plaintiffs have been reflected as owners in possession of land measuring 0-17 biswas, comprised in Khata No.209/220, Khatauni No.289, Khasra No.196, which was not inherited by the plaintiffs from their parents, but they had purchased the same from the Central Government andsuch land comprised in Khata No.205 min, Khatauni No.285 min, Khasra Nos.46, 86 was acquired independently of Khasra No.196 which actually belonged to theirparents. Mr.Sharma further contended that learned first appellate Court completely ignored mutation No.653 i.e. Ex.PL, whereby the names of the plaintiffs, on the basis of Sale Certificate issued by the Central Government, were incorporated in the Revenue Records and thereafter their names were reflected in the names of list of oustees prepared by the Department for the purpose of granting financial package in terms of understanding arrived at between the NHPC as well as the State Government.

14. Mr.Sharma further contended that learned first appellate Court erred in not taking into consideration the specific pleataken by defendants No.1 and 2 that the plaintiffs-appellants were not entitled for the compensation amount against the name reflected atSr.No.11 in the list of oustees because the same belonged to one Shri Premo son of Shri Mussadi having 14-9 bighas of land. Mr.Sharma also stated that thereis no evidence led on record in this regard by the defendants and as such learned trial Court rightly drawn an adverse inference against defendants No.1 and 2 for having failed to establish the specific plea raised by them in the written statement. In the aforesaid background, Mr.Sharma prayed that suit filed by the appellants-plaintiffs be decreed and the judgment and decree passed by the first appellate Court may be quashed and set aside.

15. Mr.P.M. Negi, learned Additional Advocate General duly assisted by Mr.Ramesh Thakur, learned Deputy Advocate General, supported the judgment and decree passed by the learned first appellate Court. Mr.Negi vehemently argued that the bare perusal of judgment passed by the first appellate Court suggests that the same is based upon correct appreciation of evidence available on record and there is no illegality and infirmity in the same and the same needs to be upheld. While refuting the contention having been put forth on behalf of Mr.Anand Sharma, Mr.Negi stated that it duly stands proved on record that on account of land, the plaintiffs, being sons of Premo, had already received financial package alongwith other family members to the tune of Rs.2,50,000/- qua the land which was acquired for the construction of Dam by the said Authorities and as such they were estopped from filing independent claim of financial package on the ground that since their land measuring 17 biswas was also acquired in independent capacity, they are also entitled to financial package to the tune of Rs.2,50,000/-.

Mr.Negi further stated that appellants-plaintiffs have no concern with the another financial package sanctioned in the name of Premo son of Mussadi son of Kundan and as such learned appellate Court rightly concluded that the plaintiffs cannot be allowed to take advantage of typographical mistake crept during preparation of list of oustees. While concluding his arguments, Mr.Negi, while referring to the statement of Tehsildar (Relief & Rehabilitation), strenuously argued that if for the sake of arguments it is presumed that 17 biswas of land, independent of land measuring 3-2-16 bighas, owned bytheir father was also acquired apart from land measuring 3-2-16 bighas, even then it stands proved thatthe same was also included in the aforesaid land measuring 3-2-16 bighas and accordingly financial package to the tune of Rs.2,50,000/- was made in favour of the plaintiffs as well as other legal representatives of late Shri Premo son of Madho. While concluding his arguments, Mr.Negi strenuously argued that once it stands duly proved on record that the plaintiffs are the sons of late Shri Premo, whose land measuring 3-2-16 bighas has admittedly been acquired and qua the same compensation has been given to him and as such they cannot be allowed to claim financial package independently on account of their names reflected at Sr.No.11 in the list of oustees because aforesaid financial package is payable to the oustees in terms ofnegotiation held with the claimants and National Hydroelectric Power Corporation Limited *(for short `NHPC')* Authorities. In the aforesaid background, Mr.Negi prayed that present petition may be dismissed.

16. I have heard learned counsel for the parties and gone through the record of the case.

17. Close scrutiny of pleadings as well as documents available on record suggests that defendants acquired huge chunk of land for the construction of Chamera Hydro Electric Project, Stage-II, Karian, Tehsil and District Chamba, H.P. through a private negotiation held with the claimants and National Hydroelectric Power Corporation Limited *(for short `NHPC')* Authorities. Record further suggests that in lieu of land acquired by the Authorities, uniform compensation at the rate of Rs.40,000/- per bigha was paid to all the affected persons. It has been specifically pleaded in the pleadings of both the parties that at the time of acquisition of land, Memorandum of Understanding *(for short `MOU')* was entered into between the State Government as well as defendant No.3-Chamera Hydro Electric Project, wherein condition was stipulated that one member of the family of oustees would be provided job in upcoming Project. Perusal of Ex.PC, i.e. proceedings of meeting of High Powered Committee held on 18.11.2002, suggests that Authorities decided to give alternative package in lieu of employment to the affected families @ Rs.3,00,000/- in cases of Chamera-I and Rs.2,50,000/- per affected family in cases of Chamera-II. Perusal of aforesaid document further suggests that it was agreed that amount in question would be given in one installment to Chamera-II and in two equal installments to Chamera-1. With the declaration of aforesaid package, no claim from any person regarding employment in Chamera-I and Chamera-II was to be entertained by the Authorities as far as employment is concerned. It also emerge from the record that after aforesaid decision having been taken, the Authorities concerned prepared list of oustees so that due and admissible compensation in terms of aforesaid decision having been arrived at between defendants No.1, 2 and 3 is paid to the affected families whose land was acquired for the construction of Project. In the present case plaintiffs; namely; Parkash Chand, Baldev and Mohinder, who admittedly are sons of sons of late Shri Premo son of Shri Madho, residents of village Jukhrari, P.O. Bharis Kothi, Tehsil and District Chamba, H.P. filed a suit for recovery of Rs.2,50,000/- in terms of financial package announced by the Authorities in lieu of employment to one member of the affected families. As per plaintiffs, they owned and possessed land measuring 3-2-16 bighas in the name of Smt.Ghimo wife of late Shri Premo. Plaintiffs further claimed that apart from above, they had land measuring 4-9 bighas at village Karian, Tehsil and District Chamba, which was also acquired by the State of Himachal Pradesh for and on behalf of defendant No.3 vide notification under Section 4 of the Land Acquisition Act on 28.4.1988. Plaintiffs, on the basis of list of 120 families prepared by the Authorities, claimed that they being oustees, whose names figured at Sr.No.11, are also entitled to the financial package to the tune of Rs.2,50,000/-, but despite several requests their claim has not been entertained by the Authorities. As per own case

of the plaintiffs, their parents were having land in the same area which was also acquired by the Authorities and they were also included in the list of oustees at Sr.No.21. It is admitted case of the plaintiffs that on account of acquisition of land measuring 3-2 bighas belonging to their parents they had received financial package to the tune of Rs.2,50,000/- which was lateron received by all the Legal Representatives including plaintiffs in equal share. In nutshell plaintiffs' case is that since 17 biswas of land independent of 3-2 bighas of land owned and possessed by their parents was also acquired for the purpose of construction of Project, they are also entitled to financial package announced by the Authorities in lieu of employment toone member of the family in independent capacity.

18. On the other hand, defendants refuted the claim of the plaintiffs by stating that plaintiffs have no concern with the another financial package sanctioned in favour of Shri Premo son of Mussadi son of Shri Kundan, whose name has been reflected at Sr.No.11 of the list of oustees. Defendants further claimed that the plaintiffs cannot be allowed to take advantage of typographical mistake committed by the staff while preparing list of oustees. As per defendants, plaintiffs being legal heirs of Shri Premo son of Shri Madho son of Shri Parago, have no concern with the land of Shri Premo son of Shri Mossadi son of Shri Kundan and as such they cannot take the benefit of financial package twice, especially when it is admitted case of the plaintiffs that they have already received financial package of Rs.2,50,000/- on account of land measuring 3-2-16 bighas owned and possessed by their father Premo son of Madho.

19. Interestingly, in the present case, plaintiffs initially claimed that their land measuring 4-9 bighas at village Karian Tehsil and District Chamba was acquired by the State of Himachal Pradesh on behalf of NHPC and as such they are entitled to financial package on account of the same in terms of their names figuring at Sr.No.11 in the list of oustees.

20. While refuting the stand having been taken by defendants in the written statement, plaintiffs by way of replication claimed that they filed suit being owners of land measuring 0-17 bighas, comprising of Khasra No.196, as depicted in Jamabandi for the year 1988-89. Plaintiffs further claimed that note appended in red ink in the aforesaid Jamabandi clearly suggests that land in question was acquired by the State of Himachal Pradesh for NHPC on 31.3.1994. Plaintiffs further claimed in the replication that their father namely; Premo; was owner in possession of 3-2-16 bighas, whereas they are owners to the extent of 0-17 bighas of land which was entered in their names and had allegedly purchased it from custodian department vide mutation No.633 attested on 28.2.1989. Plaintiffs in their replication have categorically stated that amount of package has been rightly sanctioned in their names, but in the column of land it has been wrongly mentioned as 4 bighas 9 biswas of land.

21. Learned trial Court on the basis of documentary evidence adduced on record decreed the suit of the plaintiffs and held them entitled to the amount of Rs.2,50,000/-, whereas, learned first appellate Court in appeal having been filed by the defendants reversed the judgment and decree passed by the learned trial Court and came to the conclusion that the plaintiffs have already availed the package of Rs.2,50,000/- qua the land which was earlier in the name of their late father Shri Premo son of Shri Madho which was passed to them after the death of their mother, Smt.Ghimmo. Learned first appellate Court also concluded that land measuring 0-17 bighas, comprising of Khasra No.196, which was allegedly purchased by the plaintiffs from the custodian department already stood included in the land of Smt.Ghimmo widow of Shri Premo son of Shri Madho and as such, no separate compensation to the tune of Rs.2,50,000/- can be claimed by the plaintiffs qua the land measuring 0-17 bighas. Learned first appellate Court also observed that plaintiffs have already availed package to the tune of Rs.2,50,000/- being legal heirs of late Smt.Ghimmo widow of late Shri Premo alongwith their sisters being Class-I heirs and as such they cannot be allowed to claim the aforesaid package again and again on the strength of name reflected qua Sr.No.11 in the list of oustees.

22. In the instant case, plaintiff Mohinder Kumar, with a view to prove his case appeared as PW-1 and stated that 17 biswas of land owned and possessed by them had been acquired by defendant No.3, but none of the plaintiffs was provided job. He also stated that his

father also owned land in village Jukhrari which was acquired by NHPC but since he alongwith his other two brothers were not provided job by NHPC, they were held entitled to financial package to the tune of Rs.2,50,000/- each. It is the admitted case of the plaintiffs that they have already received an amount of Rs.2,50,000/- on account of financial package announced by the respondents in lieu of job. Whereas, defendants with a view to refute the claim of plaintiffs cited one Shri Sirikanth, Naib Tehsildar (R&R), D.C. Office, Chamba, who in his statement deposed that Land Acquisition cases are being dealt with by him in the capacity of Naib Tehsildar (Relief & Rehabilitation). He also stated that defendant No.3 had deposited an amount of Rs.2,50,000/- for all the oustees of Chamera-II. He also stated that the plaintiffs filed present suit with regard to land of other person namely; Premo son of Mussadi son of Kundan and they have no connection with the same. He also stated that land measuring 17 biswas, comprising Khasra No.196, Ex.PA, is already included in the land measuring 3-2-16 bighas and the land shown vide Ex.PB had also been shown/entered in the award Mark DA which also includes some other land besides the land shown vide Ex.PA and Ex.PB in the names of Premo son of Madho.

23. This Court with a view to ascertain the genuineness and correctness of aforesaid statements having been made by Shri Sirikant, Naib Tehsildar (Relief & Rehabilitation) perused documentary evidence available on record. While going through the record, this Court could lay its hand to Ex.PM i.e. certificate issued by Land Acquisition Officer, Chamera Hydro Electric Project, Karian, District Chamba. Perusal of aforesaid certificate suggests that land measuring 2-5-16 bighas owned and possessed by Premo son of Madho son of Parago, resident of Mohal Karian, Tehsil and District Chamba, Hadbast No.174, Khatauni No.106/164 min, Kitta 5, measuring 3-2 bighas was acquired by NHPC vide award dated 31.12.1988. It also emerge from this certificate that total area of the land was 3-4 bighas and Shri Premo son of Madho had 1/3rd share in the same and as such he was owner in possession of the land measuring 2-5-16 bighas. It clearly emerge from Ex.PM that NHPC had acquired 2-5-16 bighas of land belonging to Premo son of Madho son of Parago, resident of village Karian vide award dated 31.12.1988. Since aforesaid land was acquired by the defendants, family members of late Shri Premo were entitled to financial package as per understanding arrived at between the Authorities. It is also not disputed that qua the aforesaid land having been acquired by the defendants, plaintiffs being LRs of Premo son of Madho received complete financial package which was further divided into equal shares of the legal representatives of deceased Premo son of Madho. Now, if Ex.PA and Ex.PB having been placed on record by the plaintiffs are perused, land measuring 3-2 bighas, which was in the name of their father late Shri Premo, was acquired. As per own case of plaintiffs, as stated in replication, land measuring 17 biswas comprising Khasra No.196 was acquired by the defendants independently of land measuring 2-5-16 bighas owned and possessed by their father late Shri Premo. But perusal of Ex.PA and Ex.PB clearly suggests that land measuring 3-2-16 bighas in total belonging to late Shri Premo son of Madho son of Parago was acquired by the defendants which clearly corroborates the version put forth on behalf of Shri Sirikanth, Tehsildar (Relif & Rehabilitation), D.C. Office, Chamba. He categorically stated that land measuring 17 biswas comprising in Khasra No.196 was already included in land measuring 3-2-16 bighas at the time of passing award Mark DB. If land measuring 17 biswas is added to 2-5-16 bighas, it exactly comes 3-2-16 bighas, meaning thereby that learned first appellate Court rightly came to conclusion that land measuring 17 biawas comprising in Khasra No.196 Ex.PA stands included in land measuring 3-2-16 bighas and as such plaintiffs are not entitled to another financial package in lieu of employment since they have already received financial package to the tune of Rs.2,50,000/- on account of acquisition of their land measuring 3-2-16 bighas. Hence, this Court after perusing aforesaid documents Ex.PM, Ex.PA and Ex.PB, sees no illegality and infirmity in the findings returned by the first appellate Court and by no stretch of imagination it can be said that first appellate Court misread and misconstrued the documentary evidence available on record while denying the claim of plaintiffs.

24. Similarly, list of persons, who have applied/submitted their family details for employment in Chamera Hydro Electric Project Stage-II, suggests that name of Smt.Ghimo Devi widow of Premo i.e. father of plaintiffs was reflected at Sr.No.21. It also emerge from the list that

land measuring 3-2-0 bighas was acquired. Similarly, at Sr.No.11 of the list, name of some Parkash son of Premo resident of village Jukhrari has been shown, but, the name of the land owner whose land was acquired by the NHPC has been shown as Premo son of Mussadi. More interestingly qua the name at Sr.No.11 land measuring 4-9-0 bighas has been shown to be acquired by the Authorities.

25. Since total land acquired qua Sr.No.11 has been shown to be 4-9-0 bighas, version put forth on behalf of the plaintiffs that his name stands figured at Sr.No.11 cannot be accepted for two reasons; firstly, name shown at Sr.No.11 is of Parkash son of Premo son of Mussadi, secondly, qua Sr.No.11, 4-9-0 bighas land has been shown to be acquired by the Authorities, whereas, as per own case of plaintiffs 17 biswas of land owned and possessed by them independent of their father was acquired. This Court, after carefully examining the particulars given qua Sr.No.11 in the list of oustees has reason to accept the version put forth on behalf of defendants that Parkash son of Premo son of Mussadi is different from plaintiffs and they are not entitled to second financial package on account of 17 biswas of land owned and possessed by them independent of their father. This Court after carefully examining the aforesaid aspect of the matter is convinced and satisfied that land measuring 17 biswas owned and possessed by the plaintiffs was included by the authorities while passing award and thereafter the plaintiffs being LRs of late Shri Premo son of Shri Madho son of Shri Parago has received an amount of Rs.2,50,000/- on account of financial package in lieu of job which was to be offered to one member of the family of the oustees whose land was acquired by the Authorities for construction of Project.

26. This Court also viewed this case from another angle. As per understanding arrived at between Government and the NHPC, one member of the family was to be offered employment in lieu of acquisition of their land but lateron it was resolved that in lieu of employment one time financial package to the tune of Rs.2,50,000/- would be provided to the affected family. Hence, this Court sees no force in the claim of the plaintiffs that since 17 biswas of land owned and possessed by them independent of their father was acquired by the Authorities, they are also entitled to financial package because admittedly financial package is payable in lieu of employment which was to be offered to one member of the family.

27. In the present case, since it is admitted case of the parties that financial package to the tune of Rs.2,50,000/- stands received by all the Legal Representatives of deceased Premo, there is no force in the claim of the plaintiffs and as such same was rightly rejected by the first appellate Court. Hence, this Court, after examining the evidence available on record, sees no force in the contentions having been put forth on behalf of the plaintiffs that learned first appellate Court, while reversing the judgment and decree passed by the learned trial Court, misread and misconstrued the evidence. Rather, perusal of evidence available on record clearly suggests that the learned trial Court failed to arrive at correct decision on the basis of evidence available on record. Substantial question is answered accordingly.

28. In view of the detailed discussion made hereinabove, this appeal is dismissed. The judgment passed by the learned first appellate Court below is upheld and that of the learned trial Court is quashed and set aside.There shall be no order as to costs. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

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BEFORE HON'BLE MR. JUSTICE P. S. RANA, J

Ricky Sharma s/o Sh. Raman Sharma & Others .....Petitioners/Accused

Versus

State of H.P. and others ……Non-petitioners

Cr.MMO No. 318/2016
Date of order: 27.12.2016

Code of Criminal Procedure, 1973- Section 482 and 320- Petition has been filed for quashing of the FIR registered for the commission of offences punishable under Sections 498-A, 406 and 109 of I.P.C. – it has been plead that matter has been compromised between the parties and permission be granted to compound the matter - since parties have voluntarily compromised the matter; therefore, permission granted- FIR and consequent proceeding ordered to be quashed.

(Para-5 to 7)

Case referred:

JT Narinder Singh and others Vs. State of Punjab and another, 2014(4) SC 573

For petitioners	:	Mr. H. S. Rana, Advocate
For non-petitioners No.1 & 2	:	Mr. M. L. Chauhan, Addl.A. G.
For non-petitioner No.3/ complainant	:	Mr. Sanjeev Kuthiala, Advocate

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Present petition is filed under Section 482 read with section 320 Code of Criminal Procedure 1973 on behalf of petitioners for giving permission to compound criminal offence punishable under sections 498-A, 406 & 109 IPC relating to FIR No.100/2011 dated 20.4.2011 registered at Police Station Baddi District Solan (H.P.).

Brief facts of case:

2. It is alleged by prosecution that on dated 20.04.2011 at village Basanti Bagh Baddi accused persons committed cruelty upon complainant by way of beating her and also by way of expelling her from matrimonial house. It is alleged by prosecution that accused persons were entrusted with ishtridhan of complainant and accused persons converted ishtridhan to their personal use. After investigation challan filed against accused persons before Judicial Magistrate Ist Class Court No.2 Nalagarh Distt. Solan (H.P.) and Judicial Magistrate Ist Class Court No.2 Nalagarh framed charge against accused persons on dated 09.09.2013 under sections 498-A, 406 & 109 IPC. Accused persons did not plead guilty and claimed trial. Learned Trial Court listed the case for prosecution evidence.

3. Court heard learned Advocate appearing on behalf of petitioners and learned Additional Advocate General appearing on behalf of non-petitioners No.1 & 2 and also heard Smt. Shruti Sharma complainant present in person . Court also perused the entire records carefully.

4. Following points arises for determination:

1) Whether petition filed under Section 482 read with section 320 Code of Criminal Procedure 1973 is liable to be accepted as mentioned in memorandum of grounds of petition?

3) Final order.

Findings upon point No.1 with reasons:

5. Submission of learned Advocate appearing on behalf of petitioners that lawful compromise has been executed inter se parties in matrimonial dispute and permission to compound the present case be granted is accepted for reasons hereinafter mentioned. In the present case Court recorded statement of complainant namely Shruti Sharma and also recorded statements of accused persons namely Ricky Sharma, Raman Kumar, Asha Kiran, Pradeep Thakur, Punam Thakur and Ramesh Sharma placed on record. Accused persons have also paid Rs.4,60,000/- (Four lac sixty thousand) to complainant in Court by way of drafts No.258668 and 010675.

6. Hon'ble Apex Court of India in ruling reported in **2014(4) SC 573 JT Narinder Singh and others Vs. State of Punjab and another** held that following criminal cases should not

be compounded. (1) Murder criminal case (2) Rape criminal case (3) Dacoity criminal case (4) Prevention of Corruption Act criminal case (5) Criminal cases filed under section 307 IPC. Hon'ble Apex Court of India in ruling cited supra held that following criminal cases should be compounded. (1) Commercial transaction criminal cases (2) Matrimonial disputes criminal cases (3) Family disputes criminal cases. It is held that present case falls in the category of matrimonial dispute criminal case. Court is of the opinion that it is expedient in the ends of justice to give permission to compound the present case. Hence permission to compound the present case is granted in the ends of justice while exercising inherent powers under section 482 Code of Criminal Procedure 1973. Point No.1 is answered in affirmative.

Point No.2 (Final Order).

7. In view of findings upon point No.1 present petition filed under Section 482 read with section 320 of Code of Criminal Procedure 1973 is allowed and permission to compound criminal case No.90/2 of 2011 title State Vs. Ricky Sharma and others pending before learned Judicial Magistrate Court No.2 Nalagarh Distt. Solan (H.P.) under sections 498-A, 406 and 109 IPC is granted in the ends of justice and accused persons are acquitted qua criminal offence punishable under sections 498-A, 406 & 109 IPC. Statement(s) of complainant Smt. Shruti Sharma and accused persons namely Ricky Sharma, Raman Kumar, Asha Kiran, Pradeep Thakur, Punam Thakur and Ramesh Sharma recorded on 27.12.2016 will form part and parcel of order. File of learned Trial Court alongwith certified copy of order be sent back forthwith for compliance. Cr.MMO No.318/2016 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR.JUSTICE SANDEEP SHARMA, J.

Surinder Kumar & Others ….Appellant-Plaintiffs

Versus

Smt. Sumati Kumari Joshi & Others ….Respondents-Defendants

Regular Second Appeal No.315 of 2006
Date of decision: 27.12.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit for declaration pleading that he had become the owner of the suit land by abandonment or in the alternative by adverse possession- defendant denied the claim of the plaintiff and set up a counter-claim- the suit was dismissed by the Trial Court and counter-claim was decreed – plaintiff filed an appeal, which was dismissed – held in second appeal thatthe suit was dismissed and counter claim was decreed – a decree of possession was passed in favour of the defendants – appeal was filed against the dismissal of the suit and decree of the counter claim – counter claim is treated as suit for all intents and purposes – separate appeal was required to be filed regarding the decree of the counter-claim – a single appeal was not maintainable – appeal dismissed. (Para- 24 to 48)

Cases referred:

Rajni Rani and Anothr versus Khairati Lal and Others, (2015)2 SCC 682
Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11
Narhari and others vs. Shanker and others, AIR 1953 S.C.419
Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202
Tamilnad Mercantile Bank Shareholders welfare Association(2) versus S.C.Sekar and others (2009)2 Supreme Court Cases 784
B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 Supreme Court Cases 123
Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilala Kabrawala and others, AIR 1964 SC 11
Laxmidevamma and Others vs. Ranganath and Others, (2015)4 SCC 264

For the Appellants: Mr.Bhupender Gupta, Senior Advocate with Mr.Neeraj Gupta, Advocate.
For Respondents No.1to 20 Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Sandeep Sharma, J.

This appeal has been filed by the appellants-plaintiffs against the judgment and decree dated 23.3.2006, passed by the learned Additional District Judge (Presiding Officer), Fast Track Court, Solan Camp at Nalagarh, District Solan, H.P., affirming the judgment and decree dated 30.03.2005, passed by the learned Civil Judge(Senior Division), Nalagarh, whereby the suit filed by the predecessor-in-interest of the appellants-plaintiffs *(hereinafter referred to as the `plaintiffs')* has been dismissed.

2. Briefly stated the facts, as emerged from the record, are that appellants-plaintiffs are legal heirs of original plaintiff Kishori Lal, who died during the pendency of the suit. It is averred in the plaint that the suit filed by the predecessor-in-interest of the plaintiffs was for declaration that he had become owner of suit property comprised in Khasra Nos.926, 927, 928, 1058 and 1059, measuring 421.71 sq.mtrs. and plot comprised in Khasra No.1051, measuring 26.25 sq.meters, situated in up-Mohal New Nalagarh by abandonment, alternatively by adverse possession.

3. It is averred in the plaint that respondents-defendants *(hereinafter referred to as the 'defendants')* are the progeny of Nand Karan who might be living in Nalagarh Town and his share might have been devolved in favour of his heirs, if any. It is further averred that Dwarka Dass, Piara Lal and Sukhdev were seen by deceased plaintiff Kishori Lal. They were Gautam Brahmins and predecessor-in-interest of the plaintiffs was also stated to be Gautam Brahmin. The aforesaid Dwarka Dass, Piara Lal and Sukhdev left Nalagarh Town before the partition of the country and settled in Delhi and when left Nalagarh, they handed over the property to predecessor-in-interest of the plaintiffs i.e. Kishori Lal and asked him to construct his house etc. Consequently, predecessor-in-interest of the plaintiffs constructed his house over the suit property by spending huge amount and started living there. But, when after 2-3 years all the aforesaid persons namely; Dwarka Dass, Piara Lal and Sukhdev came back and saw the predecessor-in-interest of the plaintiffs living in the house upon the suit property, which was constructed by him in the year 1951 and which construction was within their knowledge, predecessor-in-interest of the plaintiffs proclaimed himself to be owner in possession of the said property because from 1951 till date neither the aforesaid persons during their life time nor their progeny ever objected the same.

4. It is further averred in the plaint that the defendants were not born in Nalagarh and have neither Ration Card nor names in the Voter List, whereas the predecessor-in-interest of the plaintiffs lived in the house over the suit land and has electric meter and water connection since 1962 in the name of his son Ashok Kumar. It is further averred that the possession of predecessor-in-interest of the plaintiffs has also been recognized and recorded in the settlement record by Settlement Officer at the time of Settlement of the town. The entry in the revenue record in the column of ownership is nothing but since the names were continuing so it continued and no interference was made in this column of ownership by Settlement Authority. The fact remains that predecessor-in-interest of defendants never interfered in the possessary rights of plaintiffs.

5. It is further averred in the plaint that the value of the land during the year 1948 was not more than 48 to 50 rupees and relations between both the families were cordial. The owners abandoned this property in favour of deceased plaintiff Kishori Lal on 26 Bhadhon of Bikrami year 2004 corresponding to the year 1948. In the aforesaid background the predecessor-in-interest of the plaintiffs filed a civil suit.

6. Defendants, by way of filing written statement, resisted and contested the claim of the plaintiffs. They also filed counter claim against the plaintiffs. In the written statement, defendants admitted the possession of Kishori Lal over land measuring 421-71 sq.mtrs., but denied the plea of abandonment. It was pleaded that house of Kishori Lal had collapsed and in the year 1958 he was allowed by the then owners to occupy two rooms in the house situated over Khasra Nos.926, 927, 928, 1058 and 1059, total land measuring 421-71 sq.mtrs. as licensee till he was not able to construct his own house. Now, with the death of Kishori Lal, the license stands extinguished. It is averred by the defendants that no construction was made by Kishori Lal over this land.

7. As regards land comprised in Khasra No.1051 measuring 26.25 sq.mtrs. it is averred that Kishori Lal had never been in possession of this land. The defendants-respondents filed counter claim for possession of suit property measuring 421.71sq.mtrs. They prayed for injunction to restrain the plaintiffs from changing the nature of this land and from demolishing the structure. Qua Khasra No.1051, defendants sought an injunction to restrain plaintiffs from disposing of the same. In the aforesaid background the defendants prayed for dismissal of the suit.

8. The predecessor-in-interest of the plaintiffs filed replication-cum-written statement to the counter claim, whereby the averments of the plaint are re-asserted and that of counter claim are denied. It is pleaded that Kishori Lal during his life time raised construction which was never objected and even if the plea of licensee taken by defendants does not sustain since licence has become irrevocable in view of the fact that Kishori Lal was allowed to raise construction on this land.

9. On the pleadings of the parties, the learned trial Court framed the following issues:-

> "1. Whether predecessor-in-title of defendants have abandoned the rights qua suit property in favour of plaintiff, if so, its effect? OPP.
>
> 2. Whether the plaintiff has acquired title qua the suit land by way of adverse possession in the alternative? OPP.
>
> 3. Whether the plaintiff is entitled for the declaration that he is owner in possession of the suit land? OPP.
>
> 4. Whether the plaintiff is also entitled qua correction of revenue record vis-à-vis injunction, as prayed? OPP.
>
> 5. Whether the plaintiff has no cause of action and locus standi, as alleged? OPD.
>
> 6. Whether the suit of the plaintiff is not maintainable? OPD.
>
> 7. Whether the plaintiff is estopped to file the present suit by his admission, acts and omission? OPD.
>
> 8. Whether deceased Kishori Lal was a licensee in possession over the suit property, as alleged? OP-Counter Claimants
>
> 9. Whether Counter claimants are entitled for the relief of possession qua suit land, as prayed? OP-Counter Claimants
>
> 10. Whether counter claimants are entitled for the relief of permanent prohibitory injunction, as prayed?OP-Counter Claimants
>
> 11. Whether there is no cause of action for filing counter-claim, as alleged? OPP.
>
> 12. Whether the counter claim is not maintainable? OPP.
>
> 13. Relief."

10. Learned trial Court vide common judgment and decree dated 30.03.2005 dismissed the suit of the plaintiffs and decreed the counter claim filed by the defendants.

11. Feeling aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned trial Court, whereby suit filed by the plaintiffs-appellants was dismissed and counter claim by the defendants-respondents were decreed, appellants-plaintiffs filed an appeal assailing therein judgment and decree dated 30.03.2005 passed by learned Civil Judge(Senior Division), Nalagarh, in the Court of learned Additional District Judge (Presiding Officer, Fast Track Court), Solan camp at Nalagarh.

12. Learned Additional District Judge (Presiding Officer, Fast Track Court), Solan, Camp at Nalagarh vide judgment and decree dated 23.3.2006 dismissed the appeal preferred by the plaintiffs-appellants by affirming the judgment and decree passed by the learned trial Court. Learned first appellate Court also affirmed the decree passed by the learned trial Court in the counter claim.

13. In the aforesaid background, the present appellants-plaintiffs filed this Regular Second Appeal before this Court, details whereof have already been given above.

14. This second appeal was admitted on the following substantial question of law:

"(1) When the defendants-respondents admitted the possession of the plaintiffs-appellants over the suit land and also acknowledged the plaintiffs-appellants having raised permanent structure long before the institution of suit and counter claim, have not both the Courts below acted in excess of their jurisdiction in decreeing the counter claim granting decree for possession to the defendants-respondents by dismantling the structure of the plaintiffs by ignoring from consideration the provisions of Specific Relief Act, whereby it was imperative for the Courts below to have seen the feasibility of compensating the defendants in terms of money?

2. When the defendants themselves set up a case of creation of license in favour of the plaintiffs and admitted the raising of permanent structures by the plaintiffs over the suit property, was not the same resulted in creation of permanent license as per the provisions of Section 60 of the Easement Act? Have not both the Courts below acted with material illegality and irregularity in mechanically passing the decree for possession by removal of structures when the defendants or their predecessors never revoked the alleged license and acaquiesced in the acts of the plaintiffs in raising permanent structures over the suit land?

3. Whether both the Courts below have committed grave error of jurisdiction in granting the decree for possession by dismantling the structures by ignoring the fact that the counter claim filed by the defendants-respondents was beyond the period of limitation, as per the facts established on the record?

4. Whether findings of both the Courts below that plaintiffs-appellants have failed to prove that adverse possession are the result of misreading of Ex.DA and other documents which were inadmissible in evidence and further failing to consider that the presumption attached to the revenue entries stood duly rebutted on account of rival claim put forth by the parties. Have not both the Courts below committed grave error of law in misconstruing and misapplying correct principles of law while deciding the issue of adverse possession?

5. Whether both the Courts below have acted with material illegality in not property appreciating the contention put forth by the plaintiffs regarding abandonment of the right by the predecessor-in-interest of defendants-respondents in favour of the plaintiffs-appellants when the value of the

property in suit at the relevant time was less than Rs.100 and for creation of such right no registered document was required?

6. When the counter claim filed by the defendants-respondents was not in consonance with the provisions of Code of Civil procedure and valuation, are not the judgments and decrees passed b y both the Courts below illegal, erroneous and perverse and stand vitiated?"

15. At this stage, it may be noticed that today i.e. on 27th December, 2016, when this matter was listed before this Court,attention of Mr.Bhupender Gupta, Senior Advocate, representing the appellants-plaintiffs was invited towards the judgment passed by Hon'ble Apex Court in ***Rajni Rani and Anothr versus Khairati Lal and Others, (2015)2 SCC 682*** and ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilal Kabrawala and others, AIR 1964 SC 11***, which was further followed by this Court while dismissing ***RSA No.293 of 2006***, *titled as* ***Piar Chand & Others versus Ranjeet Singh & Others,*** wherein Hon'ble Apex Court has held that while dismissing the counter claim, Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree and same needs to be laid challenge, if any, by way of filing separate appeal affixing required court fee.

16. In view of aforesaid law having been laid down by the Hon'ble Apex Court, this Court deemed it fit to frame additional substantial question of law for proper adjudication of the case at hand. The additional substantial question of law is as under:-

1. "Whether the learned First Appellate Court has erred in entertaining the composite appeal having been preferred by the appellants-plaintiffs against the judgment and decree passed by learned trial Court dismissing the suit of the plaintiffs and decreeing the counter claim preferred by the defendants-respondents that too without affixing separate/ requisite court fee as far as counter claim is concerned.

17. Mr. Bhupender Gupta, learned Senior Advocate, vehemently argued that the judgments passed by both the Courts below are not sustainable as the same are not based upon the correct appreciation of the evidence adduced on record by the respective parties and as such, same deserves to be quashed and set-aside. Mr. Gupta, further contended that bare perusal of the of the judgments passed by both the Courts below suggests that evidence led on record by the appellants-plaintiffs has not been read in its right perspective and as such, great prejudice has been caused to the appellants-plaintiffs against whom decree for possession has been passed.

18. Mr.Gupta, while making his submission qua the additional issue having been framed by this Court, contended that genuine and legitimate claim of the appellants-plaintiffs cannot be allowed to be defeated on mere technicalities and this Court has wide power to ignore such technicalities and can proceed ahead to decide the matter on the basis of the evidence adduced on record by the respective parties to do substantive justice in the matter. Mr.Gupta, further claimed that the learned trial Court while dismissing the suit of the plaintiffs decreed the counter claim of the defendants-respondents and appellants-plaintiffs rightly preferred composite appeal against the same before the learned District Judge laying challenge therein to the composite decree passed in the suit as well as in the counter claim in favour of the defendants. He further contended that no appeal, if any, could be filed without there being any decree and as such, appellants-plaintiffs had no option but to file composite appeal against the impugned judgment and decree, whereby suit of the plaintiffs-appellants was dismissed and counter claim of the defendants-respondents was decreed.

19. In the aforesaid background, Mr.Gupta, strenuously argued that the counter claim filed by the defendants-respondents deserve to be dismissed after setting aside the judgment and decree passed by the Courts below. In support of his contention Mr. Gupta, also placed reliance on the judgments of Hon'ble Apex Court in ***Narhari and others vs. Shanker and others, AIR 1953 S.C.419, Gangadhar and another vs. Shri Raj Kumar, AIR(1983) Supreme Court 1202, Tamilnad Mercantile Bank Shareholders welfare Association(2)***

versus S.C.Sekar and others (2009)2 Supreme Court Cases 784 and B.S. Sheshagiri Setty and others versus State of Karnataka and others (2016)2 Supreme Court Cases 123.

20. Mr.Gupta,Learned Senior Counsel, vehemently argued that the impugned judgment and decree passed by learned first appellate is not sustainable in the eye of law as the same is not based upon correct appreciation of evidence as well as law on point. Mr.Gupta contended that bare perusal of impugned judgment passed by learned first appellate Court suggests that the same is based on conjectures and surmises and learned first appellate Court has fallen in grave error while affirming the judgment and decree passed by the learned trial Court that too on the very flimsy grounds.

21. Mr.Ajay Sharma, learned Senior counsel appearing for the respondents-defendants, supported the judgment passed by the learned first appellate Court. Mr. Sharma, vehemently argued that bare perusal of the judgment passed by the learned first appellate Court suggests that the same is based upon correct appreciation of evidence adduced on record by the respective parties and as such, there is no scope of interference, whatsoever, by this Court especially in view of the concurrentfindings of fact recorded by the Court below. He further contended that the present appeal is not maintainable in view of the law laid down by the Hon'ble Apex Court in ***Rajni Rani and another vs. Khairati Lal and Others, (2015) 2 SCC 682,*** which was further followed by this Court while passing ***judgment dated 16.9.2016 in RSA No.293 of 2006.***Mr. Sharma also placed reliance on the judgment of Hon'ble Apex Court in ***Laxmidas Dayabhai Kabrawala vs. Nanabhai Chunilala Kabrawala and others, AIR 1964 SC 11.***

22. Mr. Sharma, while concluding his arguments, further contended that apart from above, this Court has very limited power while exercising power under Section 100 CPC to re-appreciate the evidence and as such, he placed reliance on the judgment passed by Hon'ble Apex Court in ***Laxmidevamma and Others vs. Ranganath and Others,*** **(2015)4 SCC 264**, herein below:-

> "16. Based on oral and documentary evidence, both the Courts below have recorded concurrent findings of fact that plaintiffs have established their right in 'A' schedule property. In the light of concurrent findings of fact, no substantial questions of law arose in the High Court and there was no substantial ground for re-appreciation of evidence. While so, the High Court proceeded to observe that the first plaintiff has earmarked the 'A' schedule property for road and that she could not have full fledged right and on that premise proceeded to hold that declaration to plaintiffs' right cannot be granted. In exercise of jurisdiction under Section 100 C.P.C., concurrent findings of fact cannot be upset by the High Court unless the findings so recorded are shown to be perverse. In our considered view, the High Court did not keep in view that the concurrent findings recorded by the Courts below, are based on oral and documentary evidence and the judgment of the High Court cannot be sustained."

23. I have heard learned counsel for the parties and have gone through the record of the case.

24. Keeping in view the specific objection with regard to maintainability having been raised by the appellants-plaintiffs in the light of the judgment passed by the Hon'ble Apex Court, this Court deems it fit to take additional substantial question of law framed by this Court at first instance for adjudication.

25. Perusal of the counter claim filed on behalf of the defendants-respondents suggests that while filing written statement they asserted counter claim but fact remains that no requisite fee was paid on the aforesaid counter claim. The appellants-plaintiffs denied the aforesaid counter claim of the respondents-defendants terming the same to be false and claimed that there was no negligence on the part of the appellants-plaintiffs as claimed in the counter claim.

26. Careful perusal of the trial court record further suggests that appellants-plaintiffs refuted the aforesaid counter claim of the respondents-defendants by way of replication as well as by filing separate written statement. However, the fact remains that learned trial Court after framing issues, as have been reproduced above, dismissed the suit of the plaintiffs and decreed the cross-objection having been filed by the respondents-defendants. Operative part of the judgment and decree passed by the learned trial Court clearly suggests that the learned trial Court dismissed the suit of the appellants-plaintiffs, whereas decreed the counter claim of ownership and possession preferred on behalf of the respondents-defendants. Careful perusal of the decree sheet available on record suggests that decree for possession was passed in favour of the respondents-defendants and against the appellants-plaintiffs.

27. Careful perusal of the decree, as referred, hereinabove, suggests as follows:-

> "The cumulative effect of the aforesaid discussions and findings is that the plaintiff failed to establish the claim. Accordingly, suit stands dismissed, however, counter claimants are successful and counter claim stands decreed with cost. They are entitled for decree of possession qua the suit property comprised in Khewat/Khatauni Nos.141/185 bearing Khasra No.926, 927, 928, 1058 and 1059, total measuring 421.71 sq.mtrs alongwith house which was on licence with deceased plaintiff and further L.R.'s of deceased plaintiff are directed to surrender and handover the possession to the counter-claimants. However, they are at liberty to take material of so stated existing construction of kitchen, bathroom, latrine over suit property after putting counter-claimants in possession of the suit property by dismantling the said structure at their own cost. Consequently, a decree for injunction is also passed in favour of the counter-claimants as prayed."

28. Perusal of aforesaid decree prepared by the learned trial Court, while dismissing the suit and accepting the counter claim of the defendants, clearly suggests that proper decree was drawn as far as acceptance of the counter claim filed by the defendants is concerned.

29. Appellants-plaintiffs, being aggrieved with the aforesaid judgment and decree, approached the learned District Judge by way of an appeal under Section 96 CPC laying therein challenge to aforesaid judgment and decree passed by the learned trial Court. At this stage, it would be appropriate to reproduce cause title/ head note of appeal preferred by the appellants-plaintiffs before the learned District Judge, which reads thus:-

> "Appeal against the judgment and decree dated 30.3.2005 passed by the learned trial court Civil Judge(Senior Division), Nalagarh in a civil suit No.230/1 of 1999 and counter claim No.55/1 of 2004, titled as Kishori Lal v ersus Sumati Devi and others, whereby the suit of the appellants/plaintiffs has been dismissed and the counter claim of the respondents/defendants/ counter claimants has been decreed with costs."

30. Careful perusal of aforesaid cause title as well as relief claimed in the appeal clearly suggests that appellants-plaintiffs before the learned first appellate Court prayed that the appeal filed by them be accepted with costs and the judgment and decree dated 30.3.2005 passed by learned trial Court be set aside, but there is no prayer, if any, for setting aside the judgment and decree passed by the learned trial Court, whereby counter claim filed by the defendants-respondents have been decreed and they were declared owners in possession of the suit property.

31. Before adverting to the submissions having been made on behalf of the learned counsel representing both the parties, it would be appropriate to refer to relevant provisions of law applicable in the present case i.e. Order 8 Rule 6A:

> "6A. Counter claim by defendant.- (1) A defendant in a suit may, in addition to his right of pleading a set off under rule 6, set up, by way of counter claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of

suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter claim is in the nature of a claim for damages or not:

Provided that such counter claim shall not exceed the pecuniary limits of the jurisdiction of the court.

(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter claim of the defendant within such period as may be fixed by the court.

(4) The counter claim shall be treated as a plaint and governed by the rules applicable to plaints."

32. Aforesaid provisions of law entitles defendant in a suit to set up counter claim against the claim of the plaintiff in respect of cause of action accruing to him against the plaintiff either before or after filing the suit, but definitely before defendant files his defence or before the time stipulated for delivering the defence is expired. Needless to say that aforesaid right of filing counter claim is in addition to his right of pleading as set up in Rule 6. Further perusal of aforesaid provisions of law suggests that counter claim, if any, filed on behalf of the defendant would be treated as a plaint and same would be governed by Rules applicable to the plaint. Similarly, counter claims filed on behalf of the defendant would have same effect as a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and the counter claim.

33. Similarly, Rule 6A(3) enables the plaintiff to file a written statement, if any, to the counter claim filed by the defendant. Rule 6D specifically provides that in case suit of the plaintiff is stayed, discontinued or dismissed, the counter claim filed on behalf of the defendant would nevertheless be proceeded with.

34. Similarly, Rule 6E provides that if plaintiff fails to file reply to the counter claim made by the defendant, the Court may pronounce judgment against the plaintiff in relation to the counter-claim made against him/her, or make such order in relation to the counter-claim as it deems fit. It would be relevant here to refer to Order VIII Rule 6F:

"6F. Relief to defendant where counter-claim succeeds.- Where in any suit a set-off or counter-claim is established as a defence against the plaintiffs claim and any balance is found due to the plaintiff or the defendant, as the case may be , the Court may give judgment to the party entitled to such balance."

35**.** Perusal of aforesaid Order VIII Rule 6F clearly suggests that where in any suit a set-off or counter claim is established as a defence against the plaintiffs' claim and any balance is found due to the plaintiff or the defendant, Court may give judgment to the party entitled to such balance. Further perusal of Order VIII Rule 6G suggests that no pleadings, if any, subsequent to the written statement filed by a defendant other than by way of defence to set up a claim can be presented except with the leave of Court.

36. Under Order VIII Rule 10 when any party fails to file written statement as required under rule 1 or rule 9 within the stipulated time, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up.

37. Careful perusal of aforesaid provisions of law clearly suggests that counter claim, if any, preferred by the defendant in the suit is in nature of cross suit and even if suit is dismissed counter claim would remain alive for adjudication. Since counter claim is in nature of cross suit, defendant is required to pay the requisite court fee on the valuation of counter claim.

It has been specifically provided in the aforesaid provisions that the plaintiff is obliged to file a written statement qua counter claim and in case of default court can pronounce the judgment against the plaintiff in relation to the counter claim put forth by the defendant as it has an independent status. As per Rule 6A(2), the Court is required to pronounce a final judgment in the same suit both on the original claim and also on the counter-claim.

38. In the present case, as clearly emerged from the judgment passed by the learned trial Court, learned trial Court effectively determined the rights of the parties on the basis of counter claim as well as written statement thereto filed by the respective parties and as such it attained the status of decree. It would be profitable here to reproduce definition of the term *'decree'* as contained in Section 2(2) of CPC:-

> *"2.(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [1][* * *] Section 144, but shall not include –*
>
> *(a) any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b) any order of dismissal for default.*
>
> *Explanation- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"*

39. Close scrutiny of aforesaid definition of "decree" clearly suggests that there should be formal expression of adjudication by the Court while determining the rights of the parties with regard to controversy in the suit, which would also include the rejection of plaint. Similarly, determination should be conclusive determination resulting in a formal expression of the adjudication. It is settled principle that once the matter in controversy has received judicial determination, the suit results in a decree, either in favour of the plaintiff or in favour of the defendant.

40. In this regard, it would be appropriate to place reliance on the judgment of the Hon'ble Apex Court in ***Rajni Rani and Another vs. Khairati Lal and Others,*** **(2015)2 SCC 682**, wherein the Court has held as under:-

> "16. We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible."

41. After perusing aforesaid judgment passed by Hon'ble Apex Court, this Court need not to elaborate further on the issue at hand because Hon'ble Apex Court has categorically held that if by virtue of order of the Court rights have finally been adjudicated, it would assume the status of decree. Hon'ble Apex Court has also stated that Court may or may not draw a formal decree but if rights are finally adjudicated, it would assume the status of a decree. Learned Apex Court has further held that in such like situation order passed by trial Judge has the status of decree and challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee.

42. If the matter is viewed from another angle, admittedly appellants-plaintiffs filed suit for declaration that they became owners of the suit property as detailed hereinabove by abandonment and alternative by adverse possession. Aforesaid claim having been set up by the plaintiffs in the present suit was dismissed; meaning thereby plaintiffs were not declared as owners of the suit land. Whereas, in the aforesaid suit having been filed by the plaintiffs, defendants filed written statement-cum-counter claim seeking declaration to the effect that they may be declared owners in possession of the suit property, which relief was extended by the trial Court by decreeing the counter claim of the defendants declaring them to be the owners in possession of the suit property.

43. Since, as has been observed above, no challenge has been laid to the judgment and decree passed by the trial Court decreeing the counter claim of the defendants, whereby they have been declared to be owners in possession of the suit property, composite appeal laying therein challenge to the judgment and decree passed by learned Civil Judge(Senior Division), Nalagarh, District Solan, in Civil Suit No.230/1 of 1999 was not maintainable. Moreover, relief as claimed in the appeal having been filed by the appellants-plaintiffs could not be extended to them without setting aside the judgment and decree passed in the counter claim in favour of the defendants. Once defendants have been declared to be owners in possession of the suit property by the trial Court while decreeing their counter claim, it is not understood how relief as prayed for in Civil suit having been filed by the plaintiffs could be extended without setting aside the judgment and decree passed in the counter claim.

44. Accordingly, in view of the detailed discussion made hereinabove as well as law laid down by Hon'ble Apex Court, this Court sees no force in the contention put forth on behalf of the counsel representing the appellants-plaintiffs that in the absence of specific decree drawn by learned trial Court at the time of decreeing the counter claim filed by the defendants, plaintiffs could not file separate appeal. Additional substantial question of law is answered accordingly.

45. Consequently, in view of the detailed discussion made hereinabove, this Court is of the view that learned first appellate Court erred in entertaining the composite appeal having been preferred on behalf of the appellants-plaintiffs laying challenge therein to the judgment passed by the learned trial Court dismissing the suit of the appellants-plaintiffs as well as decreeing the counter claim preferred on behalf of the defendants-respondents. In view of the law laid down by the Hon'ble Apex Court *(supra)* as well as provisions contained in the law as discussed above, appellants-plaintiffs being aggrieved with the dismissal of the suit and decreeing the counter claim ought to have filed separate appeals by affixing separate court fee and composite appeal, as has been preferred in the present case, was not maintainable. In view of the aforesaid findings having been returned by this Court on the additional substantial question of law, other substantial questions of law have become redundant and as such, are not required to be answered at this stage.

47. As far as judgments relied upon by the learned counsel appearing for the appellants-plaintiffs are concerned, this Court is of the view that the same are not applicable in the present facts and circumstances of the case, especially in view of the law laid down by the Hon'ble Apex Court *(supra).*

48. In view of the detailed discussion made hereinabove, as well as latest law laid down by the Hon'ble Apex Court in ***Rajni Rani's*** case *(supra)***,** the present appeal is not maintainable and the same is accordingly dismissed. Interim order, if any, stands vacated. All miscellaneous applications are disposed of.

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Joginder Singh ….Petitioner.
Versus
State of Himachal Pradesh ….Respondent.

Cr.R. No. : 33 of 2010.
Reserved on: 15.12.2016.
Decided on: 28.12.2016.

Punjab Excise Act, 1914- Section 61(i)(a)- Accused was found in possession of 12 bottles of country liquor – he was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed- held, that only three bottles were sent for analysis out of which two were found to be country liquor – no permit is required for possessing two bottles and the prosecution version that the accused was found in possession of 12 bottles was not proved- revision petition allowed and judgments of Trial Court and Appellate Court set aside- accused acquitted.(Para-9 to 14)

Cases referred:
State of H.P. versus Ramesh Chand, Latest HLJ 2007 (HP) 1017
Dharam Pal and another v. State of Himachal Pradesh, 2009 (2) Shim. LC 208

For the petitioner Mr. Kapil Dev Sood, Sr. Advocate with Mr. Rajnish K. Lal, Advocate.
For the respondent Mr. Vikram Thakur and Mr. Punit Rajta, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way this revision petition, petitioner/accused has challenged the judgment passed by the Court of learned Additional Sessions Judge, Fast Track Court, Hamirpur, in Criminal Appeal No. 36 of 2007, dated 15.01.2010, vide which learned Appellate Court, while dismissing the appeal filed by the present petitioner, upheld the judgment of conviction and sentence imposed upon the present petitioner by the Court of learned Chief Judicial Magistrate, Hamirpur, in Case No. 206-I-05/20-III-06, dated 16.05.2007, whereby learned trial Court convicted the present petitioner for commission of offence punishable under Section 61 (1) (a) of Punjab Excise Act, as applicable to State of Himachal Pradesh (hereinafter referred to as 'Act') sentenced him to undergo simple imprisonment for a period of three months and to pay a fine of Rs. 5,000/- for commission of offence punishable under Section 61 (1) (a) of the Act.

2. The case of the prosecution was that on 29.04.2005, at about 6:00 p.m. when PW5 ASI Chaman Lal and HHC Jagat Ram were present at main bazaar, a secret information was received that Joginder Singh (petitioner/ accused) had kept huge quantity of liquor and in case search was made, the same could be recovered. As per the prosecution, on the basis of said information, rukka Ext. PW5/A was prepared, which was sent to Police Station, on the basis of which, FIR Ext. PW5/B was registered. Witnesses PW2 Kishore Chand and PW1 Anil Kumar were associated and the search of shop of accused was conducted in the presence of said witnesses, which led to recovery of 12 bottles of country liquor bearing mark Una No. 1, each containing 750 ml. of country liquor. Permit was demanded from the accused for possessing the bottles which could not be produced by him. Out of bottles so seized from the accused, three bottles were retained as samples which were sent to C.T.L. Kandaghat for chemical analysis through PW4 Constable Chaman Lal. Result of chemical analysis Ext. PW5/E revealed that each sample of country liquor contained 50 % proof alcohol in it. After the completion of investigation, challan was filed in the Court and as a prima facie case was found against the accused, he was

accordingly charged for commission of offence punishable under Section under Section 61 (1) (a) of Punjab Excise Act, as applicable to State of Himachal Pradesh, to which he pleaded not guilty and claimed trial.

3. On the basis of evidence led by the prosecution both ocular as well as documentary, learned trial Court held that prosecution was able to prove its case against the accused that he was found in possession of country liquor in excess of the limit of retail sale and he had failed to produce any permit for possessing them as was required in law. On these bases, it was held by the learned trial Court that accused had violated the provisions of Section 61 (1) (a) of the Act and it convicted the accused.

4. Feeling aggrieved by the judgment so passed by the learned trial Court, accused filed an appeal which was dismissed by learned Appellate Court vide judgment dated 15.01.2010. While upholding the judgment of conviction passed by the learned trial Court it was held by the learned Appellate Court that the prosecution had established the case against the appellant/accused beyond the shadow of reasonable doubt and learned trial Court had correctly awarded the sentence of three months' simple imprisonment alongwith fine of Rs. 5,000/- on the accused as 12 bottles of country liquor, brand Una No. 1, were recovered from the accused and such type of liquor smuggling was causing loss to the State Exchequer.

5. The judgments so passed against the accused by both the learned Courts below are under challenge by way of this revision petition.

6. Mr. Kapil Dev Sood, learned senior counsel appearing for the petitioner has argued that the judgment of conviction passed against the accused by the learned trial Court as well as judgment passed by learned Appellate Court are perverse because learned trial Court as well as learned Appellate Court failed to appreciate that the prosecution was not able to prove that the petitioner in fact was in possession of 12 bottles of country liquor. According to Mr. Sood it was admitted case of the prosecution that out of 12 bottles allegedly seized from the accused, only three were sent for chemical analysis. It was argued and urged by Mr. Sood that as only three bottles were sent for chemical analysis, it could not be assumed that remaining 9 bottles which were allegedly recovered from the accused were also containing country liquor. Mr. Sood further argued that out of three bottles which were allegedly recovered from the petitioner containing country liquor and sent for chemical analysis, a perusal of the report of Chemical Examiner demonstrated that country liquor was found in only two of them. He drew attention of this Court to report of the Chemical Examiner Ext. PW5/E, as per which opinion given after the chemical analysis of the samples of country liquor bottles was as under.

> *"Opinion:- The samples of country liquor lots No. 1479 and 1479/2 contain 50.0 % proof alcohol strength each."*

On the strength of the opinion so given by the chemical examiner, it was argued by Mr. Sood that as prosecution could prove on record that only two bottles allegedly recovered from the accused were containing country liquor and the same were within the permissible limit, his conviction for violating the provisions of Section 61 (1) (a) of the Punjab Excise Act as applicable to the State of Himachal Pradesh was totally perverse. On these bases, it was submitted by Mr. Sood that the judgment of conviction passed by the learned Trial Court and upheld by learned Appellate Court was liable to be set aside.

7. On the other hand, Mr. Vikram Thakur, learned Deputy Advocate General argued that though Ext. PW5/E does refer to country liquor having been found only in two bottles out of three bottles sent to CTL Kandaghat but this did not absolve the petitioner from the commission of offence for which he stood convicted by both the learned Courts below. Mr. Thakur further argued that it was a matter of record that petitioner was apprehended with 12 bottles of country liquor. On these bases, it was urged by Mr. Thakur that learned Courts below rightly held the accused guilty of the offence for which he was charged with and the same did not call for any interference.

8. I have heard the learned senior counsel appearing for the petitioner as well as learned Deputy Advocate General and also gone through the records of the case as well as the judgments passed by both the Courts below.

9. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

10. It is a matter of record that out of 12 bottles which were allegedly recovered from the petitioner, three were retained as samples, which as per the prosecution were sent to CTL Kandaghat for chemical analysis. It is also a matter of record that report of the Chemical Examiner, H.P.C.T.L. Kandaghat is to the effect that samples of country liquor, lot No. 1479/1 and 1479/2 contained 50% proof alcohol strength each. There is no opinion qua sample of country liquor "lot No. 1479/3". A perusal of this document further shows that there is some interpolation/overwriting in the same and that numerical figure "2" mentioned in the opinion pertaining to lot No. 1479/3 had been subsequently converted into "3". Be that as it may, the fact of the matter still remains that as per the report of the Chemical Examiner, only two samples were found to be containing 50% proof of alcohol strength each. Chemical Examiner was not examined as a witness by the prosecution. It is not a disputed issue that no permit is required for possessing two bottles of country liquor. From the record it cannot be said that prosecution was able to prove that accused in fact was in the possession of 12 bottles of country liquor without a permit. Prosecution was not even been able to prove that accused was in possession of three bottles of country liquor. Therefore, in these circumstances, when the prosecution was not able to demonstrate from the material produced on record that the accused in fact was in possession of bottles of country liquor in excess of what is permitted without a permit, learned trial Court erred in convicting accused for violating provisions of Section 61 (1) (a) of the Act and learned Appellate Court also erred in upholding the judgment of conviction so passed by the learned trial Court. Both the learned Courts below erred in not appreciating that in the absence of any evidence to demonstrate that the petitioner was possessing more than the permissible limit of country liquor bottles, he could not have been convicted for violating the provisions of Section 61 (1) (a) of the Act.

11. This Court in ***2003 CR.L.J. 1346, Mahajan v. State of Himachal Pradesh, Cr. Rev. No. 69 of 2000, dated 02.05.2002*** has held.

> *"In exercise of the powers conferred by Ss. 5 and 58 of the Punjab Excise Act, the Governor, Himachal Pradesh on 29-3-1985 issued an order bearing No. EXN.F(1)-4/76 published in Himachal Rajpatra (Extra-ordinary) on 30-3-1985 prescribing the limit for possession of Indian made foreign spirit (for short, IMFS) in respect of the areas/territories comprised in Himachal Pradesh immediately before 1st November, 1966. This order was issued by way of amendment of O. 2 of Himachal Pradesh Intoxicants Licence and Sale Orders, 1965. The relevant order reads:-*
>
> *"2-A. Limit for retail possession:*
>
> *The following are the maximum quantities of intoxicants which can be sold in each transaction in retail sale under the Punjab Excise Act, 1914, in the said area:-*

(1)	*Foreign spirit*	*Two bottles each of the capacity of 750 ml.*
(2)	*Beer whether imported or made in India.*	*Twelve bottles each of the capacity of 650 ml.*
(3)	*Cider (liquor manufactured by fermentation of juice of any fruit) whether imported or made in India.*	*Six quarter bottles.*
(4)	*Country liquor*	*Two bottles each of the capacity of 750 ml.*
(5)	*Country fermented liquor.*	*Six quart bottles.*
(6)	*Bhang*	*100 grams.*
(7)	*Rectified spirit*	*One pint of 375 ml.*
(8)	*Denatured spirit*	*One bottle of 650 ml.*

Note.—The limit of transportation mentioned at Items Nos. (1) and (2) above shall be alternative with the limit mentioned at Item No. (4) :

Provided that a person may, for bona fide consumption by him, the members of his family, or his guest, purchase, transport and possess foreign spirit up to 12 bottles of the capacity of 750 ml. each inclusive of imported spirit and 36 bottles of the capacity of 650 ml. each of Beer on the authority of a permit in Form L-50 granted by the Excise Officer, holding the charge of the District, on payment of a permit fee according to the following scale for a financial year or part thereof:-

Quantity	*Permit fee*
Exceeding six bottles of IMFS of 750 ml. each and 12 bottles of 650 ml. each of Beer but not exceeding 12 bottles of IMFS and 36 bottles of Beer.	*Fifty rupees only*

Note :-- The possession limit by one family living in a separate and distinct premises will be six bottles of IMFS of 750 ml. each and 24 bottles of Beer of 650 ml. each at one time. Imported liquor will be considered as part of stocks of IMFS and bottles of foreign liquor which may be of one litre or two litres will be converted, for this purpose, to the limits prescribed for IMFS in 750 ml. bottles:

Provided further that in case of possession and purchase of denatured spirit for industrial purposes, a permit may be obtained from the Excise Officers of the 1st Class as declared by the State Government."

(Emphasis supplied)

In view of the above quoted order issued by the State Government, the permissible prescribed limit for possession of Indian made Foreign Spirit without permit at one time by a family is six bottles of IMFS of 750 ml. each and 24 bottles of Beer of 650 ml. each.

In the present case, as per the prosecution story, eight bottles of XXX Rum were recovered from the possession of the accused. Admittedly, samples out of only three bottles were taken by the Investigating Officer and sent for analysis. Such samples were found to be of IMFS vide report Ex. P.W.5/E.

In view of such report, at the most, the prosecution has been able to prove the possession of the accused only qua three bottles of IMFS. Nothing has come on

the record to show that the remaining five bottles alleged to have been recovered from the accused also contained IMFS.

Before the accused could be convicted for the offence, the prosecution was obliged to prove that he was in conscious possession of IMFS in excess of the prescribed limit of six bottles of 750 ml. each. The prosecution, as stated above, could prove the possession of the accused only qua three bottles, which possession is below the prescribed limit. The conviction and sentence imposed upon the accused by the two Courts below, on this short ground alone cannot be sustained."

12. This Court in ***Latest HLJ 2007 (HP) 1017, State of H.P. versus Ramesh Chand, Cr. Appeal No. 159 of 2000, decided on 21.06.2007*** has held.

"It is well settled law that in appeal against acquittal if two views are reasonably possible of the evidence on the record, then the view in support of acquittal of the case should be preferred. In the instant case the regrettable features are that the respondent was alleged to have been found in possession of 12 bottles of IMFL near the bus stand Sujanpur and it has come in evidence that many persons were present during that time but no attempt was made to associate an independent witness by the police in order to inspire confidence in the prosecution case in view of the fact that no article connecting the accused was found in his ruck-sack. Secondly, out of 12 bottles of IMFL, samples of only three bottles were taken, so the prosecution has left us in lurk as to what another nine bottles contained. Thirdly, there is no link evidence, who had taken the case property to the police station; further LHC Mahant Ram (PW-4) is stated to have taken the sample for analysis to Chemical Laboratory, Kandaghat, but as PW-4 did not whisper even a single word about it. No one came forward to say that the case property/samples were not tempered withy. It is imperative on the prosecution to over-rule the possibility of tempering with the case property/or the samples till its examination. Since link evidence is missing in the instant case, benefit of which has to be given to the accused. Lastly, the seal with which the case property was sealed was not produced by LHC Mahant Ram, with whom it was entrusted. In view of the above discrepancies, case of the prosecution does not inspire confidence and conviction cannot be sustained on the version given by the official witnesses before the trial court. Accordingly, the impugned judgment of acquittal cannot be disturbed.

For the reasons aforesaid, the appeal merits dismissal which is accordingly dismissed. The respondent is discharged of the bail bonds, entered upon by him during the proceedings of the trial."

13. This Court in ***2009 (2) Shim. LC 208, Dharam Pal and another v. State of Himachal Pradesh, Cr. Rev. No. 4 of 2003, dated 8th April, 2009*** has held.

"According to prosecution, 48 bottles were recovered from the van. The prosecution case is that samples were taken only from four bottles which were ultimately sent for chemical examination and report of the Chemical Examiner Ex.PW-5/F was obtained. In Mahajan Vs. State of Himachal Pradesh, 2003 Cr. L.J. 1346, 8 bottles of XXX Rum were recovered but samples were taken from three bottles and such samples were found to be of IMFS. On those facts a learned Single Judge of this Court in para 12 has held as follows:

> *"In view of such report, at the most, the prosecution has been able to prove the possession of the accused only qua three bottles of IMFS. Nothing has come on the record to show that the remaining five bottles alleged to have been recovered from the accused also contained IMFS."*

There is nothing on record to show that the bottles from which the samples were not taken were in fact containing liquor. In other words, there is no worth

believing material on record to show that 44 bottles were containing liquor. Therefore, prosecution case at its best is that four bottles were containing liquor."

14. In view of discussion held above as well as the law laid down by this Court, this revision petition is allowed and judgment of conviction and sentence imposed upon the petitioner by the Court of learned Chief Judicial Magistrate, Hamirpur, in case No. 206-I-05/20-III-06, dated 16.05.2007, is set aside alongwith judgment passed in Criminal Appeal No. 36 of 2007, dated 15.01.2010 by the Court of learned Additional Sessions Judge, Fast Track Court, Hamirpur. Petitioner is acquitted of the offence for which he was charged. Amount of fine deposited by the petitioner, if any, is directed to be refunded to him as per law. Pending miscellaneous application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Kashetar Pal Singh alias Kripal Singh … Petitioner
Versus
Harpal Singh and another … Respondents

Cr. MMO No. 109 of 2014
Reserved on: 14.12.2016
Date of decision: 28.12.2016

Code of Criminal Procedure, 1973- Section 133- The petitioner filed an application pleading that respondent No. 1 had blocked flow of rainy and domestic water - respondent No.1 pleaded that civil litigation was going between the parties – no water was blocked by him and false application was filed – SDM dismissed the application by holding that there was no nuisance and general public was not involved in the dispute- a revision was filed before Additional Sessions Judge, which was dismissed- held, that power under Article 227 of the Constitution of India is to be used sparingly for keeping the Subordinate Courts within the bounds of their authority and not for correcting mere errors – it was not disputed that a civil suit was pending between the parties regarding the subject matter – there was no public nuisance as it was not established that drain was being used by public at large – filing of an application before Criminal Court to settle the civil dispute amounted to abuse of the process of the Court – petition dismissed with cost of Rs.10,000/- (Para-9 to 19)

Cases referred:

Radhey Shyam and another Vs. Chhabi Nath and others, (2015) 5 Supreme Court Cases 423
Ouseph Mathai and others Vs. M. Abdul Khadir, (2002) 1 Supreme Court Cases 319
Waryam Singh and another Vs. Amarnath and another, A.I.R. 1954 S.C. 215,
State of M.P. Vs. Kedia Leather & Liquor Ltd. and others, (2003) 7 Supreme Court Cases 389,

For the petitioner: Mr. Sanjeev Kumar Suri, Advocate.
For the respondents: Mr. Sunny Modgil, Advocate, for respondent No. 1.
Ms. Parul Negi, Deputy Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

<u>Ajay Mohan Goel, J.:</u>

By way of this petition filed under Article 227 of the Constitution of India, petitioner has prayed for quashing of judgment dated 20.12.2013 passed by the Court of learned Additional Sessions Judge (II), Una, Camp at Amb, in Criminal Revision No. 1/2012 RBT No. 2/2013/2012, vide which learned Court below while dismissing revision petition so filed by the present petitioner upheld the order passed by learned Sub Divisional Magistrate, Amb, District Una, in case No. 74/CR/07 titled State Vs. Harpal Singh instituted under Section 133 of Cr.P.C. dated 03.09.2010.

2. Brief facts necessary for adjudication of this petition are that petitioner Kashetar Pal Singh filed an application before Gram Panchayat, Lower Bhanjal dated 08.04.2007 to the effect that respondent No. 1 Harpal Singh had blocked the flow of rainy and domestic water of the petitioner as well as other local residents near the house of the petitioner which had caused damage to the house of the petitioner. On these bases, a Kalandra was filed by the police, Police Station Amb, under Section 133 of Cr.P.C. against respondent No. 1 Harpal Singh in the Court of learned Sub Divisional Magistrate, Amb, on the ground that Harpal Singh had blocked the flow of water forcibly causing danger to the house of petitioner and that on 03.07.2007 police visited the spot and associated petitioner as well as respondent No. 1 with the inquiry which revealed that the houses of petitioner, Satya Devi and Pushpa Devi, were adjacent to each other and respondent No. 1 Harpal Singh had constructed his house later on and had made Nallah for free flow of rain water underneath his house and rain water was also going through the same and Harpal thereafter had blocked the free flow of water by putting cement, concrete etc. on the drain as a result of which water was not going through the drain and was seepaging in the house of Kashetar Pal Singh endangering the house ofKashetar Pal Singh. It was on the basis of this inquiry that police submitted Kalandra before learned Sub Divisional Magistrate, Amb.

3. Respondent No. 1 in his response submitted before learned Sub Divisional Magistrate stated that he had not blocked any rainy water as alleged. According to him, petitioner had constructed septic tank adjacent to the drain behind his abadi and at the back side of abadi of petitioner. As per respondent No. 1, he had not blocked/obstructed any water and in fact, police had prepared a false Kalandra against the respondent. It was also mentioned in his response that there was civil litigation going on between the parties on the same subject matter in the Court of Civil Judge (Jr. Division), Court No. 1, Amb i.e. case No. 121/07 and parallel proceedings were not maintainable on the same cause in the Court of learned Sub Divisional Magistrate.

4. Learned Sub Divisional Magistrate vide order dated 03.09.2010 dismissed Kalandra by holding that there was no nuisance and further the matter in issue was not of public interest and general public was not involved in the said dispute.

5. This decision of learned Sub Divisional Magistrate was challenged by way of a revision petition which was dismissed by the Court of learned Additional Sessions Judge (II), Una, Camp at Amb on 20.12.2013.

6. While dismissing the revision petition, it was held by learned Court below that under Section 133 of Cr.P.C. Sub Divisional Magistrate on taking such evidence as he thinks fit could remove nuisance or unlawful obstruction from any public place or from any way, river or channel which is or may be lawfully used by the public. Learned Revisional Court held that the report submitted by police did not mention that path was a public path. It further held that as per report there was dispute of drain between the parties and Executive Magistrate could not take cognizance of private disputes of the parties under Section 133 of Cr.P.C. Learned Court further held that object of Section 133 of Cr.P.C. was to enable an Executive Magistrate to pass quick orders and deal speedily with the cases of public nuisance or where obstruction was caused to the right of public at large. It was further held by learned Revisional Court that there was no evidence to hold that drain on the spot was used by general public. It also held that it was also a matter of record that on the same cause of action there was a civil case pending between the parties in the Court of Civil Judge (Jr. Division), Court No. 1, Amb. Learned Appellate Court also held that in the said civil suit petitioner Kashetar Pal had sought relief of prohibitory injunction restraining Harpal from raising any sort of construction, blocking the rainy as well as domestic flow of water over the portion ABCDEFGH as shown yellow in colour in the site plan which was being used as drain being part of land measuring 0-35-38 hectares, Khata No. 187 min, Khatauni No. 417 min, Khasra No. 1090. Learned Revisional Court also held that perusal of the pleadings of the parties before Civil Court demonstrated that there was no dispute of public nuisance on the spot and Section 133 of Cr.P.C. did not apply to private nuisance. It further held that as there was a civil dispute between the parties and the dispute in issue did not involve public nuisance, therefore, the order of learned Sub Divisional Magistrate could not be said to be

illegal and that revision petition was without any substance as there was nothing on record to prove that drain was used by public at large. It was further held by learned Revisional Court that there was neither any illegality nor perversity in the order passed by learned Sub Divisional Magistrate and that the same did not warrant any interference.

7. Feeling aggrieved by the said judgment passed by learned Revisional Court, petitioner has filed this petition under Article 227 of the Constitution of India.

8. Before proceeding any further, it is necessary to deal with the scope of this Court while exercising its supervisory jurisdiction conferred upon it under Article 227 of the Constitution of India.

9. A three-Judge bench of Hon'ble Supreme Court in ***Radhey Shyam and another Vs. Chhabi Nath and others*, *(2015) 5 Supreme Court Cases 423***, has held that all the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. The Hon'ble Supreme Court has further held that control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or Revisional powers or power of superintendence under Article 227. The Hon'ble Supreme Court has further held that while appellate or Revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional.

10. It is settled law that power under Article 227 is intended to be used most sparingly and only in appropriate cases for the purpose of keeping subordinate courts within the bounds of their authority and not for correcting mere errors.

11. The Hon'ble Supreme Court in ***Ouseph Mathai and others Vs. M. Abdul Khadir*, *(2002) 1 Supreme Court Cases 319***, has held that no doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

12. A five-Judge bench of Hon'ble Supreme Court in ***Waryam Singh and another Vs. Amarnath and another*, *A.I.R. 1954 S.C. 215***, has held that this power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in - 'Dalmia Jain Airways Ltd. V. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (B), is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

13. Coming to the facts of this case, learned counsel for the petitioner could not deny the fact that the issue with regard to which Kalandra was filed before learned Sub Divisional Magistrate was already subject matter of civil suit which had been instituted by him against respondent No. 1.

14. During the course of arguments, learned counsel for the petitioner neither could point out as to what was the jurisdictional error committed by the learned Court below while deciding the revision petition or what was the perversity with the findings arrived at by learned Revisional Court and by the Court of learned Sub Divisional Magistrate to the effect that the issue raised in Kalandra was in fact a private dispute inter se the present petitioner and respondent No. 1 and there was no element of public nuisance involved in the same. In fact, it is evident from a perusal of the judgment passed by learned Revisional Court as well as other material placed on record by the parties that the issue which was raised by the petitioner by way of filing a complaint before Gram Panchayat was in fact a private dispute existing between

him and respondent No. 1 qua which he had already instituted a civil suit in the Court of competent jurisdiction. Therefore, it cannot be said that the Revisional Court erred while coming to the conclusion that the findings retuned by learned Sub Divisional Magistrate that the issue raised in the Kalandra was not a matter of public interest, was the correct decision.

15. In my considered view, it was correctly held by learned Revisional Court that the dispute did not involve public nuisance and there was no illegality with the order passed by learned Sub Divisional Magistrate. Learned Revisional Court also correctly held that there was nothing on record to demonstrate that the drain was used by the public at large and that it was a matter of record that there was a civil dispute between the petitioner and respondent No. 1 on the same cause and the dispute in fact did not involve public nuisance.

16. In fact, taking into consideration that the petitioner had already filed a suit on the same cause against respondent Harpasl Singh, his act of moving an application before Gram Panchayat and on the basis of the same of getting a Kalandra submitted under Section 133 of Cr.P.C. before learned Sub Divisional Magistrate, Amb, was nothing but an abuse of the process of law. Learned Sub Divisional Magistrate by correctly concluding that there was no element of public interest/public nuisance involved in the complaint/ Kalandra so filed, rightly dismissed the same. Similarly learned Revisional Court after appreciation of material on record correctly held that the issue raised by the petitioner did not fall within the ambit of Section 133 of Cr.P.C.

17. Proceedings under Section 133 of Cr.P.C. are not intended to settle private dispute between two members of the public. It is settled law that if a dispute is of civil nature then dispute cannot be entertained by Magistrate under Section 133 of Cr.P.C. The provisions of the said section can be used only for settlement of dispute in relation to a public right in the general interest of public at large.

18. The Hon'ble Supreme Court in ***State of M.P. Vs. Kedia Leather & Liquor Ltd. and others***, ***(2003) 7 Supreme Court Cases 389***, has held that to bring in application of Section 133 of Cr.P.C., there must be imminent danger to the property and consequential nuisance to the public. The Hon'ble Supreme Court further held that the object and purpose behind Section 133 of the Code was essentially to prevent public nuisance and it involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be caused to the public.

19. In view of my findings returned above and the law laid down by the Hon'ble Supreme Court, I do not find any merit in the present petition and the same is accordingly dismissed with cost, assessed at Rs.10,000/-, which shall be deposited by the petitioner in the Registry of this Court within a period of six weeks from today and thereafter, paid to respondent No. 1 by the Registry of this Court as per procedure. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, also stands vacated.

20. For the limited purpose of ascertaining as to whether the cost so imposed upon the petitioner is deposited by him in the Registry or not, the case shall be listed on **01.03.2017**.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sh. Narotam Dutt Sharma ...Non-applicant/Plaintiff

Versus

H.P.State Co-operative Bank Ltd. and others ..Non-applicants/Defendants/Applicant.

OMP No. 297 of 2016 in
C.S. No. 16 of 2016.
Reserved on: 22.12.2016.
Decided on: 28.12.2016.

Code of Civil Procedure, 1908- Order 7 Rule 11- An application for rejection of the plaint filed by defendant No.4 pleading that plaint does not disclose any cause of action against defendant No.4 **-** defendant No.4 had taken action in discharge of his official duties and is not liable – held, that defendant No.4 has been arrayed as party because he remained the Managing Director of the Bank – acts done in discharge of official duty are protected and immune from prosecution, provided they are done in good faith and without malafide – malafide means thatthe act is not done for the proposed purpose – malafide should be pleaded by specific allegations – merely by saying that action was not justified and was out of bias will not amount to plea of malafide- general and vague allegations of malafide have been levelled – no evidence can be led regarding a plea not asserted in the plaint- application allowed and plaint ordered to be rejected against the defendant No.4.(Para-7 to 23)

Cases referred:

State of Punjab and another vs. Gurdial Singh and others, AIR 1980 SC 319
State of Andhra Pradesh and others vs. Goverdhanlal Pitti (2003) 4 SCC 739
Ludovico Sagrado Goveia vs. Cirila Rosa Maria Pinto and others (2016) 9 SCC 615
State of Himachal Pradesh and others versus Baldev and others 2016 (1) SLC 361
Salem Advocate Bar Association, T.N. vs. Union of India (2005) 6 SCC 344
S.S. Rana vs. Registrar, Coop. Societies and another (2006) 11 SCC 634
Chandresh Kumar Malhotra vs. H.P.State Coop. Bank and others 1993 (2) Sim. L.C. 243
Vikram Chauhan vs. The Managing Director and others Latest HLJ 2013 (HP) 742 (FB)
Thalappalam Ser. Co-op. Bank Ltd. and others vs. State of Kerala & others 2013 AIR SCW 5683
Sanjeev Kumar and others vs. State of H.P. and others Latest HLJ 2014 (HP) 1061
Sumer Chand Katoch vs. The Kangra Central Cooperative Bank Ltd. 1996 (2) Sim. L.C. 134

For the Non-applicant/ Plaintiff. : Mr. P.P. Chauhan, Advocate.
For the Non-applicants/ Defendants/Applicant: Mr. Sunil Mohan Goel, Advocat for non-applicants/defendants No. 1 and 2.
Ms. Renuka Thakur, Advocate, vice Mr. Peeyush Verma, Advocate, for non-applicant/ defendant No.3.
Mr. Ashwani K. Sharma, Senior Advocate with Mr. Ishan Thakur, Advocate, for the applicant/ defendant No.4.
Defendant No.5 ex parte.
Mr. R.L.Chaudhary, Advocate, for non-applicant/defendant No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This order shall dispose of the application filed by the applicant/defendant No.4 for rejection of the plaint on the ground that it does not disclose any cause of action against him.

2. The non-applicant/plaintiff (hereinafter referred to as the 'plaintiff'), is an ex-employee of defendant No.1- bank and aggrieved by his supersession has filed this suit mainly seeking therein the decree of declaration, mandatory injunction and compensation to the tune of Rs. 1 crore on account of damages caused to his reputation as well as harassment and mental agony caused to him.

3. Besides, the H.P. State Co-operative Bank Ltd, through its Chairman/Managing Director having been impleaded as defendant No.1, the plaintiff has also impleaded the Managing Director of the Bank as defendant No.2 and in addition thereto, certain private parties including defendant No.4 Amit Kashyap, who worked as the Managing Director of defendant No.1 from the

period w.e.f. 26.10.2010 to 29.01.2013 and thereafter 02.07.2013 to 27.05.2014 have also been impleaded as party defendant by name.

4. It is averred that prior to joining of defendant No.4 as Managing Director of defendant No.1-Bank, the plaintiff was not personally known to him. Whatever documents and materials were brought before him as regards the work and conduct of the plaintiff, appropriate decision in light of the extant service rules was taken thereupon, that too, in a bonafide manner without any ill-will or any other extraneous consideration. Even otherwise, in case the plaintiff was not satisfied with the action/inaction on the part of the defendant No.4, he was free to avail all suitable departmental or legal remedies against these orders, which admittedly have not been availed of or resorted to by the plaintiff. It is further averred that looking to the nature of the relief sought for in the suit, the matter if at all justiciableis inter se between the plaintiff from one hand and defendants No. 1 and 2 on the other hand and the other defendants including defendant No.4 have no concern with the same. The impleadment of the applicant/defendant No.4 by name, signifies as regards the relief No.3 i.e. relief for grant of damages/compensation to the tune of Rs. 1 crore. He has roped the applicant by name, however, such impleadment is not only unnecessary, but it is gross abuse of the process of the Court.

5. It is averred that all the actions of the applicant/defendant No.4 have been taken in his official capacity, that too, in a bonafide manner in discharge of his official duties. That apart, the averments made in the plaint as such suffer from serious vice of insufficiency inasmuch as the plaint does not disclose any cause of action against the applicant and, therefore, deserves to be dismissed. It is averred that there is lack of necessary averments or allegations against the applicant on the basis of which the decree can be passed against the defendant No.4.

6. The plaintiff has contested the application by filing a reply wherein preliminary submission has been made with regard to the maintainability of the application on the ground that the same is misconceived and therefore, deserves to be dismissed. That apart, it is claimed that a legal notice dated 17.7.2015 was issued to the applicant with the same averments, however, he failed to reply the same and, therefore, it does not lie in his mouth to make averments in the application that the suit is not maintainable. As a matter of fact, the applicant/defendant No.4 had failed to discharge his duties in accordance with rules and regulations and that too, promptly and, therefore, the suit is maintainable. In addition thereto, it is submitted that categoric allegations of malafide have been made in paras 10 to 18 of the plaint, which is indicative of legal malafide on the part of the applicant. The adamancy shown by the applicant to change the Inquiry Officer is indicative of his malafide attitude towards the plaintiff. On reply to the merits of the application, it is submitted that the private parties including the applicant are necessary parties to the suit as they cannot escape the liability as it is on account of their acts that the plaintiff has been constrained to file the instant suit.

I have heard the learned counsel for the parties and have gone through the record of the case carefully.

7. It is not in dispute that the applicant/defendant No.4 has been made as a party in this suit only because he at one time remained the Managing Director of the defendant No.1-Bank. Therefore, as per the settled law the acts done in discharge of official duty, are normally protected and are immune from the prosecution provided that these acts are done in good faith are bonafide and should not be tainted with the bias of malafides.

8. Mr. P.P. Chauhan, learned counsel for the non-applicant/plaintiff would argue that it is only on account of illegal and malicious act of the applicant that he has been arrayed as a party to the suit and to buttress this submission he has relied upon the contents of paras 10 to 18 of the plaint which reads thus:

> *"10. That the aforesaid request for change of enquiry officer made by the plaintiff vide letter dated 28.01.2011 was turned down vide letter dated 01.03.2011 illegally and maliciously and without passing a speaking order.*

11. That on 24.04.2011 vide an un-dated letter the plaintiff had made a request for being promoted to the post of Senior Manager in pursuance to the approval by the Registrar dated 17.08.2010. However, no heed was paid thereto.

12. That vide impugned letter dated 11.06.2011, the request for further promotion during the pendency of the departmental proceedings made on 24.04.2011 vide an undated letter was turned down. The said communication was wholly illegal and against the well settled legal position by Hon'ble Supreme Court of India and this Hon'ble Court that in case during Departmental Promotion Committee, no chargesheet has been issued either in criminal case or departmental case, the promotions cannot be withheld. This principle of law was very much in the knowledge of the Bank and has been ignored purposely and knowingly.

13. That subsequent to the aforesaid, vide a letter of plaintiff dated 29.06.2011 it was brought to the notice of the concerned authority that since the enquiry had been conducted on 20.04.2011 and a report thereof had been submitted to the concerned authority thereof, promotion orders of the plaintiff be kindly not delayed.

14. That in the month of June 2012, the plaintiff received an order whereby the plaintiff was informed that though the enquiry report had been submitted by the enquiry officer on 22.04.2011 wherein all three charges levelled against the plaintiff stood proved the same was not being accepted in view of the objection raised by the plaintiff. It was further pointed out therein that the enquiry had been conducted within a day. Hence a de-novo enquiry by the same official was ordered, copy of which was received through fax by the plaintiff on 15.06.2012. It is further stated that the said inquiry has been conducted by Sh. Jitender Jamwal, the then Assistant Manager in District Office Mandi and the Defendant No.6 herein, who was present on 20.04.2011 and which fact is discernible from the order dated 12.10.2012 and also verifiable from the fact that the proceedings have been written in his handwriting. The said Sh. Jitender Jamwal was neither Inquiry Officer nor in anyway connected with the inquiry. The said Sh. Jitender Jamwal was working in District Office, Mandi and the plaintiff was working under him and during the course of their official dealings, there were clashes between the two on many occasion and the said Sh. Jitender Jamwal used to threat the plaintiff with dire consequences. This is how the said defendants No. 5 and 6 have taken undue interest in harming the career and reputation of the plaintiff by holding the inquiry in illegal and arbitrary manner.

15. That in response to the aforesaid order directing a de-novo enquiry by the same official, the plaintiff once again reiterated his objection qua the appointment of the same enquiry officer. The same was filed/received in the office of the concerned authority, i.e. the defendant Nos. 2, 4 and 5 on 20.06.2012.

16. That thereafter to the utter surprise of the plaintiff vide impugned order dated 12.10.2012 the Managing Director of the Bank i.e. the defendant Nos. 2 and 4 have ordered the dismissal of the plaintiff from service in the utmost illegal, arbitrary and malicious manner with a view to harass the plaintiff as well as jeopardize his reputation.

17. That from aforementioned facts and attending circumstances it is clearly evident that the memorandum dated 28.09.2010 was issued post grant of approval dated 17.08.2010 wherein the promotion of the plaintiff by the Registrar had been approved on 22.04.2011 but till June, 2012 no action had been taken thereon. Moreover, after June, 2012 nothing has been done qua the pending enquiry which had been ordered undated and received by the plaintiff through fax on 15.06.2012.

18. That the aforesaid facts and attending circumstances reflected a complete non-application of mind on the part of the Managing Director i.e. the defendant Nos. 2 and 4 besides malicious act on his part with a view to harass the plaintiff and cause loss of reputation and monetary benefits to him. As the Managing Director of the Bank, i.e. the defendant Nos. 2 and 4, re-ordered holding of fresh enquiry, as the enquiry report submitted on 22.04.2011 was completed within a day. After having passed the aforesaid order received by the plaintiff in 15.06.2012, the Managing Director of the Bank i.e. the defendant Nos. 2 and 4 took a volte face and based on the enquiry report submitted on 22.04.2011 which was completed within a day proceeded to dismiss the plaintiff."

9. As observed earlier, it is only on account of the fact that the applicant/defendant No.4 has been impleaded as a party as at the relevant time he served as Managing Director of the Bank, therefore, malafide in the case of the applicant would mean any act performed by him not for the proposed purpose.

10. What is the true import of malafides in relation to exercise of power has been succinctly brought forth by Hon'ble Mr. Justice Krishna Iyer in ***State of Punjab and another*** vs***. Gurdial Singh and others, AIR 1980 SC 319*** in his Lordship's inimitable style in the following manner:

"9. The question, then, is what is mala fides in the jurisprudence of power? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power - sometimes called colourable exercise or fraud on power and often-times overlaps motives, passions and satisfactions - is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfillment of a legitimate object the actuation or catalysation by malice is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in Law when he stated: "I repeat……that all power is a trust -- that we are accountable for its exercise -- that, from the people, and for the people, all springs, and all must exist". Fraud on power voids the order if it is not exercised bona fide for the end designed. Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to effect some object which is beyond the purpose and intent of the power, whether this be malice- laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impel the action, mala fides or fraud on power, vitiates the acquisition or other official act."

11. It is more than settled that malafide should be pleaded by specific allegations. Merely to say that the action was not justified and it was out of bias that the impugned action was taken, is not, in the least, any allegation of malafide.

12. The legal meaning of 'malice' and the grounds for holding an action of the State to be malafide was considered by the Hon'ble Supreme Court in ***State of Andhra Pradesh and others*** vs. ***Goverdhanlal Pitti (2003) 4 SCC 739*** wherein malice were attributed to the State in the matter of acquiring of land and it was held :

"12. *The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means 'something done without lawful excuse'. In other words, 'it is an act done wrongfully and wilfully without*

reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others'. [See Words and Phrases legally defined, Third Edition, London Butterworths 1989].

13. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all, it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. Prof. Wade in its authoritative work on Administrative Law [8th Edn., at pg. 414] based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seek to 'acquire land' 'for a purpose not authorised by the Act'. The State, if it wishes to acquire land, should exercise its power bona fide for the statutory purpose and for none other'.

14. The legal malice, therefore, on the part of the State as attributed to it should be understood to mean that the action of the State is not taken bona fide for the purpose of the Land Acquisition Act and it has been taken only to frustrate the favourable decisions obtained by the owner of the property against the State in the eviction and writ proceedings."

13. Reverting back to the case, a perusal of paras 10 to 18 of the plaint reveal that only general and vague allegations of malafides have been alleged and the same obviously cannot be treated to be a foundation for the malafide. There must be specific pleading regarding malafides and as observed above, the mere use of expression as 'malafides' or for extraneous reasons or for an ulterior motive etc. is not enough and details must be furnished and material facts have to be set out against the particular person alongwith the incidents in a manner as provided under Order 6 Rule 4 CPC.

14. Having failed to establish 'malice' in fact, Mr. P.P.Chauhan, learned counsel for the plaintiff would then argue that malice in law is writ large in the action of the applicant. This plea is not legally tenable after all legal malafide on the part of the applicant/defendant No.4 can only be understood to mean that the action of the applicant is not taken bonafidely. There is a marked difference between a wrong, erroneous or an illegal decision from the one which is tainted with malafide. From the perusal of the pleadings as quoted above, it is clearly evident that the allegations of malafide are far too general and vague and lack any specific facts and acts and, therefore, such vague allegation cannot be treated to be with foundation for the malafide. Allegations of malafide require high order of credibility, particularly when the imputations are made against the holder of an office having higher responsibility. There must be an averment to bad faith. After all, the malafide means dishonest intention of corrupt motive. Further, the malice must be based on factual matrix which cannot remain in the realm of insinuation, surmises, conjectures or vague suggestions.

15. In ***Ludovico Sagrado Goveia*** vs. ***Cirila Rosa Maria Pinto and others (2016) 9 SCC 615***, the Hon'ble Supreme Court held as under:

"24. Ground VI is totally vague and lacking in particulars. A charge of malafides has to be made out with great clarity and particularity. Also, the appellant cannot claim to be in the dark as every auction-sale was publicly advertised in newspapers. We, therefore, do not accede to the counsel's fervent plea to remit the rest of the writ petition to the High Court for hearing."

16. Confronted with this situation, learned counsel for the non-applicant/plaintiff would then argue that even in absence of specific instances regarding malafides, he would establish the same by leading evidence as he has sufficient weapons in his armoury to establish and prove these facts.

17. I am afraid that even such contention cannot be accepted, as it is more than settled that the pleadings are the foundation of the evidence and no amount of evidence beyond the pleadings can be led. This position has been long settled and was reiterated by a learned

Division Bench of this Court (of which I was a member) wherein this Court has elaborately considered in detail the relevance of pleadings in ***State of Himachal Pradesh and others*** *versus* ***Baldev and others 2016 (1) SLC 361*** and it was observed as under:-

> *"38. While deciding a civil suit, the pleadings are the foundation of the case. The pleadings play an important role in making the judgment and decree and that is why it is said that the pleadings are the heart, soul and essential foundation of a judicial verdict. It is the bedrock of the judicial disposal.*
>
> *39. In the instant case, at the cost of repetition, the plaintiffs-respondents have not prayed for relief of compensation or recovery of possession, no such foundation was laid.*
>
> *40. The Apex Court in the case titled as **State of Orissa & Anr. versus Mamata Mohanty, reported in 2011 AIR SCW 1332,** held that the relief, not founded on pleadings, cannot be granted. It is apt to reproduce para 35 of the judgment herein:*
>
> > *"35. Pleadings and particulars are required to enable the court to decide the rights of the parties in the trial. Thus, the pleadings are more to help the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted." Therefore, a decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide : Sri Mahant Govind Rao v. Sita Ram Kesho, (1898) 25 Ind. App. 195; M/s. Trojan & Co. v. RM. N.N. Nagappa Chettiar, AIR 1953 SC 235; Ishwar Dutt v. Land Acquisition Collector & Anr., AIR 2005 SC 3165 : (2005 AIR SCW 578); and State of Maharashtra v. Hindustan Construction Company Ltd., (2010) 4 SCC 518 : (2010 AIR SCW 2265)) "*
>
> *41. The parties, the Courts of first instance, the Appellate Courts or the Revisional Courts cannot travel beyond the pleadings in view of the mechanism provided in CPC, which provides as to what procedure is to be followed after trial stage, i.e. after framing the issues, in terms of Order XIV CPC and how it has to be taken to its logical end after framing the issues.*
>
> *42. The Apex Court in the case titled as **Hari Chand versus Daulat Ram,** reported in **AIR 1987 Supreme Court 94,** held that when the plaintiff fails to prove his case as pleaded in the plaint, the relief cannot be granted by the Court, which is neither pleaded nor prayed. It is apt to reproduce para 11 of the judgment herein:*
>
> > *"11. On a consideration of all the evidences on record it is clearly established that the alleged encroachment by construction of kuchha wall and khaprail over it are not recent constructions as alleged to have been made in May 1961. On the other hand, it is crystal clear from the evidences of Ramji Lal P.W. 1 and Daulat Ram D.W. 1 that the disputed wall with khaprail existed there in the disputed site for a long time, that is 28 years before and the wall and the khaprail have been affected by salt as deposed to by these two witnesses. Moreover the court Amin's report 57C also shows the said walls and khaprail to be 25-30 years old in its present condition. The High Court has clearly come to the finding that though the partition deed was executed by the parties yet there was no partition by metes and bounds. Moreover there is no whisper in the plaint about the partition of the property in question between the co-*

sharers by metes and bounds nor there is any averment that the suit property fell to the share of plaintiffs vendor Ramji Lal and Ramji Lal was ever in possession of the disputed property since the date of partition till the date of sale to the plaintiff. The plaintiff has singularly failed to prove his case as pleaded in the plaint."

43. The Apex Court in the case titled as ***Bachhaj Nahar versus Nilima Mandal & Ors.,*** *reported in* ***2009 AIR SCW 287,*** *held that the Court cannot, on finding that the plaintiff has not made out the case put-forth by him, grant some other relief. It is apt to reproduce para 12 of the judgment herein:*

"12. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo motu."

44. The pleadings and particulars are necessary to enable the Court to decide the rights of the parties in the trial.

45. The Apex Court in the case titled as ***National Textile Corporation Ltd. versus Nareshkumar Badrikumar Jagad & Ors.,*** *reported in* ***2011 AIR SCW 6180,*** *has laid down the same principle. It is apt to reproduce para 7 of the judgment herein:*

"7. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide: M/s. Trojan & Co. v. RM N.N. Nagappa Chettiar, AIR 1953 AIR 235; State of Maharashtra v. M/s. Hindustan Construction Company Ltd., AIR 2010 SC 1299; and Kalyan Singh Chouhan v. C.P. Joshi, AIR 2011 SC 1127)."

18. The learned counsel for the non-applicant/plaintiff would thereafter argue that an adverse inference ought to be drawn against the applicant/defendant No.4 as despite the service of notice under Section 80 CPC upon the applicant, he did not choose to contest the same by filing reply and thereby attorned to the contents therein and would rely upon the judgment rendered by the three Hon'ble Judges of the Hon'ble Supreme Court in ***Salem Advocate Bar Association, T.N.*** vs***. Union of India (2005) 6 SCC 344*** wherein it was held as under:

> *"38. Section 80(1) of the Code requires prior notice of two months to be served on the Government as a condition for filing a suit except when there is urgency for interim order in which case the Court may not insist on the rigid rule of prior notice. The two months period has been provided for so that the Government shall examine the claim put up in the notice and has sufficient time to send a suitable reply. The underlying object is to curtail the litigation. The object also is to curtail the area of dispute and controversy. Similar provisions also exist in various other legislations as well. Wherever the statutory provision requires service of notice as a condition precedent for filing of suit and prescribed period therefore, it is not only necessary for the governments or departments or other statutory bodies to send a reply to such a notice but it is further necessary to properly deal with all material points and issues raised in the notice. The Governments, Government departments or statutory authorities are defendants in large number of suits pending in various courts in the country. Judicial notice can be taken of the fact that in large number of cases either the notice is not replied or in few cases where reply is sent, it is generally vague and evasive. The result is that the object underlying Section 80 of the Code and similar provisions gets defeated. It not only gives rise to avoidable litigation but also results in heavy expense and cost to the exchequer as well. Proper reply can result in reduction of litigation between State and the citizens. In case proper reply is sent either the claim in the notice may be admitted or area of controversy curtailed or the citizen may be satisfied on knowing the stand of the State. There is no accountability in the Government, Central or State or the statutory authorities in violating the spirit and object of Section 80.*
>
> *39. These provisions cast an implied duty on all concerned governments and States and statutory authorities to send appropriate reply to such notices. Having regard to the existing state of affairs, we direct all concerned governments, Central or State or other authorities, whenever any statute requires service of notice as a condition precedent for filing of suit or other proceedings against it, to nominate, within a period of three months, an officer who shall be made responsible to ensure that replies to notices under Section 80 or similar provisions are sent within the period stipulated in a particular legislation. The replies shall be sent after due application of mind. Despite such nomination, if the Court finds that either the notice has not been replied or reply is evasive and vague and has been sent without proper application of mind, the Court shall ordinarily award heavy cost against the Government and direct it to take appropriate action against the concerned Officer including recovery of costs from him."*

19. It is not in dispute that defendant No.1 is only a Co-operative Society and not Government and, therefore, the provisions of Section 80 CPC do not apply. However, learned counsel for the non-applicant/plaintiff would persist that defendant No.1 being a statutory authority would nonetheless fall within the definition of Government as provided under Section 80 CPC. However, I find this contention to be based upon a complete misunderstanding of the provisions of the H.P. State Co-operative Societies Act. Defendant No.1 is only constituted and not created under the Act and functions like any other Co-operative Society and is mainly regulated in terms of the provisions of the Act, except as provided in the byelaws of the Society. The State has no say in the functions of the Society, membership, acquisition of shares and all other matters are governed by the byelaws framed under the Act. The terms and conditions of the employees of the Co-operative Society indisputably are governed by the Rules.

20. For the proper understanding of this proposition, it would be necessary to advert to the judgment rendered by the Hon'ble Supreme Court in ***S.S. Rana vs. Registrar, Coop. Societies and another (2006) 11 SCC 634***, wherein it was observed as under:

> "9. *It is not in dispute that the Society has not been constituted under an Act. Its functions like any other Co-operative Society are mainly regulated in terms of the provisions of the Act, except as provided in the bye-laws of the Society. The State has no say in the functions of the Society. Membership, acquisition of shares and all other matters are governed by the bye-laws framed under the Act. The terms and conditions of an officer of the Co-operative Society, indisputably, are governed by the Rules. Rule 56, to which reference has been made by Mr. Vijay Kumar, does not contain any provision in terms whereof any legal right as such is conferred upon an officer of the Society.*
>
> *10. It has not been shown before us that the State exercises any direct or indirect control over the affairs of the Society for deep and pervasive control. The State furthermore is not the majority shareholder. The State has the power only to nominate one director. It cannot, thus, be said that the State exercises any functional control over the affairs of the Society in the sense that the majority directors are nominated by the State. For arriving at the conclusion that the State has a deep and pervasive control over the Society, several other relevant questions are required to be considered, namely: (1) How the Society was created?; (2) Whether it enjoys any monopoly character?; (3) Do the functions of the Society partake to statutory functions or public functions?; and (4) Can it be characterized as public Authority?*
>
> *11. Respondent No.2, the Society does not answer any of the afore-mentioned tests. In the case of a non-statutory society, the control thereover would mean that the same satisfies the tests laid down by this Court in Ajay Hasia vs. Khalid Mujib Sehravardi [(1981) 1 SCC 722]. [See Zoroastrian Coop. Housing Society Ltd. vs. District Registrar, Coop. Societies (Urban) & Ors. reported in 2005 (5) SCC 632.]*
>
> *12. It is well settled that general regulations under an Act, like Companies Act or the Co-operative Societies Act, would not render the activities of a company or a society as subject to control of the State. Such control in terms of the provisions of the Act are meant to ensure proper functioning of the Society and the State or statutory authorities would have nothing to do with its day-to-day functions.*
>
> *13. The decision of the Seven Judge Bench of this Court in Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology (2002) 5 SCC 111, whereupon strong reliance has been placed, has no application in the instant case. In that case, the Bench was deciding a question as to whether in view of the subsequent decisions of this Court, the law was correctly laid down in Sabajit Tewary vs. Union of India & Ors. [(1975) 1 SCC 485], and it not whether the same deserved to be overruled. The majority opined that the Council of Scientific and Industrial Research (CSIR) was 'State' within the meaning of Article 12 of the Constitution of India. This Court noticed the history of the formation thereof, its objects and functions, its management and control as also the extent of financial aid received by it. Apart from the said fact it was noticed by reason of an appropriate notification issued by the Central Government that CSIR was amenable to the jurisdiction of the Central Administrative Tribunal in terms of Section 14(2) of the Administrative Tribunals Act, 1985. It was on the aforementioned premises this Court opined that Sabhajit Tewary (supra) did not lay down the correct law. This Court reiterated the following six tests laid down in Ajay Hasia vs. Khalid Mujib Sehravardi [(1981) 1 SCC 722]:*

"(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with Governmental character.

(3) It may also be relevant factor ….. whether the corporation enjoys monopoly status which is State conferred or State protected.

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.

(5) If the functions of the corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.

(6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government."

This Court further held (Pradeep Kumar Biswas case, SCC P. 134, para 40):

" 40. This picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be -- whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

(Emphasis supplied)

14. As the respondent No.1 does not satisfy any of the tests laid down in Pradeep Kumar Biswas (supra), we are of the opinion that the High Court cannot be said to have committed any error in arriving at a finding that the respondent-Bank is not a State within the meaning of Article 12 of the Constitution of India."

21. Notably, defendant No.1-Bank in the instant case is not different from the bank which was in issue before the Hon'ble Supreme Court in ***S.S. Rana***'s case. That apart, this Court has otherwise repeatedly held that defendant No.1-bank to be not falling within the meaning of Article 12 or under Article 226 of the Constitution. (Refer: ***Chandresh Kumar Malhotra*** vs. ***H.P.State Coop. Bank and others 1993 (2) Sim. L.C. 243, Vikram Chauhan*** vs. ***The Managing Director and others Latest HLJ 2013 (HP) 742 (FB), Thalappalam Ser. Co-op. Bank Ltd. and others*** vs. ***State of Kerala and others 2013 AIR SCW 5683*** and ***Sanjeev Kumar and others*** vs. ***State of H.P. and others Latest HLJ 2014 (HP) 1061***).

22. It needs to be clarified that defendant No.1 is a Co-operative Society governed by the Act wherein though there is a provision for mandatory notice provided under Section 76, however, the same is applicable only to the cases where the dispute touches the Constitution, management or the business of the Society. However, even this provision does not apply to the disputes involving the matters pertaining to service of the employees of the Co-operative Society as held by this Court in ***Sumer Chand Katoch vs. The Kangra Central Cooperative Bank Ltd. 1996 (2) Sim. L.C. 134*** wherein it was held as under:

"*13. The next question is whether the District Judge is right in rejecting the plaint under Order VII, Rule 11 (d), C P. C. on the ground that the suit was not*

maintainable without giving notice under section 76 of the Act. Section 76 of the Act is :-

> *"76. Notice necessary in suits.- No suit shall be instituted against a society or any of its officers in respect of any act touching the constitution, management or the business of the society, until the expiration of two months after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left."*

14. By now it is well settled that section 76 of the Act is mandatory and its compliance is must and does not permit any exception as is apparent from its language, which is couched in negative terms. Its language is similar to that of section 80, C. P C , which fell for consideration of the Supreme Court of India in State of Madras v C. P. Agencies, AIR 1960 SC 1309, wherein the learned Judges have held that:-

> *"........ . Section 80 is express, explicit and mandatory and admits of no implications or except ions........... The object of section 80 is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be. brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted. In order to enable the Government or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for."*

15. Under section 76 of the Act also notice of two months is required to be delivered to the Registrar, Co-operative Societies or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims so that the Registrar may look into the matter and issue appropriate directions to the management of the cooperative society either to contest the claim or to accept it in the interest of the society From the scheme of the Act it is clear that the Registrar, Co-operative Societies is a statutory authority who exercises overall control in respect of constitution, management and business of a co-operative society, as such, he plays a vital role in respect of a disputes touching the constitution, management and business of the society. Section 76 of the Act further provides that the plaint shall contain a statement that such a notice has been so delivered or left Therefore, if the mandatory notice under section 76 of the Act is not delivered or left, the plaint can be rejected under Order VII, Rule II (d), C P. C In view of this, the District Judge is right to the extent that compliance of section 76 of the Act is mandatory before a suit is entertained in respect of a dispute touching the constitution, management or the business of the society. (Please see: Gangappa Gurupandappa Gugwad v. Rachawwa, AIR 1971 SC 442 and The Jwali Harijan Co-operative Agricultural Society v. Maghu etc etc . AIR 1992 HP 34.

16. However, the vital question for the application of section 76 of the Act is whether the matter in respect of setting aside the termination order and grant of consequential relief is a matter touching the constitution, management or the business of the society, as stated in section 76 of the Act. This Court may hold without any fear of contradiction that it is not an act touching she constitution and the business of the society. In Deccan Merchants Co-operative Ltd v. Dalichand Jugraj Jain, AIR 1969 SC 1320 ; Co-operative Central Bank Ltd v Additional Industrial Tribunal, Andhra Pradesh, AIR U70 SC 245 and The Allahabad District Co operative Ltd v Hanuman Butt Tewari, AIR 1982 SC !20, it is held by the

learned Judges of the Supreme Court that since the word 'business' is Equated with the actual trading or commercial or other similar business activity of the society, the dispute relating to conditions of service of the workman employed by the society cannot be held to be a dispute touching the business of the society.

17. The words 'touching the constitution, management or the business of a co-operative society used in section 76 of the Act also occur in section 72 of the Act, which provides than any dispute touching the constitution, management, or the business of a co-operative society arising between the parties stated therein, shall be referred to the Registrar for decision and no court shall have jurisdiction to entertain any suit or other proceeding in respect of such dispute. Undoubtedly, these words used in both these sections carry the identical meaning. Section 72 of the Act is para materia to section 96 of the Gujarat Co-operative Societies Act, 1961, which fell for consideration of learned Judges of the Supreme Court in The Gujarat State Co-operative Land Development Bank Ltd v, P. R. Mankad and another (supra). Interpreting the expression 'management of the society', it was held that :-

> *"35. ....Grammatically, one meaning of the term 'management' is : 'the Board of Directors' or 'the apex body or Executive Committee at the helm which guides, regulates, supervises, directs and controls the affairs of the Society. In this sense, it may not include the individuals who under the overall control of that governing body or Committee, run the day-today business of the Society.......... Another meaning of the term 'management' may be: 'the act or acts of managing or governing by direction, guidance, superintendence, regulation and control the affairs of a society'.*
>
> *36. A still wider meaning of the term which will encompass the entire staff of servants and workmen of the Society, has been convassed for by Mr. Dholakia The use of the term 'management' in such a wide sense in section 96 (1) appears to us, to be very doubtful.*
>
> *37. Be that as it may, what has been directly bidden 'out-of-bounds for the Registrar by the very scheme and object of the Act, cannot be indirectly inducted by widening the connotation of 'management', A construction free from contexual contraints, having the effect of smuggling into the circumscribed limits of the expression 'any dispute', a dispute which from its very nature is incapable of being resolved by the Registrar, has to be eschewed. Thus considered, a dispute raised against the Society by its discharged servant claiming reliefs such as reinstatement in service with back wages, which are not enforceable in a Civil Court is outside the scope of the expression 'touching the management of the Society* used in section 96 (I) of the Act of 1961, and the Registrar has no jurisdiction to deal with and determine it Such a dispute squarely falls within the jurisdiction of the Labour Court under the B I. R. Act."*

18. In view of these clear observations of the learned Judges of the Supreme Court, the District Judge was not right in relying upon the judgment of Rajasthan High Court in Sawai Madhopur Co-operative Marketing Society Ltd v. Rajasthan State Co-operative Tribunal, Jaipur and another (supra) The learned Judge of Rajasthan High Court took the view that having regard to the provisions of the Rajasthan Co operative Societies Act and the Rules, the dispute in question relating to validity of the suspension and termination is a dispute touching the management of the society and falls within the ambit of section 75 of the Rajasthan Co operative Societies Act. According to them, the ambit and import of word 'touching' are very wide and it includes any matter which relates to the management of the society, more particularly, when the Registrar deals with the matters relating to the officers and employees as provided in the Act and the Rules. Section 75 of the Rajasthan

Co-operative Societies Act is para materia to section 72 of the Act and also section 96 of the Gujarat Co-operative Societies Act, which was under consideration of the learned Judges of the Supreme Court in The Gujarat State Co-operative Land Development Bank Ltd v. P R Mankad and another (supra). The learned Judges of the Rajasthan High Court have tried to distinguish the judgment of the Supreme Court by stating that, "it appears that attention of their Lordships of the Supreme Court was not drawn to the provision of section 76 under Chapter VII of the Gujarat Act and the Rules made thereunder". Section 76 of the Gujarat Cooperative Societies Act falls under Chapter VII, which deals with the management of societies and reads as under :-

> *"76. The qualifications for the appointment of a manager, secretary, accountant or any other officer or employee of a society and the conditions of service of such officers and employees shall be such as may, from time to time, be prescribed ;*
>
> *Provided that no qualification shall be prescribed in respect of any officer not in receipt of any remuneration."*

19. The reasoning of learned Judges of Rajasthan High Court is that consideration of section 76 of the Gujarat Co-operative Societies Act and the Rules made thereunder prescribing the qualification for the officers and employees of the society would have assisted the learned Judges of the Supreme Court to give wider meaning to the term 'management' covering within its encompass the disputes of appointment, termination and other conditions of service of the officers and the employees of the society. With all respect to the learned Judges of Rajasthan High Court, this Court finds it difficult to agree with this reasoning given by them. It cannot be presumed that the learned Judges of the Supreme Court did not consider section 76 of the Gujarat Co-operative Societies Act for coming to their conclusion inspite of their not referring this section in their judgment. Even if the provision like section 76 of the Gujarat Co-operative Societies Act figures in a chapter pertaining to the management of the societies it does not lead to the conclusion that the term 'management which grammatically means 'the Board of Directors or 'the apex body or 'Executive Committee at the helm would include the officers and employees of the society, who run the day-to-day business under their overall control. Moreover, the Rajasthan Co-operative Societies Act and Rules and the Act and Rules of the State of Himachal Pradesh materially differ in respect of the provisions pertaining to the Officers and employees of the society, more specifically, section 148 (2) (xxvii) and (xxx), as reproduced in paragraph 6 of the judgment in Sawai Madhopur Co-operative Marketing Society Ltd. v. Rajasthan State Co-operative Tribunal, Jaipur and another (supra), on which the learned Judges of Rajasthan High Court mainly based their conclusion. Therefore, applying the ratio of the judgment of the Supreme Court in The Gujarat State Co-operative Land Development Bank Ltd. v. P. R. Mankad and another (supra), this Court holds that the dispute pertaining to termination of the services of the appellant-plaintiff is not the dispute touching the management of the respondent-defendant bank for which notice under section 76 of the Act was required before filing of the suit."*

23. In view of the aforesaid discussion, I find merit in this application and the same is accordingly allowed and consequently, the plaintiff's suit as against defendant No.4/applicant is ordered to be rejected and his name is ordered to be struck off from the array of the defendants in the memorandum of parties. Amended memo of parties be filed within a week.

List the case on **29.12.2016.**

****

BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Smt. Jamuna Devi ….Appellant.
Versus
Arjun and others … Respondents.

RSA No.: 94 of 2008.
Reserved on: 15.12.2016.
Decided on: 29.12.2016.

Indian Succession Act, 1925- Section 63- Plaintiff pleaded that N was owner of the suit land, who had executed a Will in favour of the plaintiff – mutation was wrongly sanctioned in favour of the defendants- the suit was dismissed by the Trial Court- an appeal was filed, which was dismissed – held in second appeal that the finding of Trial Court that N was not proved to be the owner and he could not have bequeathed the suit land was not examined by the Appellate Court- Appellate Court examined the veracity of the Will, which was not permissible – appeal allowed – judgment of the Appellate Court set aside- case remanded for fresh adjudication.(Para-11 to 15)

For the appellant. Mr. Aman Sood, Advocate.
For the respondents Mr. Nimish Gupta, Advocate for respondents No. 1(a) and 1(b).
None for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (oral).

By way of this appeal, the appellant/plaintiff has challenged the judgment and decree passed by the Court of learned District Judge, Chamba, in Civil Appeal No. 40/04, dated 26.11.2007, vide which, learned Appellate Court, while dismissing the appeal so filed by present appellant upheld the judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.), Chamba, District Chamba, in Civil Suit No. 97/2001, dated 26.02.2004.

2. Brief facts necessary for the adjudication of this case are that appellant/plaintiff (hereinafter referred to as 'plaintiff') filed a suit for declaration to the effect that mutation No. 717, dated 31.07.1996 and subsequent revenue entries entered on the basis of aforesaid mutation regarding property comprised in Khasra Nos. 442, 443, measuring 0-2-14 bighas, Khata Khatauni No. 136 min/173, 174, situated in Mohal Bharmour, Pargana and Tehsil Bharmour, District Chamba, H.P. (hereinafter referred to as 'suit land') were illegal, null and void and inoperative upon the rights of the plaintiff and also suit for restraining the respondents/defendants (hereinafter referred to as defendants) from interfering, dismantling or changing the nature of the suit land. As per plaintiff, actual owner of the suit land was Nanak Chand, father-in-law of the plaintiff, who had executed a Will in favour of plaintiff on 08.05.1991. After the death of Nanak Chand, defendants No. 1 and 2 got suit property mutated in their favour vide mutation No. 717, dated 31.07.1996 in collusion with revenue staff. Factum of these revenue entries in the revenue record came to her notice in the month of January 2001 when defendants started interfering in her peaceful possession over the suit land. It was further her case that mutation No. 717 and subsequent entries in the revenue record were wrong and illegal and not binding upon the rights of the plaintiff and on these bases, she prayed for the reliefs already mentioned above.

3. The claim of the plaintiff was contested by defendant No. 1 Arjun, who took the stand in the written statement that Nanak Chand was a co-sharer in Khasra Nos. 442 and 443 and he had not executed any Will qua Khasra Nos. 442 and 443 and Will, if any, was procured by Ranjha Ram (defendant No. 2), husband of the plaintiff for the benefit of his wife. It was further mentioned in the written statement defendant No. 2 had also procured another Will in favour of

his son Manoj Kumar and Manoj Kumar had also filed a similar suit against defendant No. 1. It was further the stand of defendant No. 1 that suit property was rightly mutated in favour of defendant No. 1 and that too at the instance of defendant No. 2 and there was no collusion with the revenue staff as alleged. On these bases, claim of the plaintiff was contested by defendant No. 1.

4. On the basis of pleadings of the parties, learned trial Court framed the following issues:-

"1. Whether deceased Nanak Chand had executed a valid Will in favour of the plaintiff as alleged? OPP.

2. Whether revenue entries showing defendants the owners of the suit land are illegal, null and void as alleged? OPP.

3. Whether the plaintiff is entitled for the relief of permanent prohibitory injunction as alleged? OPP

4. Whether the plaint is bad for non joinder of necessary parties? OPD

5. Whether the plaintiff has filed the suit in collusion with defendant No. 2 as alleged? OPD

6. Relief."

5. On the basis of evidence led by the parties both ocular as well as documentary in support of their respective claims, the issues so framed were answered by the learned trial Court in the following manner:-

"Issue No.1	*: No.*
Issue No. 2	*: No.*
Issue No. 3	*:No.*
Issue No. 4	*:Yes.*
Issue No. 5	*:No.*
Relief	*:The suit of the plaintiff dismissed as per operative part of the Judgment."*

6. Learned trial Court dismissed the suit so filed by the plaintiff by holding that there was no evidence on record to prove that Nanak Chand had purchased the suit land from Chatro and that Nanak Chand in fact was not owner of the suit land. On these bases, it was further held by the learned trial Court that when the suit land was not in the name of Nanak Chand, he could not have had bequeathed the suit land by way of Will Ext. PW2/A. While arriving at the said conclusion, learned trial Court held that plaintiff had failed to furnish any jamabandi on record from which it could be demonstrated that Nanak Chand was owner of the suit land and in the absence of entry in the name of Nanak Chand as owner in the jamabandi, it could not be barely presumed that Nanak Chand was owner of the suit land before the execution of the Will. On these bases, it was held by the learned trial Court that Will Ext. PW2/A was not a valid Will as plaintiff had failed to establish that Nanak Chand was owner of the suit land which was bequeathed by way of said Will.

7. Feeling aggrieved by the dismissal of her suit, plaintiff filed an appeal.

8. Learned Appellate Court while dismissing the appeal so filed by the plaintiff returned the findings that though appellant claimed herself to be beneficiary of the Will Ext. PW2/A but she had not claimed in her suit that she had rendered services to her father-in-law during his lifetime. Learned Appellate Court went on to hold that it was settled law that where there was disinheritance of heirs of equal degree and no reason for exclusion was disclosed, then the Will was shrouded with suspicion. Learned Appellate Court further held that scrutiny of the Will Ext. PW2/A demonstrated that there was nothing on record which could show as to why Nanak Chand excluded his wife and sons and why he opted to bequeath his property in favour of

his daughter-in-law especially when there was no mention of plaintiff serving him at any point of time nor the plaintiff had claimed having served her father-in-law during his lifetime. On these bases, it was held by the learned Appellate Court that Will in fact was shrouded with suspicious circumstances and therefore, it could be safely concluded that Shri Nanak Chand had not executed any valid Will in favour of plaintiff.

9. Feeling aggrieved, the plaintiff has filed this appeal which was admitted on 20.11.2008 on the following substantial questions of law:

> *"1. Whether exclusion of the sons and wife from the duly executed Will that too for part of the property in favour of daughter in law can be said to be a suspicious circumstance particularly when the testator has not bequeathed the entire property.*
>
> *2. Whether presumption of genuineness can be attached to a duly executed registered Will?"*

10. I have heard the learned counsel for the parties and also gone through the records of the case as well as the judgments and decrees passed by both the learned Courts below.

11. A perusal of the judgment passed by the learned trial Court demonstrates that the plaintiff was non-suited by the learned trial Court on the ground that plaintiff had failed to establish that the suit land in fact was owned by the testator of the Will i.e. Shri Nanak Chand. On these bases, it was held by the learned trial Court that when Nanak Chand was not proved to be the owner of the suit land, he could not have had bequeathed the suit property by way of a Will in favour of his daughter-in-law.

12. Findings so returned by the learned trial Court were assailed by way of appeal by the appellant/plaintiff before the first Appellate Court.

13. However, learned Appellate Court rather than adjudicating as to whether the findings returned by the learned trial Court to the effect that Nanak Chand was not proved to be the owner of the suit land on record, ventured to adjudicate on the veracity of the Will on the point as to whether the plaintiff had proved the execution of Will in accordance with law or whether defendant had succeeded in proving that Will was shrouded with suspicious circumstances.

14. In my considered view, learned Appellate Court in the peculiar facts and circumstances of this case erred in doing so. This is for the reason that as learned trial Court had returned the findings that Nanak Chand was not the owner of the suit land which was bequeathed by him by way of Will Ext. PW2/A in favour of plaintiff, therefore, until and unless learned Appellate Court had returned findings on this issue as to whether Nanak Chand was owner of the suit land or not, it could not have had ventured to adjudicate upon the issue as to whether Will Ext. PW2/A was shrouded with suspicious circumstances or not. In this view of the matter, in my considered view, this appeal deserves to be allowed on this short point alone and the matter deserves to be remanded back to the learned Appellate Court with a direction to adjudicate the appeal afresh after taking into consideration the findings returned by the learned trial Court as well as the grounds taken in the appeal by the appellant/plaintiff before the first Appellate Court to challenge the findings so returned by the learned trial Court.

15. Accordingly, this appeal is allowed and judgment and decree passed by the learned Appellate Court in Civil Appeal No. 40/04, dated 25.11.2007, is set aside and the case is remanded back to the learned Appellate Court for adjudication afresh after taking into consideration the findings returned by the learned trial Court while dismissing the suit of the plaintiff and the grounds taken in appeal by plaintiff before the learned Appellate Court in challenge to the judgment and decree so passed by the learned trial Court. Parties through their counsel are directed to appear before the learned Appellate Court on 09.01.2017. Keeping in view the fact that the civil suit pertains to the year 2001, this Court hopes and trusts that learned

Appellate Court shall decide this case, as expeditiously as possible, preferably within a period of six months from today. No orders as to costs. Pending miscellaneous application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Onkar Chand ...Petitioner.
Versus
State of H.P. and others. ...Respondents.

CMPMO No. 508/2016
Decided on: 29.12.2016

Code of Civil Procedure, 1908- Section 24- An application seeking the transfer of election petition filed on the ground that respondent No. 2 had made uncalled for remarks, disclosed that he was going to set aside the election of the petitioner and behaviour of respondent No. 2 is rude – held, that a transfer petition is not to be dealt in a light hearted manner - transfer of a case from one authority to another should not be granted readily for any fancied notion of the petition – the authority should have shown an unfair attitude or biased frame of mind against the petitioner – mere suspicion of denial of justice is not sufficient to order transfer - election petition is pending for ten months – sixteen proceedings have been held, which proves that respondent No. 2 is not biased against the petitioner, otherwise he would have decided the matter – mere allegation that justice will not be done is not sufficient to transfer the matter- petition dismissed. (Para-5 to 9)

Case referred:

Usmangani Adambhai Vahora versus State of Gujarat and another (2016) 3 SCC 370

For the Petitioner: Mr. Ajay Sharma, Advocate.
For the Respondents: Mr. Meenakshi Sharma, Addl. A.G. with
Mr. J.S. Guleria, Asstt. A.G. for respondents No.1 and 2.
Nemo for respondents. 3 to 8.

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, Judge (oral**):**

By medium of this petition filed under Article 227 of Constitution of India, the petitioner has sought transfer of election petition pending before the Authorized Officer-cum-SDO (C), Sujanpur, District Hamirpur on the ground that the said Officer is biased.

2. The brief facts as are necessary for the adjudication of this petition are that an election petition came to be filed by respondent No.3 against the petitioner, which is pending before respondent No.2. It is averred that respondent No.2, has time and again, during the course of trial, made uncalled for remarks and, therefore, the petitioner apprehends that he would not get justice. It is further averred that respondent No.2 has openly disclosed that he is going to set aside the election of the petitioner. It is also averred that ever since the date of filing of the election petition on 23.2.2016, about 16 dates of hearing stand fixed by respondent No.2 and on each and every date of hearing, respondent No.2 has openly stated that he would decide the election petition within 2-3 months and he is going to set aside the election of the petitioner.

3. Apart from this, the behaviour of respondent No.2 is rude to the extent that the petitioner has been driven to the wall and it is on account of political pressure being exercised

upon him that he has time and again disclosed that he intends to make an adverse decision against the petitioner.

4. I have heard the learned counsel for the petitioner and have gone through the material placed on records of the case.

5. The basic principle governing transfer of petition is that such petition is not to be dealt with in a light-hearted manner and transfer of a case from one authority to another should not be granted readily for any fancied notion of the petitioning litigant because of the reason that such transfer of a case from one authority to another in effect casts doubt on the integrity competence and reputation of the concerned authority. Unless and until a sufficiently cogent ground is disclosed, transfer should not be allowed as a matter of course. The authority from which the case is sought to be transferred must be shown to have disclosed a definitely unfair attitude or biased frame of mind against the petitioner. Transfer can only be ordered when the party has reasonable apprehension that the justice would be denied to him. The mere fact that the party has suspicion in this regard cannot constitute a valid ground. Likewise, mere presumption or possible apprehension cannot and should not be made the basis of transferring a case from one authority to another.

6. In ***Usmangani Adambhai Vahora*** *versus* ***State of Gujarat and another (2016) 3 SCC 370,*** the Hon'ble Supreme Court has held that seeking transfer at the drop of a hat is unconceivable. It was further held that order of transfer is not to be passed as a matter or routine or merely because the interested party has expressed some apprehension about proper conduct of trial. The power of transfer has to be exercise cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to trial. There has to be a real apprehension that there would be miscarriage of justice.

7. On a careful scrutiny of the material placed on record, it cannot be gathered or held that there was a real apprehension or bias against the authority.

8. Evidently, as per the showing of the petitioner himself, the election petition is pending for the last more than ten months and has not been decided against the petitioner and in fact as many as 16 proceedings have been held in the case, which only prove that respondent No.2 is not biased against the petitioner or else by now, the proceedings would have culminated into an adverse order against the petitioner. It cannot be said that there is reasonable apprehension on the part of the petitioner that justice would not be done. The petitioner has failed to point out circumstance from which it can be inferred that he entertains apprehension and that is reasonable in the circumstances as alleged.

9. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice would not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension, the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension. This apprehension must be reasonable and not imaginary, based upon conjecture and surmises. However, no universal or hard and fast rule can be prescribed for deciding a transfer petition, which has always to be decided on the basis of each case.

10. Having said so, I find no merit in the petition and the same is dismissed in *limine, s*o also the pending applications.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ….Appellant.
Versus
Kamlesh alias Kaka ….Respondent.

Cr. Appeal No.409 of 2011.
Reserved on : 20.10.2016.
Date of Decision: 29.12.2016.

N.D.P.S. Act, 1985- Section 21- Accused was found in possession of 14 grams of heroin – accused was tried and acquitted by the trial Court- held in appeal that independent witness had not supported the prosecution version but he had admitted the signatures on the memos – the fact that the documents were signed without any pressure show that witness was not stating the truth before the Court – police officials proved the prosecution version – the findings recorded by the Trial Court that accused was not found in possession of contraband are not correct – appeal allowed and the accused convicted of the commission of offence punishable under Section 21 of N.D.P.S. Act- notice issued to the witness as to why proceedings be not initiated against him for making a false statement. (Para-7 to 25)

For the appellant : Mr. D.S. Nainta and Mr. Virender Verma, Additional Advocate Generals.
For the respondent : Mr. Ajay Kumar, Senior Advocate with Mr. Dheeraj Vashisht, Advocate.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal is maintained by the appellant-State of Himachal Pradesh against the judgment of acquittal of the accused in a case under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, passed by the learned Special Judge, Kullu, dated 31.3.2011, in Session trial No.43/2008.

2. Briefly stating facts giving rise to the present appeal are that on 31.5.2008, Police party while on patrolling duty, was present at Shishmati Kullu. In the meanwhile, ASI Balbir Singh, received a secret information to the effect that one person, namely, Kamlesh alias Kaka (hereinafter referred to as 'the accused') resident of Shishamati, having his shop near temple of Khalari Narayan, is indulging in the sale of smack. The informant also informed ASI Balbir Singh that if search conducted a large quantity of smack can be recovered. ASI Balbir Singh (Investigating Officer) complied with the provisions of Section 42 (2) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') and the said information was sent to the higher Police Officers. Thereafter, Investigating Officer alongwith other accompanying Police Officials proceeded to conduct the search of the shop of the accused and accused was found present in the shop. Police reached there at about 4:10 pm, in the second room of the shop, three persons were found taking tea. On inquiry, they disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. Mandeep alias Sonu and Sonu alias Rajinder joined as witnesses by the police. In addition to this, Investigating Officer also associated ASI Man Singh as witness. Thereafter, Investigating Officer conducted the search of the shop of the accused. During search from the eastern side of the shop, Investigating Officer found two wrapping paper rolls from the lower shelf of the counter. In addition to this, one large packet (***pura***) made of wrapping papers, weighing scale made of brass, one weight of ten grams and one weight of two grams were also found in the same shelf. When the said 'p*ura*' was opened, it was found containing heroin type substance. When the said substance was checked on the narcotic drugs testing kit, then positive result of heroin was found. On weighing the recovered heroin was

found 14 grams. Out of it two samples of 1-1 gram each were separated for chemical analysis. In compliance to the other formalities, Investigating Officer filled in NCB form in triplicate and the case property after sealing the same, was taken into possession. The investigation was later on entrusted to ASI Lal Chand, who made further investigation. After receipt of the chemical examiner's report, challan was presented in the Court.

3. The prosecution in order to prove its case has examined as many as 10 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C, wherein he has denied the prosecution case and claimed innocence. No defence was led by the accused.

4. Learned Additional Advocate General appearing on behalf of the appellant has argued that the prosecution has proved the guilt of the accused beyond the shadow of reasonable doubt and the learned trial Court has acquitted the accused, just on the basis of surmises and conjectures, therefore, the accused is liable to be convicted.

5. On the other hand, Mr. Ajay Kumar, learned Senior Counsel appearing on behalf of the accused has argued that the prosecution has failed to prove the guilt of the accused beyond the shadow of reasonable doubt. He has further argued that as per the law in ***Nallabothu Ramulu alias Seetharamaiah and others vs. State of Andhra Pradesh,2014 (12) Supreme Court Cases, 261,*** where two views are possible then one favourable to the accused is required to be taken. He has further argued that there is no perversity in the impugned judgment, therefore, the appeal is liable to be dismissed.

6. To appreciate the arguments of learned counsel appearing on behalf of the parties, this Court has gone through the record in detail and have minutely scrutinized the statements of the prosecution witnesses.

7. PW-1 Nanak Chand took the information under Section 42 (2) of the Act, to Addl. Superintendent of Police, Kullu, at about 4:25 pm.

8. PW-2 Mandeep alias Sonu has stated that he was taking tea at Shishmati at about 4/4:30 pm, police raided the shop, but except this, he denied each and every aspect of the prosecution case, as such he was declared hostile. This witness has admitted the search of the shop in his presence, but he did not identify the accused, as the same person, who was found present in the shop. In his cross-examination, he deposed that his signatures were obtained by the police on the next day by calling him as well as his friend Sonu to Police Post, Akhara Bazar, Kullu.

9. PW-3 ASI Man Singh has supported the version of PW-10 (Investigating Officer). He has stated that when Investigating Officer prepared the rukka, the same was given to him with a direction to take the same to Police Station, Kullu, on the basis of which FIR No.319 of 2008 was registered and the case file was handed over to him, which he handed over to the Investigating Officer at the spot. He has also identified the case property. According to this witness, Police Party started from Police Post at about 2:00 pm. The secret information was received by Investigating Officer through telephone. The area known as Shishmati is admitted by this witness to be thickly populated. He has further deposed that they reached at the spot after passing through number of houses, shops and temple. The shop of the accused was having three shutters, but he could not disclose about the fact whether all the shutters were open or not. When the question regarding the ownership of the shop was asked from this witness, he disclosed that it was accused who disclosed to them that all the shops were in his possession. He has admitted that except one weighing scale Ex.P-7 weight of ten grams Ex.P-8 and weight of two grams Ex.P-9, they were having no other weighing scale. He has deposed that Investigating Officer firstly weighed two grams of heroin and thereafter separated the same in two parts.

10. PW-4 LHC Manoj Kumari has deposed that on 31.5.2008 Inspector Partap Singh, deposited the case property of this case with her which she entered in register No.19 at Serial No.201. On the next day, she sent one sample parcel alongwith specimen sample seals of '**T**' and '**H**', NCB form in triplicate, copy of FIR, seizure memo to FSL, Junga through Constable Narender

Singh, vide RC No.154 of 2008 Ex.PW4/B. This witness also filled in column No.12 of the NCB form.

11. PW-5 Narender Singh, took the case property to FSL, Junga and deposited the same on 2.6.2008 and receipt Ex.PW5/A and RC Ex.PW4/B were redeposited by him with MHC, Police Station, Kullu, on 4.6.2008.

12. PW-6 HC Nirat Singh, has proved the report under Section 42 (2) of the NDPS Act, endorsement of the then Addl. Superintendent of Police Ex.PW6/A and abstract of the register Ex.PW6/B.

13. PW-7 Inspector Partap Singh, has deposed that on 31.5.2008, ASI Man Singh (PW-1) brought rukka to the Police Station, on the basis of which, he recorded FIR Ex.PW7/A and made endorsement Ex.PW7/B on rukka and handed over the case file to ASI Man Singh with a direction to take the same to Investigating Officer on the spot. On the same day, PW-8 Lal Chand, produced the case property consisting one bulk parcel and two sample parcels alongwith specimen seal impressions of '**T**' as well as NCB form in triplicate. This witness resealed the case property by affixing 3-3 seals of seal '**H**' on sample parcels and five seals of impression '**H**' on bulk parcel. He has also draw specimen sample impressions of seal of '**H**' one of which is Ex.PW7/C and also filled in columns No.9 to 11 of the NCB form and thereafter, he deposited the case property with MHC Police Station, Kullu.

14. PW-8 ASI Lal Chand, has prepared spot map Ex.PW8/A and recorded the statements of witnesses as per their version. This witness arrested the accused vide memo Ex.PW2/C and the case property was produced before the then Station House Officer, Police Station, Kullu, who resealed the same by affixing 3-3 seals of letter '**H**' on sample parcels and six seals of impression '**H**' on the bulk parcel. According to this witness, there were two shops at the spot having three shutters on it, which according to this witness were owned by accused Kamlesh. This witness admitted that adjoining to the shops there was a kiosk (khoka) and a house.

15. PW-9 Nirmal Singh, has partly investigated the case and recorded the statements of Vidya Devi, MHC Manoj Kumari, Constable Narender Kumar, and Head Constable Nirat Singh under Section 161 Cr.P.C.

16. PW-10 ASI Balbir Singh (Investigating Officer) has deposed that on 31.5.2008, he alongwith ASI Man Singh, HC Mohar Singh, HC Chet Ram, Constable Nanak Chand and Constable Kishore, was on patrolling duty and at about 4:00 pm, when they were present at Shishamati, he received a secret information regarding indulgence of the accused in the sale of smack and other narcotics. The said information was found authentic by this witness and as such, he complied with the provisions of Section 42 (2) of the NDPS Act and prepared the information Ex.PW1/A and sent the same to the then Addl. Superintendent of Police Ahmed Sayed through Constable Nanak Chand. Thereafter, this witness alongwith other accompanying Police officials proceeded to the spot and reached there within few minutes. One person was found standing on the counter of the shop. On inquiry, he disclosed his name as Kamlesh (accused). Investigating Officer also found three other persons sitting in the shop and they were having tea and on inquiry, they disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. The accused as well as those three persons were apprised about the secret information received by Investigating Officer. Thereafter, Investigating Officer had given his personal search to the accused, but nothing incriminating was found from his possession. The search of the shop was conducted and he found two silver foils/wrapping papers rolls, one large packet (pura) made of wrapping papers kept on the lower shelf of the counter. He also found one weighing scale made of brass, one weight of ten grams and one weight of two grams from the same shelf. When the said large packet (pura) was opened, it was found containing heroin type white powder, on checking with the help of narcotic detection kit, it was found positive and the heroin was recovered weighing 14 grams. Two samples of 1-1 gram each were separated from the recovered heroin. The samples were separated sealed in two packets by affixing 3-3 seals of letter

'T' on each and the bulk parcel was sealed with seal '**T**' by affixing five seals of letter **'T'** NCB forms in triplicate was filled in one of which is Ex.PW4/C and specimen seal impression of letter '**T**' Ex.PW10/A was also drawn by the Investigating Officer. This witness has duly identified the other specimen sample seals attached with the sample and bulk parcel. Thereafter, the seal was handed over to witness Sonu alias Rajinder. The case property was taken into possession vide memo Ex.PW2/B, thereafter prepared ruqa Ex.PW10/B and handed over the same to ASI Man Singh, with a direction to take the same to Police Station, Kullu. Thereafter, this witness telephonically informed ASI Lal Chand, Incharge, Police Post, City Kullu, to come present on the spot. In his cross-examination, he deposed that when he received secret information, the entire police party was also present there. Thereafter, he enquired about the shop of the accused from a person, but he admitted that he did not associate the said person in the investigation from whom he inquired about the shop of the accused. He has admitted that no personal search of the accused was conducted and only his shop was searched. So far as the alleged independent witnesses are concerned, according to this witness, they were present at the time when he searched the shop. He has also admitted that the area where the shop of the accused is allegedly situated is thickly populated area. He has further deposed that since he was having specific secret information, he only searched one shop of the accused, where the accused was found standing.

17. In the present case, PW-10 ASI Balbir Singh, (Investigating Officer) was having a specific secret information regarding indulgence of the accused in the sale of smack and other narcotics. He found the said information authentic and after complying the provision of Section 42 (2) of the NDPS Act, prepared the information Ex.PW1/A and sent the same to the then Addl. Superintendent of Police Ahmed Sayed through Constable Nanak Chand. Thereafter, this witness alongwith other accompanying Police Officials proceeded to the spot and reached there within a few minutes. One person was found standing on the counter of the shop. On inquiry, he disclosed his name as Kamlesh (accused) in the present case. The Investigating Officer also found three other persons sitting in the shop, who were having tea and disclosed their names as Sonu alias Rajinder, Mandeep alias Sonu and Ashok Kumar. The accused as well as other two-three persons were apprised about the secret information received by the Investigating Officer. Investigating Officer associated ASI Man Singh, Mandeep alias Sonu and Sonu alias Rajinder, as witnesses in the investigation. Investigating Officer gave personal search to the accused, thereafter the search of the shop was conducted and found two silver foils/wrapping papers rolls, one large packet (***pura***) made of wrapping papers kept on the lower shelf on the counter. He has also found one weighing scale made of brass, one weight of ten grams and one weight of two grams from the same shelf. When the said large packet (**pura**) was opened, it was found containing heroin type white powder, the result of which, on checking with the help of narcotic detection kit was found positive. Thereafter, the heroin was recovered weighing 14 grams. He also took two samples of 1-1 gram each, which were separated from the recovered heroin. The samples were separated sealed in two packets by affixing the seals on the sample filled in the NCB forms and seal impression was also taken. This witness duly identified the other specimen sample seals attached with the sample and bulk parcel. The case property was taken into possession by him. Investigating Officer prepared the rukka and sent the same through ASI Man Singh with a direction to take the same to Police Station, Kullu and handed over the further investigation to ASI Lal Chand. The case property was duly identified by this witness in the Court. PW-8 ASI Lal Chand, took further investigation from PW-10 ASI Balbir Singh. He reached at the spot at about 7:50 PM. He prepared the spot map and recorded the statement of witnesses, as per their version. He arrested the accused and produced the case property before the then Station House Officer, Police Station, Kullu, Shri Partap Singh, who resealed the same with seal impression '**H**' on the bulk parcel. The bulk was also sealed by him with six seal impression '**H'**. He has also filled the relevant columns of NCB forms in triplicate and obtained the specimen sample seal of '**H**'. According to PW-8 ASI Lal Chand, there are two shops at the spot having three shutters and these were owned by accused Kamlesh. PW-3 ASI Man Singh, has supported the version of PW-10 ASI Balbir Singh (Investigating Officer) on material aspect of the case. PW-7 Inspector Partap Singh, has stated about the registration of FIR, on the receipt of rukka making

endorsement and handing over the case file to ASI Man Singh with a direction to take the same to Investigating Officer at the spot. As far as taking the case property to FSL in safe custody has also been proved on record, as the narcotics were recovered from the shop of the accused, on the basis of secret information, there is sufficient compliance of Section 42 (2) as required under the Act. PW-2 Mandeep Singh alias Sonu independent witness has admitted his presence in the shop at the time of recovery. He was declared hostile and in his cross-examination, he has admitted his signatures on the documents. He has also admitted that some documents were written. He also admitted the presence of Rajinder alias Sonu at the place. He has stated that his statement was not recorded by the police. He has admitted that the police have come to the shop of the accused. Though, he has thereafter not supported the recovery, but he has admitted his signature in the recovery memo. He has admitted that memo Ex.PW2/A to Ex.PW2/C bears his signature. He also admitted that when he signed these documents no pressure was put by the police.

18. From the above, it is clear that the independent witnesses have tried to shield the accused, but his admission on the signatures of the memos Ex.PW2/A to Ex.PW2/C and his admission with regard to his presence and the presence of other independent witnesses on the spot and that he signed the documents without any pressure shows that he is not stating the truth before the Court.

19. As stated here-in-above, the prosecution by leading cogent, convincing and reliable evidence of PW-8 ASI Lal Chand, PW-10 ASI Balbir Singh and other police witnesses has proved on record the guilt of the accused beyond reasonable doubt that the prosecution has recovered 14 grams of heroin from the shop of the accused on 31.5.2008 at about 4:00 PM, at Shishmati, District Kullu, H.P, which was in the exclusive possession of the accused and accused was in possession of heroin, on the basis of secret information, heroin was lying in the shop of the accused. So, we hold that the accused has committed an offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. The findings arrived at by the learned Court below with respect to the non compliance of provision of the Act are not in accordance with law and thus are required to be set aside. The findings of the learned Court below that the heroin was not recovered from the possession of the accused are also against the proved facts on record and liable to be set aside.

20. Consequently, the appeal is allowed and accused Kamlesh alias Kaka is convicted under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985. Thus, accused Kamlesh alias Kaka now convict is required to be heard on quantum of sentence for the offence punishable under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

21. Let the convict be produced before this Court on ***12.01.2017*** by issuing a production warrant.

22. Before parting with the case, we would be failing in our duty, if ignore the manner in which PW-2 Mandeep Singh alias Sonu, independent witness has conducted himself while in the witness box. Taking note of the statement, he made while in the witness box, in our opinion, he has not disclosed true facts. He has admitted his signatures on the recovery memo Ex. PW2/A to Ex.PW2/C. He while in the witness box admits his signatures on these memos. In his cross-examination, he has admitted his signatures on the documents. He has also admitted that some documents were written. He also admitted the presence of Rajinder alias Sonu at the place. He has stated that his statement was not recorded by the police. He has admitted that the police have come to the shop of the accused. Though, he has thereafter not supported the recovery, but he has admitted his signature in the recovery memo. He has admitted that memo Ex.PW2/A to Ex.PW2/C bears his signature. He also admitted that when he signed these documents no pressure was put by the police. If nothing of this sort took place in his presence, he should not have signed these documents. Therefore, he has not spoken the truth and has rendered himself liable to be dealt with in accordance

with law including his prosecution under Section 211 of the Indian Penal Code and also within the meaning of sub-Section (1) of Section 195 of the Indian Penal Code.

23. Section 340 of the Code of Criminal Procedure takes care of such a situation. The provisions contained under the Section ibid reveal that if on an application made to it or otherwise, the Court is of the opinion that it is expedient and in the interest of justice that an inquiry should be made into any offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code, which appears to have been committed in relation to proceeding of a case in that Court, the Court shall hold a preliminary inquiry and after recording a finding that by producing a document or giving a statement in evidence, an offence referred to in clause (b) of sub-Section (1) of Section 195 of the Code is made, order to make a complaint in writing to a Magistrate of the first class having jurisdiction over the matter.

24. Section 340 of the Code of Criminal Procedure contemplates a preliminary inquiry to be conducted by the Court to form an opinion that it is expedient and in the interest of justice to hold inquiry into the offence which appears to have been committed. It is not mandatory for the trial Court to hold preliminary inquiry, because it has the opportunity to see the witness while in the witness box and to observe his demeanour. We, however, feel that the appellate Court, having no such opportunity to observe the demeanour of the witness, should hold an inquiry and give an opportunity of being heard to him, before forming an opinion that an offence within the meaning of clause (b) of sub-Section (1) of Section 195 of the Code of Criminal Procedure appears to have been committed by him. It is only thereafter, an order qua filing a complaint, as contemplated under Section 340 of the Code of Criminal Procedure, should be passed.

25. Therefore, before initiating any action against PW-2 Mandeep Singh alias Sonu, we deem it expedient and in the interest of justice to call upon him to show cause as to why an action be not initiated against him in the light of the observations in this judgment. Consequently, there shall be a direction to the Registry to issue show cause notice to PW-2 Mandeep Singh alias Sonu, for **12.01.2017** and the proceedings be registered against him separately. A copy of judgment be also sent to PW-2 Mandeep Singh alongwith show cause notice. Office of learned Advocate General to collect notice from the Registry of this Court for onward transmission to the Superintendent of Police, Kullu, for effecting service thereof upon the witness Mandeep Singh well before the date fixed. The record of the learned trial Court be retained for being referred to at the time of further consideration of the matter, after taking on record the version of the witness to be referred to as 'the respondent' in the proceedings ordered to be drawn separately against him.

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BEFORE HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ……Appellant.
Versus
Labh Singh. ……Respondent.

Cr. Appeal No. 292 of 2014
Reserved on :10.11.2016
Decided on :29.12.2016.

Indian Penal Code, 1860- Section 306 and 498-A- Deceased was married to the accused – one daughter was born – the accused started beating the deceased under the influence of liquor- she complained that her husband used to beat her and he had also tried to kill her – she committed suicide by consuming poison- the accused was tried and acquitted by the Trial Court - held in appeal that marriage of the deceased with the accused was not disputed – it was also not disputed that deceased had consumed poison – the allegations made by the deceased are nothing

but normal wear and tear of normal married life – they do not amount to such willful conduct, which would have driven the deceased to commit suicide – the instances of maltreatment and cruelty pertain to 1-2 years prior to the commission of suicide – there is no evidence that deceased was subjected to cruelty prior to commission of suicide – the Trial Court had taken a reasonable view while acquitting the accused- appeal dismissed.(Para-9 to 25)

Cases referred:

State of H.P. Vs. Pardeep Singh and another, Latest HLJ 2013 (HP) 1431
Manju Ram Kalita versus State of Assam (2009) 13 Supreme Court Cases 330

For the appellant	:	Mr. M.A. Khan and Mr. Virender Verma, Addl. AGs.
For the respondent	:	Mr. Rahul Singh Verma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

State of Himachal Pradesh aggrieved by the judgment dated 23.5.2014 passed by learned Additional Sessions Judge, Kullu in Sessions trial No. 7 of 2014(2012) is in appeal before this Court. The complaint is that learned trial Court has failed to appreciate the evidence available on record in its right perspective and acquitted the accused erroneously. The findings of acquittal of the respondent (hereinafter referred to as the 'accused') are claimed to be contrary to the evidence as has come on record by way of the testimony of PW1 Chaman Lal, the brother of deceased, her father Shri Bidhu Ram PW4 and sister Smt. Jamuna Rana PW5. They all stated in one voice that the accused had been administering beating to deceased Chinta Mani and it is on account of that she consumed poison and committed suicide.

2. Deceased Chinta Mani had consumed poison on 7.3.2012. She was brought to Regional Hospital, Kullu and as per MLC Ext.PW9/J admitted there at 9:50 A.M. She later on died and information in this regard was given by HHC Ved Ram No. 228 on PAR duty in Regional Hospital, Kullu at 12:45 P.M. Rapat Ext.PW9/A came to be entered in police station. PSI Ashok Kumar (PW9) accompanied by HC Jai Singh and L.C. Ram Kali went to hospital to conduct inquiry in the matter. In the hospital PW1 Chaman Lal, brother of the deceased was present. He made statement Ext.PW1/A and reported that the deceased was married to accused four years prior to her death as per Hindu rites and customary ceremonies. One daughter was born to them out of this wedlock. After the marriage, the accused started beating the deceased under the influence of liquor. He had been torturing her not only physically but mentally also. He was advised not to do so on several occasions but of no avail. About one year prior to her death she had come to the house of PW1 and complained that her husband had been administering beating to her under the influence of liquor. Also that on one occasion he tried to set her on fire and to kill. She lived in his house for 12-13 days. He thereafter discussed the matter with her husband the accused and she was taken by him to the matrimonial home. The accused allegedly did not mend his behavior and as the deceased was again beaten up by him, therefore, she went to Mohal to the house of her sister PW5 Jamuna Rana. There also she lived for a week and thereafter made to go back to the matrimonial home. It was, therefore, reported by the complainant party that Chinta Mani had committed suicide by consuming poison on account of being tortured mentally as well as physically by her husband, the accused.

3. On the basis of the statement Ext.PW1/A FIR Ext.PW7/B was recorded in Police Station, Sadar Kullu. PW9 had photographed the dead body. The photographs are Ext.P1 to Ext.P8. He also prepared the inquest papers Ext.PW9/B and Ext.PW9/C. He thereafter moved the application Ext.PW9/D to the Medical Officer for conducting post mortem of the dead body. After getting the post mortem conducted, the dead body was handed over to Gaytri Dutt, brother-in-law of the deceased vide memo Ext.PW9/E. Spot map Ext.PW9/F was prepared. One vial 'Nuvon' was taken in possession vide recovery memo Ext.PW2/A from the house of the accused.

The photographs of the house Ext.P12 and Ext.P13 were also taken by PW9. The house was video graphed vide CD Ext.P14. The statements of the witnesses were recorded. The Chemical Examiner's report Ext.PW9/G and MLC of the deceased Ext.PW9/J were also collected from the hospital.

4. On completion of the investigation, challan was prepared by PW8 Shri Sher Singh, the then Inspector/SHO, Police Station, Kullu.

5. Learned trial Court on appreciation of the challan and documents annexed therewith has framed charge for the commission of the offence punishable under Sections 498-A and 306 of the Indian Penal Code against the accused. He, however, pleaded not guilty to the charge and claimed trial. Therefore, in order to sustain charge against him, the prosecution has examined nine witnesses in all. Besides Chaman Lal PW1, brother of the deceased, Shri Bidhu Ram PW4 her father and sister PW5 Smt. Jamuna Rana are the material prosecution witnesses. PW2 Sukh Chand is a witness of recovery of vial which was taken in possession vide memo Ext.PW2/A. The remaining prosecution witnesses PW3 HHC Uttam Singh, PW7 SI Om Chand and PW8 Inspector/SHO Sher Singh are police officials who remained associated during the investigation of the case in one way or the other. Pw9 is the Investigating Officer. PW6 is Dr. Rajinder Kohli who has proved the post mortem report Ext.PW6/A.

6. The accused in his statement recorded under Section 313 Cr.P.C. has admitted that the deceased was his legally wedded wife and she consumed poison and expired in Regional Hospital, Kullu on 7.3.2012 at 12.45 P.M. Rest of the prosecution case has, however, been denied by him either being wrong or for want of knowledge. According to him, he is innocent and the witnesses have deposed falsely against him. He however, did not opt for producing any evidence in his defence.

7. Mr. M.A. Khan, learned Additional Advocate General has vehemently argued that cogent, reliable and convincing evidence produced by the prosecution has proved the commission of offence by the accused beyond all reasonable doubt, however, the same is stated to be erroneously brushed aside and the accused acquitted of the charge framed against him on flimsy grounds.

8. On the other hand, Mr. Rahul Singh Verma, Advocate, learned Counsel representing the accused has urged that the present is a case of no offence and as such the accused has rightly been acquitted of the charge framed against him by the learned trial Court.

9. Before coming to the rival submissions and appreciation of the evidence available on record, it is desirable to take note of as to what constitute an offence within the meaning of Section 498-A and 306 of the Indian Penal Code and also the meaning of 'abetment' in legal parlance. We can draw support in this regard from the judgment of a Division Bench of this Court in ***State of H.P.*** Vs. ***Pardeep Singh and another, Latest HLJ 2013 (HP) 1431***. The relevant text of this judgment is as under:

> ***"10.*** At the outset it is desirable to discuss as to what constitutes the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code. A bare reading of Section 498-A reveals that ***sine qua non*** to establish the said offence is subjecting to cruelty the wife by her husband or relative with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or willful conduct of the husband of such woman or a relative, of such a nature as is likely to drive her to commit suicide or to cause grave injury or danger to life, limb or health."

10. The ***Apex Court in Manju Ram Kalita versus State of Assam (2009) 13 Supreme Court Cases 330*** has held as under:

> **"***Cruelty*" for the purpose of Section 498-A IPC is to be established in the context of Section 498-A IPC as it may be different from other statutory provisions. It is to be determined/ inferred by considering the conduct of the man, weighing the

gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide, etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498-A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty."

12. So far as the commission of offence punishable under Section 306 of the Indian Penal Code is concerned, the prosecution is required to prove beyond all reasonable doubt that some person has committed suicide as a result of abetment by the accused.

13. In the case in hand, the deceased had committed suicide on 25.5.2008 in her matrimonial home at village Nau-Shehra, District Kangra, H.P. One of the ingredients of the commission of offence under Section 498-A IPC, therefore, stands proved. The prosecution, however, is further required to prove that it is the accused alone who had abetted the commission of suicide by the deceased.

14. Abetment has been defined under Section 107 of the Indian Penal Code. Its simple meaning is that a person abets the doing of a thing who firstly instigates any person to do a thing, or secondly, engages with one or more other person or persons in any conspiracy for doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to doing of that thing, or intentionally aids, by any act or illegal omission, the doing of that thing can be said to have abetted the doing of that thing.

15. ……… It is worthwhile to mention here that in a case of this nature, torture and harassment ordinarily is meted out to the victim in the four walls of the house and such cases mostly depend upon the circumstantial evidence. In the absence of direct evidence, the legislature in its wisdom has enacted Section 113-A of the Indian Evidence Act which provides that if a married woman commits suicide within the period of seven years from the date of marriage and there are allegations that she did so because of being subjected to cruelty either by her husband or relatives of her husband or by both. Having regard to all other circumstances, the Court can presume that she has committed suicide on being abetted by her husband or by such relatives of her husband. The ***Apex Court in Wazir Chand and another versus State of Haryana (1989) 1 Supreme Court Cases 244*** has held that if any person instigates any other person to commit suicide and as a result of such instigation, the other person commits suicide, the person causing the instigation is liable to be punished under Section 306 of the Indian Penal Code.

16. In a case of suicidal death, the onus to prove that suicide was abetted by the accused alone is on the prosecution and to raise the presumption under Section 113-A of the Evidence Act, one of the ingredients that the deceased was subjected to cruelty is required to be proved first by the prosecution."

11. The settled legal principles are, therefore, that in order to bring guilt home to the accused for the commission of an offence punishable under Sections 498-A and 306 of the Indian Penal Code evidence to coerce the deceased to convince her parents to meet dowry demand of her husband or his relative and that it is due to such willful conduct of the accused which had driven the deceased to commit suicide is required to be proved by the prosecution.

12. Admittedly, the deceased was married to accused Labh Singh. One female issue was born to her out of this wedlock. She consumed 'Nubon' a poisonous substance on 7.3.2012 in the matrimonial home. She was brought to Regional Hospital, Kullu for treatment at 9:50 A.M. She was admitted in the hospital, however, could not be saved and passed away at 12:45 P.M. on that day itself. She, therefore, has died within seven years of her marriage with accused Labh

Singh. As per the medical evidence available on record she was carrying 4-5 months old pregnancy at the time of her death.

13. In the statement under Section 154 Cr.P.C. Ext.PW1/A the instances of cruelty on the perusal thereof reads as follow:

i) Accused used to torture the deceased mentally as well as physically and had also been administering beatings to her.

ii) One year prior to commission of suicide by her, she came to the house of her brother the complainant PW1 Chaman Lal at village Chhurla and told that her husband (accused) used to administer beating to her under the influence of liquor.

iii) Also that on one occasion he attempted to set her on fire.

14. In view of the instances of cruelty as aforesaid nothing suggesting has come on record that her husband had maltreated the deceased in the matrimonial home with a view to coerce her parents to meet demand of dowry of the accused. The allegation if believed to be true amount to bear and tears of normal married life. The same do not amount to such willful conduct of the accused which had driven the deceased to commit suicide within the meaning of Section 498-A and 306 of the Indian Penal Code. True it is that her brother Chaman Lal the complainant while in the witness box as PW1 has supported the allegation against the accused in the statement Ext.PW1/A. However, the alleged maltreatment and incident of beatings to the deceased pertains to one year prior to the commission of suicide by her. The so called threatening by the accused to set her on fire is also not an incident i.e. immediately before the commission of suicide by her but disclosed to PW1 during her visit to his house somewhere one year also before the occurrence. In his cross-examination, he tells us that she disclosed the alleged incident of beatings given to her by the accused in the year 2012 i.e. two years prior to commission of suicide by her. He admitted that the matter was not reported either to police nor he ever consulted the elderly placed persons in the village. He, however, had discussed the matter with the accused and his colleague teacher Tej Singh. The deceased had told him that accused threatened to set her on fire about 8-10 days back on her visit to his house i.e. in the year 2010. The deceased had brought to the notice of Jamuna Rana such conduct and behavior of the accused during her visit which according to PW1 was after 4-5 months of her visit to his house, meaning thereby that to Jamuna also the deceased had revealed the incident somewhere in the year 2010 or 2011. According to Jamuna Rana PW5 the deceased had come to her house somewhere in August and September 2011. Even if the deceased had gone to her house somewhere 6-7 months prior to commission of suicide by her, PW Jamuna Rana has also not made any complaint to anyone including the members of the family of accused against his conduct and behavior. The testimony of PW1 and PW5 lead to the only conclusion that the so called instances of maltreatment and cruelty of the deceased pertain to the period prior to 1-2 years of commission of suicide by her.

15. The present as such is not a case where soon before the death of the deceased she was subjected to cruelty in connection with demand of dowry. In order to bring guilt home to the accused in a case of this nature approximate link between harassment and cruelty in connection with demand of dowry and death of victim resulting out of it should be pleaded and proved. However, in the case in hand, there is no iota of evidence to show that soon before the commission of suicide by the deceased she was treated with cruelty by the accused. The statement of her father Bidhu Ram PW4 is also of no help to the prosecution case for the reason that as per his testimony his deceased daughter had come to his house about two years back and told about she was being maltreated and tortured by the accused. According to him after about one week he made her to understand to return to the matrimonial home. During that visit she allegedly had also informed him qua the accused having attempted to set her on fire and thereby to kill her. However, his statement in cross-examination reveals that he never made any complaint to the police against the accused. No statement that the deceased disclosed setting her

on fire by the accused is however made by him before the police. Therefore, by stating so, this witness has improved his earlier version which is not legally permissible.

16. This alone is the evidence produced by the prosecution to connect the accused in the commission of offence because the remaining prosecution witnesses are police officials who remained associated during investigation of the case in one way or the other. The evidence as has come on record by way of their testimony could have been used as link evidence had the prosecution been otherwise able to establish the involvement of the accused in the commission of offence.

17. The present no doubt is a case where the deceased has committed suicide within seven years of her marriage in the matrimonial home with the accused. However, in the given facts and circumstances as well as the evidence available on record the presumption that it is the accused who abetted the commission of suicide by her cannot be drawn for the reasons that the prosecution has miserably failed to discharge the initial onus upon it. There is again no question of accused having instigated the deceased to commit suicide or abetted the commission of suicide by her within the meaning of Section 107 of the Indian Penal Code. As a matter of fact, the present is a case where nothing suggesting that the deceased was being tortured or harassed by the accused in relation to the demand of dowry or otherwise and the degree of cruelty was so high that she was not able to understand comparison between life and death and in such a state of mind, chosen the pangs of death. True it is that in normal circumstances, no person takes such a drastic step to do away with his/her life that too without there being any cause, however, present is not a case where it can be said that the deceased has committed suicide owing to cruel treatment meted out to her by the accused.

18. In view of what has been said hereinabove, this appeal fails and the same is accordingly dismissed. The personal bond furnished by the accused shall stand cancelled and the surety discharged.

19. Before parting with this judgment, we would be failing in our duty if ignore the facts which otherwise would have been of some help to the investigating agency to unearthen the truth, had the same been taken into consideration and gone into during the course of inquiry, investigation or trial.

20. As per the prosecution case the deceased was found to have consumed poisonous substance early in the morning i.e. 7:45 A.M on 7.3.2012. The reliance in this regard can be placed on the MLC Ext.PW9/J which reveals that the deceased was brought to the Regional Hospital, Kullu for treatment and attended upon by the doctor on duty at 9:50 A.M. As per record the only evidence i.e. rapat Ext.PW9/A the information qua deceased having consumed some poisonous substance and as a result thereof died in the hospital was given at 12:45 P.M. by Ved Ram who allegedly was on PAR duty in the hospital. The MLC reveals that the deceased when brought to hospital was attended upon by Dr. Rajinder Kohli. The first and foremost duty of Dr. Kohli who is PW6 in this case was to have apprised the police of Police Station, Kullu qua the deceased having been brought in serious condition as a case of poisoning to the hospital for treatment. There is no evidence that any such information was given by PW6 Dr. Rajainder Kohli to Kullu police.

21. The information when received at 12:45 P.M. in the Police Station the I.O. PW9 though conducted the investigation, however, did not inquire into this aspect of the matter. He in his cross-examination has admitted that as per the investigation he conducted the deceased was brought to hospital at 9:50A.M. by the accused and other villagers. He neither inquired the matter from those villagers who had brought the deceased to the hospital nor from the Medical Officer who on her arrival in the hospital attended her. It is only the MLC Ext.PW9/J of the deceased was collected by him from the hospital and the other record qua the treatment given to her has not been obtained.

22. Therefore, the doctor on duty i.e. PW6 Dr. Rajinder Kohli prima-facie had not given the intimation to the police of Police Station, Kullu that deceased was brought to the

hospital at 9:50 A.M. for treatment in serious condition as the case of poisoning. Likewise the I.O. PW9 had not conducted inquiry nor tried to find out as to what prevented PW6 Dr. Rajinder Kohli to give requisite information to the police. Had the intimation been received by the police well in time the statement of deceased could have possibly been recorded and had she been found fit to make statement may have divulged the circumstances leading to consumption of poison by her and commission of suicide.

23. As per the evidence available on record Sube Ram, the father of the accused was serving in Regional Hospital, Kullu. Therefore, delaying the intimation to the police can also be on account of some foul play or with a view to help the accused. In case the acts attributed to PW6 Dr. Rajinder Kohli and the I.O. PW9 Ashok Kumar are ultimately turned to be true, they not only committed an act of dereliction of duty and rendered themselves liable to be proceeded against departmentally but also of certain offences punishable under the Penal Laws of the Land. Anyhow, before any direction in this regard is passed by us, it is desirable to afford both of them the opportunity of being heard.

24. Being so, issue show cause notice to PW6 Dr. Rajinder Kohli, the then Medical Officer, Regional Hospital, Kullu and PW9 Shri Ashok Kumar, the then PSI Police Station, Kullu calling upon them to appear in this Court on ***2.3.2017*** in person and show cause why they should not be prosecuted under the Penal Laws of the Land for their act prima facie of omission and why a direction should not be issued to their respective appointing and disciplinary authority to initiate departmental action against them for imposition of penalty.

25. Learned Additional Advocate General to collect the present addresses of both of them and file the same in the Registry within a week.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Subhash Chand …. Petitioner.
Versus
State of H.P. …. Respondent.

Cr. R. No. 182 of 2008.
Reserved on 15.12.2016.
Decided on: 29.12.2016.

Indian Penal Code, 1860- Section 292- **Indian Copy Right Act, 1957**- Section 68-A- Accused was found in possession of pornographic VCDs –he was tried and convicted by the Trial Court- an appeal was preferred, which was dismissed – held in revision that seizure memo contains FIR number along with the sections under which the FIR was registered in the same ink, same pen, same flow and same handwriting as the remaining contents - FIR number has also been mentioned in the statements of the witnesses recorded under Section 161 Cr.P.C. – these documents were prepared prior to sending of ruqua and it was not possible to record the FIR number at that time – this falsifies the version of the prosecution and makes it difficult to rely upon the statements of official witnesses especially when independent witnesses have turned hostile – further independent witnesses were not associated from the locality and were taken by the I.O. with him – there was no compliance of Section 65-B of Indian Evidence Act- appeal allowed – judgment of Trial Court and Appellate Court set aside. (Para-15 to 24)

Cases referred:

Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123
Konnadan Abdul Gafoor Vs. State of Kerala, 2016 CRI.L.J. 2647

For the petitioner. Mr. B.L. Soni, Advocate with Mr. Aman Parth, Advocate.
For the respondent. Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.

By way of present revision petition, petitioner has challenged the judgment passed by the Court of learned Sessions Judge, Hamirpur in Cr. Appeal No. 27 of 2008 dated 10.9.2008 vide which, learned appellate court while dismissing the appeal filed by the present petitioner, upheld the judgment passed by the Court of learned Chief Judicial Magistrate, Hamirpur in Cr. Case No. 22-1 of 2007/40-II of 2007 dated 5.4.2008 whereby learned trial court convicted the accused for commission of offences punishable under Section 68-A of Copyright Act and Section 292 of IPC and sentenced him to undergo simple imprisonment for a period of one year and to pay a fine of Rs. 2,000/- for commission of offence punishable under Section 68-A of Copyright Act and to undergo simple imprisonment for a period of one year and to pay fine of Rs. 2,000/- for commission of offence punishable under Section 292 IPC. Both the substantive sentences of imprisonment to run concurrently.

2. The case of the prosecution was that PW6 Sub Inspector Guler Chand, HC Manohar Lal and Constables Sanjeev Kumar and Raj Kumar had gone to Nalti for the purpose of verification of entry in the Daily Diary, Ext. PW6/A, with regard to the factum of accused keeping for sale pirated and pornographic VCDs. As per prosecution, PW2 Subhash Verma and Ramesh Chand were associated by the police party as witnesses and search of the shop of accused was conducted in the course of which 19 VCDs were recovered out of which 9 were found to be MP-3 and 10 were found to be pornographic. Further as per prosecution these VCDs were sealed in a packet with seal 'H'. The CDs were seized vide seizure memo Ext. PW1/A on which signatures of witnesses Sanjeev Kumar, Suhhash and Ramesh Chand were obtained. Ruqua Ext. PW6/E was prepared and sent to the Police Station, on the basis of which, FIR Ext. PW5/B was registered. Statements of witnesses were recorded as per their versions and site plan was also prepared.

3. After completion of the investigation challan was prepared and filed in the Court and as a prima facie case was found against the accused he was charged for commission of offences punishable under Section 68-A of Copyright Act and Section 292 of IPC, to which accused pleaded not guilty and claimed trial.

4. In order to prove its case prosecution, in all, examined 07 witnesses.

5. PW-1, Ramesh Chand, who as per the prosecution was associated by the police party with the search and seizure of VCDs from the accused, did not support the case of the prosecution.

6. PW2, Subhash Verma, the other independent witness who was associated by the prosecution with the search and seizure of the VCDs from the accused also did not support the case of the prosecution.

7. PW3, Sanjeev Kumar, who was part of the police party stated that on 15.11.2006 Subhash Chand Gift Centre was checked at Nalti by Sub Inspector Guler Chand and from the counter of the said shop 19 CDs were recovered. He stated that out of these CDs, 09 were pirated and 10 were pornographic which were checked at the spot. He further stated that these CDs were taken into possession vide memo Ext. PW1/A. In his cross-examination, this witness admitted it to be correct that at Nalti there were 25-30 shops. He also stated that police party did not associate any local person with the investigation. He further stated that Ramesh had joined the investigation at the spot only and that Ramesh was not taken along by the police party. He also stated that the entire proceedings at Nalti consumed about 3 to 4 hours. He admitted that before checking the counter the police party had not given its search to anyone.

8. The next relevant witness is Sub Inspector Guler Chand who entered the witness box as PW6. This witness deposed that he was posted as Sub Inspector at Police Station, Hamirpur since July, 2006. He also deposed that on 15.11.2006 at around 2:45 p.m. some unknown person passed on information that Subhash Chand a shopkeeper at Nalti Bazar had kept pirated CDs in his shop which he used to sell and in case the shop was raided then the said CDs could be recovered. He further stated that on this he entered the Rapat i.e. Rapat No 29, Ext. PW6/A, and went to the spot in a vehicle alongwith HC Manohar Lal, Constable Sanjeev Kumar and on the way he also took witnesses Ramesh and Subhash Verma alongwith him. He further deposed that after reaching the shop of accused, search was carried out which revealed 19 CDs inside the counter which were not bearing any mark or identification sign of any Company and were in fact pirated. He further deposed that all the CDS were checked in a CD-Player which was found in the shop of accused and out of recovered CDs, 10 VCDs were found to be pornographic. He also deposed that remaining 09 pirated VCDs contained songs sung by various artists. He further deposed that Fard was prepared at the spot which was signed by witnesses Ramesh, Subhash and Sanjeev Kumar. He also deposed that he recorded the statements of the witnesses, arrested the accused and sent Ruqua, Ext. PW6/E, through HC Manohar Lal. In his cross-examination, this witness deposed that he had associated witness Subhash from his shop and witness Ramesh from outside the Police Station. He also deposed that he had taken both these witnesses alongwith him. He stated that he had taken the entire raiding party from there (Police Station) only. He also deposed that in Nalti there were about 25-30 shops and that he had not associated any local person of the area or Panch, Pradhan or shopkeeper etc. He also stated in his cross examination that before carrying out the raid he had not given his search to anyone. He also stated in his cross examination that the shop of witness Subhash was adjacent to the Police Station and that witness Ramesh Chand was a resident of village Anu. He further deposed that proceedings took place between 3:15 p.m to 6:00 p.m and Ruqua was sent at around 4:15 p.m.

9. Learned trial court on the basis of evidence produced before it by the prosecution held that the prosecution was able to prove successfully its case against the accused beyond all reasonable doubt for commission of offences punishable under Section 68-A of Copyright Act and Section 292 of IPC. Accordingly learned trial court convicted the accused for commission of the said offences. While returning the finding of conviction learned trial court held that though PW1 and PW2 turned hostile, however, statement of PW3, Constable Sanjeev Kumar, and PW6, Sub Inspector Guler Chand, proved the case of the prosecution as there was nothing to doubt the testimony of these two witnesses. Learned trial court also held that the factum of the Investigating Officer not associating any independent local witness also had no bearing as the requirement of having independent witness to corroborate evidence of Police Officers had to be viewed from a realistic angle. Learned trial court further held that even if search was made in violation of the provisions of Section 100 (4) of Cr.P.C. then also conviction can be recorded if the testimonies are found to be satisfactory. Learned trial court further held that the discrepancies in the statements of prosecution witnesses were otherwise bound to come with the passage of time and they were not sufficient to reject the prosecution case. On these bases, it was held by learned trial court that prosecution had proved that the accused was found in possession of 19 VCDs, out of which 10 were pornographic and 09 were pirated. It was also held by learned trial court that as per the provisions of Section 52-A of Copyright Act it was essential that the name and address of the person who had made the video film and declaration that he had obtained necessary licence or consent from the owner of the copyright for making such video film, the name and address of the copyright owner were mentioned on VCD and if these requirements are not mentioned then it amounts to offence punishable under Section 68-A of Copyright Act. Learned trial court also held that it was not necessary for the prosecution to track and trace the owner of the copyright to adduce evidence for infringement of copyright. It was also held by learned trial court that prosecution witnesses had consistently held that VCDs were found to be pornographic in nature and since the VCDs were kept in a shop therefore there was a reasonable inference that the same was kept for the purpose of sale or hire. On these bases, learned trial court returned the finding of conviction against the accused.

10. In appeal the finding so returned by learned trial court were upheld by learned appellate court. While upholding the judgment of conviction, learned appellate court held that neither non-association of local witnesses was fatal to the case of the prosecution nor there could be any such presumption that CDs were in fact planted by the Investigating Officer. Learned appellate court also held that the Investigating Officer had no animus against the accused and therefore statement of Investigating Officer had to be believed as the Investigating Officer had no interest to state falsely against the accused. Learned appellate court also held that even PW3 had duly supported the version of the Investigating Officer. Learned appellate court also held that it was evident from the police record that CDs were duly played on CD-player and were found to be of above description and further the conclusions arrived at by learned trial court that the pirated CDs were without any name and address and manufacture etc. and other CDs were pornographic was the correct conclusion. Accordingly learned appellate court dismissed the appeal so filed by the accused.

11. Feeling aggrieved by the said judgments passed by learned courts below, the accused has preferred the present revision petition.

12. Mr. B.L. Soni learned counsel for the petitioner has argued that the judgments passed by both the learned courts below against the accused were not sustainable in the eyes of law as the same were perverse in view of the fact that the findings of conviction returned by both the learned courts below against the accused were not borne out from the records of the case. Mr. Soni argued that both the learned courts below erred in not appreciating that the prosecution had failed to prove its case against the accused beyond all reasonable doubt. Mr. Soni argued that both the learned courts below erred in not appreciating that the independent witnesses had not supported the case of the prosecution because no CDs were recovered from the accused in the mode and manner as the prosecution wants this Court to believe. He further argued that beside this there were major contradictions and inconsistencies in the statements of PW3 and PW6 which belied and falsified the entire case of the prosecution, however, both learned courts below gravely erred in not appreciating the testimonies of PW3 and PW6 in their correct perspective which had led to grave injustice to the petitioner. It was further argued by Mr. Soni that neither the documentary evidence was correctly appreciated by both learned courts below nor it was appreciated by both learned courts below that the petitioner was falsely implicated in the case by the prosecution. On these bases, Mr. Soni prayed that the judgments of conviction passed by both learned courts below against the petitioner were liable to be set aside and the petitioner deserved to be acquitted. Mr. Soni also drew attention of this Court to various documents purportedly prepared by the Investigating Officer at the spot and he argued that the factum of FIR number being mentioned in these documents in the same ink, handwriting and flow even before the FIR was lodged demonstrated that none of these documents was actually prepared at the spot and all these documents were concocted subsequently in the Police Station. Mr. Soni also argued that another perversity with the judgments passed by both learned courts below was that both learned courts below erred in not appreciating that the CDs which were allegedly recovered from the possession of the petitioner were never exhibited in accordance with Section 65B of the Indian Evidence Act.

13. Mr. Vikram Thakur learned Deputy Advocate General, on the other hand argued that there was no merit in the present revision petition as there was no perversity with the findings of conviction returned against the accused by both the learned courts below. Mr. Thakur argued that both PW3 and PW6 had proved and corroborated the case of the prosecution on all material aspects and both the learned courts below after taking into consideration the entire evidence had rightly found the accused guilty of the offence with which he was charged. Accordingly, it was prayed by Mr. Thakur that as there was no merit in the revision petition, the same be dismissed.

14. I have heard the learned counsel for the petitioner as well as learned Deputy Advocate General and also gone through the records of the case as well as the judgments passed by both the learned Courts below.

15. Before proceeding in the matter, it is relevant to take note of what is the scope of revisional jurisdiction of this Court. It is settled law that the scope of revisional jurisdiction of this Court does not extend to re-appreciation of evidence. It has been held by the Hon'ble Supreme Court that the High Court in exercise of its revisional power can interfere only if the findings of the Court whose decision is sought to be revised is shown to be perverse or untenable in law or is grossly erroneous or glaringly unreasonable or where the decision is based on no material or where the material facts are wholly ignored or where judicial discretion is exercised arbitrarily or capriciously. It has been held by Hon'ble Supreme Court in ***Sanjaysinh Ramrao Chavan Versus Dattatray Gulabrao Phalke and Others, (2015) 3 Supreme Court Cases 123***, that unmerited and undeserved prosecution is an infringement of guarantee under Article 21 of the Constitution of India. In this case, Hon'ble Supreme Court has further held that the purpose of revision jurisdiction is to preserve the power in the Court to do justice in cases of criminal jurisprudence.

16. Coming to the facts of this case, the case of the prosecution is that on 15.11.2006 a secret information was received from some unknown person at Police Station, Hamirpur at about 2:45 p.m. to the effect that in Nalti Bazar if raid is conducted in the shop of accused, pirated VCDs could be recovered which were kept by the accused for sale to consumers. This has come in the testimony of the Investigating Officer PW6 Guler Chand who also stated that after the receipt of the said information he entered Rapat No. 29 Ext. PW6/A and thereafter proceeded to the spot in a vehicle alongwith HC Manohar Lal and Constable Sanjeev Kumar and also associated witnesses Ramesh and Subhash Verma from near the Police Station itself. This witness has further deposed that after raid was conducted in the shop of the accused purportedly in the presence of independent witnesses namely, Ramesh Chand and Subhash Verma, and 19 pirated VCDs were recovered which included 10 VCDs containing pornographic material, a ruqua was sent to Police Station i.e. Ext. PW6/E through HC Manohar Lal. It has come in his testimony that ruqua was sent through HC Manohar Lal for the registration of the case. It has also come in the testimony of this witness that before ruqua was sent, the CDS so recovered in the raid from the shop of accused were sealed in a parcel and recovery memo was prepared at the spot which was signed by witnesses Ramesh, Subhash Verma and Sanjeev Kumar.

17. Memo of recovery is on record as Ext. PW1/A, FIR is Ext. PW5/B and ruqua is on record as Ext. PW6/E.

18. A perusal of ruqua demonstrates that the same was sent by Investigating Officer on 15.11.2006 at 4:15 p.m. This document further demonstrates that on the basis of this ruqua, FIR No. 418/06 was registered against the accused at Police Station and a perusal of FIR, Ext. PW5/B, demonstrates that the time of registration of the FIR is 4:45 p.m. This means that before 4:45 p.m. no one was aware about the FIR number. However, surprisingly recovery memo Ext. PW1/A which as per the Investigating Officer himself was prepared much before the ruqua was sent to the Police Station for the registration of the case, contains FIR No. 418/06 alongwith all the Sections under which the said FIR was lodged and that too in the same ink, same pen, same flow and same handwriting with which the remaining contents of this exhibit have been entered upon by the Investigating Officer. Similarly, FIR number is also recorded in the statements which were recorded under Section 161 of Cr. P.C. of witnesses Subhash Verma and witness Ramesh Chand. Statement of PW6 i.e. the Investigating Officer also reveals that these statements were recorded by the Investigating Officer before the ruqua was sent by him to the Police Station for the registration of the case.

19. The above facts in my considered view shroud the case of the prosecution with cloud of suspicion. During the course of arguments, Mr. Thakur, learned Deputy Advocate General could not explain as to how FIR number were already mentioned in the recovery memo and that too in the same pen, handwriting and flow in which the remaining contents of this documents were entered when admittedly this document was prepared much before the registration of the FIR. Now in this background when we peruse the statements of PW1 and PW2 who as per the prosecution were independent witnesses, there appears to be merit in the statement of these two witnesses who have deposed in the Court that they were never taken by

the police to Nalti and no recovery of VCDs took place from the shop of the accused in their presence at Nalti and in fact their signatures were obtained on the documents in the Police Station.

20. Not only this, a careful perusal of the statement of PW3 and PW6 also creates a serious doubt over the veracity of the prosecution case. This is for the reason that whereas PW3 has stated that witness Ramesh Chand was associated with the proceedings by the Investigating Officer at the spot itself, however, PW6, the Investigating Officer has stated that both the independent witnesses were taken alongwith by him (Investigating Officer) from around the Police Station itself. This contradiction in the testimony of PW3 and PW6 cannot be said to be a minor inconsistency. In my considered view it is a major contradiction taking into consideration other facts which have been enumerated by me above, which if taken together create serious doubt as to whether any pirated and pornographic VCDs were actually recovered from the premises of the accused which were allegedly kept by him for sale to the general public, as the prosecution wants this Court to believe.

21. A perusal of the judgments passed by both learned courts below demonstrates that they have not at all dealt with these issues and the documents on record having not been appreciated in their correct perspective leading to perversity in their respective judgments. The appreciation of the effect of non-joining of independent witnesses at the spot despite the fact that even as per PW3 and PW6 there were 25-30 shops at Nalti by both learned courts below can also not be termed to be sustainable. Though there is no doubt that it is not as if in each and every case it is only if independent witness corroborate the testimony of police witnesses then the testimony of police witnesses can be believed, however, in this case the prosecution has not been able to explain as to why independent local witnesses of the area concerned were not associated with the alleged raid conducted in the shop/premises of the accused and why PW1 and PW2 were associated by the Investigating Officer from the Police Station itself. However, this even if PW6 had taken PW1 and PW2 alongwith him as independent witnesses, there was no bar for him to have had associated any other local independent witness to give credence to the case of the prosecution. However, it is categorically stated by both PW3 and PW6 that no independent witness of the area was associated by them in the search and seizure. In addition, it has also come in the statement of both these witnesses that no personal search of theirs was given by them before they conducted the case, before they searched the premises of the accused. All these factors when taken together create a serious doubt about the truthfulness of the case of the prosecution and in my considered view, on the basis of material produced on record by the prosecution it could not be said that the prosecution was able to prove its case beyond all reasonable doubt and when the case of the prosecution is rendered doubtful then it is obvious that the benefit of doubt has to go to the accused.

22. As far as the contention of learned counsel for the petitioner qua the learned courts below not appreciating the factum of non-compliance of the provisions of Section 65-B of the Evidence Act is concerned, in my considered view there is considerable force in the same. There is no material on record from which it can be inferred that the requirements of Section 65-B of the Evidence Act were satisfied by the prosecution as there is neither any certificate in terms of Section 65-B of Evidence Act obtained nor there is any expert opinion on record under Section 45-A of the Evidence Act.

23. Recently the Hon'ble Supreme Court of India in **Harpal @ Chotta and others Versus State of Punjab** (Criminal Appeal No. 2539 of 2014/388 of 2015) decided on 21.11.2016 has held:-

> "Qua the admissibility of the call details, it is a mater of record that though PWs 24, 25, 26 and 27 have endeavoured to prove on the basis of the printed copy of the computer generated call details kept in usual ordinary course of business and stored in a hard disc of the company server, to co-relate the calls made from and to the cell phones involved including those, amongst others recovered from the accused persons, the prosecution has failed to adduce a certificate relatable

thereto as required under Section 65B(4) of the Act. Though the High Court, in its impugned judgment, while dwelling on this aspect, has dismissed the plea of inadmissibility of such call details by observing that all the stipulations contained under Section 65 of the Act had been complied within, in the teeth of the decision of this Court in Anvar P.V. ordaining an inflexible adherence to the enjoinments of Sections 65B(2) and (4) of the Act, we are unable to sustain this finding. As apparently the prosecution has relied upon the secondary evidence in the form of printed copy of the call details, even assuming that the mandate of Section 65B(2) had been complied with, in absence of a certificate under Section 65B(4), the same has to be held inadmissible in evidence.

> This Court in Anvar P.V. has held in no uncertain terms that the evidence relating to electronic record being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Act would have to yield thereto. It has been propounded that any electric record in the form of secondary evidence cannot be admitted in evidence unless the requirements of Section 65B are satisfied. This conclusion of ours is inevitable in view of the exposition of law pertaining to Sections 65A and 65B of the Act as above."

24. High Court of Kerala in **Konnadan Abdul Gafoor Vs. State of Kerala**, 2016 CRI.L.J. 2647 has held:-

> "9. The probative information stored in digital form in a compact disc can be used before court as digital evidence or electronic evidence. The digital evidence is highly fragile and can be easily altered, damaged or destroyed and also time sensitive. Therefore special precaution should be taken to this document to collect preserve and examine this evidence. No analysis of the compact disc (hereinafter referred as CD) was made by the investigating officer to discover the files in it. This includes normal files, deleted files and encrypted files. Therefore, for identification of the files in the CD digital evidence is necessary. Identification of the type of information stored in the disc is necessary, for this appropriate technology can be used to extract it. Without examining the digital data in a scientific manner, viewing of the CD by the Magistrate, Assistant Public Prosecutor and the Sub Inspector is unsustainable in law and their satisfaction is not an appreciation of electronics evidence in law. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, the same shall be accompanied by a certificate in terms of Section 65B obtained at the time of taking the documents, without which, the secondary evidence pertaining to that electronic record, is inadmissible. Moreover the expert opinion under Section 45A of the Evidence Act was not obtained relating to the stored data in electronic form. In the absence of such a certificate and opinion, the oral evidence to prove existence of such electronic evidence is not sufficient to prove authenticity thereof.
>
> 10. However, while considering the offence under Section 292(2)(a), the prosecution has to prove that the accused sold, distributed and publically exhibited the obscene materials. Simply certain CDs were seized from a shop on the basis of information, in cannot be taken for granted that the revision petitioner was guilty of such crime. It is the primary responsibility of the prosecution to prove that the accused was in possession of the shop and the seized articles are obscene articles. In a case for offence under Section 292 of the IPC, prosecution has to prove that the accused sells, let to hire, distribute, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper drawing, painting, presentation

> or figure or any other obscene object whatsoever as alleged by the prosecution. There must be direct evidence with regard to the possession or sale of the obscene books or articles. There is no presumption with regard to possession, mere fact that some books were seized from a particular shop by a police officer. There may be exceptional cases, where the rule of presumption applies. In such cases, the proved facts and circumstances may speak for themselves and court may be justified in reaching a conclusion in the light of available evidence."

Therefore also, in my considered view, the judgment of conviction passed against the present petitioner by learned trial court and upheld by learned appellate court is not sustainable in law.

In view of discussion held above, this revision petition is allowed and judgment of conviction and sentence imposed upon the petitioner by the Court of learned Chief Judicial Magistrate, Hamirpur, in case No. 22-I of 2007/40-II of 2007, dated 5.4.2008, is set aside alongwith judgment passed in Criminal Appeal No. 27 of 2008, dated 10.9.2008 by the Court of learned Sessions Judge, Hamirpur. Petitioner is acquitted of the offences for which he was charged. Amount of fine deposited by the petitioner, if any, is directed to be refunded to him as per law. Pending miscellaneous application(s), if any, also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Smt. Darshan Kaur & another ….Appellants

Versus

Smt. Vidya Thakur & others ….Respondents

FAO No. 310 of 2012
Reserved on : 16.12.2016
Decided on : 30.12.2016.

Motor Vehicles Act, 1988- Section 166- Deceased was a TGT and was drawing gross salary of Rs. 27,000/- per month- he was to retire at the age of 58 years and was aged 56 years at the time of accident – 1/4th amount is to be deducted towards personal expenses- claimants have lost source of dependency of Rs. 20,000/- per month – the compensation has to be determined keeping in view the fact that deceased was to retire within two years and that thereafter he was to get pension for the rest of the life- keeping in view the age of the deceased, multiplier of 7 is applicable out of which multiplier of 2 has to be applied for assessing loss of salary and 5 has to be applied for assessing loss of pension – claimants are entitled to Rs. 20,000 x 12 x 2= Rs. 4,80,000/- under the head loss of salary – the deceased would not have taken pension less than Rs. 12,000/- per month out of which 1/4th is to be deducted towards personal expenses and the loss of dependency will be Rs. 9,000/- per month – claimants are entitled to Rs. 9,000 x 12 x 5= Rs. 5,40,000/- under the head loss of pension- claimants are also entitled to Rs. 10,000/- each under the heads loss of love and affection, loss of consortium, loss of estate and funeral expenses – claimants are entitled to total compensation of Rs. 4,80,000 + 5,40,000 + 40,000= Rs. 10,60,000/- with interest @ 7.5% per annum. (Para-18 to 28)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation & another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, reported in 2013 AIR (SCW) 3120
T.T. Narayanan and another versus Mrs. P. Bridget and others reported in II (1991) ACC 120 (DB)
ICICI Lombard General Insurance Co. Ltd vs Smt. Satya Devi & others I L R 2016 (VI) HP 342
Munna Lal Jain & another versus Vipin Kumar Sharma & others, reported in 2015 AIR SCW 3105

For the Appellants : Mr. N.S. Chandel, Advocate.
For the Respondents: M/s Sudhir Thakur and Anirudh Sharma, Advocates.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to judgment and award, dated 12th April, 2012, made by the Motor Accident Claims Tribunal-I, Solan, District Solan, H.P. (for short 'the Tribunal') in MAC Petition No. 24-S/2 of 2008, titled as **Smt. Vidya Thakur & others versus Shri Raj Kumar and another**, whereby compensation to the tune of Rs. 11,30,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and the appellants/owner and driver were saddled with liability (hereinafter referred to as 'the impugned award').

2. The claimants have not questioned the impugned award, on any count. Thus, it has attained finality, so far the same relates to them.

3. The owner and driver have questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned Counsel for the appellants/owner and driver argued that the accident was not caused by driver, namely, Raj Kumar and prayed that the impugned award be set aside.

5. The argument is mis-conceived and devoid of any force for the following reasons.

6. The claimants filed a claim petition before the Tribunal for grant of compensation to the tune of Rs. 25,00,000/, as per the break-ups given in the said petition.

7. Precisely, the case of the claimants was that on 21.04.2008, at about 5.50 a.m., driver, namely, Raj Kumar, had driven vehicle-truck bearing registration No. HP-11-B-0299, rashly and negligently and caused the accident, in which deceased Nardev Singh Thakur sustained injuries and succumbed to the same.

8. The respondents filed replies.

9. Following issues came to be framed by the Tribunal:

> *"1. Whether deceased expired in an accident caused due to the rash and negligent driving of respondent No. 1 while driving the vehicle of respondent No. 2? .....OPP*
>
> *2. If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled and from whom? ...OPP*
>
> *3. Whether the petition is not maintainable? ....OPR*
>
> *3-A Whether the petition is bad for non-joinder of necessary parties, as alleged? ....OPR*
>
> *4. Relief."*

10. The parties led evidence.

11. The Tribunal, after scanning the evidence, oral as well as documentary, held that driver, namely, Raj Kumar, caused the accident, while driving the offending vehicle, rashly and negligently, at the relevant point of time, in which deceased Nardev Singh Thakur lost his life.

Issue No. 1.

12. The claimants have examined HHC Kanshi Ram (PW-2), who stated that FIR (Ext. PW-2/A) was lodged against driver-Raj Kumar and after investigation, final report in terms of Section 173 of the Code of Criminal Procedure was presented against him before the Court of

competent jurisdiction. The other evidence, oral and documentary, is on record which is sufficient proof to hold that the accident was outcome of the rash and negligent driving of the driver.

13. Admittedly, appellant No. 1-Smt. Darshan Kaur is the registered owner of the offending vehicle and appellant No. 2-Raj Kumar is her son who was driving the offending vehicle at the relevant point of time. Thus, the Tribunal has rightly determined Issue No. 1.

14. Before I deal with Issues No. 2, I deem it proper to deal with Issues No. 3 & 3-A.

Issue No. 3.

15. It was for the respondents/owner and driver to prove how the claim petition was not maintainable, have failed to do so.

16. The Motor Vehicles Act, 1988, for short 'the MV Act' has gone through a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 of the MV Act have been added, whereby the Claims Tribunal can treat report of accident forwarded to it under Section 158 (6) of the MV Act as an application for compensation. Accordingly, the findings returned by the Tribunal on Issue No. 3 are upheld.

Issue No. 3-A.

17. It was for the respondents/owner and driver to prove how the claim petition was bad for non-joinder of necessary parties. Driver-Raj Kumar has caused the accident and FIR (Ext. PW-2/A) was lodged against him. Thus, the owner and driver were the necessary parties to the claim petition, as discussed hereinabove. Accordingly, the findings returned by the Tribunal on Issue No. 3-A are upheld.

Issue No. 2

18. The deceased was a TGT teacher and was drawing gross salary to the tune of Rs. 27,000/- per month, as per the salary certificate (Ext. PW-6/A), was 56 years of age at the time of the accident and had to retire at the age of 58 years.

19. Keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120,** $1/4^{th}$ is to be deducted towards the personal expenses of the deceased. Thus, it can be safely said and held that the claimants have lost source of pendency to the tune of Rs. 20,000/-, per month till the age of retirement, i.e., for two years only.

20. The compensation under the head 'loss of income' was to be assessed while keeping in view the fact that the deceased had to retire within two years and thereafter for the rest period, the same was to be assessed while keeping in view the pension payable.

21. My this view is fortified by the judgment rendered by the Kerala High Court in case titled ***T.T. Narayanan and another versus Mrs. P. Bridget and others*** reported in ***II (1991) ACC 120 (DB).*** It is apt to reproduce para 3 of the said judgment herein:

> *"3. On the date of the occurrence and death deceased had 46 months more service left as headmaster. He was in a pensionable job and he would have drawn pension for fifteen years, namely, till he attains 70 years. The Tribunal computed pay and allowances due for 46 months and the pension due for 15 years and deducted 20% for personal expenses of the deceased and 10% for uncertainties of life and thus arrived at the compensation payable to the claimants. The only submission urged by learned Counsel for the appellants in this regard is that on account of premature death of U. Vincent, the amount of family pension for the period of 15 years has to be deducted from the amount awarded. This submission appears to be correct. Family would be entitled to maximum family pension of Rs. 150/- per month. Computing this for 15 years and deducting 30% the amount of family pension would be Rs. 18,900/-. This amount has to be deducted from Rs.*

1,28,688/- awarded by the Tribunal. The correct quantum payable therefore would be Rs. 1,09,788/-."

22. This Court in **FAO No. 171 of 2012,** titled as***ICICI Lombard General Insurance Co. Ltd versus Smt. Satya Devi & others*** and another connected matter**,** decided on 04.11.2016, has laid down the same principle.

23. The multiplier of '7' is applicable in this case while keeping in view of the age of the deceased, other attending circumstances and the 2nd Schedule appended to the MV Act read with the ratio laid down by the Apex Court in the judgments, *supra,* andthe judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

24. The multiplier of '2' was applicable for assessing loss of dependency/income under the head 'loss of salary' and multiplier '5' was applicable, i.e., (after deducting multiplier '2' out of multiplier '7') for assessing loss of dependency/income under the head 'loss of pension'.

25. The claimants have lost source of dependency and are entitled to compensation to the tune of Rs. 20,000/-x 12 x 2 =Rs. 4,80,000/-,under the head 'loss of salary'.

26. The Tribunal has rightly held that after retirement, he would not have taken pension less than Rs. 12,000/- per month. 1/4th is to be deducted keeping in view the 2nd Schedule of the MV Act read with judgments rendered by the Apex Court, *supra,* the loss of source of dependency comes to Rs.9,000/-. Thus, it can be safely held that the claimants have lost source of dependency to the tune of Rs. 9,000/-x 12 x 5= Rs. 5,40,000/- under the 'loss of pension'.

27. The claimants are also held entitled to a sum of Rs.10,000/- each, i.e. Rs.40,000/-, under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'.

28. Accordingly, the claimants are held entitled to total compensation to the tune of Rs. 4,80,000/- + Rs. 5,40,000 + Rs. 40,000/- = Rs. 10,60,000/- with interest at the rate of 7.5% per annum as awarded by the Tribunal.

29. Accordingly, the impugned award is modified as indicated hereinabove.

30. The respondents/owner and driver are directed to deposit the awarded amount within eight weeks from today. On deposit, the same be released in favour of the claimants through payees' account cheque or by depositing the same in their accounts.

31. The appeal is disposed of accordingly.

32. Send down the records after placing a copy of the judgment on the Tribunal's file.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Karam Chand and others ....Petitioners.
Versus
Manjeet Singh and another ...Respondents

CMPMO No.: 39 of 2015
Reserved on: 28.12.2016
Decided on: 30.12.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiffs filed a civil suit pleading that suit land is owned and possessed by them – partition was ordered by AC 1st Grade but the order was set aside in appeal – the defendants were interfering with the suit land – an application for interim injunction for restraining the defendants was filed, which was dismissed by the Trial

Court- an appeal was preferred, which was also dismissed- held, that power under Article 227 of the Constitution of India is to be exercised sparingly and in appropriate cases for keeping Subordinate Courts within the bounds of their authority – the defendants are recorded owners in possession of the suit land- plaintiffs are not recorded to be the owners in possession of the suit land – in case injunction prayed for is granted, the defendants will suffer – the Courts had not committed any jurisdictional error while dismissing the application- petition dismissed.

(Para-7 to 17)

Cases referred:

Radhey Shyam and another Vs. Chhabi Nath & others, (2015) 5 Supreme Court Cases 423
Ouseph Mathai and others Vs. M. Abdul Khadir, (2002) 1 Supreme Court Cases 319
Waryam Singh and another Vs. Amarnath and another, A.I.R.1954 S.C. 215
Dalmia Jain Airways Ltd. V. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (B)
Zenit Mataplast Private Limited Versus State of Maharashtra and others, (2009) 10 Supreme Court Cases 388

For the petitioners. :Mr. Ajay Sharma, Advocate.
For the respondents :Mr. Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition filed under Article 227 of the Constitution of India, petitioners have prayed for the following reliefs.

> *"It is, therefore, respectfully prayed the present petition may kindly be accepted impugned orders dated 31.10.2014 in Civil Misc. Appeal No. 6-D/XIV-2013 passed by ld. Addl. District Judge-II, Kangra at Dharamshala, H.P., orders dated 1.6.2013 in Civil Misc. Appeal No. 76/2012 in Civil Suit No. 93/2012 passed by Ld. Civil Judge (Sr. Division), Kangra at Dharamshala, H.P., whereby application under Order 39 Rule 1 and 2 CPC filed by the petitioners/plaintiffs stands dismissed and appeal filed also stands dismissed, may very kindly be set aside and application filed by the petitioners/plaintiffs, under Order 39 Rule 1 and 2 CPC may very kindly be allowed, thereby respondents herein may very kindly be restrained from changing the nature, raising any boundary wall and construction on the suit land and also from interfering in the possession of the applicants/petitioners/plaintiffs with respect to the land detailed in the suit and application, during the pendency of the suit, in the interest of law and justice."*

2. Facts necessary for the adjudication of the present case are that vide order dated 01.06.2013, Court of learned Civil Judge (Sr. Divn.), Kangra at Dharamshala dismissed an application filed by the present petitioners/plaintiffs under Order 39 Rules 1 and 2 of the Code of Civil Procedure (hereinafter referred to as 'CPC') i.e. CMA No. 76/2012, in Civil Suit No. 93/2012, vide which petitioners/plaintiffs had prayed for issuance of interim injunction restraining the respondents/defendants from interfering in the peaceful possession of the petitioners/plaintiffs and changing the nature or raising any construction over the suit land, subject matter of Civil Suit No. 93/2012, which had been filed by petitioners/plaintiffs against the respondents/defendants. As per petitioners/plaintiffs, suit land which was recorded in the ownership and possession of respondents/ defendants was carved out of Khasra Nos. 223 and 224, which were owned and possessed the petitioners/plaintiffs, Manjeet Singh and other co-sharers jointly and respondents/defendants had filed an application for partition of the joint land before Assistant Collector 1st Grade, who had abruptly ordered the partition. However as per the petitioners/plaintiffs, appeal filed against the order so passed by the Assistant Collector 1st Grade

was accepted by the Appellate Authority i.e. learned Sub Divisional Collector, Dharamshala, who set aside the order of partition. As per the petitioners/plaintiffs, respondents/ defendants were still interfering in the peaceful possession of the petitioners/plaintiffs. On these bases, temporary injunction was prayed for in the civil suit which was so filed by the petitioners/plaintiffs against the respondents/defendants.

3. The application so filed for grant of temporary injunction was contested by respondents/defendants on the grounds that in fact they were owners in possession of the suit land and entries to this effect stood incorporated in revenue records and there was no joint-ness of land in between the parties and they were having no knowledge of the appeal filed against the order of partition.

4. Learned trial Court dismissed the application so filed by the petitioners/plaintiffs under Order 39 Rules 1 and 2 by holding that the suit land comprising Khasra No. is recorded as *'Gair Mumkin Rasta'*, whereas the land comprising Khasra Nos. 772/223, 1022/773/224, 1025/773/224, 1146/774/224 was recorded in the exclusive ownership and possession of plaintiffs, defendants and other co-sharers. Learned trial Court held that records demonstrated that respondent Manjit Singh had filed an application for partition before Assistant Collector 1st Grade which was allowed on 18.07.2002 and appeal filed against the said order was allowed by Collector, Dharamshala on 07.07.2009 who remanded back the case to Assistant Collector 1st Grade to examine the objections of the petitioners/ plaintiffs after affording an opportunity of being heard. Learned trial Court further held that order dated 23.03.2013 passed by Assistant Collector 1st Grade demonstrated that partition order dated 18.07.2002 in file No. 19/99 was given a final effect in the revenue record w.e.f. 21.05.2003 and entries to this effect had also been carried out in jamabandis for the year 2004-2005 and 2009-2010. On these bases, it was held by the learned trial Court that it was apparent that parties were no more having joint status and suit land stood partitioned by metes and bounds and appropriate remedy for plaintiffs was to approach the higher forum on the side of revenue courts for redressal of grievance. It further held that said application was fairly and squarely hit by Section 41 (h) of the Specific Relief Act, as well as Section 171 (2) (xvii) of H.P. Land Revenue Act. On these bases, learned trial Court held that there was no prima facie case in favour of plaintiffs and balance of convenience was rather in favour of respondents/defendants. Accordingly, learned trial Court dismissed the application so filed by the petitioners/plaintiffs.

5. Feeling aggrieved, petitioners/plaintiffs filed an appeal i.e. Civil Misc. Appeal No. 6-D/XIV/2013 which was dismissed by the Court of learned Additional District Judge-II, Kangra at Dharamshala vide order dated 31.10.2014. While dismissing the appeal it was held by the learned Appellate Court that suit land stood partitioned by Assistant Collector 1st Grade vide order dated 18.07.2002 and pursuant to partition order, suit land stood allotted to respondents/defendants and partition had been given effect to in the revenue record. Learned Appellate Court also held that petitioners/plaintiffs had assailed the partition order before Sub Divisional Collector, who has set aside order dated 18.07.2002 and remanded back the case to Assistant Collector 1st Grade and after remand, Assistant Collector 1st Grade did not interfere with the partition order already passed on 18.07.2002 on the ground that partition had already been given effect to in the revenue records. Learned Appellate Court further held that admittedly the said order passed by the Assistant Collector 1st Grade dated 23.03.2013 had not been assailed, meaning thereby that partition order had attained finality and the fact remained that suit land stood partitioned and respondents/defendants were in possession of the suit land. Learned Appellate Court further held that being owners in possession of the suit land, respondents had every right to use the same in the manner they intended to and petitioners/plaintiffs had no prima facie case in their favour. It also held that balance of convenience was also not in favour of petitioners/plaintiffs nor they were going to suffer any irreparable loss in any manner. On these bases, learned Appellate Court upheld the order passed by learned trial Court and dismissed the appeal so filed by the petitioners/plaintiffs.

6. Feeling aggrieved, petitioners/plaintiffs have filed this petition.

7. Before proceeding further, it is necessary to deal with the scope of this Court while exercising its supervisory jurisdiction conferred upon it under Article 227 of the Constitution of India.

8. A three-Judge bench of Hon'ble Supreme Court in ***Radhey Shyam and another Vs. Chhabi Nath and others, (2015) 5 Supreme Court Cases 423***, has held that all the courts in the jurisdiction of a High Court are subordinate to it and subject to its control and supervision under Article 227. The Hon'ble Supreme Court has further held that control of working of the subordinate courts in dealing with their judicial orders is exercised by way of appellate or Revisional powers or power of superintendence under Article 227. The Hon'ble Supreme Court has further held that while appellate or Revisional jurisdiction is regulated by the statutes, power of superintendence under Article 227 is constitutional.

9. It is settled law that power under Article 227 is intended to be used most sparingly and only in appropriate cases for the purpose of keeping subordinate courts within the bounds of their authority and not for correcting mere errors.

10. The Hon'ble Supreme Court in ***Ouseph Mathai and others Vs. M. Abdul Khadir, (2002) 1 Supreme Court Cases 319***, has held that no doubt Article 227 confers a right of superintendence over all courts and tribunals throughout the territories in relation to which it exercises the jurisdiction but no corresponding right is conferred upon a litigant to invoke the jurisdiction under the said Article as a matter of right. In fact power under this Article casts a duty upon the High Court to keep the inferior courts and tribunals within the limits of their authority and that they do not cross the limits, ensuring the performance of duties by such courts and tribunals in accordance with law conferring powers within the ambit of the enactments creating such courts and tribunals. Only wrong decisions may not be a ground for the exercise of jurisdiction under this Article unless the wrong is referable to grave dereliction of duty and flagrant abuse of power by the subordinate courts and tribunals resulting in grave injustice to any party.

11. A five-Judge bench of Hon'ble Supreme Court in ***Waryam Singh and another Vs. Amarnath and another, A.I.R.1954 S.C. 215***, has held that this power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in - ***'Dalmia Jain Airways Ltd. V. Sukumar Mukherjee', AIR 1951 Cal 193 (SB) (B)***, is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

12. Coming to the facts of this case. Mr. Ajay Sharma, learned counsel appearing for the petitioners argued that jurisdictional error which was committed by learned Additional District Judge-II, Kangra at Dharamshala while dismissing the appeal so filed by the petitioners against the order passed by the learned trial Court whereby it had refused to grant temporary injunction in favour of petitioners was that learned Appellate Court did not appreciate that the subsequent order passed by Assistant Collector 1st Grade dated 23.03.2013 stood assailed before the Appellate Authority. It was further urged by Mr. Sharma, that besides this, both the learned Courts below erred in not appreciating that as there was a prima facie case in favour of petitioners and balance of convenience was also in their favour, as such, it was incumbent for the learned Courts below to have had restrained the respondents/defendants from carrying out any construction over the suit land during the pendency of the civil suit, otherwise very purpose of filing the suit would have had frustrated. Mr. Sharma further argued that learned Courts below also erred in not appreciating that what stood allotted to the respondents by way of partition was in excess of what they were entitled to as per their share. Mr. Sharma relied upon the judgment passed by Hon'ble Supreme Court in case ***Zenit Mataplast Private Limited Versus State of Maharashtra and others, (2009) 10 Supreme Court Cases 388*** and on the strength of this judgment he urged that the impugned orders be set aside and during the pendency of the civil suit, respondents/ defendants be directed not to carry out any construction over the suit land.

13. Mr. Sanjeev Bhushan, learned Senior Counsel appearing for the respondents/defendants, on the other hand, argued that there was no merit in the present petition because fact of the matter was that in the appeal proceedings which had been preferred by the petitioners against the order passed by Assistant Collector 1st Grade, dated 23.03.2013, no stay order had been granted by the Appellate Authority and factum of filing appeal was never disclosed by petitioners before learned Appellate Court. Mr. Bhushan submitted that the arguments which were being advanced by learned counsel for the petitioner were in fact beyond the scope of plaint also and in fact there was no illegality in the orders which stood assailed before this Court because both the learned Courts below had rightly held that there was neither any prima facie case nor balance of convenience was in favour of petitioners nor they were to suffer any irreparable loss if temporary injunction, as prayed for, was not granted. Mr. Bhushan argued that had injunction been granted against the defendants, then that would have caused irreparable loss to the defendants because effect of the said order would have had been that true owners who are duly recorded as owners in possession of the suit land would have had been restrained from utilizing the same. Mr. Bhushan further argued that even otherwise whatever construction was to be carried out by the respondents/ defendants during the pendency of the suit was always subject to the decision of the civil suit and the defendants were ready to face the consequences. On these grounds, he argued that there was no merit in the present petition and the same be dismissed.

14. I have heard the learned counsel for the parties and gone through the records of the case as well as the orders passed by the learned Courts below.

15. It is settled law that any party which seeks interim injunction/protection in its favour has to prove three things. (1) Prima facie case, (2) Balance of convenience and (3) Irreparable loss. It is the own case of the petitioners/plaintiffs that the suit land as per revenue record is recorded in the ownership and possession of the respondents/ defendants. The contention of the petitioner is that said revenue entries are recorded on the basis of partition proceeding effected by Assistant Collector 1st Grade which stands challenged by them before the appropriate authority. Be that as it may, fact of the matter still remains that as per the revenue record it is the respondents/defendants who are owners in possession of the suit land and not the petitioners/ plaintiffs. Therefore, it cannot be said that there is a prima facie case in favour of the petitioners/plaintiffs. Learned counsel for the petitioners has not placed on record any stay granted by the Appellate Authority in the proceedings which stands initiated against the order of partition passed by learned Assistant Collector 1st Grade, meaning thereby that as of now the order of partition passed by the said authority is in force. In this view of the matter, even balance of convenience cannot be said to be in favour of petitioners/plaintiffs because the order of partition stands duly implemented in the revenue record and till the time same is set aside or stayed by the competent authority, its operation in law cannot be curtailed. Besides this, when as per revenue records, petitioners/plaintiffs are not owners in possession of the suit land, then it cannot be said that if temporary injunction is not granted in their favour and respondents are not restrained from carrying out construction, petitioners/plaintiffs will suffer irreparable loss and very purpose of filing the civil suit will be frustrated. This is for the reason that ordinarily injunction is not granted against the true owners. Besides this, as the petitioners/plaintiffs have already filed a suit against the respondents/defendants, which is pending adjudication, construction, if any, carried out over the suit land by the respondents/defendants would be subject to decision of the suit. In addition, there is no bar for petitioners to approach the Appellate Authority by way of an appropriate application for stay of operation of the partition order till the appeal filed by them is decided or for moving an application praying for any other appropriate relief in this regard. I also find merit in the contention of learned senior counsel appearing for the respondents/defendants that even otherwise injunction cannot be granted in favour of petitioners on contentions which are beyond the scope of plaint filed by the petitioners/plaintiffs.

16. The judgment passed by Hon'ble Supreme Court in case ***Zenit Mataplast Private Limited Versus State of Maharashtra and others, (2009) 10 Supreme Court Cases***

388 relied upon by the learned counsel for the petitioners/plaintiffs is also of no assistance to the case of petitioners in the peculiar facts and circumstances of this case because this Court has come to the conclusion that neither the petitioners have any prima facie case in their favour nor balance of convenience is in their favour nor it can be said that they would suffer from irreparable loss if temporary injunction is not granted in their favour. In fact, it has been held by the Hon'ble Supreme Court in the above judgment that grant of temporary injunction is governed by three basic principles, prima facie case, balance of convenience and irreparable loss, which are required to be considered in the appropriate proportion in the facts and circumstances of a particular case. Hon'ble Supreme Court held that it is not appropriate for any Court to hold a mini trial at the stage of grant of temporary injunction.

17. Therefore, in view of findings returned above, in my considered view, there is neither any jurisdictional error committed by the learned first Appellate Court while dismissing the application of the petitioner nor it could be said that findings returned by the learned Civil Judge (Sr. Divn.) Kangra at Dharamshala while dismissing the application under Order 39 Rules 1 and 2 of the petitioners/plaintiffs suffer from any perversity. However, it is clarified that dismissal of this petition shall not come in the way of petitioners for approaching the Appellate Authority before whom order dated 23.03.2013, passed by the Assistant Collector 1st Grade stands assailed for seeking appropriate interim relief from the said authority. Accordingly, as there is no merit in the present petition, the same is dismissed. It is made clear that findings returned in this case shall have no bearing on the merits of the Civil Suit and the Civil Suit shall be decided by the learned trial Court uninfluenced by the findings returned and observations made by this Court in this petition. Interim orders, if any, stand vacated. Pending miscellaneous applications, if any, also stand disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

Oriental Insurance Company Ltd. …Appellant.
Versus
Smt. Brahmi and others …Respondents.

FAO No. 29 of 2011
Reserved on: 16.12.2016
Decided on: 30.12.2016

Motor Vehicles Act, 1988- Section 166- Claimants specifically stated in the claim petition that deceased was driving the vehicle at the time of accident – owner also admitted this fact in the reply - it was specifically stated in the FIR that accident had taken place due to rash and negligent driving by the deceased- thus, it can be safely said that accident had taken place due to the negligence of the deceased – rashness and negligence have to be proved to get compensation under Section 166- the claim petition was therefore, not maintainable under Section 166 – since, the income of the deceased was proved to be Rs. 23,791/- per month; therefore, claim petition cannot be treated under Section 163-A – appeal allowed- award set aside. (Para-12 to 25)

Cases referred:

Minu B. Mehta and another versus Balkrishna Ramchandra Nayan & anr, AIR 1977 SCC 1248
Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai, (1987) 3 Supreme Court Cases 234
Oriental Insurance Co. Ltd. versus Meena Variyal and others, (2007) 5 Supreme Court Cases 428
Oriental Insurance Company Limited versus Premlata Shukla & others, 2007 AIR SCW 3591
Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241
United India Insurance Company Limited versus Sh. Mohan Lal and others, I L R 2016 (VI) HP 704

Ningamma and another versus United India Insurance Company Limited, (2009) 13 Supreme Court Cases 710
Oriental Insurance Company Ltd. versus Sihnu Ram and others, I L R 2016 (V) HP 1000 (D.B.)

For the appellant: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Jeevan Kumar, Advocate.
For the respondents: Mr. Rajiv Rai, Advocate, for respondent No. 1.
Nemo for respondents No. 2 to 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this appeal, the appellant-insurer has called in question award, dated 15th December, 2010, made by the Motor Accident Claims Tribunal, Fast Track Court, Chamba, District Chamba (HP) (for short "the Tribunal") in M.A.C. No. 17/2010, titled as Smt. Brahmi and others versus The Oriental Insurance Company Limited and another, whereby compensation to the tune of ₹ 29,98,432/- with interest @ 7.5% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the insurer was saddled with liability (for short "the impugned award").

2. The claimants and the owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellant-insurer has called in question the impugned award on the ground that deceased himself was driving the offending vehicle rashly and negligently at the time of the accident, the claimants are the parents and children of the deceased and the owner-insured is the wife of the deceased, thus, the claim petition was not maintainable.

4. Heard learned counsel for the parties.

5. The following points arise for determination in this appeal:

(i) Whether the legal representatives/ heirs of deceased-Desh Raj, who was driving the offending vehicle at the relevant point of time and caused the accident, can file a claim petition under Section 166 of the Motor Vehicles Act, 1988 (for short "MV Act") for grant of compensation? and

(ii) Whether the claim petition was maintainable?

6. In order to determine both these points, it is necessary to give a brief resume of the facts of the case herein.

7. The claimants invoked the jurisdiction of the Tribunal under Section 166 of the MV Act for grant of compensation to the tune of ₹ 30,00,000/-, as per the break-ups given in the claim petition, on the ground that they lost their bread earner, namely Shri Desh Raj, in the vehicular accident, while driving the car, bearing registration No. HP-54-2475, on 16th February, 2010, at about 4.30 P.M., at place Nand Gram near Maredi, P.S. Chamba, on his way back from Government Senior Secondary School, Jadera.

8. The respondents in the claim petition, i.e. the insurer and the owner-insured of the offending vehicle, have filed the replies. The insurer has resisted the claim petition whereas the owner-insured, who is the widow of deceased-Desh Raj, has not resisted the claim petition.

9. On the pleadings of the parties, following issues came to be framed by the Tribunal:

"1. Whether Des Raj died on 16.2.2010, at about 4.30 PM at Nand Gram near Maredi within the jurisdiction of P.S. Chamba in a vehicular accident involving vehicle No. HP-54-2475? OPP

2. If issue No. 1 is proved in affirmative, whether the petitioners being dependant of deceased are entitled for the grant of compensation, if so, to what amount and from which of the respondents? OPP

3. Whether the respondent No. 1 is liable to indemnify the owner in respect of death of deceased, who is husband of owner of offending vehicle? OPR-2

4. Whether the petition is not maintainable? OPR-1

5. Whether the offending vehicle was not having valid registration certificate, fitness certificate, valid route permit etc. if so, its effect? OPR-1

6. Whether the driver of the offending vehicle was not holding a valid and effective driving licence? OPR-1

7. Whether the deceased was not third party? OPR-1

8. Relief."

10. In support of their claim, the claimants examined Dr. Davinder Kumar as PW-1, Shri Pankaj Kapoor as PW-2, HC Pawan Kumar as PW-4 and one of the claimants, namely Sh. Sarwan Kumar, himself stepped into the witness box as PW-3. The insurer examined Shri Ramesh Kumar, Branch Manager, as RW-1. The owner-insured has not led any evidence.

11. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants are the victims of the vehicular accident, which was caused by deceased-Desh Raj while driving car, bearing registration No. HP-54-2475, on 16th February, 2010, at about 4.30 P.M., at place Nand Gram near Maredi and decided issue No. 1 in favour of the claimants. The Tribunal determined issue No. 3 in favour of the owner-insured. Issues No. 2 and 4 to 7 came to be decided against the insurer and compensation to the tune of ₹ 29,98,432/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization was granted in favour of the claimants.

Issues No. 1 and 4:

12. The claimants in para 24 of the claim petition have specifically stated that the offending vehicle was being driven by deceased-Desh Raj himself at the time of the accident. The owner-insured of the offending vehicle has admitted the said factum. In the FIR, Ext. PW-4/A also, it has specifically been recorded that the accident had occurred due to the rash and negligent driving of the offending vehicle by deceased-Desh Raj. HC Pawan Kumar, while appearing in the witness box, has testified the contents of the FIR to be correct. Thus, it can be safely held that deceased-Desh Raj had caused the accident because of his own rash and negligent driving. The findings of the Tribunal that deceased-Desh Raj was not responsible for the accident, while deciding issue No. 1, are not legally sustainable and are accordingly set aside.

13. Had the claimants pleaded and proved that the accident was outcome of the rash and negligent driving, the claim petition under Section 166 of the MV Act would have been maintainable, as the rash and negligent driving is *sine qua non* for maintaining a claim petition seeking compensation in terms of the provisions of Section 166 of the Act.

14. My this view finds support from the judgment rendered by the Apex Court in the case titled as **Minu B. Mehta and another versus Balkrishna Ramchandra Nayan and another,** reported in **AIR 1977 Supreme Court 1248,** wherein it has been held that in a motor accident claim case, the proof of negligence is necessary for saddling the owner or the insurance company with liability. It is apt to reproduce para 36 of the judgment herein:

"36. In a recent judgment of Madras High Court a Division Bench in A. A. O. Nos. 607 of 1973 and 296 of 1974 M/s. Ruby Insurance Co. Ltd. v. V. Govindaraj, delivered on 13th December, 1976 has suggested the necessity of having social insurance to provide cover for the claimants irrespective of proof of negligence to a limited extent say Rs. 250 to Rs. 300 a month .It has also suggested that instead of a lump sum payment which does not often reach the claimants a regular monthly payment to the dependants by the nationalsied insurance company or bank would

be desirable. Unless these ideas are accepted by the legislature and embodied in appropriate enactments Courts are bound to administer and give effect to the law as it exists today. We conclude by stating that the view of the learned judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to be liable for the payment of compensation in a motor accident claim case."

(Emphasis added)

15. The correctness of the judgment in **Minu B. Mehta's case (supra)** came up for consideration before the Apex Court in the case titled as **Gujarat State Road Transport Corporation, Ahmedabad versus Ramanbhai Prabhatbhai,** reported in **(1987) 3 Supreme Court Cases 234,** wherein it was held that the observations made by the Apex Court in **Minu B. Mehta's case (supra)** were in the nature of *obiter dicta.*

16. Both these judgments, i.e. **Minu B. Mehta's and Gujarat State Road Transport Corporation's cases (supra),** came up for consideration and were re-examined by the Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Meena Variyal and others,** reported in **(2007) 5 Supreme Court Cases 428.** It would be profitable to reproduce paras 24 to 27 of the judgment herein:

"24. It was argued by learned counsel for the appellant that since on the finding that the deceased was himself driving the vehicle at the time of the accident, the accident arose due to the negligence of the deceased himself and hence the insurer is not liable for the compensation. Even if the case of the claimant that the car was driven by Mahmood Hasan was true, then also, the claimant had to establish the negligence of the driver before the insured could be asked to indemnify the insured. The decision in Minu B. Mehta & Anr. Vs. Balkrishna Ramchandra Nayan & Anr. (1977) 2 SCC 441 : (1977) SCR 886, of a three Judge Bench of this Court was relied on in support.

25. In that decision, this Court considered the question whether in a claim for compensation under the Motor Vehicles Act, 1939, proof of negligence was essential to support a claim for compensation. On the facts in that case, their Lordships found that the appeal was liable to be dismissed subject to certain directions issued therein. But their Lordships, in the light of the fact that the High Court had discussed the law on the question and it was of some importance, felt that it was necessary to state the position in law. Noticing that the liability of the owner of the car to compensate the victim in a car accident due to negligent driving of his servant is based on the law of tort, the court discussed the scheme of the Act of 1939 and the law on the question. Regarding the view of the High Court that it was not necessary to prove negligence, the court held: (Minu B. Mehta case, SCC pp. 455-56, para 33)

> *"33. The reasoning of the two learned judges is unacceptable as it is opposed to basic principles of the owner's liability for negligence of his servant and is based on a complete misreading of the provisions of Chapter VIII of the Act. The High Court's zeal for what it considered to be protection of public good has misled it into adopting a course which is nothing short of legislation."*

Their Lordships also noticed that proof of negligence remained the lynch pin to recover compensation. Their Lordships concluded by saying: (Minu B. Mehta case, SCC pp. 456-57, para 37)

> *"We conclude by stating that the view of the learned Judges of the High Court has no support in law and hold that proof of negligence is necessary before the owner or the insurance company could be held to*

be liable for the payment of compensation in a motor accident claim case."

26. Learned counsel for the respondent contended that there was no obligation on the claimant to prove negligence on the part of the driver. Learned counsel relied on Gujarat SRTC v. Ramanbhai Prabhatbhai and another, 1987 (3) SCC 234 in support. In that decision, this Court clarified that the observations in Minu B. Mehta's case (supra) are in the nature of obiter dicta. But, this Court only proceeded to notice that departures had been made from the law of strict liability and the Fatal Accidents Act, 1855 by introduction of Chapter VIIA of the 1939 Act and the introduction of Section 92A providing for compensation and the expansion of the provision as to who could make a claim, noticing that the application under Section 110A of the Act had to be made on behalf of or for the benefit of all the legal representatives of the deceased. This Court has not stated that on a claim based on negligence there is no obligation to establish negligence. This Court was dealing with no-fault liability and the departure made from the Fatal Accidents Act, 1855 and the theory of strict liability in the scheme of the Act of 1939 as amended. This Court did not have the occasion to construe a provision like Section 163A of the Act of 1988 providing for compensation without proof of negligence in contradistinction to Section 166 of the Act. We may notice that Minu B. Mehta's case was decided by three learned Judges and the Gujarat State Road Transport Corporation case was decided only by two learned Judges. An obiter dictum of this Court may be binding only on the High Courts in the absence of a direct pronouncement on that question elsewhere by this Court. But as far as this Court is concerned, though not binding, it does have clear persuasive authority. On a careful understanding of the decision in Gujarat State Road Transport Corporation (supra) we cannot understand it as having held that in all claims under the Act proof of negligence as the basis of a claim is jettisoned by the scheme of the Act. In the context of Sections 166 and 163A of the Act of 1988, we are persuaded to think that the so called obiter observations in Minu B. Mehta's case (supra) govern a claim under Section 166 of the Act and they are inapplicable only when a claim is made under Section 163A of the Act. Obviously, it is for the claimant to choose under which provision he should approach the Tribunal and if he chooses to approach the Tribunal under Section 166 of the Act, we cannot see why the principle stated in Minu B. Mehta's case should not apply to him. We are, therefore, not in a position to accept the argument of learned counsel for the respondents that the observations in Minu B. Mehta's case deserve to be ignored.

27. We think that the law laid down in Minu B. Mehta & Anr. Vs. Balkrishna Ramchandra Nayan & Anr. (supra) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under sub-section (1) of Section 163A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163A of the Act, the

compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle." (Emphasis added)

17. The Apex Court, in the case titled as **Oriental Insurance Company Limited versus Premlata Shukla & others,** reported in **2007 AIR SCW 3591,** held that proof of rashness and negligence on the part of the driver of the vehicle is *sine qua non* for maintaining an application under Section 166 of the MV Act.It is apt to reproduce para 10 of the judgment herein:

> "10. *The insurer, however, would be liable to re-imburse the insured to the extent of the damages payable by the owner to the claimants subject of course to the limit of its liability as laid down in the Act or the contract of insurance. Proof of rashness and negligence on the part of the driver of the vehicle, is therefore, sine qua non for maintaining an application under Section 166 of the Act."*
>
> *(Emphasis added)*

18. The Apex Court in the case titled as **Surinder Kumar Arora & another versus Dr. Manoj Bisla & others,** reported in **2012 AIR SCW 2241,** while approving the principle laid down by the Apex Court in **Meena Variyal's case (supra),** held that once the victim of an accident or his legal dependants approached the Tribunal for grant of compensation in terms of the mandate of Section 166 of the MV Act, they have necessarily to establish the rash and negligent driving. It is worthwhile to reproduce paras 7 to 12 of the judgment herein:

> *"7. Having heard the learned counsel for the parties to the lis, the question that would arise for our consideration and decision is, whether the parents of the deceased are entitled to the payment of compensation under the provisions of the Act by the respondent Insurance Company. In order to answer the issue that we have framed for ourselves, the facts in brief requires to be noticed:*
>
> *8. The claimants are the parents of the deceased person. The deceased was a doctor by profession. The deceased was travelling in the motor vehicle driven by respondent no.1, who happens to be a close associate/friend. It has come in the evidence of the claimants as well as respondent no.1 that the vehicle in question was not driven in a rash and negligent manner by respondent no.1.*
>
> *9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that respondent No.1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help respondent No.1, the claimants had not taken up that plea before the Tribunal. Therefore, High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in the case of Kaushnuma Begum (Smt.) & Ors. (AIR 2001 SC 485 : 2001 AIR SCW 85) (supra) would have come to the assistance of the claimants.*
>
> *10. In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of Oriental Insurance Co. Ltd. (AIR 2007 SC 1609 : 2007 AIR SCW 2362) (supra). In the said decision the Court stated:*
>
> > *"…Therefore, the victim of an accident or his dependents have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded*

in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

11. We are in agreement with the principles stated by this Court in the aforesaid decision.

12. In view of the above, in our opinion, neither the Tribunal nor the High Court has committed any error whatsoever which would call for our interference in the appeal filed by the parents of the deceased. Accordingly, we reject the appeal. However, we direct that the amount paid by the respondent Insurance Company by way of interim compensation under Section 140 of the Act, shall not be recovered from the appellants by the respondent Insurance Company. No order as to costs. Ordered accordingly."(Emphasis added)

19. This Court in the case titled as **United India Insurance Company Limited versus Sh. Mohan Lal and others,** being **FAO No. 281 of 2012,** decided on 18th November, 2016,has laid down the same principle.

20. In the case titled as **Ningamma and another versus United India Insurance Company Limited,** reported in **(2009) 13 Supreme Court Cases 710,** the Apex Court has held that when a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving.It is apt to reproduce pars 21, 24 and relevant portion of para 25 of aforesaid judgment herein:

"21. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike. We have already extracted Section 163A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle.

22. ....

23. ....

24. However, the question remains as to whether an application for demand of compensation could have been made by the legal representatives of the deceased as provided in Section 166 of the MVA. The said provision specifically provides that an application for compensation arising out of an accident of the nature specified in Sub-section (1) of Section 165 may be made by the person who has sustained the injury; or by the owner of the property; or where death has resulted from the accident, by all or any of the legal representatives of the deceased; or by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be.

25. When an application of the aforesaid nature claiming compensation under the provisions of Section 166 is received, the Tribunal is required to hold an enquiry into the claim and then proceed to make an award which, however, would be subject to the provisions of Section 162, by determining the amount of compensation, which is found to be just. Person or persons who made claim for compensation would thereafter be paid such amount. When such a claim is made by the legal representatives of the deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving............."(Emphasis added)

21. Applying the test to the instant case, deceased-Desh Raj was himself driving the offending vehicle at the time of the accident, as is evident from the perusal of the FIR, Ex. PW-4/A and also admitted by the parties. The contents of the FIR have not been disputed by the claimants, rather, they themselves have proved the contents of the FIR, which is exhibited as Ext. PW-4/A.

22. The legal representatives of deceased-Desh Raj have not taken plea of rash and negligent driving for the reasons best known to them, which, as discussed hereinabove, is *sine qua non* for maintaining claim petition under Section 166 of the MV Act.

23. Having said so, the claim petition under Section 166 of the MV Act was not maintainable.

24. Had the claimants filed the claim petition under Section 163-A of the MV Act, then rashness and negligence was not required to be proved. The claimants were only required to prove that the death was outcome of the use of the motor vehicle. The claimants have not filed the claim petition under Section 163-A of the MV Act.

25. The Tribunal or the Appellate Court can treat the claim petition under Section 163-A of the MV Act, is not maintainable in the instant case in view of the fact that the income of the deceased has been proved to be ₹ 23,791/- per month and for maintaining the claim petition under Section 163-A of the MV Act, the income of the victim of a vehicular accident should be less than ₹ 40,000/- per annum, as has been held by a Division Bench of this Court, of which (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **Oriental Insurance Company Ltd. versus Sihnu Ram and others,** being **FAO No. 474 of 2010,** decided on 28th September, 2016, while replying upon the various judgments rendered by the Apex Court.

26. In view of the discussions made hereinabove, the claim petition was not maintainable. Viewed thus, the findings returned by the Tribunal on issues No. 1 and 4 are set aside.

Issues No. 2, 3 and 5 to 7:

27. In view of the findings returned hereinabove, it is useless to discuss and determine these issues.

28. Both the points, framed hereinabove, are determined accordingly.

29. Having glance of the above discussions, the appeal is allowed, the impugned award is set aside and the claim petition is dismissed.

30. Registry to release the deposited amount, if any, in favour of the appellant-insurer through payee's account cheque. It is made clear that in case the claimants have received any amount of compensation under “No Fault Liability”, the same shall not be recovered by the appellant-insurer.

31. Send down the record after placing copy of thejudgment on the Tribunal's file.

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BEFORE HON’BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J.

FAO (MVA) No. 52 of 2014 a/w
FAO (MVA) No. 180 of 2014.
Reserved on: 16.12.2016
Date of decision: 30.12.2016.

1. <u>FAO No.52 of 2014.</u>

Oriental Insurance Company ….Appellant
Versus
Sh. Roop Singh and others ….Respondents.

2. FAO No 180/2014.

Sh. Roop Singh .....Appellant

Versus

Sh. Baldev Singh Thakur and others .....Respondents.

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 30% permanent disability- his right leg has been shortened – he cannot drive the vehicle the way he was driving before the accident – accident has affected earning capacity to the extent of 50% - monthly income of the claimant was Rs. 7,800/- per month and loss of earning will be Rs. 3,900/- per month– the claimant was 34 years at the time of accident and multiplier of 15 is applicable- thus, the loss of income is Rs. 3,900 x 12 x 15= Rs. 7,02,000/- - compensation of Rs. 50,000/- under the head pain and suffering during treatment, Rs. 50,000/- under the head loss of enjoyment of life, Rs. 60,000/- under the head loss of earning capacity during treatment, Rs. 83,000/- under the head special diet and attendant charges do not need any interference- claimant is entitled to Rs. 9,70,000/- as compensation – rate of interest reduced from 9% to 7.5% per annum.

(Para- 15 to 22)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434

Oriental Insurance Company versus Smt. Indiro and others, ILR 2015 (III) HP 1149

For the appellant(s): Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate, for the appellant in FAO No. 52 of 2014 and Mr. Lakshay Thakur, Advocate, for the appellant in FAO No. 180 of 2014.

For the respondent(s): Mr.Lakshay Thakur, Advocate, for respondent No. 1 in FAO No. 52 of 2014.

Mr. Rajiv Sood, Advocate, for respondents No. 2 and 3 in FAO No. 52 of 2014 and for respondents No. 1 and 2 in FAO No. 180 of 2014.

Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate, for respondent No. 3 in FAO No. 180 of 2014.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice .

These two appeals are outcome of a common judgment and award dated 2.12.2013, passed by the Motor Accident Claims Tribunal (III), Shimla, H.P., hereinafter referred to as "the Tribunal", for short, in MAC Petition No.136-S/2 of 2012/10, titled *Sh. Roop Singh versus Sh. Baldev Singh Thakur and others,* whereby compensation to the tune of Rs.10,16,800/- alongwith 9% interest came to be awarded in favour of the claimant and insurer came to be

saddled with the liability, for short "the impugned award" on the grounds taken in the memo of appeal.

2. The insurer has filed appeal being FAO No. 52 of 2014, on the ground that the Tribunal has fallen in an error in saddling it with the liability and the claimant has filed appeal being FAO No. 180 of 2014, for enhancement of compensation, on the grounds taken in their respective appeals.

3. This judgment shall govern both these appeals.

4. The owner/insured and the driver have not questioned the impugned award on any ground, thus the same has attained finality so far as it relates to them.

5. Following two points are to be determined in these appeals.

(i) Whether the Tribunal has rightly saddled the insurer with the liability, and;

(ii) Whether the amount awarded is inadequate?

6. In order to determine both these points, it is necessary to give a brief resume of relevant facts herein.

7. The claimant/injured Roop Singh, being the victim of a vehicular accident, filed claim petition before the Tribunal for the grant of compensation to the tune of Rs.15,00,000/- as per the break-ups given in the claim petition on account of the injuries suffered by him on 31.3.2009 at 9.30 P.M. near Harabag Tehsil Sunder Nagar, District Mandi, H.P. in a motor vehicular accident caused by driver Khajana Ram while driving vehicle bearing registration No. HP-65-0644, rashly and negligently due to which he sustained grievous injuries on his right arm and right leg, i.e., compound fracture. He took first aid at Government Hospital, Sunder Nagar and thereafter referred to I.G.M.C. Shimla where he remained admitted w.e.f. 1.4.2009 to 13.4.2009 and from 22.10.2009 to 31.10.2009. He was operated upon his right leg and arm at IGMC Shimla. It is stated that he has spent a sum of Rs.3,20,000/- on his treatment at IGMC Shimla and an amount of Rs.1,50,000/- is required for his further treatment.

8. The claim petition was resisted by all the respondents by filing replies. The Tribunal, on the pleadings of the parties framed following issues.

1. *Whether petitioner suffered injuries on account of rash and negligent driving of respondent No.2 on 31.3.2009? OPP.*
2. *If issue No. 1 is proved to what amount of compensation the petitioner is entitled to and from whom? OPP.*
3. *Whether the respondent No. 2 was not holding valid and effective driving licence at the time of accident? OPR.*
4. *Whether truck No. HP-65-0644 was being plied in violation of RC, route permit? OPR.*
5. *Relief.*

9. The claimant/injured, in support of his case, examined as many as seven witnesses and respondents on the other hand examined as many as five witnesses.

10. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant/injured has proved that the driver, namely, Khajana Ram had driven the offending vehicle rashly and negligently. The driver has not questioned the said findings and insurer has no right to question the said findings.

11. I.O. HHC Durga Singh appeared in the witness-box as RW2 and has also stated that the driver of the offending vehicle has driven the same rashly and negligently. There is sufficient proof on the file indicative of the fact that the driver of the offending vehicle has driven

the said vehicle rashly and negligently. Having said so, the findings returned by the Tribunal on issue No. 1 are upheld.

12. Before dealing with issue No. 2, I deem it proper to deal with issues No. 3 and 4.

Issue No.3.

13. Driving licence Ext. RW3/A is on record, which does disclose that the driver was competent to drive the offending vehicle. The Tribunal has made discussion in para 29 of the impugned award and has rightly held that the driver was having a valid and effective driving licence at the time of accident. It is apt to record herein that the learned counsel for the insurer has not questioned the said findings. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No.4.

14. It was for the insurer to prove that the owner has committed willful breach, has not led any evidence. Insurance policy, registration certificate and other documents are on record. Tribunal has rightly made discussion in para 30 of the impugned award. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No.2.

15. Factum of insurance is not in dispute. Claimant/injured was driver by profession and was driving another vehicle No.HP-69-0819, which was hit by offending vehicle, as discussed hereinabove, thus, fall within the definition of third party and his risk is covered. Learned counsel for the insurer has not disputed the liability. Disability certificate Ext. PW1/C, is on the record, which does disclose that the claimant/injured has suffered 30% permanent disability which has affected his professional capability. His right leg has shortened, cannot drive the vehicle, the way he was driving before the accident. Thus, it can be safely held that it has affected his earning capacity to the extent of 50%. The Tribunal, after making discussion in paras 14 to 18 has rightly held that the injured has lost earning to the tune of Rs.7800/- per month.

16. The age of the claimant/injured was 34 years at the time of accident. The multiplier applicable is "15" in view of the 2nd Schedule attached to the Motor Vehicles Act, 1988 for short "the Act", read with ***Sarla Verma and others versus Delhi Transport Corporationand another*** reported in ***AIR 2009 SC 3104*** and upheld in ***Reshma Kumari and others versus Madan Mohan and another***, reported in ***2013 AIR SCW 3120***. Thus, the Tribunal has fallen in an error in applying the multiplier of "16".

17. At the cost of repetition, claimant/Injured was driver by profession and he cannot drive the way he was driving before the accident. But it can be held that he can do the work as a labourer and can perform other jobs. Thus, the Tribunal has rightly deducted 50% towards the personal expenses of the claimant/injured and held that the claimant/injured has lost source of dependency to the tune of Rs.3900/- per month. Viewed thus, it can be safely held that the claimant/injured has lost source of dependency to the tune of Rs.3900/-x12x15= Rs.7,02,000/-.

18. The Tribunal has rightly awarded the amount on other heads, i.e., Rs.50,000/- under the head "pain and suffering during treatment", Rs.50,000/- "loss of enjoyments of life" Rs.60,000/- under the head "loss of earning capacity during treatment", Rs.83,000/- under the head "medical expenses" and Rs.25,000/- under the head "Special diet and attendant charges", needs no interference.

19. Thus, in all, the claimant/injured is held entitled to compensation to the tune of Rs.7,02,000/-+Rs.50,000+ Rs,50,000/-+Rs.60,000/-+ Rs.83,000/-+ Rs. 25,000/-. Total Rs. 9,70,000/-.

20. The Tribunal has awarded interest @9% per annum. However, the interest was to be awarded at the rate of 7.5% per annum, for the following reasons.

21. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as *United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, reported in (2002) 6 SCC 281; Satosh Devi versus National Insurance Company Ltd. and others, reported in 2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others reported in (2012) 11 SCC 738; Smt. Savita versus Binder Singh & others, reported in 2014, AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn., reported in 2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, reported in (2015) 4 SCC 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, reported in (2015) 4 SCC 434,* and discussed by this Court in a batch of *FAOs, FAO No. 256 of 2010*, titled as *Oriental Insurance Company versus Smt. Indiro and others*, being the lead case, decided on 19.06.2015.

22. Accordingly, interest @7.5% per annum instead of 9% is awarded from the date of claim petition till realization of the amount.

23. Having glance of the above discussion, the appeal being FAO No. 52 of 2014, filed by the insurer is allowed, the impugned award is modified as indicated hereinabove and the appeal being FAO No. 180 of 2014, filed by the claimant/injured for enhancement of compensation is dismissed.

24. The points are answered accordingly.

25. Registry is directed to release the amount alongwith interest @ 7.5% per annum in favour of the claimant, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account or by depositing the same in his bank account and excess amount, if any, be released in favour of the insurer alongwith interest accrued thereon, through payees' cheque account, after proper verification.

26. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Rakesh Kumar. ......Appellant.
Versus
State of Himachal Pradesh. ......Respondent.

Cr. Appeal No. 372 of 2016
Reserved on: 25.11.2016
Decided on: 30.12.2016

Indian Penal Code, 1860- Section 302- Deceased was married to the accused- two children were born – accused killed the deceased – he was tried and convicted by the Trial Court – held in appeal that daughter of the accused had witnessed the incident – the weapon of offence was got recovered by the accused – blood stains were found on the same – medical evidence showed that the injuries could have been caused with the weapon of offence- it was duly proved that there was altercation between the accused and the deceased after which the accused had killed the deceased – the oral and circumstantial evidence proved the guilt of the accused- appeal dismissed.(Para-10 to 25)

For the appellant: Mr. Rajesh Mandhotra, Advocate.
For the respondent: Ms. Meenakshi Sharma, Addl. AG, with Mr. J.S. Guleria, Asstt. AG.

The following judgment of the Court was delivered:

Chander Bhusan Barowalia, Judge.

The present appeal has been preferred by the appellant/accused/convict (hereinafter referred to as "the accused") laying challenge to the judgment, dated 02.01.2006, passed by the learned Additional Sessions Judge(I), Mandi, District Mandi, H.P. (Camp at Sarkaghat), in Trial No. 20 of 2014, whereby he was convicted for the commission of offence under Section 302 Indian Penal Code, 1860 (hereinafter referred to as "IPC") and was sentenced to undergo rigorous imprisonment for life and also to pay fine of Rs. 20,000. In case of default in payment of fine, the accused was further ordered to undergo simple imprisonment for one year.

2. The factual matrix, as per the prosecution story, giving rise to the present appeal are that deceased/victim, Sumna Devi (hereinafter referred to as "the deceased") was married to the accused and out of said wedlock two children were born. The accused had suspicion upon the fidelity of the deceased. On 27.10.2013, Police Post Dharampur got information through Smt. Tambo Devi (PW-1), Pardhan, Gram Panchayat Binga, that the deceased had been murdered at village Dabrot. This information formed the basis for *rapat* No. 5, Ex. PW-19/A, which was recorded in Police Post, Dharampur. ASI, Nasib Singh alongwith other police officials went to the place of occurrence. Statement, under Section 154 Cr.P.C., of Smt. Tambo Devi (PW-1) was recorded, wherein she stated that on 27.10.2013, during day time, when she had gone to bring grass, around 4:30 p.m. she received a telephonic call from Anil Kumar, Ward Panch. The Ward Panch informed her that the mother of the accused, Smt. Gambhari Devi, divulged to him that her daughter-in-law had been killed by someone inside the house. Subsequently, she telephonically informed PW-2, Ravi Kumar, Vice President qua the incident and reached the spot around 4:45 p.m. She discovered the dead body of the deceased, with several injuries, lying in the room. Blood stained clothes, stones were also there on the bed. Minor daughter of the deceased, on being questioned by PW-1, divulged that the accused quarreled with her mother and killed her. Statement of PW-1, Ex. PW-1/A, formed the basis for *rukka,* which was sent by ASI Nasib Singh, through constable Baldev Singh (PW-9), to Police Station, Sarkaghat. SI Prashotam Dhiman made his endorsement over *rukka* and FIR, Ex. PW-9/A, was registered. As per the prosecution story, prior to rushing to the spot of occurrence, ASI Nasib Singh informed about the occurrence to the Superintendent of Police, Mandi, Deputy Superintendent of Police, Sarkaghat and Station House Officer, Police Station, Sarkaghat. Shri Desh Raj, Photographer, was also associated by the police, who took photographs of the spot as well as the dead body, which are Ex. PW-14/A1 to Ex. PW14/A6. ASI Nasib Singh examined the dead body, which was lying on double folding-bed in the ground floor. Subsequently, SHO and Dy. SP, Sarkaghat, also came on the spot.

3. ASI Nasib Singh filled form 25-35A, Ex. PW-1/H. The dead body was taken into possession and sent for post mortem examination at CH Sarkaghat, alongwith application, Ex. PW-13/A, under the supervision of Constables Hem Raj and Desh Raj. Spot map, Ex. PW-19/B, was prepared. Blood stained stones were also found over the bed. Blood stained *smeaj*, bra, shirt, *salwar*, blood stains from first floor, from stairs, bed sheet/*khind* (mattress), were collected vide memos, viz., Ex. PW-1/B to Ex. PW-1/G. The articles were wrapped in different parcels and sealed with seal impression 'S'. Facsimile of seal impression 'S', Ex. PW-1/G, was separately taken on a piece of cloth, which was witnessed by PW-1, Tambo Devi, and PW-2, Ravi Kumar. The parcels, alongwith seal impression, were taken into possession vide aforesaid memos. Statements of PW-1, Tambo Devi, and PW-2, Ravi Kumar, were recorded by ASI Nasib Singh.

4. The accused, who was present in the house, was interrogated and subsequently arrested vide memo, Ex. PW-9/H. Information qua his arrest was given to his uncle, Bahadur Singh. Case property was deposited with MC HHC Ramesh Kumar. On application, Ex. PW-12/A, the accused was medically examined at CH Sarkaghat, and his Medico Legal Certificate, Ex. PW-12/B, was obtained. ASI Nasib Singh handed over the case file to SI/SHO Satish Kumar for further investigation. On 28.10.2013, SI Satish Kumar (PW-20) started investigation and

visited the spot alongwith PW-5, Smt. Neela Devi alias Leela and Inder Singh (sister of deceased and her maternal uncle). PW-14, Desh Raj, Photographer, was also associated. Statement of Kumari Shiwani, Ex. PW-7/A, was recorded in presence of Neela Devi alias Leela, Inder Singh and the same was signed by the aforesaid persons and attested by PW-20, SI Satish Kumar, also did videography of the statement in association with Photorapher Desh Raj. On 30.10.2013, the accused was interrogated in the police station by PW-20 in presence of Ajay Chandel, Pardhan Gram Panchayat Ropari and Santosh Kumar brother of the deceased. The accused revealed that he had hidden a bamboo stick/*baint* in the room of his house below the bed and this fact is only known to him. Disclosure statement of the accused, Ex. PW-3/A, was recorded and *baint* was recovered at his instance in presence of aforesaid witnesses. Sketch of the *baint*, Ex. AS3, was prepared on a piece of paper in presence of Santosh Kumar and Ajay Chandel. Videography of the entire recovery proceedings was done. Recovered *baint* was wrapped in a cloth parcel and sealed with seal impression 'N' at six places. Facsimile seal, Ex. PW-3/C, was separately taken over a piece of cloth and the aforesaid *baint* was taken into possession vide memo, Ex. PW-3/B. Supplementary statement of the Photographer Desh Raj was also recorded. Spot map, Ex. PW-20/A, qua recovery of *baint,* was prepared.

5. On 01.11.2013, the accused, through his disclosure statement, Ex. PW-2/A, which was given in presence of Up Pardhan Ravi Kumar and Anil Kumar, disclosed that he can give demarcation of the place where he had beaten his wife. On the basis of statement of the accused, Ex. PW-2/A, *fard nishandehi,* Ex. PW-2/B was prepared and spot map, Ex. PW-20/B, was drawn. After receiving the result from RFSL, the case property, vide *rapat* No. 17(A), was taken from *malkhana* Incharge for showing the same to Medical Board Members, who conducted the post mortem of the deceased. Their opinion, Ex. PW-13/E, was also obtained. Vide memo, Ex. PW-20/D, the dead body, after post mortem, was handed over to Bahadur Singh. Further investigation was assigned to ASI Nasib Singh (PW-19). *Aks Sajra* and *jamabandi,* Ex. PW-15/B and Ex. PW-15/C, respectively, were obtained from the *Halka* Patwari, Gian Chand (PW-15). Copy of *Pariwar* register, Ex. PW-6/B, was obtained from the Secretary Gram Panchayat, Binga, on moving an application, Ex. PW-6/A. Statements of Constable Ramesh Kumar, Baldev Singh and Gambhari Devi were recorded.

6. In order to prove its case, the prosecution examined as many as twenty witnesses. The statement of the accused, under Section 313 Cr.P.C., was recorded. No defence was led by the accused.

7. The learned Court below, vide its judgment dated 02.01.2016, convicted the accused for the offence punishable under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life and to pay fine of Rs. 20,000/-. In case of default in payment of fine, the accused was also ordered to further undergo simple imprisonment for one year, hence the present appeal.

8. We have heard the learned Counsel for the respondent/accused and learned Additional Advocate General for the respondent/State.

9. The learned counsel for the appellant has argued that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt and the accused may be acquitted by setting aside the judgment of conviction, as recorded by the learned Court below. Conversely, the learned Additional Advocate General has argued that the findings of conviction, as recorded by the learned Court below are just, reasoned and deserves no interference, as the prosecution has proved the guilt of the accused beyond reasonable doubt. In rebuttal, the learned counsel for the accused has argued that the prosecution has failed to connect the accused with the offence and, thus the accused may be acquitted.

10. As per the prosecution, the accused gave beatings to the deceased with *baint* (bamboo stick) and stones on 27.10.2013 during day time due to which she died. The whole incidence was witnessed by minor daughter of deceased, Kumari Shiwani (PW-7) and minor son Rahul. Kumari Shiwani informed to her grand mother, Gambhari Devi, and she informed Ward

Panch, Anil Kumar. Ward Panch further informed about the incidence to PW-1 Pardhan, Tambo Devi, and PW-1 informed PW-2, Up Pardhan, Ravi Kumar. PW-1 also telephonically informed the police.

11. The statement of PW-7, Kumari Shiwani, is very vital. Being a minor witness, her awareness was verified by the learned Trial Court by putting questions of different nature and she was declared a competent witness. PW-7 has deposed that the deceased was her mother, accused is her father and Gambhari Devi is her grand mother. There are seven rooms in her house and she used to sleep with her grand mother in the room of first floor and her parents used to sleep in the ground floor. She has further deposed that there is window in each room and one can see inside the room through the gap of door and window. As per this witness, she was present alongwith her brother, Rahul, when her mother died. She has also identified the photographs of the deceased and admitted that there were injury marks on the person of the deceased. She heard the noise of cries of her mother and when she peeped inside, she noticed that her mother was lying unconscious on bed and blood was oozing from her body. She noticed blood stains on the spot and bed, which is also identifiable in the photographs. PW-7 has further deposed that her father had not visited their house after the death of her mother and she used to live with her grand mother. She has stated that when her mother was being given beatings by *baint*, she was in the courtyard. On the day of occurrence she did not go to school and was present in the house, as it was Sunday. She had given statement, Ex. PW-7/A, to the police, which bears her signatures. As per the version of this witness, nobody rescued her mother. She identified *baint,* Ex. AS2, and deposed that with the same *baint* her father gave beatings to her mother and the *baint* was on the ground floor. This witness was exhaustively cross-examined and during her cross-examination she deposed that cow barn is near to the house and at the time of occurrence her grand mother had gone to work in NREGA near Government School, Marhi. She denied that she alongwith her brother was with her grand mother at Marhi. She voluntarily stated that her brother was at home and she had gone to Marhi School with her grand mother, however, she further stated that she could reach Marhi School from her house in two minutes. She could not divulge name of her *mausi,* but she stated that she knows her by face. This witness denied that there was no *baint* in the hand of the accused and she had seen the *baint* in the Court. She voluntarily stated that *baint* was lying in the ground floor, which was earlier used by *dada (Jabra)*, who has expired. A very imperative Court question was put to this witness, ***"why she had gone to the place of work of her grand mother"?***She replied that ***"I had gone to call my grand mother by saying that my mother had died".*** The statement of PW-7 was recorded by the police in presence of her *mausi,* Leela Devi and Inder Singh and the same was videographed by IO. This fact is fortified by PW-14, Desh Raj (Photographer) and he tendered CD, which is Ex. CI. The videography is duly proved by PW-14, Desh Raj.

12. PW-5, Neela Devi, elder sister of the deceased stated that she, being an illiterate lady, did not remember the date, month and year. As per the version of this witness, the marriage of the deceased was solemnized with the accused and the deceased was having two children. The deceased alongwith her children during the month of *Sauj* (September) visited her house for 4-5 days and the deceased told her that accused is not keeping her well and suspecting upon her fidelity on which she advised the deceased to live properly in her in-laws' house. Subsequently, she came to know that her sister was murdered by the accused by using *baint* and stones. When she heard about the death of her sister, she alongwith Inder Singh, her maternal uncle, went to Sarkaghat and saw the dead body of the deceased. This witness has further stated that she and her maternal uncle were taken by the police to the place of occurrence where statement of PW-7, Kumari Shiwani, was recorded in their presence. Videography of the recording of the statement was also done and PW-7 stated that her mother was killed by her father with *baint* and stones. PW-5 in her cross-examination has admitted that the deceased married the accused by going against her parents. She also admitted that the accused loved the deceased, but later on their relations became strained and the accused started giving beatings to the deceased. She had denied that on the day of occurrence Kumari Shiwani (PW-7) had gone to school. She has further stated that she was present in the house, as it was Sunday.

13. PW-3, Ajay Chandel alongwith Santosh Kumar witnessed the recovery of weapon of offence, i.e., *baint,* Ex. AS2, which was recovered on disclosure statement made by the accused. PW-3 deposed that during the year 2011 he was Pardhan of Ropari Panchayat and on 30.10.2013 he alongwith brother of the deceased (Santosh Kumar) went to Police Station Sarkaghat. As per this witness, the accused, who is present in the Court, was being inquired by the police in the Police Station. The accused divulged to the police that he could get the *baint* recovered. The statement of the accused, Ex. PW-3/A, was recorded by the police, which bears his signatures and also the signatures of marginal witnesses. Subsequently, police took the accused alongwith witnesses to Dabrot/Marhi and the accused got recovered the *baint* from a room of ground floor, which was concealed under a folding double bed. Sketch of the *baint,* Ex. AS3, was prepared and it was packed, sealed with seal impression 'N' at four places. This witness has also identified parcel, Ex. AS-1 and *baint* Ex. AS-2, which were taken into possession vide memo, Ex. PW-3/C. As per this witness, whole process was also videographed. In cross-examination, this witness has deposed that he might have visited Police Station, Sarkaghat, between 9 a.m. to 10 a.m. and he was taken by brother of the deceased, being Pardhan of the Panchayat. He met the accused in the courtyard of police station as he was brought out of judicial lock up.

14. The weapon of offence, i.e., *baint* was sent for chemical analysis and as per report, Ex. PW-13/B, Assistant Director RFSL Centre Range Mandi, detected blood traces on the said *baint.* Dr. Ashish Guleria, (PW-13) deposed that on 27.10.2013, ASI Naseeb Singh, through application, Ex. PW-13/A, prayed for conducting postmortem on the dead body of the deceased. He alongwith Dr. Dharampal conducted the postmortem on 28.10.2013 and gave their report, Ex. PW-13/B, wherein they have opined as under:

> "Average built female body lying on PM table. PM Rigidity-fully developed upto fingers and toes. Subject was wearing red shirt (floral)-Purple shirt blood stained. Sacred thread around neck. No other clothes found.
>
> Abrasion of dimension 2x1 cm on neck, dark brown in colour, lacerated wound on chest 3x2 cm. Irregular margins, lacerated wound in right arm 3x1 cm left arm 2x1 cm, both on lateral aspect with irregular margins. No foreign bodies. Contusion round eye with swelling around parietal and temporal region with depression in frontal bone. Contusion on left lateral thigh with blood margin. Multiple abrasion around left elbow and right thigh lateral 4x6 cm 4x1 cm, 3x1.2 cm dark brown in colour. Abrasion on hip both sides extending from right to left wide on right and narrow on left side, 5.2 cm on right side and 3x1 cm on left side. Bark brown in colour, lacerated wound on Tibial side (front) on left side 3x2 cm dimension no foreign body detected. No injury seen on media thigh and around external genitals, abrasion around waist right side no visible frontal and prital region with depression on frontal bone. Fracture present on frontal bone, Membranes of brain tear with haematoma spinal cord not opened.
>
> Thorax-Plaura, Larynx and trachea, right lung and left lung Paricardium, heart large vessels-congested, walls, ribs and cartilages normal.
>
> Abdomens: Kidneys congested, walls, peritoneum mouth, pharymx and Oesophagus, stomach and its contents, small intestines and their contents, large intestines and their contents, liver spleen, bladder, organs of generation (external and internal) normal. No sign of pregnancy, Muscles bones joints-fracture frontal bone.
>
> Certificate of cause of death: With the best of our clinical knowledge, the subject died of subdural hematoma which leads to cardiopulmonary rest. Though the viscera had been preserved and sent for chemical examination and final opinion about any suspected chemical will be given after viscera examination from forensic laboratory.

> Probable time between injury and death was within one hour. The probable time between death and postmortem was within 24 hours."

Viscera containing spleen part of liver, one kidney, stomach, blood were sealed in separate Jars sealed with seal impression CH Sarkaghat, after taking facsimile seal impression, Ex. PW-13/C, on a separate piece of cloth was handed over the police. Police brought report No. 8578, Ex. PW-13/B, from RFSL Mandi, which was issued by Assistant Director RFSL Mandi. After perusal of the same, finally the Medical Board observed that no alcohol, no poison has been detected in viscera. Therefore, the opinion remained the same. On 27.12.2013, SHO, P.S. Sarkaghat, moved an application, Ex. PW-13/D, whereby the weapon of offence, i.e., *baint* was shown to the medical board. PW-13 alongwith Dr. Dharampal gave their opinion, Ex. PW-13/E, opining that injuries mentioned in postmortem report can be caused by bamboo stick/baint. Dr. Dharampal also identified stones, Ex. P1 to Ex. P4. According to this witness, injuries mentioned in postmortem report, Ex. PW-13/B, can be caused with the recovered stones and other bodily injuries, which were found on the body of the deceased, were sufficient to cause death in ordinary course. In his cross-examination, this witness admitted that time between injuries and death cannot be said with precision. He has also admitted that there should be three member board to conduct the postmortem. This witness denied that injuries, as mentioned in Ex. PW-13/B, can be caused in an accident. He has also denied that the injuries sustained by the deceased are possible by fall from stairs.

15. PW-4, Anil Kumar, stated that he was informed by the mother of the accused, Gambhari Devi, telephonically that the accused killed the deceased. He went to the spot and disclosure statement of the accused, Ex. PW-2/A, was recorded. On the basis of Ex. PW-2/A, police prepared the spot map, Ex. PW-2/B in his presence. This witness could not divulge the exact time when he received telephonic call from the mother of the accused. He admitted that he did not go through the contents of Ex. PW-2/A.

16. Smt. Tambo Devi, Pardhan, deposed as PW-1. Her statement, Ex. PW-1/A, under Section 154 Cr.P.C was recorded by the police. She deposed that when she reached the house of the deceased, Gambhari Devi, Rakesh Kumar and two minor children were weeping. She did not make any inquiry from Gambhari Devi. As per this witness, accused Rakesh Kumar disclosed that someone killed his wife and the children did not disclose anything. The minor daughter had gone to school. This witness was declared hostile and during her cross-examination she has admitted that blood stained shirt, *smeaj*, shirt, bra and *salwar* were taken into possession vide memo, Ex. PW-1/B, and were packed in a cloth parcel, which was sealed with seal impression 'S'. She admitted that soil stained with blood, broken bangles and soil stained with blood from the ground floor were taken into possession vide memos, Ex. PW-1/C to Ex. PW-1/E. In presence of PW-2, Ravi Kumar, *khind* (mattress) and bed sheet were recovered vide memo, Ex. PW-1/F. Ex. P-1 to Ex. P-9 (articles) were recovered in her presence. This witness in her cross-examination deposed that she met the accused on way when she was going to his house. She has denied that police did not recover anything from the spot and there was rumour that someone killed the deceased. She volunteered that accused was saying that his wife was killed by someone.

17. Shri Ravi Kumar, while appearing as PW-2 has deposed that accused divulged that someone had killed his wife. PW-2 has further stated that PW-1, Pardhan, telephonically informed the police. He has deposed that in presence of Tambo Devi, Pardhan, vide memo, Ex. PW-1/B, stone, *smeaj,* shirt, *salwar* and bra were taken into possession. As per this witness, in his presence, soil stained with blood was also taken into possession vide memo, Ex. PW-1/C. He has admitted the police took into possession cement pieces, Ex. P11, soil, Ex. P12, vide memo Ex. PW-1/D, *khind* (mattress), Ex. P13 and double bed sheet, Ex. P15, vide memo, Ex. PW-1/F. He has admitted that Investigating Officer filled form 25-35, Ex. PW-1/H, in his presence. He has also admitted that seal impression, Ex. PW-1/G, of seal 'S' was taken on piece of cloth. This witness was declared hostile, as he deposed that PW-7 Kumari Shiwani did not disclose any facts qua killing of her mother. PW-2 has denied that PW-7, Kumari Shiwani, divulged to the police

that her father killed her mother with stones. He has also denied that on the basis of Ex. PW-2/A accused identified the place of occurrence. During his cross-examination he has deposed that police came on the spot at about 6/6:15 p.m.

18. PW-6, Lalit Kumar, issued copy of *Pariwar* Register, Ex. PW-6/B, of the accused. PW-8, HHC Shyam Lal, deposed that MHC, Police Station, Sarkaghat, handed over 12 cloth parcels to him, which were sealed with different seal impressions and he deposited the same in proper condition at RFSL, Mandi. As per this witness, on his return he handed over the receipt to MHC. PW-9, Constable Baldev Singh, brought *rukka,* Ex. PW-1/A, from the spot and gave the same to SHO, Prashotam Dhiman, who registered the FIR, Ex. PW-9/A. PW-10, HHC Ramesh Chand, deposed that on 27.10.2013, ASI Naseeb Singh, around 11:55 p.m., deposited with him five parcels, which were sealed with seal impression 'S'. On 28.10.2013, he gave the above parcels to PW-9, Constable Baldev Singh vide RC No. 29/13, Ex. PW-10/A, with a direction to deposit the same in *malkhana.* No tampering had occurred during the time he possessed the said parcels. PW-11, Dharam Singh, Incharge of *malkhana, deposed* that on 28.10.2013 vide RC No. 29/13, Constable Baldev Singh, deposited ten cloth parcels, which were sealed with different seal impressions and one envelope of specimen seal impression CHK. He made entry in *malkhana* register at Sr. No. 1152/13. He also tendered the abstract copy of *malkhana* register, Ex. PW-11/A. He has further deposed that on 30.10.2013, SI Satish Kumar (PW-20), deposited a cloth parcel having seal impression 'N' at six places, which stated to have contained a *baint.* No tampering took place during the time he possessed the case property.

19. Dr. Dinesh, M.O. CH Sarkaghat (PW-12), conducted the medical examination of the accused and issued MLC, Ex. PW-12/B. According to him the accused was not under alcoholic influence. He has further stated that he did not take urine and blood samples of the accused. As per this witness, he has recovered pant and shirt containing blood stains and packed the same. He has denied that he did not preserve the clothes of the accused. PW-15, Gian Chand, Patwari, prepared the spot map, Ex. PW-15/B and issued *jamabandi*, Ex. PW-15/C depicting the location of the house of the accused. PW-16, HC Hoshiyar Singh, deposed that on 07.11.2013 he sent 12 parcels, as per list mentioned in RC, Ex. PW-16/C to RFSL Mandi for chemical analysis through HHC Shyam Lal. PW-17, Constable Sanjeev Kumar, had drawn *rapats,* Ex. PW-17/A and Ex. PW-17/B qua departure and arrival of Investigating Officer alongwith case property, which was to be shown to the medical board. PW-18, Parshotam Dhiman, registered FIR, Ex. PW-9/A. PW-19, ASI Nasib Singh, Investigating Officer, investigating the matter. PW-20 is SI/SHO Satish Kumar, partly investigating the matter.

20. The statement of PW-7, Kumari Shiwani, who is a minor witness, is very material evidence. The statement of a child witness is reliable and trustworthy, if the Court comes to the conclusion that the child witness is not tutored. PW-7, Kumari Shiwani, admittedly used to reside with her grand-mother, Gambhari Devi (mother of the accused). In her cross-examination, she could not divulge the names of her maternal grand parents, as she was not in touch with them. Evidently, the statement of PW-7, Ex.PW-7/A, was recorded in presence of Neela Devi alias Leela and Inder Singh and videography of the same was also done. In the video CD, Ex. C-1, which was played in the open Court by the leaned Trial Court, PW-7 unequivocally deposed that her father (accused) killed her mother. PW-7 meticulously stated that it was Sunday on 27.10.2013, so she did not go to school, thus tutoring of this witness is not probable. PW-7 was living under the care and custody of Smt. Gambhari Devi, her grand mother, who was given up by the prosecution, being won over by the accused. Thus, there is likelihood of pressurizing of this witness by her grand mother. After scrutinizing the statement of this witness coupled with the facts of the case, it is worth noticing that in fact the pressure is supposed to be on the child witness (PW-7) to depose in favour of the accused as she was living in the care and custody of her grand mother, who is mother of the accused. PW-7 was subjected to extensive cross-examination, but she has specifically stated that she had gone to call and tell her grand mother that her mother had died. She has specifically denied the suggestion put by the learned counsel for the accused that *baint* was not in hands of her father. She also denied that she had seen *baint,* Ex. AS2, for the first time in the Court. In fact, she has identified the *baint* as the one

which was used by her *dada* (grand father), locally called *Jabara.* In these circumstances, after exhaustively examining the statement of child witness (P'W-7), it can safely be held that there is no infirmity in her statement. It is correct that the competency of a child witness depends upon the degree of his/her understanding and in the case in hand the degree of understanding of Kumari Shiwani (PW-7), child witness, is in fact very good and par excellence, thus it can be inferred that she was not tutored.

21. As per prosecution story *baint,* Ex. AS2 was got recovered by the accused himself. Manifestly, CDs Ex. C2, Ex. C3 and the statement of PW-3, Ajay Chandel, reveal that accused made a disclosure statement, Ex. PW-3/A. The said statement was made in presence of PW-3, Ajay Chandel, and as per CD accused led the police party and witnesses inside the room and he got recovered a *baint* (Ex. AS2), which was hidden below a folding double bed. Now, if the recovery part is examined in conjunction with the statement of PW-7, Kumari Shiwani, then the story of the prosecution stands further fortified, as PW-7 deposed specifically that *baint* was in the ground floor and the same was recovered from the ground floor. As per the testimony of PW-7, the said *baint* belonged to her *Dada (Jabra)*, who is no more. Lastly, the recovery of *baint* has been further substantiated by PW-3, Ajay Chandel. Thus, the recovery of *baint* stands fully established by the prosecution.

22. It is emanating from the record that consequent upon the disclosure statement, Ex. PW-3/A, made by the accused, PW-20 SI Satish Kumar effected recovery of *baint,* vide recovery memo, Ex. PW-3/B. There no incriminating material available on record disproving disclosure statement, Ex. PW-3/A. Apparently, the recovery was effected after three days of occurrence, i.e., on 30.10.2013. The recovered *baint,* Ex. AS2, was sent to RFSL, Mandi, for chemical analysis and the report of Assistant Director RFSL, Ex. PW-13/B, depicts that blood was detected in traces over the *baint,* but the same was insufficient for the purpose of serological examination. Thus, the chemical analysis reveals that blood was found on the said *baint.* As per postmortem report, Ex. PW-13/A, Dr. Ashish Guleria (PW-13), opined that injuries mentioned in the postmortem report can possibly be caused by *baint,* Ex. AS2. Thus, the conspectus of the above discussion is that statement of PW-7, child witness, stands duly substantiated viz-a-viz disclosure statement, Ex. Pw-3/A, recovery memo, Ex. PW-3/B, RFSL report, Ex. PW-13/B and statement of Dr. Ashish Guleria, PW-13.

23. As per the prosecution story ASI Nasib Singh (PW-19) was asked to come on the spot by PW-1, Tambo Devi, Pardhan, Gram Panchayat, Binga. This fact also stands corroborated by PW-1, Tambo Devi, PW-2 Ravi Kumar and PW-4, Anil Kumar. PW-19 recovered four stones, Ex. P1 to Ex. P4, which were stained with blood. The recovery of stones has been admitted by PW-1, Tambo Devi, and PW-2, Ravi Kumar. Recovered stones were chemically examined at RFSL, Mandi, and as per report, Ex. PW-13/B, human blood was detected on the stones. PW-12, Dr. Dinesh, Medical Officer, C.H. Sarkaghat, handed over to police samples of blood and urine alongwith pant and T-shirt containing blood stains, which were sealed with seal impression CH. As per the testimony of PW-13, Dr. Ashish Guleria, the injuries mentioned in postmortem report can be caused by stones, Ex. P1 to P4, and *baint,* Ex. AS2. Admittedly, accused was arrested on 27.10.2013 and was medically examined by PW-12, Dr. Dinesh, on 28.10.2013. PW-12 preserved pant and T-shirt of the accused, which were stained with human blood, and he handed over the same to police. The defence did not give any explanation qua presence of blood on the clothes of the accused. The fact that the accused was suspecting fidelity of the deceased also stands substantiated by PW-5, Neela Devi alias Leela (sister of the deceased). As per her statement accused, when deceased and their children stayed in her house for 4-5 days, the deceased divulged to her that accused was suspecting on her character. Nothing incriminating has come on record to disbelieve her statement.

24. On meticulous analysis of the material on record, it can be held that on the day of occurrence there was an altercation between the accused and the deceased and accused taking help of stones, Ex. P-1 to Ex. P-4, *baint,* Ex. AS2, killed the deceased. The entire happening was witnesses by PW-7, Kumari Shiwani, and her younger brother Rahul. PW-7, Kumari Shiwani,

saw the occurrence through a window side that is why she deposed that her mother was crying for help. As her grand mother had gone to work in NREGA, nobody helped the deceased. Recovery of weapon of offence, that is, *baint,* Ex. AS2, and its identification by PW-7 demonstrates that the same was used as a weapon of offence by the accused.

25. Manifestly, blood traces were found on the recovered *baint* and pant and shirt of the accused were also stained with blood, which were preserved by PW-12, Dr. Dinesh, while medically examining him. The presence of human blood on Ex. AS2, *baint,* and stones, Ex. P-1 to Ex. P4, show that these were used for committing the offence. Thus, the chain of circumstances is complete. In these circumstances, this Court finds that the prosecution has proved the guilt of the accused conclusively and beyond the shadow of doubt, thus the judgment of conviction passed by the learned Court below deserves no interference. Accordingly, the appeal, being devoid of any merit, is dismissed. Pending application(s), if any, shall also stand(s) disposed of.

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